

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

_____, STUDENT,)
by and through _____,)
PARENTS,)
)
Petitioner,)
v.)
)
)
NORTH KANSAS CITY 74 SCHOOL)
DISTRICT,)
Respondent.)

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

PROCEDURAL HISTORY AND STATEMENT OF ISSUES

A. Procedural History

This matter comes before the three-member due process hearing panel convened by the Missouri Department of Elementary and Secondary Education (“MDESE”) pursuant to § 162.961 R.S.Mo., on the request for due process filed by the parents of Student (hereinafter “Parents” or “Petitioners” jointly or “Mother” or “Father” individually) on behalf of their daughter (hereinafter “Student”), a student who resides in the North Kansas City 74 School District (hereinafter “School District” or “District” or “Respondent”). The request for due process (“Complaint”) was received by MDESE on March 22, 2010. Respondent exhibit 38 (hereinafter R for Respondent, P for Petitioner or HP for Hearing Panel, followed by a dash and then exhibit number and then at page number if applicable). The panel convened by MDESE consists of panel members Dr. Patty Smith and Ms. Pamela Walls and Chairperson Janet Davis Baker. The Student and her parents are represented by Bruce A. Goldstein and Jay C. Pletcher with the law firm of Goldstein, Ackerhalt & Pletcher, L.L.C., with Nancy E. Huerta of Equal Chance Education Consulting, L.L.C. as local counsel. The Respondent School District is represented by Shellie L. Guin with Guin, Martin & Mundorf, LLC.

A resolution meeting was conducted on April 5, 2010, but the parties were not able to resolve the dispute. Transcript at page 6 (hereinafter “Tr.” followed by page number(s)). Respondent challenged the sufficiency of the Complaint, and the Panel Chairperson found the Complaint sufficient on May 11, 2010. HP-3; Tr. 6.

The hearing was conducted at the offices of the School District on July 12-14, 2010; August 9-10, 2010; and September 20-21, 2010. A motion for judgment was made at the conclusion of the

Parents' case, which was denied at the time. HP-4; Tr. 1210. The hearing was closed at Parents' request. Tr. 6-7. Respondent's exhibits, R-1 through R-42, and Petitioners' exhibits, P-1 through P-22 and certain DVD's marked P-23 through P-29, were all admitted by agreement. Tr. 202-03, 465, 819-20, 1139, 1621. Certain portions of a deposition taken of Jeanne Fredriksen were also admitted into the record by agreement as HP-1.¹ Tr. 727-28. The parties agreed to a stipulated protective order regarding certain documents provided by the School District to the Petitioners. HP-6.

Parents called the following witnesses to testify: Dr. Jennifer Beutel, Ashley Fields, Anne Marie Shetley, Jeni Schreifels, Clara Bowlin, Jeanne Fredriksen, Dr. Carol A. Flexer, Dr. Sarah King, Sarah Sanftner, Megan Friedman, Student's Mother and Student's Father. Respondent called Dr. Jennifer Beutel, Steven Beldin, and Robin Gaschler.

B. Time-Line Information

The initial deadline for issuance of the hearing panel's decision was May 20, 2010. The Petitioners requested an extension of time for the hearing panel's decision through July 18, 2010, and then through October 11, 2010, which the Chairperson granted. At the conclusion of the hearing, the parties jointly requested an extension of time for the hearing panel's decision through January 21, 2011, which the Chairperson granted. A subsequent request was made by the School District to extend the panel decision through February 22, 2011, which the Chairperson granted and then a request by the Petitioners to extend through March 2, 2011, which the Chairperson granted.

C. Statement of Issues

The issues before the Panel upon which evidence was presented during the hearing arise out of the compliance of the School District with the requirements of the Individuals with Disabilities Education Act ("IDEA") as implemented in the State of Missouri, regarding the School District's provision of a free appropriate public education ("FAPE") to Student through an individualized education program ("IEP") developed by the School District for Student. The issues are more specifically identified by counsel for Petitioner in a June 18, 2010 letter (R-38) as follows:

1. The IEP team failed to recommend an appropriate, coordinated aural/oral program and placement specifically designed to meet Student's needs as an oral-deaf child with bilateral cochlear implants.
2. The IEP team failed to recommend appropriate, intensive, and coordinated aural/oral services specifically designed to meet Student's needs as an oral-deaf child with bilateral cochlear implants.
3. The IEP team failed to ensure that the providers needed to implement an appropriate aural/oral program for Student have the necessary background, training and experience to implement or deliver such a program.

¹ There was an HP-2 that was marked for use for cross-examination and was subsequently admitted as part of Respondent's exhibits, as R-40.

4. The IEP team failed to adequately consider Student's language and mode of communication.
5. The present levels of academic achievement and functional performance section of the IEP proposed by the IEP team does not adequately and appropriately reflect Student's needs as an oral-deaf child with bilateral cochlear implants, including her needs for intensive aural/oral special education and related services.
6. The present levels of academic achievement and functional performance section of the IEP proposed by the IEP team does not accurately describe how Student's hearing loss affects her participation in age-appropriate activities, including related academic, communication and social development.
7. The present levels of academic achievement and functional performance section of the IEP proposed by the IEP team does not accurately reflect the concerns of Student's parents and the professionals currently providing services to Student, including her needs for an intensive, coordinated aural/oral program of special education and related services provided by professionals with the background, training and experience to provide the same.
8. The IEP goals contained in Student's IEP do not adequately and appropriately address Student's needs as an oral-deaf child with bilateral cochlear implants and do not address her proper development in language, communication and audition.
9. The North Kansas City School District has failed to make available a continuum of programs and placements designed to meet Student's needs as an oral-deaf child with bilateral cochlear implants, such as provided at St. Joseph Institute for the Deaf.

The letter concluded that the Parents would show that their unilateral placement at St. Joseph Institute for the Deaf (hereinafter "St. Joseph"), a private school, is appropriate and equitable considerations support their request for reimbursement.

The Complaint suggested resolution through reimbursement to Parents for the cost of Student's placement at St. Joseph as well as all expenses including transportation, continued placement of Student at St. Joseph at School District expense pursuant to a 12 month IEP with payment of transportation expenses, and reimbursement for Parents' reasonable attorneys' fees.²

The School District answered the Complaint and denied the allegations.³ The School District specifically denied that its identification of Student as a Young Child with a Developmental Delay ("YCDD") rather than as a deaf child was improper. It further denied that the IEP failed to recommend any special education placement and stated that the placement of Student in

² Only courts may award attorneys' fees to prevailing parties in due process proceedings. Missouri State Plan for Special Education ("State Plan") at Regulation V, page 75; 34 C.F.R. § 300.517.

³ The issues presented in the Complaint were not as detailed as those contained in Petitioners' counsel's June 10, 2010 letter.

itinerant service outside the home is a special education placement within the least restrictive environment continuum and the appropriate placement to implement Student's IEP. HP-5.

There is a two year statute of limitations under the IDEA for due process complaints which runs from the time the parent or public agency (the School District), "knew or should have known about the alleged action that forms the basis of the due process complaint." 34 C.F.R. § 300.511(e). This deadline has exceptions, however, if the parent was prevented from filing a complaint because the public agency made specific misrepresentations that it had resolved the problem forming the basis of the complaint or that the public agency withheld information from the parent that was required to be provided to the parent. 34 C.F.R. § 300.511(f). There are no allegations by Parents of any exceptions to the two year statute and no dispute regarding the timeframe for the relevant evidence concerning the issues before the panel. While an analysis of IDEA violations may only go back two years, testimony and evidence relating to the Student prior to that time provides the hearing panel with relevant background and context.

FINDINGS OF FACT

1. Student was born on November 18, 2006, and passed her infant hearing screening. Tr. 1006.

2. Parents first noticed Student was having difficulty with her hearing in October or November of 2007. Student was diagnosed with hearing loss on January 2, 2008. Tr. 1007; R-4; R-9. Student was without access to sound from October or November 2007 until March 2008. Tr. 1067.

3. Student received her first cochlear implant in March 2008 and her second in August 2008. Tr. 1012, 1015; R-4 at p.2. Knowledgeable persons affiliated with both Parents and School District testified regarding the science of cochlear implants. A cochlear implant is a surgically-inserted device that stimulates the neural tissue in the cochlea bypassing the hair cells that are the sensory receptors and sending stimulation to the auditory centers of the brain for processing. A receiver is located on the external portion of the head. The device transforms acoustic information in the environment to electrical impulses that are sent through the coil that has been surgically inserted in the cochlea. Insertion of a cochlear implant typically destroys any residual hearing for that individual. Tr. 212-13, 581-82, 712.

First Steps Early Intervention Services

4. Student began receiving services through First Steps on January 28, 2008 through an Individualized Family Service Plan ("ISFP") implemented at St. Joseph Institute for the Deaf, a private deaf education institution with its Kansas City campus located in Lenexa, Kansas. R-2; R-24 at p. 187. First Steps is the early intervention program in Missouri that is in effect until age three. First Steps focuses on training the parent to work with the child at home and to continue therapy strategies and techniques after the therapist is gone. Through First Steps training, Parents were able to learn to utilize many of the techniques and strategies utilized by St. Joseph staff and even taught others to use the same techniques. Mother testified that she intended to

continue to work with Student at the same level of commitment as she did during First Steps intervention services. Tr. 456-59, 634, 1020- 1021, 1071-72, 1423; R-2.

5. Through First Steps, Student received 60 minutes per week of speech and language therapy in the home and participated in a play group for 90 minutes per week at St. Joseph for a few months. Student received all of her First Steps services through St. Joseph. Tr. 69, 424, 461, 499-500, 549, 1022, 1069, 1424, 1453; R-9; R-20.

6. In March 2008, St. Joseph conducted an evaluation of Student. The overall impressions from that evaluation summary were that Student appeared to be a normally developing 16 month old, except in the areas of receptive and expressive language and speech development. R-9. St. Joseph administered the Preschool Language Scale-4 (PLS-4). The PLS-4 measures a child's receptive language skills or auditory comprehension and expressive language skills. It renders a total language score and according to Clara Bowlin, School District speech and language pathologist and the staff person who conducted certain evaluations of Student, it is probably the most used early childhood language assessment. Tr. 392, 396, 415. On that assessment, Student achieved a standard score of 66 (five month age equivalency) on the receptive portion, a standard score of 83 (11 month age equivalency) on the expressive portion, and a total language score of 72 (eight month age equivalency). She was one year, four months at the time of the evaluation. The summary reported that Parents desire Student to learn to listen and use spoken language so that she may attend regular mainstream school as soon as possible. Tr. 118, 398-399; R-9; R-20.

7. In a Biannual Summary Report dated October 27, 2008, St. Joseph noted that Student demonstrated skills similar to or above her hearing peers in the areas of gesture and play. R-9.

8. In March 2009, St. Joseph conducted another evaluation of Student. The overall impressions contained in that evaluation summary were that "[Student] is developing language skills within normal limits when compared to her age-matched hearing peers." R-34 at p. 63. St. Joseph again administered the PLS-4. On that assessment, Student achieved a standard score of 105 (two years, four months) on the receptive portion, a standard score of 103 (two years, four months) on the expressive portion, and a score of 105 (two years, four months) on total language, all well within the average range. She was two years, three months old at the time. *Id.* At that time, it was reported in the evaluation summary that it was still the desire of Student's parents that she attend regular mainstream school as soon as possible. R-20.

9. Clara Bowlin has a master's degree in speech pathology. She holds a kindergarten through twelfth grade teaching certificate in speech correction and held a Certificate of Clinical Competence (the "CCC's") from ASHA, the American Speech and Hearing Association, but did not maintain the certification after she chose to stay home and raise her family. When she returned to work in the public school setting, the CCC's were not required at the time and she now only does evaluations for the School District. Tr. 389-92. According to Ms. Bowlin, Student progressed significantly, particularly in auditory comprehension, between March 2008 and March 2009. Tr. 399-400.

10. A functional assessment conducted by Parents as Teachers on April 16, 2009, indicated that Student's hearing was adequate with her implants. Tr. 109; R-3.

11. Student's mother, her audiologist from Midwest Ear Institute (Dr. Sarah King), her First Steps provider from St. Joseph (Stefanie Meert⁴), and a representative from the School District all participated in a First Steps transition meeting held on May 11, 2009. R-4. During the meeting, it was noted that Student "seems to be picking up on vocabulary without explicit teaching." According to Dr. Jennifer Beutel, the Assistant Director of Pupil Services for the District who oversees the early childhood special education program for children age three to five, this means Student picks up vocabulary through incidental learning from her environment without specific programming to increase it. It was also noted in the meeting notes that her hearing is "great" with implants and her hearing is all within the "range of normal." Tr. 117; R-4.

12. Student receives her audiology services through Midwest Ear Institute. In May 2009, Student's audiological testing revealed that she had excellent audibility of the speech frequencies with each ear individually and in the binaural condition. Speech perception testing revealed that Student had consistent word identification and was making great progress. R-10. Witnesses affiliated with both Petitioners and Respondent testified as to the audiogram process and decibel levels. An audiogram indicates the decibel (loudness) at which someone can detect varying frequencies of sound. Typically, the desire is for a child to be able to respond at about 25 decibels. Normal speech is at about 60 decibels, so audiologists typically try to program cochlear implants at around 25 decibels. Student's audiogram reveals borderline normal thresholds. She has access to normal, conversational speech and, as such, is expected to learn incidentally as well as through instruction. Tr. 287-89, 740, 743, 1553; R-10. As of August 2009, Midwest Ear Institute was recommending that Student receive speech, language and auditory training for two to three hours per week. Tr. 799-800; R:33 at p. 48.

13. By all accounts, Student made significant progress through First Steps. Tr. 102-03, 261, 445-46, 548-49, 633, 668-69, 1070, 1281-82. According to Dr. Beutel, student made remarkable gains based on her language scores and appeared to be right on target with her peers. Tr. 295-96. The District considers a student's level of success and progress through First Steps in determining what level of services may continue to be appropriate in the context of early childhood special education. Tr. 102-03, 1281-82.

14. According to Steven Beldin, the School District's Director of Pupil Services, who is responsible for special education services, Student is a good example of how things can work well and be extremely effective through First Steps early intervention. Her early identification and insertion of cochlear implants, the fact that she had some hearing prior to loss, the commitment of her parents in following through with professional recommendations (characterizing Mother as "the star of the show"), were all factors that contributed to Student's success during First Steps intervention. Tr. 1356. Student's access to conversational speech and ability to learn language incidentally also contributed to that success, in the opinion of Dr. Beutel. Tr. 1554.

⁴ Stefanie Meert is now Stefanie Spencer. Tr. 525.

The District's Evaluation of Student

15. On May 15, 2009, the District notified Student's parents that it would evaluate Student for eligibility for Early Childhood Special Education ("ECSE") services. R-6.

16. Jeni Schreifels, who coordinated Student's evaluation on behalf of the School District, received her master's degree in clinical psychology. She then completed 1500 clinical hours and received her license as a master's level psychologist. She subsequently completed the additional requirements to attain advanced licensure and then worked in private practice for several years. In 2004, she received her teacher's certificate as a school psychological examiner and has been with the District ever since. She works for the District's Early Childhood Center and evaluates children in order to determine eligibility for services. Tr. 311-12. She participated in Student's evaluation and has evaluated other oral deaf children. Tr. 312, 320.

17. Prior to the District's evaluation of Student and in connection with an observation of another student attending St. Joseph, Ms. Bowlin had an opportunity to observe Student at St. Joseph. During that observation, Ms. Bowlin noted that Student seemed to be at a higher developmental level than the student she was observing and was initiating interaction during play with the student being observed. Student used more words than the other student during their interaction. Tr. 424-26.

18. The District initiated the evaluation process for Student on August 27, 2009. R-11. According to Ms. Schreifels, the School District's evaluation process begins with a review of existing data, which reviews all the different developmental areas for that child, asks the parents what areas they have concerns in, collects any information the parents have about those areas, indicates any services the child has been receiving in those areas, and lists any previous testing that has been done. Once all that information is reviewed, a determination is made about what areas require further assessments or data. Tr. 331.

19. A meeting that included the parent was held on September 3, 2009, to review existing data for Student in the various areas of functioning. R-12. Ms. Schreifels reviewed each area of functioning with Student's mother, and Mother was given an opportunity to provide information and feedback on each one. She was also given the opportunity to indicate whether she believed any additional data was needed in each area. Tr. 332-34. During that meeting, Mother reported information in the area of Social/Emotional/Behavioral that Student is shy but does well at play group and church group activities, initiates play and is appropriate with toys. R-12. Student's mother did not express any objection or disagreement with the areas in which additional assessments were going to be conducted as indicated in the evaluation plan. Tr. 336.

20. After reviewing existing data, it was determined that additional assessment data was needed in the areas of speech/language and adaptive behavior. Student's mother provided written consent for assessment in these areas. Parents have an opportunity to provide input in development of the evaluation plan and that input would be noted. There was no disagreement by Student's parents indicated on the review of existing data or evaluation plan developed for Student. Tr. 104-05; R-13.

21. As part of Student's evaluation, the District administered the Vineland Adaptive Behavior Scales 2nd Edition, which assesses an individual's performance of day-to-day activities required for personal and social sufficiency. R-20. The Vineland scores are based on parental report and School District observation, conducted by Ms. Schreifels on September 25, 2009. Ms. Schreifels noted that Student engaged in both parallel and cooperative play but she preferred to play primarily by herself. Tr. 313:16-25, 314:1-6; R-20. The assessment tool measures four domains, including socialization. The socialization domain evaluates how a child interacts and gets along with others, as well as how a child plays and uses leisure time. Of the four domains, Student scored the highest in the area of socialization with a scaled score of 102. Her total adaptive behavior composite score was 94, placing Student at the adaptive level of "adequate." Tr. 345-46; R-20.

22. As part of Student's evaluation, the District administered the Goldman-Fristoe Test of Articulation-2 (GFTA-2). The GFTA-2 assesses a child's ability to produce individual phonemes or sounds in specific word positions. Tr. 393. Ms. Bowlin administered the Goldman-Fristoe in order to evaluate Student's articulation skills and is qualified to do so. Tr. 392-93, 417-18. Student achieved a standard score of 73 (two years zero months). She was two years, ten months at the time the test was administered. Ms. Bowlin noted that the intelligibility of Student's conversational speech was affected by her articulation errors. R-20.

23. The evaluation included a hearing assessment from Midwest Ear Institute which indicated that with her implants, Student's hearing was within normal limits. R-20. Her latest audiogram from Midwest Ear Institute at the time of her evaluation showed her responses to tone with the implants was in the slight to mild hearing loss range. R-20. Although the Evaluation Report indicated that "hearing is restored within normal limits," Dr. Beutel testified that her understanding of this phrase referred to Student's level of access, that Student has cochlear implants and her level of hearing has not been restored to normal. Tr. 1446.

24. As part of the evaluation process, Mother reported that Student had limited exposure to peers her age. She had never been in a preschool setting but did attend play groups and church group activities. She was appropriate with toys, and Mother reported that she did well in those settings. Tr. 1032-33; R-20.

25. As part of Student's evaluation, the results of a more recent PLS-4 were reviewed. The test, administered in March 2009, indicated language skills were within normal limits and that Student was developing language skills within normal limits when compared to her age-matched hearing peers. R-20.

26. On October 23, 2009, the School District received the St. Joseph Transition Report and a Biannual Summary Report. R-17. The Transition report indicated among other things, the following:

- a. [Student's] listening attitude is good on a scale of poor/fair/good.
- b. Student understands many spatial concepts and is able to correctly understand and answer most what and where questions but is not yet demonstrating emerging skills with who questions.

- c. In connected speech, [Student's] articulation skills dramatically decrease and her intelligibility is poor to unfamiliar listeners.
- d. During one-on-one therapy, [Student] appropriately interacts and plays with adults.
- e. During the 2008 school year, [Student] briefly participated in parallel play with other children on a few occasions.

R-17.

27. St. Joseph's Transition Report included an observation summary that indicated Student interacted with another little girl once during the observation during which they engaged in cooperative play that included turn taking. R-17.

28. In anticipation of Student's IEP meeting, St. Joseph made the following observations and recommendations in her Transition Report:

- a. [Student's] parents' commitment to utilize everyday activities as speech, language, and listening learning opportunities.
- b. Placement in a classroom setting in which [Student] can develop her social skills, ability to listen in noise, and use of intelligible language.
- c. A personal FM system to be utilized in all classroom situations, at home, and during any extracurricular activities in which Student participates.
- d. Daily sound checks (Ling Six Sound Test) with her cochlear implants individually to be done at home and at school.
- e. Increase [Student's] ability to advocate for herself.
- f. Appropriate individual and classroom amplification systems should be monitored by staff trained in the systems' use.
- g. Classroom should meet ASHA guidelines for appropriate acoustical environments for students with hearing impairment.
- h. Continued follow-up with Midwest Ear Institute at least every 6 months to ensure the best mapping and audiologic management for [Student].

R-17.

29. The October 2009 Biannual Summary Report from St. Joseph formally assessed Student's receptive language with a standard score of 101 (three years, zero months) and her expressive language with a standard score of 107 (three years, four months). At the time, Student was two years and 11 months. The report stated that a same-aged child with normal hearing would achieve a standard score within the range 85-115. The report also indicated that Student was beginning to parallel play and share toys with other children. It further indicated that she displayed age appropriate skills in the areas of language comprehension and language expression. R-17.

30. Where the St. Joseph Transition Report indicated Student was not yet able to perform certain task, Dr. Beutel and Ms. Bowlin indicated that these were tasks not yet developmentally appropriate for Student. Tr. 1248, 412-15. Due to Ms. Bowlin's concern that St. Joseph was conducting assessments of skills beyond those associated with Student's chronological age, she inserted parentheticals into the Evaluation Report in order to clarify that Student was not

expected to be able to answer certain questions on the assessment for expressive and receptive language skills based upon her chronological age. Tr. 412-15; R-20.

31. The School District developed an Evaluation Report containing the results of the evaluations and recommendations of the evaluation team, identified as the Parents, Ms. Bowlin, Jan King, itinerant early childhood special education teacher, Ms. Schreifels and Karen Horne, school nurse. The Evaluation Report itself is not dated, but it references a diagnostic staffing on October 28, 2009. R-20. Most of the information contained in the District's Evaluation Report was provided by St. Joseph. Tr. 106, 360. Some of the information was also provided by Midwest Ear Institute. Tr. 789, 791-92.

32. Student's Evaluation Report identified a delay in the area of articulation which when added to her diagnosed hearing loss, indicated a need to continue communication services for Student. Tr. 120, 1317, 1555; R-20. The report contained a diagnostic conclusion of "a group of qualified professionals" that Student meets the criteria established by the School District and the State of Missouri for a Young Child with a Developmental Delay ("YCDD"). In order to be considered a YCDD, a student must perform at or below 1.5 standard deviations of the mean in any development areas or at or below 2.0 standard deviations in any one area of development. While Student did not meet the criteria, it was the professional judgment of the team to consider her as eligible for ECSE services. Without these services, it was the evaluation team's judgment that "[Student's] delays may continue to impede her development and chances for reaching her full potential." R-20. Parents did not express any disagreement with the content or results of Student's evaluation, nor did anyone else on the team. Tr. 127-28, 349, 1083.

Student's Eligibility for Early Childhood Special Education Services

33. Student's eligibility for ECSE was determined by the use of professional judgment. R-20. Her standard score of 73 on the Goldman-Fristoe did not meet the technical criteria for eligibility. However, she continued to show delays in her articulation. Those concerns, in addition to her diagnosed hearing loss, indicated a need to continue communication services through the use of professional judgment. The team specifically considered Student's hearing loss in determining whether she would qualify for services. Tr. 125; R-20.

34. The District qualifies children for early childhood special education under the category of Young Child with a Developmental Delay ("YCDD"). According to Ms. Schreifels, the School District uses this category because it is broader in nature as the young child has not had exposure to an academic setting, although the developmental area of delay is specified. Tr. 342. Mr. Beldin testified that the use of the YCDD identification as opposed to a categorical label, provides flexibility as far as identification of disability. Tr. 1314. The YCDD eligibility continues until a child turn age six. According to Mr. Beldin, if Student had been determined eligible under a different categorical disability, it would not have changed the services to which she is entitled that are reflected in her IEP because the services are based on her evaluation and goals. Tr. 1315, 1352, 1458. A deficiency in socialization is not an area of independent eligibility under IDEA, nor is poor self-esteem. Tr. 1231, 1263. Whether Student would also be eligible under a specific categorical disability never came up in IEP team discussions according to Dr. Beutel. Tr. 1490-91.

The District's October 28, 2009 IEP

35. An IEP team meeting was held for Student on October 28, 2009. The purpose of the meeting was to review the evaluation data, determine initial eligibility and develop an IEP if needed. Tr. 343:9-15, 344:3-5, 344:16-17, 344:19 – 345:1, 364:7-12; R-15; R-16; R-18 and R-19.

36. The multi-disciplinary team developed an IEP for Student on October 28, 2010. R-21. The team included a statement describing her Present Level of Academic Achievement and Functional Performance (“PLAAFP”) in Student’s IEP. Student’s present level report indicated that the “articulation errors [Student] displays affect her ability to be understood as she verbally communicates her needs and wants, verbally participates in play with peers and attempts to communicate her knowledge of typical preschool topics.” It also specifically acknowledges her hearing loss and cochlear implants. R-22. Her IEP specifically addressed her identified delay in the area of articulation and included goals for articulation, audition and self-advocacy, some of which were developed in response to parent concerns. Student’s IEP also included accommodations and modifications that were individualized for Student. They included check “Ling 6” sounds, monitor for interaction in group, be sensitive to syntax by modeling correct sentences, and environmental modifications due to cochlear implants. R-22. The IEP team determined that Student’s goals could be met with 60 minutes per week of speech therapy, 60 minutes per week of language group and 30 minutes per month of consultation services. The team further determined that the least restrictive environment in which these services could be implemented was through itinerant services at the District’s Early Childhood Center. Tr. 131-34, 142-43, 146-48, 1468; R-22.

37. There are no goals addressing receptive or expressive language skills, occupational therapy-type skills or pre-academic skills in the District’s IEP because the team concluded based upon the evaluation data and established Missouri criteria that those areas were not areas of deficit or delay for Student. Mr. Beldin testified that pre-academic skills are not an area of focus at the early childhood level. Tr. 1323-24.

38. During the October 28, 2009, IEP meeting, the parents raised concerns about Student’s social play, articulation, and the mechanical operation of her cochlear implants. The team discussed and addressed each of these concerns. In response to these concerns, the team added a language group to Student’s IEP as well as an accommodation/modification that Student’s performance in the language group would be specifically monitored to determine whether further evaluation and services in those areas were necessary. Tr. 134, 1467-68; R-22. The language group would also help with generalization of skills, provide greater opportunity to develop self-advocacy and allow the District to monitor Student’s social skills. Tr. 253-54, 267-68. The parents also raised Student’s self-advocacy as an issue and the team discussed it and added a goal to the IEP to address it. Tr. 352.

39. St. Joseph made certain recommendations with respect to Student’s transition to school age services. One of those recommendations pertained to following ASHA guidelines for an acoustical classroom environment although Megan Friedman, the St. Joseph speech pathologist who testified on behalf of Parents and who made the recommendation, could not precisely

describe the content of the guidelines. R-34 at p. 53; Tr. 986-87. Another recommendation pertained to Student utilizing a personal FM system although Student was not at the time of this due process hearing using a personal FM system at St. Joseph. Tr. 987. According to Jeanne Fredriksen, director of St. Joseph's Kansas City campus and an oral-deaf educator, a personal FM system is not typically used by three year old children. Fredriksen Deposition 43:16-44:15. Although Student is not yet able to utilize a personal FM system, another St. Joseph speech pathologist encouraged Parents to advocate for one from the District when Student began school there. R-34, p. 154.

40. The IEP team specifically considered and discussed Parents' preference with respect to Student's mode of communication, which was auditory-oral. Tr. 115-16. The IEP section on special considerations recited that mode of communication was considered. R-22. As explained by the School District's speech language pathologist Ashley Fields, the auditory-oral mode of communication relies primarily on auditory input but also utilizes other techniques to supplement, such as lip reading and gestures, but not sign language. Auditory-verbal therapy relies only on auditory input with no supplemental support. Tr. 211. The PLAAFP section of the IEP states as a strength of Student, good listening skills, which would have been information provided primarily through the Parents. Tr. 132. The District has never refused to honor a parent's chosen approach with respect to mode of communication. Tr. 237:11-14, 299:6-10, 299:17-19, 1538:24 – 1539:7. The District indicated to Student's parents that it would honor their preferred modality and never indicated to parents that it intended to use sign language with Student. Tr. 238, 340, 1038-39, 1334-35. The District specifically acknowledged Student's mode of communication through the evaluation process and in her IEP. Tr. 136-37, 1334.

41. According to Mr. Beldin, there is a difference between mode of communication and methodology of instruction. Methodology is the how the teacher decides to deliver specialized instruction to the student. Methodology can vary depending on the task being addressed and the unique circumstances of the child, which may cause the provider to vary the techniques and strategies they are using. The professional implementing the services has the latitude to determine methodology on a case-by-case basis. Tr. 1335-36.

42. Parents did not express any disagreement with Student's evaluation results or with the IEP developed by the team during the October 28, 2009, IEP meeting, and Parents did not request or raise potential placement at St. Joseph during that meeting. Tr. 149, 319.

43. According to Ms. Schreifels, the team had the following information before it at the time of the October 28, 2009, IEP meeting: R-3, R-5, R-9, R-10 and R-17. Tr. 321-327, 329.

44. Dr. Carol Flexer testified on behalf of Petitioners as an expert witness. She has a Ph.D. in audiology and specializes in pediatric and educational audiology and listening and spoken language development in infants and children with hearing loss. After teaching at the university level, she is now an independent consultant. Tr. 566-67. Dr. Carol Flexer is an international expert in pediatric and educational audiology and listening and spoken language development in infants and children with hearing loss. She holds a Certificate of Clinical Competency in audiology. She also has expertise in FM technologies, cochlear implants and in utilization of that technology in developing communication skills. Tr. 567-68. Dr. Flexer has presented and

trained providers all over the world. Tr. 567. She has served as the president of the Alexander Graham Bell Academy for Listening and Spoken Language, a Section 501(c)(3) subsidiary of the Alexander Graham Bell Association (“AG Bell”), an organization that advocates for the listening and spoken language mode of communication for deaf and hard of hearing individuals. Tr. 569-70, 617. The AG Bell Academy sponsors the certification program for Listening and Spoken Language Specialist (“LSLS”), which is a voluntary certification beyond any professional certification legally required to provide services. Tr. 573-74.

45. According to Dr. Flexer, the stimuli that are sent using a cochlear implant are not like hearing typical sound. For that reason, the cochlear implant is not a restorer of hearing. It does not make hearing normal, nor does it give the detail of sound that typical hearing has. Dr. Flexer testified that “there are huge limitations” to cochlear implants, including difficulty processing in noise. Tr. 582-83.

46. Student’s IEP team developed goals and services in her IEP to address the recommendation made in the St. Joseph Transition Report (R-17) that Student be placed in a classroom situation where she can develop her ability to listen in noise. Tr. 46-48, 407-08, 427-28. The team discussed the difficulty in determining whether certain social behaviors were the preference of Student as opposed to a skill deficit. Tr. 111-13, 120-21. The team decided to add participation in a language group to monitor such determination and because it is difficult for a child to generalize skills in a noisier environment without some explicit teaching in that environment. Tr. 139-40, 444.

47. Dr. Beutel testified that there is a difference between the ability to hear due to the distance factor which is determined by the typical distance a cochlear implant can pick up sound and the ability to detect sound when noise is introduced. Tr. 1559-60. Ms. Schreifels testified that receptive language assessments measure whether a student understands what is being said. To achieve the best results, testing is done in a quiet environment. It would not be appropriate to assess receptive language skills with the introduction of noise because this would impact test results. No one, including Student’s parents, raised any concern that Student’s receptive language skills had not been assessed with the introduction of noise. Tr. 359-60. Ms. Schriefels testified that she did not recall observing any assessment data from St. Joseph on Student’s ability to detect sound with the introduction of noise. There was no information in the St. Joseph evaluation reports to indicate that this type of assessment had been conducted. Tr. 359-60, 982-84.

48. St. Joseph uses different strategies and techniques in working with Student to address the impact of the introduction of noise. According to Megan Friedman, St. Joseph speech and language pathologist, the District could utilize the same strategies and techniques. Tr. 979-80.

49. According to Dr. Beutel, a typical hearing child’s ability to listen in noise does not fully develop until eleven years old. Tr. 1561. If it is determined that a significant discrepancy exists in a child’s ability to hear in noise, it may be addressed through acoustical accommodations and possible FM amplification. Tr. 1561-1562.

50. At the time of her evaluation, Student was engaging in parallel play. Parallel play is when one child plays alongside another child but does not interact in their play. Parallel play is developmentally appropriate for a three year old. Tr. 188-89, 347-48. The IEP team discussed whether Student had needs in the area of socialization. The discussion centered on whether the concerns expressed by the parent were personal preference on the part of Student or whether there was a skill delay resulting from her disability. Tr. 112, 419, 781, 901. District team members did not have a concern at the time of her IEP meetings about her socialization skills because she had exhibited developmentally appropriate skills. Tr. 320, 347, 358-59, 367-69, 382, 403, 423-24, 1215-18, 1223.

51. Student had demonstrated through her evaluation that she had certain skills but would chose at times to not utilize them, for instance in participating in play with other children and the ability to hear in environments with background noise. Tr. 112-14, 346-47, 374-75, 429, 1221-23. In order to address the concern of the Parents in these areas and monitor the situation to determine whether Student had deficits or delays in these areas, the IEP team developed Annual Goal 4, added language group minutes, and added an accommodation/modification to Student's IEP. Tr. 37-8, 144, 404-05, 435-36, 1224-25; R-22.

52. If further concern arose that Student was exhibiting deficits or delays in these areas, District representatives testified that there would be a reevaluation in that area and the IEP team would reconvene to determine whether additional goals and services needed to be added to the IEP. Tr. 145, 782, 1219, 1226-27.

53. According to both St. Joseph Director Ms. Fredriksen, and St. Joseph preschool teacher Sarah Sanftner, Student's social interaction with peers while attending St. Joseph has continued to be developmentally appropriate. Tr. 853-54, 509-10.

Implementation of the District's IEP

54. Student's services would be delivered through the School District twice a week. The direct therapy minutes in her IEP were designed to address her articulation. The group minutes were intended to address some of the issues with audition, play, socialization, and interaction. Tr. 51, 53.

55. Implementation of the services provided for in Student's IEP would require a certified speech/language pathologist, a certified early childhood special education teacher, and a certified teacher of the deaf and hearing impaired. The District has staff members who hold each of these certifications. Tr. 1332, 1556. There are no state requirements for a deaf educator to have any special certifications with respect to modality. Tr. 1370-71. The District has appropriately qualified staff on hand ready and able to implement the services that are provided for in Student's IEP. Tr. 1344.

56. Ashley Fields, who would be the School District's speech language pathologist to implement Student's IEP, has a master's degree in communications disorders. She has her Missouri license, her State teaching certificate and is ASHA certified with the Certificate of Clinical Competency. She completed internships with the Blue Springs Multi-District Deaf and

Hard of Hearing Program and the Rehabilitation Institute. She served on the audiology team at the University of Central Missouri and continued her training and education specifically in the area of oral deaf education through various conferences and training sessions. She works for the School District as a speech/language therapist. Ms. Fields also has personal experience with a family member who has cochlear implants. Tr. 38, 206-10, 1375, 1386.

57. In implementing therapy services in Student's IEP, Ms. Fields would start by testing Student's equipment, including any FM system she may be using at the time. She would then conduct a Ling Six Sound Test⁵. Tr. 221-22. She would initially begin therapy with discrimination testing to ensure Student was discriminating final sounds. Once she completed those tasks, she would have Student produce and imitate sounds with her pursuant to her IEP goals, starting at the word level and then building up to phrase and then generalize as conversational speech. Tr. 222-23, 251. Student's sessions would start with individual therapy in a small therapy room and then move to the language group. This particular schedule had not been developed before and was individualized for Student's needs considering Student's high language skills. Tr. 225-26, 252. Ms. Fields testified that there would be "good" models, including typical peer models, in Student's language group. Tr. 227-28, 420-21, 443. She is familiar with and would utilize such techniques and strategies as use of a hoop, physical positioning, pitch and volume, stressing particular words, and blocking any non-auditory cues. Tr. 235-37. She relies on research to determine which strategies to utilize first. Tr. 239. Ms. Fields would also ensure that appropriate environmental modifications were made for Student, such as new replacement doors to reduce sound, carpeting, blocking the windows, and putting balls under chair legs. Tr. 233-34.

58. Anne Marie Shetley, who would be the deaf educator for the School District listed on Student's IEP, has an undergraduate degree in elementary education and education for the hearing impaired and a master's degree in early childhood special education from the University of Kansas. She holds certifications to teach elementary education, hearing impaired from early childhood to 12th grade, and multi-categorical disabilities from birth to eight. She has taught kindergarten, special needs children in Peru and at Children's TLC (a private center) for several years. Since obtaining her degrees, she has continued her training through conferences, workshops and continuing education. Approximately half of her education and training is in the auditory-oral modality. She has specifically provided instruction to students with cochlear implants in the North Kansas City School District. Ms. Shetley is known to be an advocate for children who are deaf or hard of hearing, having experienced a hearing loss herself, and, according to Dr. Sarah King with the Midwest Ear Institute, does a "good job" at seeking out recommendations and determining what accommodations and modifications or services a particular students needs. Tr. 276-80, 303, 803-04.

59. In implementing the deaf educator consultation services under Student's IEP, Ms. Shetley would coordinate services between Ms. Fields, the educational audiologist and the

⁵ All phonetic sounds fall within a range of frequencies that comprise what is referred to as a speech banana on an audiogram. The Ling 6 sounds – m, ah, oo, ee, s and sh – fall within the range of frequencies capturing all other speech sounds. By performing a Ling 6 sound check, a therapist can ensure that someone is detecting all of those sounds. Tr. 216:1-22.

audiologist mapping Student's cochlear implant in order to ensure all services are working together. She would consult with respect to any specific or daily challenges, to make recommendations with respect to FM equipment, and to ensure that rooms were acoustically sound. Tr. 282-83. Ms. Shetley began inquiring about amplification equipment for Student and determined that use of a sound field system was not advisable for Student. Tr. 292-94. The District participates in the Blue Springs Multi-District Deaf and Hard of Hearing program, and Ms. Shetley may consult with their staff and audiologists for any child. Tr. 1384-85.

Parent Request for Placement at St. Joseph

60. Following the IEP meeting on October 28, 2009, the District issued a notice of action informing the parents of the services and placement offered to Student. R-23.

61. On November 2, 2009, Parents sent a letter to the District notifying the District of their intent to place Student at St. Joseph. R-24. The letter stated that Parents disagreed with the October 28, 2009 proposed IEP, in that it did not include sufficient services to address Student's auditory, oral and articulation needs. Mother was unable to testify at hearing as to what at the time of the letter she believed could have been added to the IEP to address these needs. Tr. 1087.

62. In response to this letter, the District issued a notice of action on November 6, 2009, refusing the parents' request because the IEP team had already determined Student's IEP could be implemented at a less restrictive placement on the continuum. Tr. 161; R-25.

63. On November 23, 2009, the parents requested that a second IEP meeting be held so that the IEP team could discuss their request that Student be placed in a full day preschool program at St. Joseph. Tr. 319, 408-09; R-26.

December 17, 2009 IEP Meeting

64. A second IEP team meeting was held on December 17, 2009. The following individuals were present for and participated in that meeting: the parents, Dr. Jennifer Beutel (LEA (local education agency – the School District - representative), Anne Marie Shetley (special education teacher), Jan King (regular classroom teacher), Jeni Schreifels (individual interpreting instructional implications of evaluation results), Clara Bowlin (speech/language pathologist), Ashley Fields (speech/language pathologist), Dr. Carol Flexer (via telephone at parent request), and Jeanne Fredriksen (St. Joseph Director). R-28.

65. According to Dr. Beutel, while a placement in St. Joseph was not discussed at the October 28, 2009 IEP meeting, the team went through the least restrictive environment continuum and stopped where the group felt the placement was appropriate. Parents had not yet made the request for St. Joseph placement. Dr. Beutel did not see any data in the School District's evaluation report or October 28, 2009 IEP that would support a full day separate preschool placement. Tr. 150-51. During the December 17, 2009, IEP meeting, parents did not offer any new data that would support a separate full day preschool placement for Student. Tr. 165.

66. During the December 17, 2009 IEP meeting, the parents did not express any disagreement with Student's evaluation or with her IEP, other than to request placement in a full day preschool program at St. Joseph. Neither Dr. Flexer nor parents nor anyone else attending this meeting provided any new data to support a separate full day preschool program at St. Joseph. Tr. 614, 677-78, 777, 780, 1444, 1462. The IEP team considered the parents' request and still determined that her IEP could be implemented through itinerant services at the District's Early Childhood Center. The District revised Student's IEP to reflect the concerns relayed by the parents during the IEP meeting and their placement request. Tr. 245-46; R-28. During the December meeting, the parents and their invited attendees did not ask District staff about their background, training or experience or how they would provide services to Student. Tr. 246, 357. Carol Flexer participated via telephone and according to Ms. Schreifels, spoke briefly only once toward the end of the meeting. Tr. 357-58.

67. On December 18, 2009, the District issued a notice of action informing the parents that their request that Student be placed in a full day preschool program at St. Joseph was refused. R-27.

Transportation

68. Parents never raised transportation as an issue at either IEP meeting nor in any correspondence to the District. Tr. 68, 142, 1047-48, 1096-97. There was discussion about where Student would receive the services in her IEP, and parents toured the Early Childhood Center. Tr. 140, 339-40, 1036. Parents assumed the services would be provided at the Early Childhood Center at the time of the IEP meeting. Tr. 1072, 1074-77. Parents also assumed that a parent would ask about transportation if there was an issue. Tr. 1097-98. There was no discussion that the services would occur in the home. Tr. 141. The Parents understood that the IEP team could decide whether Parents would bring Student to the Early Childhood Center or whether the District would send a bus. Tr. 1039-40. Mother testified that she would have concern about having Student transported by bus. Tr. 1096. The District's experience is that most parents of three year old students prefer to transport them to the Early Childhood Center themselves. According to Mr. Beldin, if a parent raises a transportation concern, the District would have worked with the parent to figure out how to get the child to the needed services. Tr. 1230-31, 1299-300, 1488.

Student's Placement at St. Joseph

69. On November 18, 2009, Parents enrolled Student in a full day preschool program at St. Joseph where she has attended ever since, with the exception of summer 2010. R-33 at p. 51; R-34 at p. 1; P-18 at p. 1; Tr. 1056.

70. According to staff at St. Joseph, Student was one of the top students as far as being a good language model for others. Tr. 828. She was part of a very social, very talkative group. Tr. 834. St. Joseph staff describes Student as very assertive, that she likes to be a leader, that she likes to be in charge and is an extremely hard worker with lots of friends. Tr. 846-47.

71. Student scored within normal limits on the Clinical Evaluation of Language Fundamental Preschool, 2nd Edition (CELF Preschool-2) administered by St. Joseph in January 2010. Tr. 929. St. Joseph staff controls the type of assessments to conduct on Student and what to report in evaluation summaries. St. Joseph staff assessed in those areas that they deemed important. Tr. 976-77, 983-84.

72. By April 2010, Student scored well above her chronological age in every assessment St. Joseph conducted as part of its evaluation. Student achieved a standard score of 111 (three years, 11 months) in receptive language and 103 (three years, six months) in expressive language. She achieved a total language score of 120 (four years, one month) on the PLS-4, which assesses auditory comprehension and expressive communication. Student achieved a standard score of 106 (three years, ten months) on the Goldman-Fristoe Test of Articulation. Student was three years, four months old at the time. Her evaluation summary from St. Joseph notes that Student's assessed levels show her several months beyond her current age in various assessed areas. The summary further indicates that Student is developing language skills within normal limits and is progressing in a developmentally appropriate way and that she makes a similar amount of articulation errors compared to her same age hearing peers at the word level. R-34, pages 30-38.

73. Student did not attend the summer 2010 program at St. Joseph due to transportation costs and the fact that Mother had a new baby, although summer school tuition is already included in the base tuition for the program, so there is no additional cost associated with it. Tr. 480-81, 847, 1056, 888, 1056. Parents did inquire about hiring someone from St. Joseph to work with Student over the summer. Tr. 889.

St. Joseph IEP

74. On February 3, 2010, St. Joseph developed its own IEP for Student. Tr. 464, 469, 850, 870; R-34, pages 84-108. According to Ms. Fredriksen, it was developed several months after she began attending St. Joseph and after staff had time to observe and get to know her better. Tr. 470.

75. A St. Joseph IEP is developed by laying out a Student's entire instructional program in all areas of functioning. Progress is reported by following developmental checklists such as those found in HELP, the Hawaii Early Learning Profile. Tr. 505, 886. Goals are developed based upon these types of checklists. Tr. 470, 505-06, 849, 872-75, 991; R-35. St. Joseph does not follow state guidelines or regulations in IEP development. Tr. 507.

76. Many of the goals and objectives in Student's St. Joseph IEP are developmentally at or beyond her chronological age. Some of the services in St. Joseph's IEP do not address areas of need or delay that were identified in Student's evaluation and not all the goals and objectives were disability based. Tr. 878, 1234-35, 1237-41, 1338-39, 1432, 1608. Such skills are not a weakness or delay for her if they are age appropriate. Tr. 879-80, 1256, 1337-38, 1467, 1506.

St. Joseph Institute for the Deaf

77. St. Joseph is located in an industrial office facility located at 87th and Monrovia in Lenexa, Kansas that has been converted into a typical preschool environment with some acoustical adjustments. Tr. 453, 867.

78. The program at St. Joseph looks very similar to what a typical preschool would look like. Tr. 869, 838. Every child in Student's class at St. Joseph has the same schedule and program. Tr. 892; R-41.

79. Every child at St. Joseph receives full day programming regardless of their developmental level. Tr. 516-17, 1292-92. According to Dr. Beutel, it presents as a fairly standard program with little or no differentiation among students. Tr. 1291. St. Joseph uses the same forms in programming for every child, mainly developmental checklists, and works on the same categories of skills for every child. Tr. 886-87. All students have the same method of progress reporting. Tr. 887, 920; R-34, pages 75-83. St. Joseph utilizes the same lesson plans for all students. Tr. 921; R-41. All students receive the same number of therapy minutes per day. Tr. 959. St. Joseph does not typically revise their IEPs mid-year. Tr. 920.

80. Jeanne Fredriksen is the Director of the St. Joseph campus in Kansas City. She has a bachelor's degree in deaf and elementary education and a master's degree in special education. She was the transition coordinator at St. Joseph prior to becoming director. Tr. 449-51. She recognizes that other programs may have also had success with deaf and hard of hearing students. Fredriksen Deposition 30:12 – 31:1. The auditory-oral approach at St. Joseph does not affect or change their curriculum for students, it merely describes how they are instructing students. Fredriksen Deposition 32:8-13. Some of the strategies and techniques St. Joseph uses to accomplish this approach is physical placement (what the student can see) and the use of a hoop by staff. Fredriksen Deposition 34:3-24. The environmental accommodations or modifications that St. Joseph makes for students include small classroom size, a sound field systems, carpet and ceiling tiles that absorb sound. Fredriksen Deposition 42:24 – 43:15.

81. The annual tuition rate for St. Joseph is \$21,300, which includes summer school. Every student receives the same summer school program. Fredriksen Deposition 52:16 – 53:8. Student was awarded financial assistance from St. Joseph for the 2009-2010 school year. Tr. 1051. Her parents paid a total amount of \$5,817.66 for the 2009-2010 school year in tuition to St. Joseph. Tr. 1052. Student also received a financial award in the amount of \$12,000 through St. Joseph for the 2010-2011 school year. Tr. 1054.

82. Parents have expressed concerns about the distance from their home to St. Joseph. Student would travel 70 miles round trip every day to attend preschool at St. Joseph. Student would be traveling in either a taxi cab or a bus for approximately one and one-half hours every day to attend preschool at St. Joseph. Parents question whether they are comfortable with the school district transporting Student that far to preschool every day. Tr. 135, 1056, 1095-96.

83. Ms. Fredriksen believes professionals to have the proper background, training and experience in working with oral deaf children if they utilize techniques that facilitate listening and spoken language, train parents to use those techniques at home, and know how to monitor and troubleshoot listening devices. Tr. 455-56.

84. Megan Friedman is a speech language pathologist at St. Joseph and has a master's degree in speech language pathology. She is certified as a listening and spoken language specialist. Tr. 924-25. Megan Friedman has never worked in public education or in a typical school. Tr. 968. She has worked for four years as a speech pathologist with her entire career being at St. Joseph. Tr. 926.

85. Sarah King, Student's audiologist at Midwest Ear Institute, received her doctorate in audiology in 2008. Tr. 730. Prior to working at Midwest Ear Institute, she worked at the St. Louis Children's Hospital Cochlear Implant Program. Tr. 731. She does not have experience in writing and developing IEPs or in drafting goals for IEPs. Her role is limited to giving her medical perspective of how a cochlear implant works. She does not provide an educational perspective to IEP teams. Tr. 775, 777. Dr. King testified at the hearing regarding Student's progress. Student's hearing was age appropriate when compared to typical peers. She could hear frequencies that other normal hearing children can hear. She did very well with her cochlear implants when compared to other hearing-impaired children with cochlear implants. Tr. 754-55. Nevertheless, Dr. King testified that this doesn't mean that Student processes or understands everything as her understanding is affected by the "degraded signal" she receives from the implants. Dr. King's recommendations at the hearing were that Student continue to receive speech/language and auditory training for at least 2-3 hours a week with a trained professional teaching Student how to listen. Tr. 753.

86. Sarah Sanftner received her master's degree in deaf education in 2008 and is certified in deaf education for kindergarten through twelfth grade. She has only worked at St. Joseph as a preschool teacher since receiving her degree and has been there for three years. She has not worked in a public school setting or in a typical preschool setting. She is somewhat familiar with IDEA but is unable to explain the process. She recognizes that public school districts are not required to provide preschool programming for all children. Tr. 823-24, 864-65, 868-69, 881-82, 884.

87. Techniques that St. Joseph uses with children with cochlear implants include physical positioning of your body, use of a hoop, and monitoring the listening devices to ensure they are working properly. According to Ms. Friedman, the techniques and strategies used by St. Joseph are such that the parent or others can be trained to use them. Tr. 948-49; 988. Ms. Fredrikson only briefly observed as the School District's Early Childhood Center and testified that she had no knowledge regarding whether District staff utilize the same techniques as St. Joseph in working with children with cochlear implants and did not know enough about District staff to describe their background, training and experience. Tr. 497-98.

88. St. Joseph provided various DVDs of Student as exhibits for the hearing. P-23 through P-29. The videos represent typical lessons for the services provided by St. Joseph. Tr. 896-97, 985. According to Ms. Sanftner, the videos reflect the strategies and techniques that St. Joseph

89. During an observation of St. Joseph's program, Dr. Beutel developed concerns about the implementation of the instructional program. Specifically, she observed a language group being conducted by someone other than a speech/language pathologist and observed 23 different objectives/concepts introduced in a 30 minute period. Tr. 1254-1256. She testified that the District provides whatever accommodations, speech and language supports and consultation that deaf or hearing impaired student need. Tr. 1274-77.

90. Robin Gaschler, an educational audiologist with the Multi-District Deaf and Hard of Hearing Program in the Blue Springs, Missouri School District for 18 years, testified on behalf of the School District.⁶ Ms. Gaschler has a master's degree in audiology and has participated in approximately 30 training sessions specifically with respect to cochlear implants in the last 15 years. She is certified by the American Speech-Language-Hearing Association in audiology and has her audiology licensure through the State of Missouri. She is also a member of ASHA and has authored various technical reports for those associations. In addition to regular audiological duties, she supervises graduate students and guest lectures at local universities. In her role as educational audiologist, she conducts diagnostic evaluations and classroom observations, monitors hearing screening programs, assists outside districts with evaluations and IEP development, helps troubleshoot, trains staff regarding equipment, educates staff regarding hearing loss, determines students' needs and manages access to equipment. She has worked directly with over 30 students with cochlear implants. She has approximately 500 student contacts per year through the multi-district program of which approximately 50 are on existing IEPs. Tr. 1514-20, 1531-32, 1578. As an IEP team member, she makes recommendations to school districts about services they are required to provide in order to provide a free appropriate public education to a student. Tr. 1531.

91. Ms. Gaschler has had experience with St. Joseph. One-third of the students of which Ms. Gaschler is aware returned to their home schools after attending St. Joseph had to repeat a grade when they returned to the public school. Tr. 1542, 1592-93. She would only consider placing a student at St. Joseph if the student exhibited listening and spoken language delays that could not be addressed in the public school. Student does not meet this criteria. Tr. 1567. According to Ms. Gaschler, given the short period of time Student was without access to sound, fewer delays and better progress with her speech and learning skills would be expected for Student when compared to her peers because she had an auditory memory in place. Tr. 1551, 1602. Student's language scores indicate she has done very well with her audition and language acquisition in general. Tr. 1561. According to Ms. Gaschler who reviewed some of the DVDs,

⁶ The Parents through counsel moved to strike Ms. Gaschler's testimony, based both on their interpretation of *Gill v. Columbia 93 School District*, 1999 WL 33486650 (W.D. Mo. Sept. 2, 1999) ”), *aff'd* 217 F.3d 1027 (8th Cir. 2000) and that Ms. Gaschler acknowledged reviewing transcripts of prior witness testimony, which violated Parents' right to a closed hearing. After briefing by the parties, the Chairperson by Order of November 2, 2010, denied the Motion. HP-7.

the significance of Student being able to hear until approximately the age of 11 months and having an auditory memory can be observed through her performance on the videos. Tr. 1550.

92. Ms. Gaschler testified that a child with cochlear implants does not automatically qualify for services under IDEA, unless she or he exhibit deficits that would qualify them for special education services. Tr. 1521, 1609-10.

93. Dr. Flexer has never met Student. Tr. 580. She believes that Student would be in a typical preschool if she had cochlear implants to provide her with access to sound as early as seven months old. Tr. 722-23. She has never been to St. Joseph. Tr. 601. She has no personal knowledge about what services the District can provide to students who are deaf or hard of hearing. Tr. 608. Dr. Flexer has no knowledge about the background, qualifications and experience of the staff at either St. Joseph or the District. Tr. 612, 681. She does not believe that a child who is deaf or hard of hearing can only effectively be served through a private agency. Tr. 610. Dr. Flexer has not attended many IEP meetings, but did attend the December 17, 2009, IEP meeting for Student by phone. During the December 17, 2009, IEP meeting, Dr. Flexer did not inquire about the services the District could offer, the qualifications of their staff, or their experience in working with children with cochlear implants. Tr. 613-14, 617, 635.

94. Dr. Flexer believes that scientific-based intervention will “optimize” reaching the parents’ desired outcome for Student. Tr. 572. Dr. Flexer does not believe a professional service provider must possess LSLVS voluntary certification through AG Bell in order to effectively provide services. Tr. 619. Nor does she believe that a service provider must have received their training and education through a particular program or university in order to be a skilled provider of services for Student. Tr. 682. She believes parents with very little educational background or formal training may be very effective at providing such services. Tr. 619, 592. According to Dr. Flexer, placement at St. Joseph for Student would give her the “greatest opportunity” to develop and prepare her for school. Tr. 673-77.

The District’s Early Childhood Special Education Program

95. The District ECSE program offers a full range of services. Most of its eligible students attend the school they would normally attend and are in general education most of the time. It offers a full continuum of placement options. Tr. 1267.

96. The District has served numerous deaf and hard of hearing students over the years. Although it is a low incidence rate, it has had 20 students at one time and currently has approximately six. Tr. 1270. The services for those students may vary significantly depending on their level of functioning and whether they have additional disabilities or areas of developmental delay. Tr. 1271. The District has experienced success in serving students with cochlear implants. Two recent students with cochlear implants have both graduated and are going to college. One of those students was a high achieving scholar. Tr. 1272. The District has mainstreamed its students with cochlear implants. Tr. 1310-11. According to Dr. Beutel, the outcome for deaf and hard of hearing students in the District is very good. Tr. 1539-40.

97. According to Mr. Beldin, students who are placed in private agencies are typically school age, lower functioning, and have some very complicated behavioral issues that are pervasive. Of the 1,900 special education students in the District, only about 10 students are contracted out for private placement because the District is unable to serve them. Tr. 1285. The District has contracted with St. Joseph in the past. Tr. 1289. Last year, the District had one student placed at St. Joseph. Tr. 1399.

98. Mr. Beldin testified that the objective of the District's early childhood special education program is to minimize the impact of disability on the child's development. It is not designed to ameliorate the impact of the disability, but rather to help students move on into school age and benefit from the services and support to enable them to access the general curriculum. Tr. 1277.

99. Jennifer Beutel is the Assistant Director of Pupil Services for the District and oversees the ECSE program for children age three to five. She received her bachelor's degree in elementary education and her master's degree in special education, severe and multiple disabilities. In 2006, she received her educational doctorate. She holds a Missouri administrative certification for special education director and special education teacher certificate. She has professionally worked as a special education teacher in a self-contained classroom, served in an itinerant service position, worked in a consultative role and then moved to North Kansas City where she became the elementary special education coordinator. She has held her current position for three years. Tr. 26-7, 71, 73.

100. Steven Beldin, the School District's Director of Pupil Services, who is responsible for all special education services, has a master's degree in special education, and further graduate work in school administration and in school psychology. He holds a lifetime certification in specific learning disabilities, behavior and emotional disorders, is a school psychological examiner and special education administrator. Tr. 1265-66.

101. The District serves approximately 350 students in its ECSE program. Students must meet eligibility criteria to qualify for the program. Approximately eight to ten of those students are deaf or hard of hearing. The program includes various service models that serve as a continuum of alternative placements. Services may be delivered through an itinerant model, where services may be provided at the Early Childhood Center, at another school in the District, at a preschool, at a daycare, or in the home. The location of services is driven by the principal that children of this age best generalize skills when the learning occurs in the closest approximation to the environment in which they would need to use those skills. The ECSE program also includes a center-based program with morning and afternoon sessions as well as satellite programs at two elementary schools in the District. The District also has two students in the program who are served through a contracted private placement, which is the most restrictive placement available. Tr. 77-78, 80, 86, 170.

102. Mr. Beldin testified that services typically decline in intensity from First Steps, which is designed to be more intense early intervention, to ECSE. It is determined on a case-by-case basis. Such would typically be the case for a child who has an auditory memory and quickly receives cochlear implants and receives early intervention services. Tr. 1367, 1451, 1463, 1523-25.

103. School District witnesses testified how students qualify for the District's ECSE program and the IEP development process. Qualification is initially based on an individualized evaluation. Tr. 629. The results of that evaluation generate an IEP, which serves as the basis for that student's programming. Tr. 81, 629-30. Although there is an automatic referral for a special education evaluation from First Steps to ECSE, not every child who is eligible for First Steps is automatically eligible for ECSE. Tr. 87-8, 330.

104. In ECSE, there are five areas of development that serve as the foundation for eligibility. They are cognition, adaptive behavior, communication, physical (gross and fine motor), and social/emotional/behavioral. Tr. 95. A student's IEP is drafted based on the developmental area in which they qualify and does not encompass a comprehensive preschool program. Tr. 97. The evaluation information forms the basis for the present level report in the IEP. Tr. 1310. The goals developed by the IEP team will then determine the number of service minutes required to implement a child's IEP. Tr. 99. According to Mr. Beldin, a goal must stand on its own and not require objectives in order to be understood and measurable. Tr. 1497. Once goals and services are established, the team then determines where those services can be implemented in the least restrictive environment. Tr. 100-01. The District uses the State's model form for its IEPs. Tr. 129-30, 350-51. IEPs are fluid documents that can be revised anytime if necessary for a particular child, especially if a child appears to be regressing. Tr. 257, 1373. Not every child with the same type of disability or developmental delay is placed in the same program. Programming is individualized depending on the developmental level and levels of functioning for each child, which varies from child to child. Tr. 96, 442-43, 623-24, 629-30, 1073, 1309-10, 1316-18, 1322-25, 1381-82, 1497, 1503-04. If the District determines that a student is not sufficiently generalizing a skill it is working on, they look for ways to explicitly teach that skill in a more generalized environment, such as a language group. Tr. 1247.

105. Mr. Beldin testified that there is no universal preschool in Missouri, meaning the School District is not obligated to offer preschool. The District does not offer preschool for all students on a voluntary basis either. 1269-70. Parents may obtain preschool programming on a private voluntary basis. Tr. 1278-79. Parents in the District who desire preschool programming for their child prior to kindergarten may go through community education preschool, Head Start (if they qualify), or a variety of private early childhood preschools in the area. According to Dr. Beutel, the School District does not pay for any of the privately-based programs parents may choose to utilize. Tr. 75-7.

106. Mr. Beldin and Dr. Beutel testified that the School District may suggest to many parents that they should consider enrolling their child in a typical preschool in order to broaden their child's exposure and experiences. Such a recommendation does not mean that the child has a disability or needs special education services in that area. Tr. 1214-15, 1245-46, 1284. Such a suggestion also does not obligate the District to pay for preschool tuition for the child. Nor would a parent request for full day preschool obligate the District to pay the tuition merely because the child may qualify for special education services. Tr. 1342. The District suggested that Parents may want to enroll Student in a regular preschool program if they wanted her to have greater opportunities for socialization with other children, but such program was not determined to be a required component of her IEP. Tr. 1047, 1213-14, 1502.

107. The District typically convenes an IEP meeting in March of every year to determine whether a child is eligible for extended school year (“ESY”) programming. Such determination is based on a pattern of regression and the trajectory for recoupment of skills. Tr. 1462-63. The District would follow the same process for Student. Tr. 1463.

The District’s Offer of Educational Services for Student

108. The District increased Student’s services from what she was receiving in First Steps. Tr. 103:9-17, 1449:15-21, 1455:3-10. The IEP developed for Student by the District is appropriate based on her needs as identified through her evaluation. Student will make progress and derive educational benefit from her District IEP. No one has expressed concern that Student will not benefit under the District’s IEP, and the parents affirmed during her IEP meeting that Student will learn wherever she is. Tr. 163, 165-66, 240-41, 1312-14, 1330-31, 1345, 1369, 1485, 1555-56. There is no information in Student’s evaluation or present level report to support additional services beyond what is provided for in the District’s IEP and no data to support a full day preschool program at St. Joseph. Tr. 255-56, 913-14, 1331. The District’s IEP actually provides for more than adequate service to Student based on her evaluation data. Tr. 294-96, 916, 981, 1557-58.

109. Parents’ witnesses for the most part acknowledged at hearing that student will make some level of progress under the District’s IEP and receive some educational benefit. Tr. 549-51, 552-53, 554, 630-31, 684, 903. Dr. King acknowledged that Student will still be able to be mainstreamed if she were served through the District’s IEP, but that she may require some additional supports and in her opinion it would take longer from the mainstreaming to occur. Tr. 769-71. Parents’ witnesses believe the level of progress and benefit derived between the District’s IEP and St. Joseph’s IEP may vary and it would be speculating to say that Student would not be able to keep pace with hearing peers. Tr. 630-31, 772, 902, 904-06.

110. Ms. Fredriksen does not believe that the School District’s IEP provides an appropriate education as the IEP does not provide for what she considered appropriately trained staff to provide the services. She was unable to say in her testimony whether the School District’s IEP would provide some benefit. Tr. 484-85, 549-554.

111. Ms. Friedman testified that she had not seen the School District’s IEP until the due process hearing. Tr. 966. However, she testified that she would not expect Student to be mainstreamed into the regular education environment by kindergarten based upon the School District’s IEP. Tr. 966-67. She believes that the IEP did not have enough auditory or language goals and that the focus was on articulation. The lack of goals in these areas would create gaps in language and listening, in her opinion. Tr. 962-63.

112. Ms. Sanftner’s opinion as an oral-deaf educator was that the School District’s IEP did not provide an adequate level of service for Student to be able to keep pace with her hearing peers. Tr. 861-62.

113. Parents have never requested changes to the School District’s IEP in terms of services or goals but only wanted placement for Student at St. Joseph. Tr. 1337. Ms. Gaschler testified

that in her experience, in IEP meetings where representatives from St. Joseph have attended, they typically expect the student to continue receiving services from St. Joseph. Tr. 1542.

114. Dr. Flexer is concerned that if Student does not get a full day preschool program at St. Joseph, she may experience “slippage” when she reaches grades three, four or five. Tr. 585. She recognizes that it is in Student’s best interest to be mainstreamed. Tr. 672. She wants to capitalize on the “amazing possibilities” for Student and does not want her to be “slipping back” in future years. Tr. 587, 672. Dr. Flexer believes Student would advance in her speech skills under the District’s IEP but does not want to wait and see if there is “slipping” in the future. Tr. 674-75. While acknowledging she would be speculating, Dr. Flexer did give an opinion that she did not think the level of services provided for in the IEP even if delivered by trained professionals would support mainstreaming by kindergarten. Tr. 674, 685-86. She emphasized the need for a sustainable foundation of skills and not waiting for a decline in skills before providing a higher level of services. Tr. 674-75.

115. Dr. King testified that she did not believe the level of services provided for the School District’s IEP would prevent regression and that she would expect Student to be struggling by the time she reached kindergarten. Tr. 766, 768. She emphasized the need for the service providers to have at least a master’s degree in deaf education. Tr. 758.

116. According to Ms. Friedman, all students typically regress somewhat over the summer. Tr. 974. However, the School District does not program for potential regression but analyzes regression and recoupment data to determine whether further programming becomes necessary. Tr. 1228. The School District programs based on the current data and present functioning for a student, not potential future regression. Tr. 1229, 1365-66, 1393-94, 1535-36. According to Mr. Beldin, it would be hard for the School District to predict Student’s needs beyond what has been currently assessed. Tr. 1361.

117. If a student starts to regress, the IEP team will reconvene to review the data and methods that the District was using to determine whether the IEP needs to be modified or if services need to change, including placement. Tr. 190-91, 1229, 1535.

118. According to Ms. Gaschler, a child whose language skills are commensurate with their peers should be able to participate in a regular education program. Tr. 1534. Ms. Gaschler’s experience is that the level of functioning of students with cochlear implants is varied, and that some students are never serviced outside of their home district after receiving cochlear implants. Tr. 1603-04. Ms. Gaschler follows her students throughout their educational career and does not typically see students who are receiving their education through auditory and spoken language regress. Tr. 1534-35.

The District’s Continuum of Placement Options

119. North Kansas City offers a continuum of alternative placements in its Early Childhood Special Education Program. Such continuum includes itinerant services, services in an early childhood setting, services in an early childhood special education setting, services in the home, services in a separate school, and services in a residential facility. R-22. The continuum of

placements is described on pages 3, 4 and 5 of the District Early Childhood Special Education Parent Handbook. R-31. Within the itinerant services model, the student may receive such services at the Early Childhood Center, at their preschool or at a daycare. Placement on the continuum is determined based on each child's needs. Provision of services in a student's home district is considered least restrictive, with provision of services in a multi-district public program or even private school being more progressively restrictive. Tr. 31, 81-83, 1330, 1520-21, 1529-30; R-31.

Least Restrictive Environment

120. Once an IEP team has developed programming for a child, it must then determine placement based on the concept of LRE, which may vary from child to child. Tr. 634-35. In considering LRE, the District considers what would be close to the typical experience by an early childhood student. Tr. 1327.

121. St. Joseph staff believes that when a child reaches the level of functioning at or above their hearing peers, it is appropriate to mainstream them back to their school district. Tr. 519. Dr. Flexer believes Student needs an environment in which that can occur, and she has seen that occur in the public school district setting. Tr. 621-22. Dr. Flexer noted a trend from educating deaf or hard of hearing children in segregated schools toward educating them in traditional school settings, specifically educating preschool age children in a mainstream environment if they have at or near age-appropriate speech and language skills. Tr. 627-28.

122. There are no services provided for in Student's IEP that the District cannot provide within the District. Tr. 1290-91. In Student's case, it was determined that the LRE within which her services could be implemented is itinerant services at the District's Early Childhood Center. Tr. 1329. The District has typical peer models in its ECSE program. At St. Joseph, Student imitates and models her teacher and her speech pathologist, both adults. Tr. 920-21. Most children are not in a full-day program in early childhood, and a vast majority of children with cochlear implants are eventually served in their home districts. Tr. 1375, 1532. District representatives believe placement at St. Joseph would be a more restrictive placement for Student. Tr. 1331.

Blue Springs Multi-District Deaf and Hard of Hearing Program

123. The Blue Springs Deaf and Hard of Hearing Program ("MDHH") has a multi-district component in which 30 school districts contract with the program for services. Some of those contracting districts have their own deaf and hard of hearing program while others do not. The MDHH program provides such services as consultation, IEP development, evaluations and determination of student needs and services. Tr. 1530-31. Their program utilizes various modes of communication (auditory-oral, total communication, sign language) depending on the student and preference of the parent. Tr. 1528.

124. The District participates in the MDHH program. Tr. 1267. Such services include consultation in areas like assistive technology. The District has had several students to which it has provided personal FM systems. Tr. 1268. The MDHH program may also participate on IEP

teams, evaluations and assist in determining eligibility and FAPE. The District does not contract for student placements in the MDHH program because they are able to serve the students within the District. Tr. 1536-38. The District always complies with the recommendations made by MDHH program. Tr. 1539. The MDHH program is currently consulting with the District for three or four early childhood children, one of whom has a cochlear implant, all of whom are being served within the District. Tr. 1579.

DISCUSSION AND DECISION RATIONALE

General Legal Principals of FAPE, LRE and Private School Placement:

Under the IDEA, all children with disabilities as defined by the statute are entitled to a free appropriate public education (“FAPE”) in the least restrictive environment (“LRE”) appropriate to allow that child to receive educational benefit. 20 U.S.C. §§ 1412(a)(1)(5); 1401(8). In addition to the federal statute and its implementing regulations at 34 CFR Part 300, Missouri has adopted the Missouri State Plan for Special Education – Regulations Implementing Part B of the Individuals with Disabilities Education Act (“State Plan”) setting forth requirements imposed upon school districts for the provision of FAPE.

Under the Supreme Court test established by *Board of Education v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034 (1982), FAPE consists of educational instruction specifically designed to meet the unique needs of the handicapped child, and related services as are necessary to permit the child to benefit from the instruction. FAPE is not required to maximize the potential of each child; however, it must be sufficient to confer educational benefit. *Id.* at 200. The *Rowley* standard is satisfied by providing meaningful access to educational opportunities for the disabled child. *Id.* at 192; *see also Lathrop R-II School District v. Gray*, 611 F.3d 419, 427 (8th Cir. 2010). The *Rowley* court determined that the IDEA requires school districts to provide a “basic floor of opportunity” consisting of “access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.” *Rowley*, 458 U.S. at 201. The Supreme Court found Congress’ intent in passing the IDEA was “more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.” *Id.* at 192.

A student is substantively provided a free, appropriate education when the student receives personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State’s educational standards, must approximate the grade levels used in the State’s regular education, and must comport with the child’s IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. *Id.* at 203-04.

The extent of educational benefit to be provided to the handicapped child is not defined by *Rowley*; the Supreme Court required an analysis of the unique needs of the handicapped child to carry out the congressional purpose of access to a free appropriate public education. *Id.* at 188.

However the Supreme Court found implicit in this purpose, the “requirement that the education to which access is provided be sufficient to confer *some* educational benefit upon the handicapped child.” *Id.* at 200 (emphasis added); *T.F. v. Special School District*, 449 F.3d 816, 820 (8th Cir.2006); *see also Gill v. Columbia 93 School District*, 217 F.3d 1027, 1035 (8th Cir. 2000). When quoting from *Gill*, the Eighth Circuit supplied additional emphasis and stated: “The standard to judge whether an IEP is appropriate under IDEA is whether it offers instruction and supportive services reasonably calculated to provide *some* educational benefit to the student for whom it is designed.” *Bradley v. Arkansas Department of Education*, 443 F.3d 965, 974 (8th Cir. 2006) (emphasis by Court).

Federal courts interpreting *Rowley* have held that *Rowley* does not require a school district “to either maximize a student’s potential or provide the best possible education at public expense.” *Fort Zumwalt School District v. Clynes*, 119 F.3d 607, 612 (8th Cir. 1997), *cert. denied*, 523 U.S. 1137 (1998). A school district is not required to provide a program that will “achieve outstanding results” (*E.S. v. Independent School District No. 196*, 135 F.3d 566, 569 (8th Cir. 1998)) or one that is “absolutely best” (*Tucker v. Calloway County Board of Education*, 136 F.3d 495, 505 (6th Cir. 1998)) or one that will provide “superior results” (*Ft. Zumwalt*, 119 F.3d at 613); *see also Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 658 (8th Cir.1999). However, the *Rowley* requirement of consideration of the unique needs of the handicapped child does require consideration of the child’s capacity to learn. *Nein v. Greater Clark County School Corp.*, 95 F.Supp.2d 961, 973 (S.D. Ind.2000). The requirement of “some educational benefit” requires more than a “trivial” benefit but not a maximization of the potential of a handicapped child. *N.J. v. Northwest R-1 School District*, 2005 U.S. Dist. LEXIS 24673, 22 (E.D. Mo. 2005).

To achieve its goals, the IDEA “establishes a comprehensive system of procedural safeguards designed to ensure parental participation in decisions concerning the education of their disabled children and to provide administrative and judicial review of any decisions with which those parents disagree.” *Honig v. Doe*, 484 U.S. 305, 308 (1988). The primary vehicle for carrying out the IDEA’s goals in the provision of FAPE is the Individualized Education Program (“IEP”). 20 U.S.C. §§ 1414(d), 1401(8). An IEP must be in effect for each child with a disability who has been deemed eligible for services no later than the child’s third birth date. 34 C.F.R. § 300.323; State Plan, Regulation IV, Page 40. An IEP is a written document containing, among other things:

- (a) a statement of the child’s present levels of academic achievement and functional performance; including for preschool children, how the child’s disability affects the child’s participation in appropriate activities;

- (b) a statement of measurable annual goals, including academic and functional goals designed to meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum, and meet each of the child’s other educational needs that result from the disability; and

(c) a statement of the special education, related services, supplementary aids and services, and modifications and accommodations to be provided to the child to enable the child to advance appropriately toward attaining those annual goals, to be involved and progress in the general curriculum, to be educated and to participate with other children in these activities, both disabled and nondisabled.

20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.320; *State Plan*, Regulation IV, Page 40. For children who are deaf or hard of hearing, the statute and regulations and State Plan require the consideration of the communication needs of the child, including the child's language and communication mode, "including opportunities for direct instruction in the child's language and communication mode." 20 U.S.C. § 1414(d)(3)(B); 34 C.F.R. § 300.324(a)(2)(iv). A school district is not required to put more into an IEP than is required by law. *Lathrop*, 611 F.3d at 425.

Under *Rowley*, there are two components to the FAPE analysis, one procedural and the other substantive. An educational program can be set aside for failure to provide FAPE on procedural grounds under three circumstances: (1) where the procedural inadequacies have "compromised the pupil's right to an appropriate education"; (2) when the district's conduct has "seriously hampered the parents' opportunity to participate in the formulation process"; or (3) when the procedural failure has resulted in "a deprivation of educational benefits." *Independent School District No. 283 v. S.D.*, 88 F.3d at 556; *Lathrop R-II School District v. Gray*, 611 F.3d 419, 424 (8th Cir. 2010). Where this type of harm is found, the substantive question of whether the IEP provided FAPE is not addressed by the hearing panel. *W.B. v. Target Range School District*, 960 F.2d 1479, 1485 (9th Cir. 1991). Assuming no denial of FAPE on procedural grounds, the analysis turns to the substance of whether the IEP provides FAPE as defined by the *Rowley* standard.

Under the *Rowley* standard, the ultimate question for a court under the IDEA is "whether a proposed IEP is adequate and appropriate for a particular child at a given point in time." *Rowley*, 458 U.S. at 200; *Town of Burlington v. Department of Education*, 736 F.2d 773, 788 (1st Cir. 1984), *aff'd* 471 U.S. 359 (1985). An IEP is not required to maximize the educational benefit to a child or to provide each and every service and accommodation that could conceivably be of some educational benefit. *Rowley*, 458 U.S. at 200; *Gill v. Columbia 93 School District*, 217 F.3d 1027, 1035-36 (8th Cir. 2000). Although parental preferences must be taken into consideration in deciding IEP goals and objectives and making placement decisions, the IDEA "does not require a school district to provide a child with the specific educational placement that her parents prefer." *Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 658 (8th Cir. 1999); *T.F. v. Special School District*, 449 F.3d 816, 821 (8th Cir. 2006). The issue is whether the school district's placement is appropriate, "not whether another placement would also be appropriate, or even better for that matter." *Heather S. v. Wisconsin*, 125 F.3d 1045, 1057 (7th Cir. 1997).

It is also well settled that the determination of whether an IEP is appropriate and reasonably calculated to confer an educational benefit must be measured from the time it was offered to the student. *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1035 (3d Cir. 1993).

As noted by the *Fuhrmann* court, “[n]either the statute nor reason countenance ‘Monday Morning Quarterbacking’ in evaluating the appropriateness of a child’s placement.” *Id.* at 1040. Therefore, in determining whether a particular IEP was reasonably calculated to confer educational benefit, the actions of the IEP team should not be judged in hindsight. *Roland M. v. Concord School Committee*, 910 F.2d 983, 992 (1st Cir. 1990). “An IEP is a snapshot, not a retrospective . . . [i]n striving for ‘appropriateness,’ an IEP must take into account what was and was not objectively reasonable when the snapshot was taken, that is at the time the IEP was promulgated.” *Id.*

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

Each public agency shall 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 non-disabled; and
- (2) Special classes, separate schooling or other removal of children with disabilities from the general educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

34 CFR § 300.114.

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

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

To the maximum extent appropriate, disabled and severely disabled children shall be educated along with children who do not have disabilities and shall attend regular classes, except that in the case of a disability resulting in violent behavior which causes a substantial likelihood of injury to the student or others, the school

district shall initiate procedures consistent with state and federal law to remove the child to a more appropriate placement. Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment shall occur only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

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Each school district must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. The placement options for children ages three (3) to five (5) include individual, early childhood settings, early childhood special education classes in settings with children who are nondisabled, early childhood special education in settings with only children with disabilities, multiple settings, and residential settings. 34 CFR § 300.115; State Plan, Regulation IV, Page 52. The least restrictive environment should always be considered in determining whether a parentally preferred placement is appropriate. *Independent School District No. 83 v. S.D.*, 88 F.3d at 556, 561 (8th Cir. 1996); *see also Reese v. Board of Education*, 225 F.Supp.2d 1149, 1159 (E.D. Mo. 2002) (holding that although parents seeking an alternative placement for their child may not be subject to the same mainstreaming requirements as a school board, “the ‘IDEA’s requirement that an appropriate education be in the mainstream to the extent possible 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.”) (*quoting M.S. v. Board of Education*, 231 F.3d 96, 105 (2nd Cir. 2000)). Parents who choose a private school for their child which only offers a restrictive non-mainstream environment have the burden of proving that such an environment is needed to provide their child with an appropriate education. *Id.*

Parents are not required to keep their children in educational placements proposed by school districts that the parents believe are inappropriate. However, “parents who unilaterally change their child’s placement during the pendency of the review proceedings, without the consent of state or local school officials, do so at their own financial risk.” *Burlington v. Department of Education*, 471 U.S. 359, 373-74 (1985); *Fort Zumwalt*, 119 F.3d, 611-12; *T.F. v. Special School District*, 449 at 820. Reimbursement is only appropriate if the public school district has failed to provide FAPE and the parental placement is appropriate. *Burlington*, 417 U.S. at 370. If this showing is not made, the costs of the private placement do not shift to the public agency and the parents bear the cost of the private placement. *Id.*; *Florence County School District No. 4 v. Carter*, 510 U.S. 7 (1993).

The IDEA specifically addresses unilateral private placements by parents in pertinent part as follows:

(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 court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or 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 or a court 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.

34 C.F.R. § 300.148.

The burden of proof in a due process hearing is on the party initiating the challenge to the IEP to prove a denial of FAPE. *Schaffer ex rel. Schaffer v. Weast*, 456 U.S. 49, 126 S.Ct. 528, 537 (2005). Accordingly, the burden of proof in this case is on the Petitioner to establish that the IEP at issue did not provide FAPE to Student. Petitioner must sustain her burden of proof by a

preponderance of the evidence, the standard appropriate to most civil proceedings and the standard utilized by reviewing courts of hearing panel decisions. *Blackmon*, 198 F.3d at 654; 20 U.S.C. § 1415(i)(2)(B); *Doe v. Defendant I*, 898 F.2d 1186, 1191 (6th Cir. 1990) (finding Student has the burden of proving by a preponderance of the evidence that the IEP was inadequate; citing *Tatro v. State of Texas*, 703 F.2d 823, 830 (5th Cir.), *aff'd in part and rev'd in part sub nom.*, *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984)).

PROCEDURAL ARGUMENT

The IDEA at 20 U.S.C. § 1415 sets forth the statutory procedural rights available to parents. *See also Evans v. District No. 17*, 841 F.2d 824, 828-31 (8th Cir. 1988).

Sec. 1415. Procedural safeguards

(a) Establishment of procedures

Any State educational agency, State agency, or local educational agency that receives assistance under this subchapter shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies.

(b) Types of procedures

The procedures required by this section shall include the following:

(1) An opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child.

....

(3) Written prior notice to the parents of the child, in accordance with subsection (c)(1), whenever the local educational agency -

(A) proposes to initiate or change; or

(B) refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.

....

(6) An opportunity for any party to present a complaint -

(A) with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child;

....

(c) Notification requirements

(1) Content of prior written notice

The notice required by subsection (b)(3) shall include -

(A) a description of the action proposed or refused by the agency;

(B) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;

(C) a statement that the parents of a child with a disability have protection under the procedural safeguards of this subchapter and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;

(D) sources for parents to contact to obtain assistance in understanding the provisions of this subchapter;

(E) a description of other options considered by the IEP Team and the reason why those options were rejected; and

(F) a description of the factors that are relevant to the agency's proposal or refusal.

With respect to alleged procedural violations, although not specified in their attorney's June 18, 2010 letter, at hearing Petitioners seem to have claimed that the District failed to appropriately consider their concerns, which impeded their right of parental participation. The evidence adduced at hearing does not support this claim.

A. Receipt of Procedural Rights

At the outset, it is important to note that the parents have not claimed that they did not receive notice of their procedural rights. The parents testified they did receive notice of their procedural rights.

B. Right of Parental Participation

The parent's right of participation is limited by the IDEA to the opportunity to participate in meetings, including IEP meetings, with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child. 20 U.S.C. § 1415 (b)(1); 34 C.F.R. §§ 300.345, 501; *see also Gill*, 217 F.3d at 1037. Parents also have the right to invite "other individuals who have knowledge or special expertise regarding the child," to attend IEP meetings and function as a member of the IEP team. 34 C.F.R. § 300.344(a)(6).

The IDEA's parental participation requirements are satisfied where "a school district provides parents with proper notice explaining the purpose of the IEP meetings, the meeting is conducted in a language that the parents can understand . . . the parents are of normal intelligence, and they do not ask questions or otherwise express their confusion about the proceedings." *Blackmon*, 198 F.3d at 657; *see also Burilovich v. Board of Education*, 208 F.3d 560, 568 (6th Cir.), *cert. denied*, 531 U.S. 957 (2000) (finding that parents failed to demonstrate that they were denied participation in the special education process where they expressed their views and had the opportunity to participate at IEP meetings). A school district's "failure to apprehend and rectify that confusion" is not a procedural violation. *Blackmon*, 198 F.3d at 657.

The IDEA's encouragement of consensus in the development of the IEP does not mean that a school district must accede to parental demands. As the Eighth Circuit stated in *Blackmon*, "[a] school district's obligation under the IDEA to permit parental participation in the development of a child's educational plan should not be trivialized. . . . Nevertheless, the IDEA does not require school districts simply to accede to parents' demands without considering any suitable alternatives." 198 F.3d at 657. Thus, where a district considers, but rejects a parental request, "[t]he School District's adherence to this decision does not constitute a procedural violation of the IDEA simply because it did not grant [the] parents' request." *Id.* at 657.

There is ample evidence that the IEP team considered the Parents' concerns:

- At the meeting to review existing data for Student in the various areas of functioning, each area of functioning was reviewed with Student's mother, and she was given an opportunity to provide information and feedback on each one. She was also given the opportunity to indicate whether she believed any additional data was needed in each area. During that meeting, the parent provided information in the area of Social/Emotional/Behavioral that Student is shy but does well at play group and church group activities, initiates play and is appropriate with toys. Student's mother did not express any objection or disagreement with the areas in which additional assessments were going to be conducted as indicated in the evaluation plan.
- At the same meeting, Parents had an opportunity to provide input in development of the evaluation plan. Student's parents did not indicate any disagreement with the review of existing data or evaluation plan developed for Student.
- During the October 28, 2009, IEP meeting, the parents raised concerns about Student's social play, articulation, and the mechanical operation of her cochlear implants. The team discussed and addressed each of these concerns. In response to these concerns, the team added a language group to Student's IEP as well as an accommodation/modification that Student's performance in the language group would be specifically monitored to determine whether further evaluation and services in those areas were necessary. The parents also raised Student's self-advocacy as an issue, and the team discussed it and added a goal to the IEP to address it.
- The IEP team specifically considered and discussed the parents' preference with respect to Student's mode of communication, which is the auditory-oral approach. The District indicated to Student's parents that it would honor their preferred modality and never indicated to parents that it intended to use sign language with Student. The District specifically acknowledged Student's mode of communication through the evaluation process and in her IEP.

The panel finds no violation of IDEA in the area of parental participation. Petitioners' procedural rights were not violated. In fact, Parents can be characterized as being allowed to play an "aggressively participative role" in the IEP development process. *Independent School District No. 283*, 88 F.3d 556, 562 (8th Cir. 1996). There is no evidence that Parents or the St. Joseph representatives or Dr. Flexer were precluded from providing their input or opinions about the IEP components. There was no evidence that the District failed to answer any questions of Parents; rather, the District's answers may not have been the ones Parents wanted to hear.

SUBSTANTIVE ARGUMENT

The panel considers whether FAPE was offered through the District's IEP. The analysis of all IEPs as stated by the Eighth Circuit, is whether the program offered an educational program "reasonably calculated to enable the child to receive educational benefits." *Fort Zumwalt*, 119 F.3d at 611 (quoting *Rowley*, 458 U.S. at 206-07). The question before the panel is whether the IEP offered "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Rowley*, 458 U.S. at 203. The goal of FAPE is addressed "through the development of an IEP for each child setting forth her present level of

performance, annual goals and objectives, specific services to be provided, an explanation of the extent to which she will not receive education with nondisabled children, a statement of modifications to district-wide assessment procedures needed in order for her to participate in such assessments, transition services needed, the projected dates and duration of proposed services, and objective criteria and evaluation procedures.” *Blackmon, supra*, 198 F.3d at 658; 20 U.S.C. Sec. 1414(d).

Under IDEA, the services needed by each child with a disability to receive FAPE must be based on the child’s unique needs and not on the child’s disability. 34 C.F.R. § 300.39. The court’s key inquiry in assessing whether a district has provided FAPE is “to determine whether a proposed IEP is adequate and appropriate for a particular child at a given point in time.” *Town of Burlington*, 736 F.2d 773, 788 (1st Cir. 1984). Thus, the determination of whether an IEP is appropriate and reasonably calculated to confer an educational benefit must be measured from the time it was offered to the student. *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1035 (3rd Cir. 1993); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990).

When reviewing IEPs, panels should keep in mind that state and local educational agencies are deemed to possess expertise in education policy and practice. *Burilovich v. Board of Education*, 200 F.3d 560 (6th Cir. 2000). Deference is to be given to the decisions made by professional educators. *Independent School District No. 283 v. S.D.*, 88 F.3d at 561 (noting that the hearing officer was required to give “sufficient weight to the views of the School District’s professional educators”); *Gill v. Columbia 93 School District*, 217 F.3d 1027, 1038 (8th Cir. 2000) (courts “must defer to the judgment of education experts who craft and review a child’s IEP so long as the child receives some educational benefit and is educated alongside his non-disabled classmates to the maximum extent possible”). Once a procedurally proper IEP is developed, a reviewing court should be reluctant to second-guess the judgment of professional educators, and not disturb an IEP just because the court may disagree with its content, as long as the IEP provides the child with the “basic floor of opportunity that access to special education and related services provides.” *MM v. School District of Greenville County*, 303 F.3d 523, 532 (4th Cir. 2002) (quoting *Tice v. Botetourt County School Board*, 908 F.2d 1200, 1207 (4th Cir. 1990)).

Petitioners argue that the Student requires a full day preschool program at St. Joseph in order to receive FAPE. The issue for the panel, however, is not whether the St. Joseph placement is superior to the placement proposed by the District, which it may well be. *Heather S.*, 125 F.3d 1045, 1057 (7th Cir. 1997). The issue is whether the School District’s IEP provided FAPE for Student at that point in time based upon information available to the School District. The panel notes that the District was hampered in its ability to obtain information from observation because Student was not in attendance at the District prior to the development of the IEP.

The panel considers whether the District’s IEP offers FAPE and considers each of the issues raised by Student in that regard.

A. District Provided FAPE

FAPE is broadly defined in the IDEA regulations as special education and related services that:

- (a) Are provided at public expense, under public supervision and direction, and without charge;
- (b) Meet the standards of the state education agency, including the requirements of the IDEA;
- (c) Include an appropriate preschool, elementary school, or secondary school education in the state involved; and
- (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of 34 C.F.R. § 300.320 through § 300.324.

34 C.F.R. § 300.17. The District is therefore obligated to develop an IEP crafted to provide educational benefit based upon Student's disability. Prior to the October 28, 2009 IEP meeting, St. Joseph sent the District a Transition Report containing the following recommendations in order to provide FAPE to Student:

- a. [Student's] parents' commitment to utilize everyday activities as speech, language, and listening learning opportunities.
- b. Placement in a classroom setting in which [Student] can develop her social skills, ability to listen in noise, and use of intelligible language.
- c. A personal FM system to be utilized in all classroom situations, at home, and during any extracurricular activities in which Student participates.
- d. Daily sound checks (Ling Six Sound Test) with her cochlear implants individually to be done at home and at school.
- e. Increase [Student's] ability to advocate for herself.
- f. Appropriate individual and classroom amplification systems should be monitored by staff trained in the systems' use.
- g. Classroom should meet ASHA guidelines for appropriate acoustical environments for students with hearing impairment.
- h. Continued follow-up with Midwest Ear Institute at least every 6 months to ensure the best mapping and audiologic management for [Student].

The District's IEP addresses all of the recommendations listed by St. Joseph, excluding the personal FM system. However, Student is too young to use a personal FM system, and she was not using one at St. Joseph. The remaining recommendations were addressed by the District in Student's IEP.

The District's IEP will provide educational benefit. Parents and most of their witnesses testified that Student will make some level of progress under the District's IEP and receive educational benefit. Some of Student's witnesses also believe that Student will still be able to be mainstreamed if she were served through the District's IEP, but that she may require some additional supports and will take additional time. St. Joseph cannot identify any data for Student to suggest that she would not make any progress under the District's IEP. While there may be some difference of opinion between the Parents' and District's witnesses regarding the amount

of educational benefit, that is not the issue. Instead, the Panel looks to whether the District's IEP will provide some educational benefit. On that issue, the majority of witnesses (although albeit some grudgingly) agree.

The IEP developed for Student by the District is appropriate based on her needs as identified through her evaluation. Student's IEP developed by the District is reasonably calculated to provide her with educational benefit and offers her FAPE. Student will make progress and derive educational benefit from her District IEP. No one has expressed concern that Student will not benefit under the District's IEP, and the parents affirmed during her IEP meeting that Student will learn wherever she is. There is no information in Student's evaluation or present level report to support additional services beyond what is provided for in the District's IEP and certainly no data to support a full day preschool program at St. Joseph. The District's IEP actually provides for more than adequate service to Student based on her evaluation data and provides for more services than Student received through First Steps under which she made tremendous progress.

When judged by the *Rowley* and *Blackmon* standards, the District's IEP provided more than minimal educational benefit. It was reasonably calculated to provide meaningful educational benefit to Student. The Panel finds the District offered FAPE to Student.

B. Categorization as Young Child with a Developmental Delay

Petitioners contend that Student was improperly categorized as a Young Child with a Developmental Delay. School districts are required to determine eligibility for children ages three through five using one of the following methods:

- Identify all children using any of the disability categories except that of Young Child with a Developmental Delay (YCDD); or
- Identify all children as eligible using only the category of Young Child with a Developmental Delay (YCDD); or
- Identify all children as eligible using any of the disability categories including that of a Young Child with a Developmental Delay (YCDD).

State Plan Regulation III, p. 30. For children ages three (3) through five (5), a child has a developmental delay when:

1. The child's development is at or below 1.5 standard deviations, or equivalent levels, of the mean in any TWO areas of development OR at or below 2.0 standard deviations, or equivalent levels, in any ONE area of development. Areas of development that can be used to determine eligibility include physical, cognitive, communication, social/emotional, or adaptive.

2. The child needs special education and related services.

Id. A child may also be deemed eligible when the evaluation report documents through formal and informal assessment that a significant deficit exists and a child is eligible for services even though the standard scores or equivalent levels do not meet the stated criterion levels, or the team

may determine that a child, who is functioning above the stated criterion level and because of intensive early intervention, is eligible for services based on expected regression if services were to be terminated. *Id.*

The District completed its evaluation on or about October 28, 2009. A child with cochlear implants does not automatically qualify for services under IDEA, particularly if they do not show any deficits and are on grade level or have age appropriate skills and language development. Based on the evaluation information, a group of qualified professionals determined that Student meets the State's criteria for Young Child with a Developmental Delay in the area of Communication. Student did not technically qualify as a child with a disability under the Missouri State Plan in that her performance was not at or below 1.5 standard deviations of the mean in any two developmental areas or at or below 2.0 standard deviations in any one area of development. Student's eligibility was determined by the use of professional judgment.

The District qualifies children for early childhood special education under the category of Young Child with a Developmental Delay ("YCDD"). The District uses this category because it is broader in nature (although it specifies the developmental area at issue), and the District considers it a more effective classification given that a young child has not had exposure to an academic setting. YCDD provides flexibility as far as identification of disability. The YCDD eligibility continues until a child turn age six. If Student had been determined eligible under a different categorical disability, it would not have changed the services to which she is entitled that are reflected in her IEP because the services are based on her evaluation and goals. Whether Student would also be eligible under a specific categorical disability never came up in IEP team discussions.

The panel finds that the District appropriately qualified Student for services as YCDD and was not required to qualify her under a separate categorical disability. The panel further finds that Student was not denied FAPE due to her category of qualification because her services would be the same regardless of her categorical disability. The Petitioners' own case citation establishes that it is not the diagnosis of YCDD versus deaf that is the issue when it comes to FAPE, as "the diagnosis given does not drive the services provided to Student. The Student's unique needs drives the services provided." *Parkway C-2 School District*, 4 ECLPR 738 (SEA Mo. 2005)

C. Present Level of Academic Achievement and Functional Performance

Petitioners levy several complaints about the District's IEP. First they allege the statement of Student's present levels of academic achievement and functional performance ("PLAAFP") is deficient because it:

- does not adequately and appropriately reflect Student's needs as an oral-deaf child with bilateral cochlear implants, including her needs for intensive aural/oral special education and related services,
- does not accurately describe how Student's hearing loss affects her participation in age-appropriate activities, including related academic, communication and social development, and

- does not accurately reflect the concerns of Student’s parents and the professionals currently providing services to Student, including her needs for an intensive, coordinated aural/oral program of special education and related services provided by professionals with the background, training and experience to provide the same.

The PLAAFP report must not only include the present levels of academic achievement and functional performance, but must also include how the child’s disability affects the child’s participation in appropriate activities. 20 U.S.C. § 1414(d)(1)(A)(I); 34 C.F.R. § 300.320(a)(1). The PLAAFP is intended to address the area of disability in which the Student was determined eligible for services. Despite Petitioners’ contentions, the PLAAFP report is sufficient. It identifies Student’s articulation deficit and how it affects her participation in age appropriate activities. It further identifies how her articulation impacts other issues raised by the Parents, such as socialization. The section specifically includes a description of the parents’ concerns which was revised when the parents raised additional concerns. While the alleged deficiencies cited by Petitioners are not legally required, the present level also addresses the fact that Student has a bilateral hearing loss and utilizes cochlear implants. The panel finds the PLAAFP report is appropriate.

D. Appropriateness of Goals

Petitioners also allege the IEP goals do not adequately and appropriately address Student’s needs as an oral-deaf child with bilateral cochlear implants and do not address her proper development in language, communication and audition. At hearing, Petitioners also seemed to argue that the goals were insufficient because they were not drafted to avoid possible regression at some point in the future. The panel finds no merit in Petitioners’ complaints about the goals contained in the District’s IEP.

The District’s IEP must include a statement of measurable annual goals designed to meet the student’s needs that result from her disability to enable the student to enable the student to participate in appropriate activities and to meet each of the student’s other educational needs that result from her disability. 34 C.F.R. § 300.320(a)(2)(i); State Plan, Regulation IV, p. 43. There is no legal authority that sets forth exact specificity requirements in the statement of annual goals. *O’Toole v. Olathe District Schools Unified School District No. 223*, 144 F.3d 692, 706 (10th Cir. 1998).

A review of the five goals contained in the District’s IEP shows three goals designed to increase Student’s articulation skills, one goal to increase her auditory skills, and one goal to increase her self-advocacy. Her IEP specifically addressed her identified delay in the area of articulation and included goals for articulation, audition and self-advocacy, some of which were developed in response to parent concerns. There are no goals addressing receptive or expressive language skills, occupational therapy-type skills or pre-academic skills in the District’s IEP because those are not areas of deficit or delay for Student. Pre-academic skills are not an area of focus at the early childhood level.

The authorities cited by Petitioners in support of their contention that only a program that a school like St. Joseph can provide satisfies the FAPE requirement are not persuasive. The

authorities, the majority of which are State level hearing panel decisions, are dealing with situations that do not exist herein concerning unqualified staff and the track record of the school districts involved in providing services.

The Panel concludes that the District's goals were calculated to provide Student educational benefit, and therefore provide FAPE.

E. Continuum of Alternative Placements

Petitioners also allege the District failed to make available a continuum of programs and placements designed to meet Student's needs as an oral-deaf child with bilateral cochlear implants. Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. 34 C.F.R. § 300.115(a). The placement options for children ages three (3) to five (5) include individual, early childhood settings, early childhood special education classes in settings with children who are nondisabled, early childhood special education in settings with only children with disabilities, multiple settings, and residential settings. 34 CFR § 300.115; State Plan, Regulation IV, Page 52. The District is not required to offer parents a variety of placement options for their children and allow them to choose. Rather, the IDEA merely requires school districts to have a continuum of alternative placements available, and to select the appropriate placement based on the IEP produced by the IEP team, including the student's parents. Therefore, the pertinent inquiry is whether the District considered a number of alternative placements for Student after receiving input from her parents. *James D. v. Board of Education*, 642 F.Supp.2d 804, 821-22 (N.D.Ill. 2009).

The District offers a continuum of alternative placements in its Early Childhood Special Education Program. Such continuum includes itinerant services, center-based services and services at contracted agencies. The continuum of placements is fully described in the District's Early Childhood Special Education Parent Handbook. Within the itinerant services model, the student may receive such services at the Early Childhood Center, at their preschool or at a daycare. Placement on the continuum is determined based on each child's needs. Provision of services in a student's home district is considered least restrictive, with provision of services in a multi-district public program or even private school being more progressively restrictive. The IEP team considered the following placements: early childhood setting; early childhood special education; separate school; and itinerant service outside the home. The IEP team chose the latter placement based on the services required in the IEP and least restrictive environment considerations.

The panel finds that the District had a continuum of alternative placement options available.

F. Consideration of Student's Mode of Communication

Petitioners allege the IEP team failed to adequately consider Student's language and mode of communication. However, the evidence presented at hearing showed that Student's language and mode of communication were considered. The IEP team specifically considered and discussed the parents' preference with respect to Student's mode of communication, which is the

auditory-oral approach. The District has never refused to honor a parent's chosen approach with respect to mode of communication. The District indicated to Student's parents that it would honor their preferred modality and never indicated to parents that it intended to use sign language with Student. The District specifically acknowledged Student's mode of communication through the evaluation process and in her IEP.

There is a difference between mode of communication and methodology, and there is no real dispute as to either. The District was never unwilling to provide an oral deaf program. Methodology is a consideration under the IDEA regulations as in order to address the unique needs of the child that result from the child's disability, it may be necessary to adapt "the content, methodology, or delivery of instruction" in order to ensure access of the child to the general curriculum. 34 C.F.R. § 300.39(b)(3); *see Strawn v. Missouri State Board of Education*, 210 F.3d 954 (8th Cir. 2002) (considering communication needs of student with multiple disabilities). Methodology is the how the teacher decides to deliver specialized instruction to the student. Methodology can vary depending on the task being addressed and the unique circumstances of the child that may cause the provider to vary the techniques and strategies they are using. The professional implementing the services has the latitude to determine methodology on a case-by-case basis. Even so, the District utilizes the same strategies and techniques that St. Joseph utilizes with its students.

The panel finds the IEP team adequately considered Student's language and mode of communication.

G. Staff Qualifications

Petitioners allege that the IEP team failed to ensure that the providers needed to implement an appropriate aural/oral program for Student have the necessary background, training and experience to implement or deliver such a program. However, the Panel finds there is no evidence to support this allegation. There is no dispute that the District's staff met State requirements for teacher qualifications. Implementation of the services provided for in Student's IEP would require a certified speech/language pathologist, a certified early childhood special education teacher, and a certified teacher of the deaf and hearing impaired. The District has staff members who hold each of these certifications. There are no state requirements for a deaf educator to have any special certifications with respect to modality. The District has appropriately qualified staff on hand ready and able to implement the services that are provided for in Student's IEP.

The staff that would be involved with Student did not need to have "every conceivable credential relevant to every child's disability." *Hartmann v. Loudoun County Board of Education*, 118 F.3d 996, 1001 (4th Cir. 1997), *cert. denied*, 522 U.S. 1046 (1998) ("We can think of few steps that would do more to usurp state educational standards and policy than to have federal courts rewrite state teaching certification requirements in the guise of applying the IDEA.")⁷; *West Platte R-II School District v. Wilson*, Case No. 04-6040 at p. 11 (W.D. Mo. March 2, 2006) ("Unless

⁷ The *Hartman* Court noted: "[n]ot all school systems will have the resources to hire top-notch consultants, nor will every school have the good fortune to have personnel who were involved in a major state program related to the needs of every disabled child." *Id.* at 1004.

and until the State requires teachers to be certified in dyslexia or obtain specialized training in dyslexia, this Court will not impose such a requirement of L.W.'s teachers"), *rev'd on other grounds*, 439 F.3d 782 (8th Cir. 2006). While the Supreme Court has acknowledged the importance of parental consultation in the IEP decision-making process, "nothing in the Court's opinions suggest that parents usurp the District's role in selecting its staff to carry out the IEP's provisions." *Slama v. Independent Sch. Dist. No. 2580*, 259 F.Supp. 880, 885 (D. Minn. 2003).

The panel finds that District staff possesses the appropriate and necessary qualifications to implement student's IEP.

H. Potential Regression

While not identified in their statement of issues, at hearing Petitioners seemed to argue that the District's IEP was deficient because it was not designed to avoid possible future regression. However, it was clear that Petitioners wanted a program at St. Joseph regardless of the special education services provided by the District. Petitioners presented evidence that if Student does not get a full day preschool program at St. Joseph, she may experience "slippage" when she reaches grades three, four or five. However, an IEP should be drafted based on current needs of the Student as determined by her evaluation, not on potential future regression.

If a student starts to regress, the IEP team will reconvene to review the data and methods that the District was using to determine whether the IEP needed to be modified or if services needed to change, including placement. All students typically regress at some point. The District does not program for potential regression but analyzes regression and recoupment data to determine whether further programming becomes necessary. The District programs based on the current data and present functioning for a student, not potential future regression because it is difficult to predict needs beyond what has been currently assessed.

There is no legal support for Petitioners' argument. In *El Paso Independent School District v. Robert W.*, 898 F.Supp. 442, 449 (W.D. Tex. 1995), the district court stated:

First and foremost, the administrative hearing officer was in error when he decided that [student] was not receiving meaningful educational benefit from his IEP because of the "widening gap" between [student] and his non-disabled peers. This is not the proper evaluation.

The panel finds that the District's IEP was properly developed to address Student's current delays arising from her disability. It would be inappropriate to attempt to address future, speculative regression.

I. Transportation

Although not identified in their Statement of Issues, Petitioners argued in hearing that the District failed to provide transportation in its IEP. The evidence does not support this allegation. Transportation is a related service, as defined by 34 C.F.R. § 300.34(c)(16) of the IDEA regulations, and can include travel to and from school and between school; travel in and around

school buildings; and specialized equipment such as special or adapted buses, lifts, and ramps. A child's IEP team is responsible for determining whether transportation between school and other locations is necessary in order for the child to receive FAPE. 34 C.F.R. § 300.34(c)(16). A school district is only required to provide transportation as a related service if the IEP team determines that transportation is necessary for the student to receive FAPE.

Parents never raised transportation as an issue. They did not mention it in either IEP meeting nor in any correspondence to the District. The IEP states that Student does not require transportation as a related service, and Parents never objected. There was extensive discussion about where Student would receive the services in her IEP, and parents toured the Early Childhood Center. Parents assumed the services would be provided at the Center at the time of the IEP meeting. Parents also assumed that a parent would ask about transportation if there was an issue. There was no discussion that the services would occur in the home. The parents acknowledge that the District informed them they could bring Student to the Center or the District would send a bus. It causes parents some concern to think about putting their three old child on a bus. The District's experience is that most parents of three year old students prefer to transport them to the Center themselves. If a parent raises a transportation concern, the District would have offered them transportation services.

The panel finds that the IEP appropriately did not include transportation as a related service. It further finds that if transportation were determined to be a necessary related service for Student, failure to include it in Student's IEP did not result in a denial of FAPE.

J. Least Restrictive Environment

There is a "strong congressional preference" under the IDEA for educating students in the least restrictive environment. *Rowley*, 458 U.S. at 202; *Carl D. v. Special School District*, 21 F.Supp.2d 1042, 1058 (E.D. Mo. 1998).

The District's IEP provides FAPE in the least restrictive environment. Once an IEP team has developed programming for a child, it must then determine placement based on the concept of least restrictive environment, which may vary from child to child. In considering least restrictive environment, the District considers what would be close to the typical experience by an early childhood student. In Student's case, it was determined that the least restrictive environment within which her services could be implemented is itinerant services at the Center. The District has typical peer models in its early childhood special education program. At St. Joseph, Student imitates and models her teacher and her speech pathologist, both adults. Most children are not in a full-day program in early childhood, and a vast majority of children with cochlear implants are served in their home districts.

There are no services provided for in Student's IEP that the District cannot provide in district. Even if it were determined that St. Joseph's IEP is an appropriate IEP for Student, the District can implement that IEP at its Early Childhood Center or at a typical preschool.

The panel finds that the District's IEP provides services in the least restrictive environment.

RIGHT TO REIMBURSEMENT

As the panel finds that the District has provided FAPE to Student, it is not necessary to reach concerns such as the appropriateness of the proposed private placement. *Burlington*, 471 U.S. 359, 370 (1985). To opine further about the appropriateness of the St. Joseph placement would be to provide an advisory opinion, which this panel is without authority to do.

However, while it is correct that private schools do not need to meet state education standards in order to be deemed an appropriate placement according to the U.S. Supreme Court in *Florence County School District Four v. Carter*, 510 U.S. 7, 14 (1993), it is not true that a private school placement is to be reviewed absent all considerations under the IDEA. The district court, in *Reese v. Board of Education*, 225 F.Supp.2d 1149, 1159 (E.D. Mo. 2002), provides a summary of cases where courts have held that the private school placement chosen by the parents must comply with IDEA requirements. The private placement must “at a minimum, provide some element of special education services in which the public school placement was deficient.” *Berger v. Medina City School District*, 348 F.3d 513, 523 (6th Cir 2003). While a “segregated environment does not disqualify schools that specialize in educating disabled children”, *Justin G. v. Board of Education*, 148 F.Supp.2d 576, 584, (S.D. Md. 2001), and clearly parents generally opt for a private placement that is segregated in the area of their child’s disability, mainstreaming must remain “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 [private] placement was appropriate.” *Reese, supra*, 225 F.Supp.2d at 1159-60, quoting from *M.S. v. Board of Education*, 231 F.3d 96, 105 (2nd Cir. 2000). Mainstreaming in the regular classroom environment to the maximum extent possible is not required by IDEA; rather the law requires mainstreaming to the maximum extent appropriate. *Beth B. v. Van Clay*, 282 F.3d 493, 499 (7th Cir. 2002).

Even if this panel had found the IEP not to provide FAPE, it does not follow that FAPE can only be provided for Student in a segregated environment. While there was no guarantee that a public school setting would have ultimately accommodated student, the School District should have had the opportunity, and to an extent has the duty, to try a less restrictive placement prior to a placement in a totally segregated environment. *T.F. v. Special School District*, 449 F.3d at 821; *Evans v. Dist. No. 17*, 841 F.2d 824, 832 (8th Cir. 1988).

It is clear that Petitioners did not have any intent to allow the District to attempt to implement its IEP regardless of the services offered. Parental zeal in ensuring the best possible result for Student does not mean the District is required to pay for the best possible result. *Slama, supra*, 259 F.Supp.2d at 882.

CONCLUSIONS OF LAW

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

1. The North Kansas City School District did not deny FAPE to Student by procedural errors.
2. The District's IEP provided FAPE to Student.
3. Because the District's IEP provided FAPE to Student, Petitioner's are not entitled to their requested reimbursement for their unilateral placement of Student at St. Joseph.

DECISION

The Panel finds unanimously that the Parents did not meet their burden of proof and find in favor of the North Kansas City School District in this matter. Pursuant to § 162.962 R.S.Mo., the following procedures apply to requests for judicial review:

1. Proceedings for review may be instituted by filing a petition in the state circuit court of the county of proper venue within forty-five (45) days after the receipt of the notice of the agency's final decision and are governed by Chapter 536, R.S.Mo., to the extent not inconsistent with other provisions of Chapter 162 R.S.Mo. or 34 C.F.R. Part 300.
2. The venue of such cases shall be at the option of the plaintiff, be in the Circuit Court of Cole County, or in the county of the plaintiff's residence.
3. You also have a right to file a civil action in federal or state court pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. § 1415(i)(2) and 34 C.F.R. § 300.512.