

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

<b>XXXXXX</b>	)	
on behalf of , a minor child	)	
Petitioner,	)	<b>FILED: 6/11/2010</b>
	)	
<b>v.</b>	)	
	)	
<b>BLUE SPRINGS R-IV</b>	)	
<b>SCHOOL DISTRICT</b>	)	
Respondents.	)	

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

The Hearing Panel, after conducting the due process hearing on September 15-17, 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. (“Student”) is the minor child in this case. Student is the daughter of XXXXXX (“Mother” or “Petitioner”), all of whom have resided within the boundaries of the Blue Springs School District at all times relevant to this case. The family currently resides at , Independence, MO 64055. (Panel Ex #9 -Joint Stipulation of Facts #s 1 and 2).
  
2. The Blue Springs R-IV School District (“the District”) is a Missouri Public School District which is organized pursuant to Missouri statutes. The District is located in Jackson County, Missouri and educates approximately 13,952 students, including 4229 high school students. (2009-10 Missouri School Directory).
  
3. Deborah S. Johnson, 9923 State Line Road, Kansas City, MO 64114, represented the Mother and Student in this case.
  
4. The District was represented by Julius M. Oswald and Ryan T. Fry, who are with the law firm of the Cochran, Oswald & Roam, LLC, 601 NW Jefferson Street, Blue Springs, MO 64013-0550.

5. The Hearing Panel for this due process proceeding was:

Pamela S. Wright	Hearing Chairperson
George Wilson	Panel Member (selected by the District)
James Walsh	Panel Member (selected by the Mother)

6. During all times relevant to this proceeding, the following persons were employed by the District and have provided educational services to Student in connection with this case:

Dr. Annette Seago	Assistant School Superintendent – Curriculum & Assessments for K-12
Randy Laskoski	Assistant Director of Special Education
Dr. Terry Allee	Part-Time Director of Special Education from 2006-June 2010
Elizabeth Roberts	8 <sup>th</sup> Grade Social Studies Teacher
Victoria Lee Heermann	Special Education Coordinator
Tara Michelle Ely	Special Education Teacher

### **Time Line Information and Procedural Background**

7. Mother, through her counsel, Deborah S. Johnson, requested a due process hearing by Complaint to the Department of Elementary and Secondary Education (“DESE”) dated June 11, 2010, which was received by DESE on the same date. (Rex. A at 1-13).<sup>1</sup>

8. On June 18, 2010, the District filed a Motion Challenging the Sufficiency of Petitioner’s Due Process Complaint. (PEX. 5 at 103-108). The Petitioner responded with a letter dated June 21, 2010 in which she clarified issues raised in the District’s Motion. (PEX. 7 at 205-245). The Chairperson entered an Order on June 23, 2010 in which she denied the Motion and declared the Due Process Complaint to be adequate.

9. The parties had a Resolution Meeting on July 1, 2010 but they failed to reach a settlement.<sup>2</sup>

10. The Chairperson held a Pre-Hearing Conference with the attorneys on July 7, 2010. The parties agreed on hearing dates of September 15-17, 2010 and agreed to extend the timeline to October 29, 2010. They also reached an agreement on the Issues for the Hearing Panel.

11. After receiving a written request from the District for an extension of the timeline, the Chairperson entered a detailed Scheduling Order on July 14, 2010 setting out the discussion

---

<sup>1</sup> All references to the Petitioner’s Exhibits will be cited as “PEX.[#]”; references to Respondent’s Exhibits will be cited as REX. [#] and references to the Hearing Panel’s Exhibits will be cited (as in Finding of Fact #1 on page 1) “Panel Ex. [#]. See also Panel Ex. 9, Joint Stipulation of Facts #10.

<sup>2</sup> The parties differ markedly as to what was discussed at the Resolution Meeting but we decline to reach any conclusions on the discrepancies.

at the Pre-Hearing Conference. The Order also provided that the each party would have 8.0 hours to present direct and cross-examination.<sup>3</sup>

12. On July 30, 2010, the District filed a Motion to Partially Dismiss Petitioner's Complaint. Basically, the District sought the dismissal of two of the three remedies sought by the Petitioner (as set out in the Scheduling Order): (a) the District be ordered to take corrective action to help ensure future IEPs are accurate, clear and meaningful and (b) the District be ordered to correct the June 11, 2008 IEP so that the revised IEP is clear, accurate and meaningful. Petitioner filed her Response on August 24, 2010. The Chairperson entered an Order on September 14, 2010 granting the Motion in part by dismissing the remedy set out in paragraph (a) above but denying the Motion relative to the remedy set out in paragraph (b).

13. On September 13, 2010, the District filed the following Motions: First Motion in Limine (Statute of Limitations) and Motion to Quash Petitioner's Subpoena for Dr. Annette Seago. On September 13, 2010, the Petitioner filed Response and Suggestions in Opposition to the Motion to Quash Subpoena of Dr. Annette Seago. On September 14, 2010, the Petitioner filed her Response and Suggestions to the First Motion in Limine (Statute of Limitations).

14. On September 14, 2010, the District filed its Second Motion in Limine (Collateral/Estoppel/Res Judicata). Petitioner filed her Response and Suggestions in Opposition to the Second Motion in Limine on September 15, 2010.

15. After conferring with the other Panel members on the first day of the hearing on September 15, 2010, the Chairperson denied the two Motions in Limine. (Tr. I: 7).<sup>4</sup> After considerable discussion on the record with the attorneys, the Chairperson denied the Motion to Quash Petitioner's Subpoena for Dr. Annette Seago. (Tr. I: 7-12).

16. The Chair closed the hearing as per the request of the Petitioner and counsel. (Tr.I:5).

17. Before the second day's testimony, the Chair advised the parties of the amount of time each side had used on the first day: 51 minutes of the District's allocated 8 hours and 292 minutes of the Petitioner's allocated 8 hours. (Tr.II:5).

18. After the Petitioner had used her 8 hours of allocated time by the early part of day three, the District opted not to call witnesses after having used its time with cross-examination of all witnesses called by the Petitioner. The District then filed its Motion for Directed Verdict, which the Hearing Panel denied. (Tr. II: 306).

19. Petitioner introduced Exhibits 1-10. The District objected to the following Exhibits offered by Petitioner: 3; 4; 5 (pages 87-88); 6 (pages 127-130; 134; 138-143; 195-200); and 10. Petitioner's Exhibits were all admitted. (Tr. I: 65; Tr. II: 30-35; 130; 263-277).

---

<sup>3</sup> The Order does not reflect the Petitioner's objection to the time limits imposed by the Chairperson but her counsel had a continuing objection throughout the proceedings.

<sup>4</sup> The court reporter's transcript has two volumes so all references to the record will be as follows: Tr. [volume#]:[page#].

20. Respondent offered Exhibits A-VV and YY-RRR. Exhibits D & E; K-P; and BB-CC were admitted by consent of Petitioner with the stipulation that the Exhibits were created by the District at or about the time of the date on the document. (Tr. II: 278). Petitioner consented to the admission of the remaining Exhibits offered by the District. (Tr.II: 278-279).

21. Over the objection of Petitioner, there were eight Hearing Panel Exhibits admitted into evidence: #1 is a Contract for Services (covering 08-09 school year); #2 is a Contract for Services (ESY 2008); #3 is a Contract for Out of District Services (covering the 2009-10 school year); #4 consists of a cover letter and a Contract for Out of District Services (covering the 2010-11 school year); #5 is the Defendant's Motion for Protective Order and for Reconsideration of Admittance of Additional Evidence (filed in the Circuit Court of Jackson County, MO); #6 is the Plaintiff's Response and Suggestions in Opposition to the Defendant's Motion (admitted as Panel Exhibit #5); #7 is Respondent's Proposed Findings of Fact, Conclusions of Law and Decision filed with the prior Hearing Panel in 2009; and #8 is Petitioner's Proposed Findings of Fact and Conclusions of Law filed with the prior Hearing Panel in 2009. (Tr.I:130-131; Tr. II: 268-271). The Hearing Panel also took judicial notice of the majority opinion issued by Richard Ulrich (and dissenting opinion) in a prior due process case on May 21, 2009.<sup>5</sup>

22. Witnesses for the Petitioner included: Dr. Annette Seago; Ms. Heidi Atkins-Lieberman (testified by phone); Dr. Terry Allee; Randy Laskoski; Dr. Gary Seabaugh (testified by phone); Mother; Elizabeth Roberts; Victoria Lee Heermann; Tara Ely. The District called no witnesses.

23. At the end of the hearing, the court reporter agreed to have the transcript completed on or before October 11, 2010.<sup>6</sup> The parties agreed to file their Proposed Findings of Fact and Conclusions of Law on or before November 22, 2010. The District requested, and the Petitioner consented to, the extension of the time line from October 29, 2010 to December 28, 2010.

24. On November 17, 2010, Petitioner requested an extension until December 28, 2010 to file her Proposed Findings of Fact and Conclusions of Law as well as an extension of the time line to file the opinion.<sup>7</sup> The Chairperson replied on November 17, 2010 that an extension would be granted to December 3, 2010 for the parties to file their Proposed Findings of Fact and Conclusions of Law. She, however, declined the Petitioner's offer to extend the time line for filing the opinion, which is being issued within the December 28, 2010 time line.

### **The Issues Heard by the Hearing Panel**

25. The following issues were heard by the Hearing Panel:

(a) Did the District violate the procedural requirements of IDEA in its development of

---

<sup>5</sup> We recognize the case remains on appeal according to Petitioner in her Post-Hearing Brief, footnote 7 on page 8. The opinion will hereinafter be referred to as ("the Ulrich opinion at #"). The Hearing Panels' majority and dissenting opinions covered the time frame of May 29, 2006-May 28, 2008. (Ulrich opinion at 81).

<sup>6</sup> She completed one volume on September 26, 2010 and the other on September 28, 2010.

<sup>7</sup> The District did not oppose the requested extension.

the June 11, 2008 IEP (“the IEP”) for Student? If so, did this violation (1) impede Student's right to a free appropriate public education; (2) significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or (3) cause a deprivation of educational benefits?

(b) Did the District substantively violate the IDEA under one or more of the following circumstances:

(i) Did the IEP require the District to provide math tutoring and counseling services to Student?

(ii) Assuming the District was required to provide math tutoring and counseling services under the IEP, did the District fail to do so? If the District failed to provide these required services to Student, was the failure to implement a significant, substantial or material failure?

(iii) If the IEP did not require the District to provide math tutoring and counseling services to Student, does the absence of these services result in the IEP not being reasonably calculated to provide Student a free appropriate public education?

(c) If the Petitioner prevails on one or more of the above issues, what are the appropriate remedies? Are the following remedies, *inter alia*, available to the Petitioner:

(i) The District be ordered to correct the entirety of the IEP consistently with what the District believed was accurate at the time the IEP was developed, and in such a way that the IEP is accurate, clear, and meaningful, so Petitioner can make use of the IEP in future decision-making processes and in assessing whether services, accommodations, modifications were provided that should have been provided, and in assessing the appropriateness of IEPs developed after June 11, 2008; and/or

(ii) The District be ordered to provide compensatory services to make up for any services in math tutoring or social skills counseling which were needed during the period of the IEP, and which were not provided for by the IEP?

## **BACKGROUND FACTS<sup>8</sup>**

### **Student’s Educational Disability**

26. In the June 11, 2008 IEP, which is the subject of this proceeding, Student’s disability is described as a Specific Learning Disability in the area of mathematics reasoning. (REx. A at 3). She first received that educational diagnosis in March 2001. (*Id.*) Student scored in the low average range of cognitive ability on the WISC-III test administered in February 2004. (*Id.*) Her Full Scale IQ was 84. (*Id.*)

### **Student’s Medical Disabilities**

27. Dr. Christopherson of Children’s Mercy Hospital diagnosed her with ADHD in September 1999. (REx. A at 4). Psychologist Dr. John Wubbenhorst subsequently evaluated her and

---

<sup>8</sup> We include more Background Facts than may be necessary but we recognize the opinion may very well be reviewed in the state or federal courts so a detailed Findings of Fact may be helpful at the higher level.

diagnosed Student with Tourette's Syndrome and Visual Perception. (*Id.*) In August 2005, Dr. Marilyn Metzl conducted a neuropsychological evaluation which indicated severe anxiety, depression and ADD. (*Id.*) In September 2007, Chris Van Horn, D. O. diagnosed Student with major depression, Tourette's Disorder and ADHD. (*Id.*); PEx. 6 at 175). In 2008, both Dr. Wubbenhorst and Dr. Van Horn added Bipolar Disorder as a medical diagnosis for Student. (*Id.*)

### **Student's Educational History prior to June 11, 2008**

28. Student attended Delta Woods Middle School for seventh and eighth grade during the school years of 2006-2007 and 2007-2008, respectively. (REx. A at 3).

29. Student attempted suicide in the September 2007. (Ulrich opinion at 61). Dr. Van Horn recommended Homebound Services for Student. (REx. A at 4). On October 11, 2007, the IEP team met and determined that Student would receive homebound services for Math, Science, Social Studies, Communication Arts and Study Skills for a total of 300 minutes per week. (*Id.*) They developed an IEP to cover the period of October 11, 2007-October 11, 2008. (Ulrich opinion at 62).

30. On November 14, 2007, the IEP team developed an Addendum to modify Student's IEP to include a combination of homebound services and modified regular instruction and specialized instruction to assist in her transition back to the school setting. (REx. A at 4). The IEP team also provided for positive interventions and supports such as staff persons identified to serve as a direct contact and "safe" person for Student to go to if concerns were present. (*Id.*) Additional steps taken by the IEP team included: increased oversight of Student in classrooms, hallways and other parts of the school environment; have Student seated at the front of the bus near the driver; place immediate phone calls to parents if concerns were present; teachers to contact principal immediately if a concern was present; "safe" areas were identified for Student to go to if necessary and school counselor to be near Student during lunch to provide supervision and support for Student. (*Id.*)

31. Student attended school from November 26, 2008-December 21, 2008. (Ulrich opinion at 64).

32. On or about January 1, 2008, Mother informed school officials that Student had been hospitalized (after attempting suicide on December 27, 2007) and needed to be placed back in Homebound for the rest of the year. (Ulrich opinion at 32; 64). She began receiving homebound services two days later. (*Id.*)

33. On January 10, 2008, the IEP team developed an Addendum to modify the IEP to provide Homebound Services for 300 minutes per week in Math, Science, Social Studies, Communication Arts and Study Skills.<sup>9</sup> (REx. A at 4).

34. On April 28, 2008, Student's IEP team reconvened and placed her at the Blue Springs Freshman Center for the upcoming 2008-2009 school year. (PEx. 7 at 219).

---

<sup>9</sup> Note a majority in the prior Hearing Panel decision found that the District provided FAPE to Student during the 7<sup>th</sup> grade school year (2006-2007) and the first semester of the 8<sup>th</sup> grade year but not in the second semester of 8<sup>th</sup> grade because of a procedural violation. (Ulrich opinion at 86-88). The Homebound teacher erroneously counted travel time in the total service hours provided to Student. (*Id.*) The majority found a deficiency of 25 instructional hours to be given to Student as compensation. (*Id.*) The parties subsequently reached an agreement for the District to pay for the following: 12.5 hours of instructional services in math to be provided to Student by Plaza Academy (PEx. 10 at 310-316) and 12.5 hours of social skills counseling to be provided to Student by Kansas City Psychiatric and Psychological Services, LLC. (PEx. 6 at 195-200).

35. Through a letter dated May 28, 2008 from her counsel, Deborah Johnson (who continues to be her counsel), Mother expressed interest in the District providing payment for “Student’s placement at a safe, private school such as Plaza Academy. “ (Panel Ex. 9, Joint Stipulation of Facts #5); (REx. A at 4).

36. On June 6, 2008, the District sent notice of an IEP meeting in response to the Parents’ request to convene the IEP team. (REx. M at 88).

37. Prior to the June 11, 2008 IEP meeting, Parents researched and visited Plaza Academy to inquire about enrolling Student at the private school. (Tr. II: 138-39; Tr. II: 219).

38. During their visit to Plaza Academy, Dr. Gary Seabaugh explained the method of instruction for students at Plaza Academy and also discussed tuition expenses with Petitioners. (Tr. II: 139-40; Tr. II: 243-45).

39. On or about June 9, 2008, the Parents provided a copy of a letter dated May 20, 2008 from Dr. Van Horn who indicated that he had been treating Student for Bipolar Disorder, ADHD as well as Tourette’s Syndrome. (PEx. 6 at 175); (Panel Ex. 9, Joint Stipulation of Facts #8). Dr. Van Horn indicated that he had also seen Petitioner during a couple of hospital stays at Research Psychiatric Center. (*Id.*) Dr. Van Horn also stated that he was in agreement with the family’s pursuit of an alternative placement for Student. (*Id.*)

#### **June 11, 2008 IEP Meeting**

40. On June 11, 2008, Petitioner attended the IEP meeting at Delta Woods Middle School with her attorney, Deborah Johnson. (Tr. II: 207). Other attendees included: Steve Cook (8<sup>th</sup> Grade Principal); Tara Ely; Beth Roberts; Vicki Heermann; Randy Laskowski; Brandon Martin and Ryan Fry, counsel for the District. (Panel Ex. 9, Joint Stipulation of Facts #6). No representative from Plaza Academy or any other private school attended the IEP meeting.

41. Contrary to the recollection of Mother regarding a short and hurried meeting, the June 11, 2008 IEP meeting was lengthy and lasted more than two hours. (Tr. II: 179-80; 209; 254; Tr. III: 295).

42. At the June 11, 2008 IEP meeting, Petitioner’s attorney asked questions and provided input on behalf of Petitioner. (REx. D at 49-55).

43. Mother fully participated in the June 11, 2008 IEP meeting by posing questions to the School District members of the IEP team, by providing input as to Student’s goals and present levels, by providing input as to Student’s related services and accommodations, and by requesting private placement. (REx. A at 1-13; REx. D at 49-55; Tr. II: 99-102; Tr. II: 252-53; Tr. III: 285-86).

44. More particularly, Mother asked for and received an explanation of the Scholastic Reading Inventory (“SRI”) test completed in December 2007. Other concerns expressed by her (or her counsel): Student does not know basic multiplication facts; how does the District use MAP scores and how a teacher adjusts lessons based on the results; how the school

accommodates students who do not make progress; she wanted to better understand the math goals for Student; she wanted to know what Student is working on and at what level Student is functioning; the draft did not contain medical information provided by her doctors; Mother wanted her comment re homebound instruction in the previous IEP to be clarified; she asked questions re the ESY statement in the draft; whether the goals need to be more stringent and more extensive. (REx. A at 4 & 5); (REx. D at 49-56).

45. The District members of Student's IEP team responded to all questions raised by Mother and her attorney at the June 11, 2008 IEP meeting, including but not limited to: adding the missing medical information; clarifying Mother's previous comments re homebound instruction; that not all 9<sup>th</sup> grade math objectives needed to be written out in the IEP; the goal of the story problem in the second goal is at the 9<sup>th</sup> grade level; a portfolio could be provided so Mother would know what Student was working on. (Tr. II: 102; Tr. II: 285-86); (REx. D at 49-56).

46. Mother had been presented with the most recent evaluation (dated January 5, 2007) in an IEP meeting prior to the June 11, 2008 meeting, wherein said evaluation was explained to her. (Tr. II: 286).

47. The June 11, 2008 IEP team offered to explain the most recent evaluation information to Mother once again at the completion of the June 11, 2008 IEP meeting. (REx. A at 5; REx. D at 49-50; Tr. II: 100-01; Tr. II: 210-11; Tr. II: 286).

48. Mother chose to forego further explanation of Student's most recent evaluation information at the conclusion of the June 11, 2008 IEP meeting and has made no such request for further explanation of the District to date. (Tr. II: 100-02; Tr. II: 214).

49. The District offered a copy of the procedural safeguards to Mother at the June 11, 2008 IEP meeting; however, Mother refused the copy of the procedural safeguards at that time because she had received a copy a few days earlier. (REx. A at 5; Tr. II: 101; Tr. II: 211-12).

50. The District provided Mother with a copy of the Parents' Guide to Special Education in Missouri at the June 11, 2008 IEP meeting. (REx. A at 5; Tr. II:101; Tr. II: 213).

51. Randy Laskowski, Assistant Director of Special Education for the School District, specifically offered to explain the procedural safeguards and Parents' Guide to Special Education in Missouri to Mother at the conclusion of the June 11, 2008 IEP meeting, an offer that Mother also refused. (REx. A at 5; Tr. II: 100-02).

52. All concerns raised by Petitioner and her attorney were recorded in the June 11, 2008 IEP meeting seven page, detailed minutes and were addressed by Student's IEP team in the June 11, 2008 IEP created for Student. (REx. A at 4-5); (REx. D at 49-56). At no time during the June 11, 2008 IEP meeting did Mother or counsel express an opinion that the draft of the IEP was unclear or vague. (Tr. II: 258).

53. Petitioner and her attorney provided input at the June 11, 2008 IEP meeting that indicated Student needed counseling, but that Petitioners preferred to continue with the private counseling they had established and did not wish for Student's counseling needs to be addressed by the IEP team and/or the District. (REx. D at 52; Tr. II:111; Tr. II:170-71;Tr.II: 06-07).

54. Petitioner and her attorney specifically requested that the District act in a consultative role only in counseling as that would be "least intrusive" for Student. (REx. D at 53; Tr. II: 170-71). The members of Student's IEP team therefore decided that the District's role would be consultative only regarding school adjustment issues. (REx. A at 10; REx. D at 53). No other counseling requirements are provided for in the June 11, 2008 IEP. (*Id.*)<sup>10</sup>

55. Neither Petitioner nor her attorney made a request that separate tutoring be included in Student's June 11, 2008 IEP. (Tr. II:112).

56. Student's IEP team placed her at Plaza Academy, identifying several reasons for the placement, including: Student's difficulty in interacting with peers and adults; parent input; input from Dr. Van Horn; provision of a small classroom setting; the benefits of the treatment model from Plaza Academy; and the desire to transition Student back into the school environment (from her then-current homebound placement where she had been for almost the entire previous school year). (Tr. II: 75; Tr. II: 103; Tr. II: 117-18; Tr. II: 139-40).

57. The IEP team found Student to be eligible for Extended School Year (ESY) for the summer of 2008 to address transition back to a school setting and to acclimate Student to the private placement at Plaza Academy. (Tr. II:107-108; REx A at 4).

58. The District presented at least seven (7) placement alternatives to Petitioner and her attorney at the June 11, 2008 IEP meeting, ranging from placement at the Blue Springs School District Freshman Center to homebound placement utilizing virtual learning. (REx. A at 11; REx. D at 53-54; Tr. II: 105-06; Tr. II: 214-15).

59. Petitioner expressed no interest in fully exploring the placement options provided by the District, including a refusal to visit a potential placement option, Ozanam South. (Tr. II: 240).

60. Randy Laskowski clearly explained to Petitioner at the June 11, 2008 IEP meeting that the IEP drafted on that date was subject to amendment at that time, and continuing into the future, if Petitioner desired to alter the document in any way. (REx. D at 52; Tr. II: 104-05; Tr. II: 215-16).

61. Petitioner received a copy of the June 11, 2008 IEP for her review and comment after the June 11, 2008 IEP meeting. (Tr. II: 234-35). Petitioner has never been asked by the

---

<sup>10</sup> Note that neither Petitioner nor her counsel have made a request that the District pay for private counseling services to Student other than through the settlement agreement referenced in footnote #9. (Tr. II:118;198). Additionally, the billing information provided at the due process hearing reflected minimal out-of-pocket expenses incurred by Petitioner for private counseling. (PEx. 6 at 177-195; Tr. II: 199-205)

District to sign a statement that she understood and agreed to the June 11, 2008 IEP (or any other IEP for Student). (Tr. II: 32).

### June 11, 2008 IEP

62. The June 11, 2008 IEP created for Student contained all the elements required by the IDEA: Present levels of academic achievement and functional performance;<sup>11</sup> How the child's disability affects involvement and progress in the general curriculum; A statement of measurable goals; A description of how the child's progress toward meeting annual goals will be measured and when periodic reports on progress toward meeting annual goals will be provided; A statement of special education and related services and supplementary aides and services for the child; A statement of program modifications or supports for local school personnel that will be provided for the child; An explanation of the extent to which the child will not participate with nondisabled children; A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on state and district-wide assessments; and Transition services, if applicable. (REx. A at 1-13; Tr. I: 123-125; Tr. I: 209-212; Tr. III: 290-92).

63. The Student's June 11, 2008 IEP contained the requisite information of below grade functioning and goals to address same. Specifically, on page 3 of IEP in the How the Student's Disability Affects Involvement and Progress in the General Education Curriculum section states in part:

Math: [Student's] learning disability affects her ability to succeed in the regular classroom. Her deficits in math have a negative impact on her ability to understand grade level math concepts.

64. The Baselines/Goals and Benchmarks on page 7 of the IEP addressed her deficiencies in Math with the following two goals:

Math – Operations- [Student] is able to compute sum, difference, product and quotient with 70% accuracy without a calculation.

**Goal:** The student will compute sum, difference, product, quotient using a calculator with 95% accuracy. Direction – Increase.

- The student will compute sum, difference, product, quotient using a calculator with 85% attainment within one semester based upon data collection.

- The student will compute sum, difference, product, quotient using a calculator with 95% attainment within one year based upon data collection.

---

<sup>11</sup> Contrary to Mother's assertions in her Post-Hearing Brief, this section is more than adequately detailed in the June 11, 2008 IEP. See REx. A. at 3-5. While the Strengths component alone is arguably skimpy, the overall description of Student's Present Level of Academic Achievement and Functional Performance ("PLAAFP") sufficiently describes Student so that any educator looking at the document would be aware of her then current strengths and weaknesses and would know where her level of instruction for the following year should begin.

Math—Reasoning-[Student] is able to compute sum, difference, product and quotient with 70% accuracy without a calculation.

**Goal:** The student will solve a one-step problem using a calculator with 85% accuracy. Direction – Increase.

- The student will identify keyword in a story problem that determines the appropriate calculation skills with 85% attainment within one year based upon data collection.

- The student will apply keyword in a story problem that determines the appropriate calculation skills using a calculator with 85% attainment within one year based on data collection.

- The student will solve one-step story problem using a calculator with 85% attainment with one year based upon data collection.<sup>12</sup>

65. The June 11, 2008 IEP specifically provided that Student was to receive 240 minutes per week of modified regular education in math in either the special education or regular education setting for the 2008-2009 school year. (REx. A at 10).

66. Special education services can be provided in any number of different environments or locations, as long as the services are specifically designed instruction and services that provide a child access to the general education curriculum. (Tr. I: 163; Tr. I: 211-12).

67. The June 11, 2008 IEP specifically provided that Student was to receive 1,500 minutes per week of modified regular instruction in all courses for the duration of the 2008 ESY session. (REx. A at 13).

68. During the 2008 ESY session, the 1,500 minutes of modified regular education in all courses specified for ESY in the June 11, 2008 IEP took precedence over the 240 minutes of modified regular education specified for the 2008-2009 school year in only math. (Tr. II: 109).

69. The June 11, 2008 IEP created for Student contained no statement regarding or requiring the provision of tutoring services.<sup>13</sup> (REx. A at 1-13; Tr. II: 112).

70. The June 11, 2008 IEP created for Student contained no statement requiring the District to provide counseling in that counseling services were already being privately provided by arrangement of and at the behest of Petitioner. (REx. D at 53; Tr. II: 171).

---

<sup>12</sup> The IEP also contained a Social Skills –Problem Solving – Goal. The baseline stated [Student] has demonstrated adjustment concerns related to interaction with peers and adults in a school setting. The IEP team set this goal: the Student will demonstrate appropriate social skills in the classroom with 90% accuracy. The IEP team also included three benchmarks: (1) Student will demonstrate appropriate social skills during structured classroom activities with 90% attainment within one year based upon data collection; (2) Student will demonstrate appropriate social skills during unstructured classroom activities with 90% attainment within one year based upon observation by staff; and (3) Student will demonstrate appropriate social skills during communication exchange with 90% attainment within one year based upon observation by staff. (REx. A. at 7).

<sup>13</sup> Randy Laskoski was aware from information on the Plaza Academy website that tutoring was part of Plaza's educational approach. (Tr. II: 38-39). He, however, testified that the subject of tutoring did not come up at the June 11, 2008 IEP meeting. (Tr. II:39).

71. Student's June 11, 2008 IEP did not and was not required to provide a minute-by-minute account of Student's day at Plaza Academy, but the June 11, 2008 IEP allowed the staff at Plaza Academy to provide Student with all the services identified in Plaza Academy's treatment model. (Tr. II: 135-36; REx. VV at 389A-389E).

72. The June 11, 2008 IEP does not contain a provision for post-secondary transition services because Student would not be turning 16 during the time the IEP would be in effect. (REx A at 6).

73. We conclude that under the June 11, 2008 IEP, Student received access to the regular education curriculum for the 9<sup>th</sup> grade as well as remedial and/or specialized instruction in math so she could access grade objectives. She also received considerable help with deficiencies in the Social skills area.

### **Student's Education after June 11, 2008<sup>14</sup>**

74. Mother has failed to contact the District requesting an explanation of the procedural safeguards or the Parents' Guide to Special Education in Missouri from June 11, 2008 to the present. (Tr. II: 100-02).

75. Neither Petitioner nor counsel made any request of the District or Plaza Academy to amend or even discuss the June 11, 2008 IEP after the IEP meeting on that Date.<sup>15</sup> (Tr. II: 120; Tr. II: 126; Tr. II: 151; Tr. II: 168-70; Tr. II: 234-36). For example, Petitioner attended her daughter's annual IEP review meeting in June 2009 but raised no concerns regarding the June 11, 2008 IEP. (Tr. II: 120-21; 151; 169-170; 195-96); REx. E at 56-63).

76. The staff at Plaza Academy implemented the June 11, 2008 IEP for Student during ESY of 2008 and during the 2008-2009 school year. (Tr. II: 146-47; REx. VV at 389B). They provided all services that Mother requested for Student. (Tr. II:157; 228-229).

77. During the 2008 ESY session, Student was assessed and evaluated by Plaza Academy staff to determine her present levels of functioning. (Tr. II: 145-46).

78. After evaluating Student during the 2008 ESY session, the staff at Plaza Academy created a curriculum specifically designed to meet Student's needs. (Tr. II: 145-46).<sup>16</sup>

79. The services provided to Student under the June 11, 2008 IEP were delivered in accordance with Plaza Academy's treatment model that was discussed with Petitioners when they first visited Plaza Academy in advance of the June 11, 2008 IEP meeting. (Tr. II: 133-34;

---

<sup>14</sup> This Section is not exhaustive regarding Student's education post-June 11, 2008 to June 11, 2010 because the issues before us focus primarily on the June 11, 2008 IEP.

<sup>15</sup> The Mother argues in her Post-Hearing Brief that in the May 28, 2008 due process proceeding, she requested an Order directing the District to develop an appropriate IEP and BIP that would provide FAPE but the Chairperson dismissed this request on January 2, 2009. (Ulrich opinion at 11). Thus, Mother contends this action is the reason that she waited two years to file for due process on the June 11, 2008 IEP.

<sup>16</sup> Mother testified at an earlier due process proceeding that Student received grade level curriculum at Plaza Academy. (Tr. II: 193).

Tr. II: 140-41). Class sessions are 50 minutes in length, typically divided into thirds: first third is a lecture; second third is discussion and practice and the final third is tutorial. (Tr.II:135). She has six classes daily so she would receive tutoring at least 6 times per day.<sup>17</sup> (Tr. II:133).

80. The services provided to Student by Plaza Academy are at some level, all special education services by virtue of Plaza Academy being a Missouri-approved private agency operating as a special purpose, special function school. (Tr. II: 133).

81. Student made progress toward the math goals in her June 11, 2008 IEP during the 2008-2009 school year at Plaza Academy. (Tr. II: 153; REx. VV at 389D).

82. Student made progress toward the social skills goals in her June 11, 2008 IEP during the 2008-2008 school year at Plaza Academy. (Tr. II: 147-48; REx. VV at 389D).

83. For the fall semester of the 2008-2009 school year, Student received the following grades in the corresponding courses [at Plaza Academy]: Algebra, C; English I, B; vocational Economics, A; Weaving, A; English II, B and Biology, C. (Panel Ex. 9, Joint Stipulation of Facts #14).

84. For the Spring semester of the 2008-2009 school year, Student received the following grades in the corresponding courses [at Plaza Academy]: Pre-Algebra, D; Art Concepts, A; Vocational Economics, C; Math Strategies, D; English II, D; Biology, B; English I, C and Pre-Algebra, C. (Panel Ex. 9, Joint Stipulation of Facts #15).

85. Student also attended Plaza Academy for the 2009-2010 school year and is currently attending Plaza Academy for the 2010-2011 school year. (REx. C at 32-48; REx. Z at 203-204).

86. Student is on track to graduate from Plaza Academy as scheduled in May 2012. (Tr.II:158; 283); (REx. Z at 203-204).

87. The District provides the tuition for Student at Plaza Academy in an approximate amount of \$25,000.00 per year, plus the costs of daily transportation to and from school. (Tr. II:159).

### **Mother's Testimony**

88. Mother's testimony that she was not able to participate meaningfully at the June 11, 2008 IEP meeting is not credible in view of the meeting notes and the final IEP containing very detailed descriptions of the concerns expressed by her.

89. At one point during the June 11, 2008 IEP Mother cried and thanked the IEP team members for honoring her request to place Student at Plaza Academy.<sup>18</sup> (Tr.II:110; 253). In

---

<sup>17</sup> The most recent IEP created for Student in February 2010 does provide for tutoring at the end of each class period under the Modifications and Accommodations section. (REx. C at 40).

contrast, however, she testified more than 2 years later that she had agreed to placement at Plaza Academy because she knew of no other place. (Tr. II: 218).

90. Mother was very evasive when she was asked a simple question as to whether she had asked Dr. Van Horn to write his letter dated May 20, 2008.<sup>19</sup>

91. Mother could not “remember” or “recall” the following attempts to get very basic information from her:

(a) whether at the January 2009 due process hearing, she had been asked about the placement at Plaza Academy (Tr. II: 190);

(b) whether she made a request for a due process hearing between June 11, 2008 and June 11, 2009 (Tr. II: 195);

(c) whether she asked for an IEP meeting outside of the June 2009 IEP meeting (Tr.II:196);

(d) whether, at the June 11, 2008 IEP meeting, she asked for counseling services to be paid for by the District (Tr.II:198);

(e) whether she was told at the June 11, 2008 IEP meeting, the SRI score for Student would have been reported after homebound services ended in December 2007 (Tr. II: 208);

(f) whether anybody told her that she could make suggested changes to the draft of the June 11, 2008 IEP (Tr. II: 210);

(g) whether Mr. Laskowski offered to read through and explain the procedural safeguards at the end of the June 11, 2008 IEP meeting (Tr. II: 212);

(h) whether she asked about Math scores at the June 11, 2008 IEP meeting (Tr. II:213);

(i) whether she asked about MAP scores at the June 11, 2008 IEP meeting and how the teachers adjust lessons based on the results (Tr. II:214);

(j) whether she asked at the June 11, 2008 IEP meeting what happens when a child does not meet special education criteria (Tr. II:215);

(k) whether she made a request to discuss the June 11, 2008 IEP before filing for due process (Tr. II: 222); and

---

<sup>18</sup> She denied that she was relieved that the \$25,000 cost would be picked up by the District. (Tr. II: 245). She testified that she was simply overwhelmed and overjoyed that her daughter would be back in school. (*Id.*)

<sup>19</sup> This is the same letter referenced in Findings of Fact #39.

(m) whether she spoke with anyone at the District after getting the June 11, 2008 IEP about her concerns (Tr. II:236).

92. When confronted with the transcript from the prior due process hearing in January 2009, Mother admitted that she had previously testified: Student is very happy, is learning now, is very proud and wants to go to school. (Tr. II: 192 and Ulrich opinion at 74).

93. When asked repeatedly by District counsel as to whether she was pleased with the education that her daughter received at Plaza Academy, she gave the same scripted response: I am pleased that she is happy to go school or I had nothing with which to compare the education received at Plaza. (Tr. II: 194; 219; 225).

### **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 Student and her Parents 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 The IDEA's Burden Of Proof**

4. If parents of a "child with a disability" believe that the educational program provided for their child fails to meet FAPE, 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 (8<sup>th</sup> Cir. 1998); *Fort Zumwalt School District v. Clynes*, 119 F.3d 607, 610 (8<sup>th</sup> Cir. 1997), *cert. denied* 523 U.S. 1137, 118 S.Ct. 1840, 140 L.Ed 2d 1090 (1998).

5. The Student and her Mother filed the due process complaint that initiated this matter on June 11, 2010. The complaint alleges the June 11, 2008 IEP developed by the District violated the IDEA because: the June 11, 2008 IEP is entirely vague and meaningless and/or inaccurate; the IEP was the same as the previous one proposed placing Student at a school within the District and the June 11, 2008 IEP provides for a private placement at Plaza Academy; none of the District programs or services were eliminated from the June 11, 2008 IEP implemented by Plaza Academy; none of the modifications, accommodations and curriculum provided to Student by Plaza Academy were ever incorporated into the June 11, 2008 IEP; the IEP failed to include counseling and tutoring – related services needed by Student. Based on the

foregoing problems with the June 11, 2008 IEP, Parent's right to participate in the decision-making processes was impeded and FAPE was denied.

6. 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).

### **Free Appropriate Public Education**

7. The IDEA, its regulations and the *State Plan for Part B of the Individuals With Disabilities Education Act* (2007), ("State Plan") constitute regulations of the State of Missouri which further define the rights of Petitioner and his Parents and regulate the responsibilities of educational agencies, such as the District, in providing special education and related services to children 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 requires that a disabled child be provided with access to a "free appropriate public education." ("FAPE") *See Board of Education of the Hendrick Hudson Central School District, Board Of Education, Westchester County v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 3049, 73 L.Ed.2d 690 (1982). The term "free appropriate public education" is defined by 34 C.F.R. § 300.17 as follows:

"...the term 'free appropriate public education' means special education and related services that--

(a) Are provided at public expense, under public supervision and direction, and without charge;

(b) Meet the standards of the SEA, including the requirements of this part;

(c) Include preschool, elementary school, or secondary school education in the State involved; and,

(d) Are provided in conformity with an IEP that meets the requirements of §§300.340--300.350."

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

11. 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 (10<sup>th</sup> 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*, 102 S.Ct. 3034, 3047. In so doing the IDEA does not require that the District "either maximize a child's potential or provide the best possible education at public expense," *Rowley*, 102 S.Ct. 3034, 3049; *Fort Zumwalt School District v. Clynes*, 119 F.3d 607, 610 (8<sup>th</sup> Cir. 1997), *cert. denied* 523 U.S. 1137, 118 S.Ct. 1840, 140 L.Ed 2d 1090 (1998) and *A.W. v. Northwest R-1 School District*, 813 F.2d 158, 163-164 (8<sup>th</sup> Cir. 1987). Likewise, the IDEA does not require the District 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); that is "absolutely [the] best," *Tucker v. Calloway County Board of Education*, 136 F.3d 495, 505 (6<sup>th</sup> Cir. 1998); that will provide "superior results," *Fort Zumwalt School District v. Clynes*, 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 (8<sup>th</sup> Cir. 1999); *E.S.*, 135 F.3d 566, 569. *See also: Tucker*, 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 (7<sup>th</sup> Cir. 1991).

### **Procedural Compliance with IDEA**

12. 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*, 102 S. Ct. at 3034. 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 District. No. 1*, 512 F. 3d 455, 461 (8th Cir. 2008). Substantive violations of IDEA result in the denial of FAPE but procedural violations do not necessarily equate to a denial of FAPE. *See, e.g., A. K. ex rel. J. K. v. Alexandria City Sch. Bd.*, 484 F. 3d 672, 684 (4<sup>th</sup> Cir. 2007, *reh'g denied*, 497 F. 3d 409 (4<sup>th</sup> Cir. 207), *cert. denied*, 128 S. Ct. 1123 (2008).

13. Section 1415 of IDEA provides in cases alleging a procedural violation, FAPE is lacking only if the procedural inadequacies (I) impeded the child's right to a free public education; (II) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of FAPE or (III) caused a deprivation of educational benefits. 20 U. S. C. Section 1415 (f)(3)(E). *See also* 34 C.F.R. Section 300.513 (a)(2). Minor technical procedural violations do not mandate a finding of denial of FAPE. *Independent Sch. Dist. No. 283*, 88 F. 3d 556, 557 (8<sup>th</sup> Cir. 1996).

14. An IEP is a written statement that must include, *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 (8<sup>th</sup> 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. The June 11, 2008 IEP met the requirements of 20 U. S. C. Section 1414(d)(1)(A) summarized in Conclusion of Law #14 above. As noted in more detail in the Findings of Fact #62-68, the June 11, 2008 IEP clearly and accurately set out all the requisite components for a valid IEP under IDEA.

16. The IDEA provides that parents of a child with disabilities must be afforded "an opportunity . . . to participate in meetings with respect to the identification, evaluation, and educational placement of the child." 20 U. S. C. Section 1415(b)(1). *See also Schaffer v. Weast*, 546 U. S. 49, 53 (2005) ("Parents and guardians play a significant role in the IPE process.").

17. We conclude that the District did not violate the procedural requirements in its development of the June 11, 2008 IEP by having a draft prepared at the time of the IEP meeting on June 11, 2008. *See, e. g., Brown v. Bartholomew Consolidated School Corp.*, 442 F.3d 588 (7<sup>th</sup> Cir. 2006); *Cerra v. Pawling Central School District*, 427 F.3d 186, 194 (2<sup>nd</sup> Cir. 2005); *B. B. v. State of Hawaii, Department of Education*, 483 F. Supp.2d 1042 (D. Haw. 2006); *Tracy v. Beaufort County Board of Education*, 335 F. Supp.2d 675 (D. S. C. 2004). The District had not predetermined placement and therefore, did violate IDEA procedural requirements.<sup>20</sup>

18. Contrary to the arguments advanced by the Mother, the District did not significantly impede her participation in the development of the IEP and thus, we find there was no denial of FAPE in this case. Put another way, we conclude that the District complied procedurally with the IDEA.

### **Family Education Rights and Privacy Act ("FERPA")**

19. FERPA confers on parents the right to request that a school correct records which they believe to be inaccurate or misleading. 20 U.S. C. Section 1232(g)(2) If the school decides not to amend the record, the parent then has the right to a formal hearing. 34. C. F. R. Section 99.20. After the hearing, if the school still decides not to amend the record, the parent has the right to place a statement with the record setting forth his or her view about the contested information. 34 C. F. R. Section 99.21.

---

<sup>20</sup> The Mother first complained about the failure of the District to have a representative from Plaza Academy at the June 11, 2008 IEP meeting in her Post-Hearing Brief and is therefore waived. *See, e.g., A. E. v. Westport Board of Education*, 463 F. Supp.2d 208 (D. Conn 2006). Even if this procedural claim is not waived, it is without merit. Because placement had not been determined, there was no requirement for a representative of Plaza Academy to attend the June 11, 2008 IEP meeting. *Virginia S. v. Department of Education, State of Hawaii*, 2007 WL 80814 at 7 (D. Haw. January 8, 2007). Additional reasons for the claim lacking any merit: (1) she was familiar with the Plaza program because she had visited the Academy (FF# 37) and (2) this was the very placement that she requested. (FF# 35; 89).

20. Mother never took any action under FERPA to seek correction of what she believed to be inaccurate and misleading information in Student's June 11, 2008 IEP.

### **Substantive Compliance with IDEA**

21. A public school district is required to provide children with disabilities with "publicly funded education that benefits the student," *Fort Zumwalt*, 119 F.3d. at 613. "An individualized education program is appropriate under the IDEA if it offers instruction and supportive services reasonably calculated to provide some educational benefit to the student for whom it is designed." *Missouri Dept. of Elementary and Secondary Educ. v. Springfield R-12 School District*, 358 F.3d 992, 998, note 7, (8th Cir. 2004). *See also: Rowley*, 458 U.S. at 201, 102 S. Ct. 3034; *Blackmon*, 198 F.3d at 658-59; and *T.F. v. Special School Dist. of St. Louis County*, 449 F.3d at 820.

22. The District met the requirements of the IDEA Regulations, 34 C.F.R. § 300.324(a) when it developed Petitioner's June 11, 2008 IEP because during that process Petitioner's IEP Team considered: (a) the strengths of Petitioner; (b) the concerns of the Parents for Petitioner's education; (c) the results of the evaluation of Petitioner; and (d) the academic, developmental and functional needs of the Petitioner.

23. The June 11, 2008 IEP does not contain provisions for individual counseling and tutoring because the team never agreed that said services would be included in the IEP.<sup>21</sup> We further conclude that the absence of these services did not result in a denial of FAPE to Student.

### **Other Issues**

24. Because the Student and Parents failed to show beyond a preponderance of evidence that FAPE was denied either procedurally or substantively under IDEA, we decline to address the remedy issues set out in FF#25 (c).

### **DECISION**

The Mother alleges in her Due Process Complaint alleges the June 11, 2008 IEP developed by the District violated the IDEA because: the IEP is entirely vague and meaningless and/or inaccurate; the IEP was the same as the previous one proposed placing Student at a school within the District and the June 11, 2008 IEP provides for a private placement at Plaza Academy; none of the District programs or services were eliminated from the June 11, 2008 IEP implemented by Plaza Academy; none of the modifications, accommodations and curriculum

---

<sup>21</sup> Any oral offers for those services would not be enforceable. *Systema v. Academy School District No. 20*, 538 F. 3d 1306, 1317(10<sup>th</sup> Cir. 2008)(Substantive compliance is determined by an analysis of the four corners of the IEP.)

provided to Student by Plaza Academy were ever incorporated into the June 11, 2008 IEP; the IEP failed to include counseling and tutoring – related services needed by Student. Based on the foregoing problems with the June 11, 2008 IEP, Mother’s right to participate in the decision-making processes was impeded and FAPE was denied.

### **Procedural Compliance with IDEA**

We first address whether the District complied with the procedural requirements of the IDEA and if not, did a denial of FAPE result. Generally, the focus on procedural issues is whether a school gave the parents an adequate chance to participate in the development of their child’s IEP. *See e.g., P. K. v. Bedford Central School District*, 569 F. Supp.2d 371, 383 (S. D. N. Y. 2008).

Mother claimed that the meeting was hurried, no one seemed interested in what she had to say and the outcome seem predetermined; thus, she felt that the June 11, 2008 IEP meeting did not give her an adequate opportunity to participate. There is no basis for Mother’s complaint. As we noted in great detail in our Findings of Fact, she participated, along with her counsel, in a two hour meeting in which Mother’s input was sought (and found to be valuable) and her questions answered by other members of the IEP team. (FF# 41-46, 52). The meeting notes reflect that the District changed the draft to include comments from Mother and counsel – clearly showed the parties engaged in a meaningful discussion regarding what was best for Student. Mother’s claim that she did not understand what was discussed at the June 11, 2008 IEP meeting is not credible. We also note that the meeting had been initiated by Mother to discuss a private placement at Plaza Academy --- the placement ultimately agreed to by all members of the IEP team. (FF# 37; 56).

Mother's second procedural claim is that the June 11, 2008 IEP is vague, inaccurate and not meaningful. We find no basis for this position. The June 11, 2008 IEP very specifically sets out the requisite components of a valid IEP: (1) there is a three page *detailed* statement of her present levels of academic achievement and functional performance ("PLAAFP") as well as a description how her disability affects her involvement in the general education curriculum; (FF#63 & 64); REx. A at 1-3) (2) contains three annual goals and benchmarks that are meaningful, specific, concise, realistic, capable of measurement and directly relate to Student's areas of weaknesses identified in the PLAAFP section (FF#64); (3) describes how Student's annual goals would be measured and when periodic reports would be provided (FF#64); REx. A. at 7)<sup>22</sup>; (4) description of assessment accommodations (REx. A at 8); (5) program modifications and accommodations (REx. A at 8-9); (6) a statement of special education services to be provided to Student (FF#65); and (7) provision for ESY services. (FF#67).

The June 11, 2008 IEP contains none of the defects so obviously present in the *Escambia County Board of Education v. Benton*, 406 F. Supp.2d 1248 (S. D. Ala. 2005), a decision cited by mother and her counsel. In *Escambia*, there was a lack of any record of progress, omission of measurable annual goals and a failure to describe specific special education services to be provided to the student. *Id.* at 1254. Unlike in *Escambia*, the District has not provided annual goals in fuzzy, ambiguous, ill-defined terms that render it very difficult to know what the objectives are, or virtually impossible to measure whether she has achieved them. *Id.* at 1275.

---

<sup>22</sup> The June 11, 2008 IEP includes quantitative numerical goals even though not mandated by the IDEA. *Kuszewski v. Chippewa Valley Schools*, 131 F.Supp.2d 926, 933 (E. D. Mich.2001). *See also Hjortness v. Neenah Joint School District*, 507 F.3d 1060, 1063 (7<sup>th</sup> Cir. 2007) (No denial of FAPE even though the new IEP has nearly the same goals as the previous IEP but with lowered percentages as well as new short term objectives) and *Wagner v. Board of Education of Montgomery County*, 340 F.Supp.2d 603, 613 (D. Md. 2004) (Court noted parents failed to object at IEP meeting to having the same goals as the previous years).

Mother's testimony that she didn't understand the terms of the June 11, 2008 IEP which she considered very vague is simply not credible. She was an active participant at the June 11, 2008 IEP meeting along with her very experienced attorney. The meeting notes do not reflect any complaint regarding vagueness or ambiguities with the draft of the IEP. (FF#52). The mother and counselor got a final draft (which incorporated many of mother's comments and questions) shortly thereafter but took virtually no action to address any alleged vagueness or inaccuracies until she filed this due process action on June 11, 2010 – the very last day for coming within the two year statute of limitations.<sup>23</sup>

Even if the final draft contained some minor discrepancies from the services actually rendered at Plaza Academy and if the final draft did not contain all the laundry list of requirements, the Eighth Circuit has held that “minor ‘procedural and technical deficiencies in the IEPs’ cannot support a claim that a FAPE has been denied.” *CJN v. Minneapolis Public Schools*, 323 F. 3d 630, 639 (8<sup>th</sup> Cir. 2003). This would seem to be particularly true when Mother received the very placement that she requested.

### **Substantive Violations of IDEA**

We next turn to the allegations that the June 11, 2008 IEP had substantive violations of IDEA because the IEP failed to contain provisions for individual counseling and tutoring. The meeting notes clearly state that Student needed counseling but that Mother preferred Student to continue with the private counseling that had been established for her. (FF#53 & 54). Mother and her counsel wanted the District to act in a consultative role as that would be “least intrusive” for Student. (FF#54). Thus, there is no IEP provision requiring any counseling services to be made available to Student by the District. Similarly, there is no requirement in the June 11, 2008 IEP

---

<sup>23</sup> We recognize Mother's generic demand raised in the prior due process matter for all future IEPs to be drafted appropriately but even this request was dismissed in January 2009 – some eighteen months before the current action was filed.

for Student to receive tutoring. The meeting notes contain no request for tutoring services. (FF#55).

Mother's position is that the absence of these services in the June 11, 2008 IEP resulted in a lack of FAPE. Regardless of the specific inclusion of math tutoring in Student's IEP, she received this service as a part of the educational methodology and model employed by Plaza Academy beginning with Student's attendance in the summer of 2008 and continuing through the present year. (Tr. II:133). Plaza Academy's educational methodology includes approximately twenty (20) minutes of tutoring for each class period on a daily basis, a special feature known and considered by all parties when they selected the Plaza Academy placement in June of 2008. (FF#79).<sup>24</sup>

Similar to math tutoring, Student's placement at Plaza Academy specifically provided daily interventions designed to address her social skills and counseling needs. Also just like math tutoring, Plaza Academy's treatment model that was discussed with Mother well in advance of Student's placement there, includes both individual and group training sessions aimed at improving Student's social skills and overall mental health. (REx. RRR at 546). Counseling is another example of the educational methodology utilized by Plaza Academy with all students. Plaza Academy's treatment model including, but not limited to, daily tutoring, social skills intervention strategies and personal counseling services, was specifically and personally explained to Mother by Dr. Gary Seabaugh in her visit to Plaza Academy prior to the June 11, 2008 IEP meeting. (Tr. II: 138-39). Notably, Student received counseling services at

---

<sup>24</sup> Mother also argues that the absence of this service makes it difficult to prepare future IEPs if the June 11, 2008 IEP is not corrected. As we noted in an earlier footnote, the most recent IEP created for Student in February 2010 does provide for tutoring under the Modifications and Accommodations section. (REx. C at 40).

Plaza Academy, in addition to the private counseling that Mother continued outside the school environment, for the entirety of the 2008-2009 school year to the present.

In sum, Mother received the very placement that she wanted when she initiated the request for an IEP meeting in June 11, 2008. That placement has delivered counseling services, math tutoring and much more for her daughter. We find NO substantive violations of IDEA.

### **CONCLUSION**

We unanimously conclude: (a) Petitioner failed to carry her burden of proof on her claim of procedural violations under IDEA; and (c) Petitioner failed to carry her burden of proof on her claim of substantive violations under IDEA.

Because the Petitioner failed to show beyond a preponderance of evidence that the District failed to provide FAPE, we decline to address the issues in 25(c) (set out earlier in the Findings of Fact section) dealing with remedies if FAPE had been denied to Student.

### **ORDER**

The Due Process Complaint filed by the Petitioner is dismissed and judgment is entered against Petitioner and judgment is entered in favor of Blue Springs R-IV School District.

### **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 28<sup>th</sup> day of December, 2010.

/s/  
Pamela S. Wright, Chairperson of the Hearing Panel

/s/  
George Wilson, Panel Member

/s/  
James Walsh, Panel Member

**CERTIFICATE OF SERVICE**

Copies of the foregoing Opinion were mailed via certified mail, return receipt requested (and by electronic mail to Ms. Johnson and Mr. Fry) via regular US Mail to Mr. Wilson, Mr. Mr. Walsh and Ms. Bruner on this 28<sup>th</sup> day of December, 2010:

Ms. Deborah S. Johnson  
Attorney at Law  
9923 State Line Road  
Kansas City, MO 64114

Mr. Ryan T. Fry  
Cochran, Oswald & Roam, LLC  
601 N. W. Jefferson Street  
Blue Springs, MO 64013

Mr. James Walsh  
400 S. Woods Mill Road, Suite 250  
Chesterfield, MO 63017-3481

Mr. George Wilson  
2656 County Road #2950  
Clark, MO 65243

Ms. Jackie Bruner, Director  
Special Education Compliance  
Department of Elementary &  
Secondary Education  
PO Box 480  
Jefferson City, MO 65102-0480

/s/

\_\_\_\_\_  
Pamela S. Wright