

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

_____, a minor, by and through her	)	
Parents, _____,	)	
	)	
Petitioners,	)	<b>Filed: 03/10/11</b>
v.	)	
MIDWAY R-I SCHOOL DISTRICT,	)	
	)	
Respondent.	)	
	)	
MIDWAY R-I SCHOOL DISTRICT,	)	
Petitioner,	)	
	)	
v.	)	
	)	<b>Filed: 03/14/11</b>
_____, by and on	)	
behalf of their daughter, _____	)	
Respondents.	)	

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

The Hearing Panel, after conducting the due process hearing on June 20-23, 2011, issues the following Findings of Fact, Conclusions of Law, Decision and Order:

**FINDINGS OF FACT**

The Hearing Panel makes the following Findings of Fact:

**The Parties**

1. \_\_\_\_\_ (“Student”), born in 20\_\_, is the minor child in this case. Student is the daughter of \_\_\_\_\_ (“Father,” “Mother” or “Parents”), all of whom have resided in the boundaries of the Midway R-I School District (“the District”) at all times relevant to this case. (Tr. 831-832).<sup>1</sup>

2. The District is a Missouri Public School District which is organized pursuant to Missouri statutes. The District is located in Cass County, Missouri and educates approximately 530 students, including 281 elementary school students. (2010-2011 Missouri School Directory).

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<sup>1</sup> Citations to the Transcript will be referenced as: Tr.[pg].

3. Lisa M. Sutherland and Daniel R. Cayou of Missouri Protection and Advocacy Services, 3100 Main Street, Suite 207, Kansas City, MO 64114, represented Student and her Parents.

4. Teri B. Goldman of Mickes Goldman, LLC, 555 Maryville University Drive, Suite 240, St. Louis, MO 63141, represented the District. Scott Kimble of the same law firm attended the first two days of the hearing.

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

Pamela S. Wright	Hearing Chairperson
Dr. Terry Allee	Panel Member (selected by the District)
Pamela Walls	Panel Member (selected by the Parents) <sup>2</sup>

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

6. Parents, through their attorneys, Lisa M. Sutherland and Daniel R. Cayou, requested a due process hearing by Complaint to the Department of Elementary and Secondary Education (“DESE”) dated March 10, 2011, which was received by DESE on the same date. (Ex. R-26 at 436; Ex. P-FF).<sup>3</sup> In the Complaint, the Parents allege the District failed to take into account the future needs for Student when the IEP team terminated Braille instruction in Student’s most recent IEP. (Ex. R-26 at 437-438). The Parents also invoked the “stay-put” protection of IDEA. (*Id.*).

7. On March 14, 2011, the District, through its counsel, Teri B. Goldman, filed a request for a due process hearing by Complaint dated March 14, 2011, which was received by DESE on the same date. (Ex. R-26 at 442; Ex.P-T). In this Complaint, the District seeks a declaration that its most recent re-evaluation is appropriate and therefore, the Parents’ request for an independent educational evaluation (“IEE”) should be denied. (Ex. R-26 at 443).

8. On March 21, 2011, the District filed its response in letter format to the Complaint filed by the Parents on March 10, 2011. (Ex. R-26 at 460). In the response, the District alleges IDEA does not require an IEP team to write an IEP based on future needs. (Ex. R-26 at 460-461).

9. On March 24, 2011, the Parents filed their Answer to the Complaint filed by the District on March 14, 2011. (Ex. R-26 at 483).

10. On March 24, 2011, the parties had a Resolution Meeting but they failed to reach a settlement.

11. On April 4, 2011, the Chairperson held a Pre-Hearing Conference with the attorneys. The parties agreed on hearing dates of June 20-23, 2011 and requested an extension of

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<sup>2</sup> Parents originally selected Fred Davis, who resigned for health reasons. Pamela Walls succeeded Mr. Davis.

<sup>3</sup> All references to the exhibits of the Parents will be cited as “Ex.P-[#]” and references to the District’s exhibits will be to “Ex.R-[#].”

the timeline to June 30, 2011.<sup>4</sup> The parties also reached an agreement regarding the consolidation of the two matters as well as the Issues for the Hearing Panel.

12. The Chairperson entered a detailed Scheduling Order on April 13, 2011 setting out the discussion at the Pre-Hearing Conference. (Ex. R-26 at 478-480). The Order also provided that each party would have 10.0 hours to present direct and cross-examination. (*Id.*).

13. On or about May 4, 2011, Mother e-mailed Shelbie Dalton, the District's Special Services Director, to inform her that she had scheduled an independent evaluation for Student with the Center for the Visually Impaired ("CCVI") for May 13, 2011 and requested that CCVI be permitted to conduct the evaluation at the District's elementary school. (Ex. R-23 at 394).

14. On or about May 5, 2011, Ms. Dalton responded to Mother's May 4, 2011 e-mail and informed her that the District would not permit CCVI to observe as the District had filed a due process request with respect to the independent evaluation issue. (Ex. R-23 at 394).

15. On or about May 10, 2011, the Parents, through their legal counsel, filed a Motion to Compel the independent evaluation by CCVI. (Ex. R-26 at 491-500). On or about May 16, 2011, the Parents through counsel filed an Addendum indicating that CCVI would not be conducting the IEE but Parents were actively seeking another entity to perform same. (Ex. R-26 at 512). On or about May 24, 2011, the District opposed the Motion to Compel. (Ex. R-26 at 514-604). On or about May 25, 2011, the Parents withdrew the Motion to Compel. (Ex. R-26 at 607-10).

16. The Chair closed the hearing as per the request of Parents and counsel.<sup>5</sup> (Tr. 7).

17. The Parents introduced Exhibits A-Z and AA-GG. (Tr. 978). The District objected to all the Exhibits except EE and X. (Tr. 979). All of Parents' Exhibits except C, D, Y and DD were admitted. (Tr. 979-988).

18. The District initially offered Exhibits 1-26. (Tr. 14). They were admitted without objection. (*Id.*). Later during the course of the hearing, the District offered four additional Exhibits that were admitted without objection: R-27 -- Resume for EW; R-28 --handwriting sample by Student; R-29 -- January 2011 Addendum regarding handwriting; R-30 --Resume for AW. (Tr. 117; 215; 216; 272).

19. The District presented its case first and called the following witnesses during its case-in-chief: Shelbie Dalton, Mother, EW and AW. The Parents presented the following witnesses in response to the District-initiated case: Shelbie Dalton, Nicole Hanlon and AW. With respect to the Parents' initiated case, the Parents presented the following witnesses during their case-in-chief: Gary Wunder, KS and Mother. The District presented the following witness: Shelbie Dalton.

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<sup>4</sup> The parties memorialized the request for the extension of the timeline in a signed Joint Motion for Extension.

<sup>5</sup> Dr. Fred Pellerito, the new Director of Special Services for the District as of July 1, 2011, was permitted to observe the hearing. (Tr.67).

20. At the close of the hearing on June 23, 2011, the parties jointly requested extension of the June 30, 2011 timeline to August 29, 2011. (Tr. 829). The parties agreed to have their Proposed Findings of Fact and Conclusions of Law filed no later than August 1, 2011. (Tr. 830).

21. On June 28, 2011, the Chairperson issued an Order memorializing the dates referenced in Finding of Fact (“FF”) 20.

22. The Hearing Panel issues its unanimous decision within the August 29, 2011 time line.

### **The Issues Heard by the Hearing Panel<sup>6</sup>**

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

- (a) Was the re-evaluation as reflected in Student’s Evaluation Report dated December 13, 2010 appropriate?
- (b) If the District does not prevail on the above issue, is Student entitled to an IEE at public expense?
- (c) Does the failure to include Braille instruction in the IEP dated February 22, 2011 result in the February 22, 2011 IEP not being calculated to provide free appropriate public education (“FAPE”)?
- (d) In making the decision to terminate Braille instruction, as per the February 22, 2011 IEP, was the District required to consider her future needs or use for Braille instruction?
- (e) If Student prevails on issues (c) and (d), what are the appropriate remedies?

### **BACKGROUND FACTS<sup>7</sup>**

#### **Student’s Disabilities**

24. Student has been diagnosed with oculocutaneous albinism; macular hypoplasia; nystagmus; exotropia and photophobia. (Ex. P-G and H at 27-29). These diagnoses present visual difficulties for Student in the form of light sensitivity; blurry, unclear vision; fatigue and uncontrollable movements of the eye. (Tr. 136; 139; 833-834). Student’s vision cannot be corrected with glasses. (Tr. 299). Her visual acuity is 20/240 in one eye and 20/280 in the other

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<sup>6</sup> These are the same Issues set out in the earlier referenced Scheduling Order issued by the Chairperson on April 13, 2011. (Ex. R-26 at 478-480). The parties agreed that the first two issues would be tried first, with the District having the burden of proof. (*Id.*). Parents would then proceed on the remaining issues. (*Id.*).

<sup>7</sup> We include more Background Facts than may be necessary but we recognize the opinion may very well be reviewed in the state or federal courts so a detailed Findings of Fact may be helpful at the higher level.

eye. (Tr. 833). Student is considered legally blind.<sup>8</sup> (Tr. 50; 121). She has an educational diagnosis on her IEP of Visual Impairment. (Tr. 49).

### **Student's Educational History:**

#### **Early Childhood – October 2005-September 2008<sup>9</sup>**

25. In October 2005 and in anticipation of Student's third birthday, the District initially evaluated her to determine her eligibility for special education services under the IDEA. (Ex. R-2 at 24-48; Tr. 869). After reviewing evaluation information, a multidisciplinary team determined Student met the eligibility criteria for visual impairment/blindness and, additionally, was eligible to receive special education services. (Ex. R-2 at 34).

26. Among the participants in the October 2005 meeting was Debbie Tone-Pah-Hote. (*Id.*). Ms. Tone-Pah-Hote was an employee of the Multi-District Program for the Visually Impaired ("Coop"). (*Id.*). The District has contracted, at times, with the Coop for services for its visually impaired students. (Tr. 16). The Coop also conducts evaluations and provides training. (Tr. 16-17). The Coop serves approximately 16 school districts in the Kansas City, Missouri metropolitan area. (Tr. 20).

27. On or about November 3, 2005, the District prepared an initial IEP for Student. The IEP provided for Student to receive 720 minutes per week of specialized instruction and 30 minutes of occupational therapy consultation. (Ex. R-2 at 35). The IEP reflected that, based upon Student's current and future reading and writing skills and needs, Braille was not required. (*Id.*, at 45). The IEP also provided for the use of magnification devices as needed and a desk slant or reading stand. (*Id.*, at 47).

28. From 2005 through the fall of 2008 when Student enrolled in the District's kindergarten, she received her IEP services through the Belton School District's early childhood special education program through a contractual arrangement with the District. (*See, e.g.*, Ex. R-2 at 24).

29. In December 2005, Ms. Tone-Pah-Hote, conducted a functional vision assessment of Student. (Ex. R-3 at 49). At the time, Student was able to use her vision efficiently and walked between two ribbons 18 inches apart without stepping on the ribbon. (*Id.*, at 52). Ms. Tone-Pah-Hote recommended preferential seating and thickened and darkened lines for contrast. (*Id.*, at 53).

30. In January and February 2006, Ms. Tone-Pah-Hote conducted an orientation and mobility evaluation. (*Id.*, at 54-58). Her report noted that Student turned her head toward sources of light and hesitated when moving from a dimly to brightly lit area. (*Id.*, at 56). Student

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<sup>8</sup> An individual must have a visual acuity of 20/200 in the better eye with best correction to be considered legally blind. Tr. 118-19. Additionally, the individual must have a field of less than 20 degrees. Tr. 119. Field is what an individual can see peripherally and in front. Tr. 118.

<sup>9</sup> Prior to the age of three, Student received services from Missouri's First Steps program for her diagnosed conditions. *See, e.g.*, R-1 at 7-16.

was able to locate a classroom door and a couch and chair within ten feet. (*Id.*). With respect to depth perception, Student was able to determine which object was closer. (*Id.*). Student was able to see and go around other students and avoid other children and objects while walking. (*Id.*). Student also had sufficient vision to travel safely indoors. (*Id.*). She also was able to recognize familiar objects through the use of her vision. (*Id.*, at 57). Additionally, Student was able to walk up a ramp independently without using an available handrail, to run smoothly, to line up with other students and remain in line while walking, to independently walk to the playground and in hallways and to ascend and descend stairs using a handrail. (*Id.*). Because of Student's visual abilities, Ms. Tone-Pah-Hote did not recommend orientation and mobility training. (*Id.*, at 58).

31. In February 2006, Ms. Tone-Pah-Hote, Amie Brown, and EW, Coop employees, conducted a learning media assessment of Student in which Student's primary learning channel was visual. (*Id.*, at 60). A learning media assessment is an objective process of systematically selecting learning and literacy media for students with visual impairment. (Ex. R-6 at 154). That assessment helps the IEP team to make deliberate and informed decisions with respect to the range of instructional media needed to facilitate learning for a visually impaired student. (*Id.*)

32. On or about February 17, 2006, the District reconvened Student's IEP team to review and revise Student's IEP. (Ex. R-3 at 63). Mother, Ms. Tone-Pah-Hote, and EW were among those in attendance. (*Id.*, at 78). The IEP team added pre-Braille goals to the IEP and 30 minutes every other week of pre-Braille instruction. Pre-Braille involved teaching Student to use her tactile skills to identify shapes. (Tr. 617). The IEP reflected that the IEP team considered Student's current and future needs when adding pre-Braille. (Ex. R-3 at 61, 64 and 75). The IEP also included the use of magnification devices. (*Id.*, at 77).

33. AW, another Coop employee, began providing pre-Braille instruction to Student during the time she was enrolled in the Belton early childhood special education program. (Tr. 275).<sup>10</sup>

34. On or about November 10, 2006, the District again convened Student's IEP team to review and revise her IEP. (Ex. R-4 at 97). Mother and AW were among those who attended and participated. (Ex. R-4 at 97 & 110; Tr. 22). The present level of the IEP noted the significant gains Student had made. (Ex. R-4 at 99). The IEP also provided for Student to receive 30 minutes of pre-Braille instruction and to have access to Brailled books. (Ex. R-4 at 97, 107; Tr. 617.)

35. Because Student attempted to use her vision rather than her fingers to identify shapes during pre-Braille instruction, she did not progress as well as anticipated on her pre-Braille goals. (Tr. 618-21; Ex. R-4 at 111-12).

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<sup>10</sup> As noted later in this opinion, AW also provided Student with Braille instruction during Student's first and second grade years but not during her kindergarten year. Tr. 275.

36. In October 2007, Dr. Denise Hug, a pediatric ophthalmologist, evaluated Student and determined her visual acuity with both eyes was 20/200. (Ex. R-5 at 115). Dr. Hug also noted that Student was controlling the intermittent exotropia. (*Id.*). Because Student's best vision was in the 20/200 range, Dr. Hug recommended preferential seating, enlarged materials and the use of low vision devices. (*Id.*). Dr. Hug did not recommend Braille instruction. (*Id.*).

37. On or about November 1, 2007, the District reconvened Student's IEP team. (Ex. R-5 at 116). Mother and AW were among those participating. (*Id.*, at 116). The IEP present level reflected that Student had met all of her prior IEP goals, was able to imitate Braille shapes and had increased her ability to match tactile shapes and textures. (*Id.*, at 118). Student, however, required much prompting to engage in pre-Braille activities without using her vision. (*Id.*, at 121, 136, 138; Tr. 629). The IEP provided for Student to receive 705 minutes of specialized instruction per week and, based on her current and future needs, 15 minutes of pre-Braille instruction twice a month. (*Id.*, at 116; Tr. 626). The IEP also provided for the use of magnification devices and a desk slant. (*Id.*, at 129).

38. On or about January 4, 2008, ophthalmologist Dr. Patricia Murray conducted a low vision evaluation of Student. (Ex. R-5 at 139; Tr. 630). Student's near visual acuity was 20/100 in her left and right eyes and her near acuity using both eyes was 20/60 at 3-4 inches. (*Id.*, at 140). Because Student appeared to be a visually oriented person, Dr. Murray recommended the use of enlarged materials up to 12-14 point font and magnification. (*Id.*, at 141-42).

39. On or about April 10, 2008, the District convened Student's multidisciplinary team to review the results of a re-evaluation conducted in preparation for Student's entry into kindergarten in the fall. (Ex. R-6 at 147). Mother and AW were among those in attendance. (*Id.*, at 161). The evaluation report reflected that Student's gross motor skills were age appropriate and Student was able to negotiate playground equipment and run, climb and swing. (*Id.*, at 149). She was able to pedal a tricycle on the playground and showed no concerns with balance. (*Id.*) Her fine motor skills also were age appropriate and she was able to use regular scissors and draw well. (*Id.*, at 150).

40. The evaluation report also included the results of a functional vision assessment completed by AW. (Ex. R-6 at 151-54; Tr. 280, 636). That assessment demonstrated that, at a viewing distance of 16 inches, Student had near visual acuity of 20/250. (*Id.*, at 151). Her distance acuity, using both eyes, was at 20/200. (*Id.*). At 10 feet, Student was able to recognize and imitate gross body movements. (*Id.*). During testing, she also was able to use eye movements to track and shift attention to different objects. (*Id.*, at 152).

41. AW also completed a learning media assessment as part of the 2008 re-evaluation. (*Id.*, at 154). At that time, Student's primary learning mode was visual for almost every task. (*Id.*, at 155). The evaluation report further reflected that, during Braille instruction, Student preferred to visually look at the activities rather than to identify items tactually. (*Id.*). Although eye fatigue did not appear to be an issue at that time, AW recommended that the District monitor for eye fatigue as Student progressed educationally. (*Id.*). On the administered Oregon Project assessment, Student showed growth in all areas. (*Id.*, at 158). At the time of the evaluation, Student was performing in the regular classroom at an above average rate. (*Id.*, at 153). After reviewing the evaluation information, the multidisciplinary team concluded that

Student met eligibility criteria to be identified as visually impaired/blind and continued to be eligible for IEP services. (*Id.*, at 161).

42. In May 2008, the District contracted with Connie Zuber to serve as Student's teacher of the visually impaired during the 2008-09 school year, Student's kindergarten year. (Ex. R-7 at 169; Tr. 275, 449, 636).

### **Kindergarten School Year: 2008-2009**

43. During the 2008-09 school year, Student attended the Midway R-I School District as a kindergarten student. (Ex. R-9 at 230).

44. On or about September 26, 2008, the District reconvened Student's IEP team. (Ex. R-8 at 176). Mother attended that meeting. (*Id.*). The IEP present level noted that Student continued to need encouragement to not use her eyes when reading and writing Braille. (*Id.*, at 178). Based on Student's current and future needs, that IEP provided for 60 minutes of Braille instruction per week and magnification devices and preferential seating. (*Id.*, at 181; 187; 191).

45. In October 2008, Dr. Hug again evaluated Student. (*Id.*, at 192). Dr. Hug noted an increase in the frequency of Student's intermittent exotropia. (*Id.*). Dr. Hug recommended the use of low vision devices for Student but did not recommend Braille. (*Id.*, at 193).

46. In April 2009, Student's multidisciplinary team, after conducting a review of existing data, recommended another re-evaluation. (Ex. R-9 at 194). As a result, AW conducted another functional vision assessment in late April 2009. (*Id.*, at 197; Tr. 282). During that assessment, Student was able to copy letters from the top of a sheet of elementary lined paper, read and/or spell a list of words in 18 point from 3-4 inches, move around the classroom with ease and color independently from a distance of 2-3 inches. (*Id.*, at 197-198). She also was able to line up for lunch, follow the class to the cafeteria, get her lunch and sit at the table. (*Id.*, at 198). At that time, Student's acuity had not changed from 2008 and AW's educational recommendations, therefore, remained the same. (*Id.*).

47. In April 2009, AW began to form a professional opinion that Student might not require Braille instruction.<sup>11</sup> (Tr. 639-40).

48. As part of the 2009 evaluation and in May 2009, Delia Hubbard, a District employee, observed Student in her physical education class. (Ex. R-9 at 200). During that observation, Student was able to independently climb on a mini-trampoline, see others jump and count for them, and attempt to hit a softball. (*Id.*). She also was able to navigate through the P.E. centers. (*Id.*). Ms. Hubbard conducted a second observation during a reading and cutting activity. (*Id.*, at 201). During that observation, Student was able to color and cut out flowers, place them on a bulletin board and keep up with her peers on an academic assignment. (*Id.*).

49. As part of the Spring 2009 re-evaluation, a Coop vision consultant conducted an orientation and mobility assessment. (Ex. R-9 at 202). During that assessment, Student was able

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<sup>11</sup> Note that AW did not teach Student during Kindergarten. Thus, she got a fresh look at Student's progress (or lack of progress) in Braille instruction when AW participated in the re-evaluation in the spring of 2009.

to scan for and locate objects without prompting. (*Id.*, at 203). Student also did not use the protective techniques most persons with low vision tend to use. (*Id.*). She was able to independently locate pertinent areas of the classroom without making contact with people or objects in her path, navigate relevant areas of the school, negotiate hallways without difficulty, read and identify words and pictures on the wall, and locate her bus and seat at the end of the school day. (*Id.*, at 203-05).

50. Student's classroom teacher completed a questionnaire as part of the orientation and mobility assessment. (Ex. R-9 at 208). On that questionnaire, the teacher reported that Student did not experience any problems either indoors or outdoors. (*Id.*). She further noted that Student's visual impairment did not impact her participation in the classroom. (*Id.*).

51. On or about May 22, 2009, Student's IEP team convened to review and revise her IEP. (Ex. R-9 at 212). Mother was present at that meeting. (*Id.*, at 229). Nicole Hanlon, with Rehabilitation Services for the Blind, also participated. (*Id.*, at 212, 229). The IEP present level noted that Student had performed at an average kindergarten level. (*Id.*, at 213). The present level also reflected that Student required enlarged materials and modifications for some activities. (*Id.*). The present level also noted that Student still needed to be encouraged to use her magnifier at school. (*Id.*). The IEP specifically noted Parents' desire that Student continue to learn Braille, with the family to practice on a daily basis at home to help Student achieve fluency.<sup>12</sup> (*Id.*). Based on Student's current and future needs, that IEP provided for Student to receive Braille instruction for 60 minutes per week in the resource room and 120 minutes of Braille practice in the regular classroom. (*Id.*, at 224; Tr. 642).

52. On or about May 27, 2009, the District convened a multidisciplinary team to review the results of the recently completed re-evaluation. (*Id.*, at 230). After reviewing the results of the re-evaluation, the team determined that Student continued to meet the eligibility criteria of visual impairment/blindness. (*Id.*, at 250). Mother, Nicole Hanlon and Shelbie Dalton, the District's Special Services Director, participated in that meeting. (*Id.*, at 252).

### **First Grade School Year: 2009-2010**

53. During the 2009-10 school year, Student attended first grade in the District. ( Ex. R-10 at 256).

54. At AW's recommendation and on or about September 23, 2009, the District again convened Student's IEP team. (Ex. R-10 at 255; Tr. 644). The team reconvened in September, even though a meeting was held in May, because AW wanted to propose an increase in Braille instruction. (Tr. 644). Although AW had doubts about whether Student should continue to receive Braille instruction, she recommended an increase at that time because Student had only begun to learn to read print. (Tr. 645). Mother, Ms. Dalton and AW were among those who participated. (Ex. R-10 at 255). In the present level, the IEP noted that Student had adjusted well to first grade and her teacher had moved her desk to the front and center of the classroom. (*Id.*, at 256). In September 2009, Student still needed to be encouraged to use her magnifier and other low vision tools. (*Id.*, at 256; Tr. 647).

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<sup>12</sup> We question whether this practice occurred on a daily basis. (Tr. 869-871).

55. The September 2009 IEP present level also noted that Student had completed some of the kindergarten Braille curriculum but still needed encouragement to use Braille correctly. (Ex. R-10 at 256). At the time, Student tended to visually, rather than tactually, read Braille. (*Id.*). Based on Student's current and future needs, the September 2009 IEP increased Student's Braille instruction from 60 minutes one time per week to 60 minutes two times per week. (*Id.*, at 267; Tr. 652). AW provided that instruction in the resource room. (*Id.*, at 270; Tr. 652). The IEP also called for Student to receive an additional 90 minutes per week of Braille guided practice. (Ex. R-10 at 270).

56. The December 2009 IEP progress reports showed that Student was making "slow progress" with respect to her Braille goals. (*Id.*, at 275).

57. In March 2010, Student was evaluated by Dr. Amy Sullivan, an ophthalmologist. (Ex. R-11 at 277). Dr. Sullivan's report showed Student's unaided acuity for her right eye was 20/300 and for her left eye was 20/250. (*Id.*). Dr. Sullivan recommended enlarged near work and low vision tools to assist Student in achieving her academic goals. (*Id.*). Dr. Sullivan did not recommend Braille. (*Id.*).

58. On or about May 17, 2010, the District convened Student's IEP team. (Ex. R-11 at 281). Parents, Ms. Dalton, Ms. Hanlon and AW were among those who participated. (*Id.*, at 281, 298). The IEP present level noted that Student was struggling with Braille fluency and was reluctant to participate in Braille instruction. (*Id.*, at 282). Instead of using her tactile skills to discriminate Braille shapes, Student would guess. (*Id.*; Tr. 657). Although Student had just completed first grade, she was only then completing the kindergarten Braille curriculum. (Ex. R-11 at 282). Based on her current and future needs, the May 2010 IEP provided for Student to receive, in second grade, 120 minutes per week of Braille instruction in the resource room and 90 minutes a week of Braille guided practice.<sup>13</sup> (*Id.*, at 295).

### **Second Grade School Year: 2010-2011**

59. On or about September 2, 2010, AW, Ms. Dalton and Ms. Hubbard held an informal meeting with Mother. (Ex. R-12 at 299). The District requested the meeting due to AW's concerns about Student's Braille progress and her resistance to instruction in that area. (*Id.*; Tr. 23-24, 658). At that time, AW was concerned that Student was not receiving any benefit from the Braille instruction and was missing regular classroom instruction as a result.<sup>14</sup> (Ex. R-12 at 299; Tr. 662). Moreover, Student had regressed in her Braille skills from the end of first grade. (Tr. 658-59). The Parents had not been able to practice Braille with Student as much as the Parents would have liked to do. (Tr. 716).

60. During the September 2nd meeting, AW informed Mother that Student was primarily a sight reader and was only secondarily a Braille reader. (Ex. R-12 at 299). Ms. Dalton explained that the meeting was being held to inform Mother about Student's progress and

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<sup>13</sup> This IEP continued accommodations/modifications included in previous IEPs: large print; magnification tools; preferential seating near writing boards; adaptation of worksheets; reading when writing on the board. (Ex. R-11 at 290-291).

<sup>14</sup> The time spent on Braille instruction outside of the classroom resulted in the loss of instruction in the subjects of writing, science and social studies. (Tr. 773-775; 933-935).

the missing classroom instruction. (*Id.*). Mother became upset during the meeting and insisted that Student continue to receive Braille.<sup>15</sup> (*Id.*). At the end of the meeting, the District agreed to take data for four weeks to monitor Student's progress. (*Id.*; Tr. 24).

61. For the next approximately four weeks, Student's second grade teacher, KS, observed Student and took data as agreed. (Ex. R-12 at 301). Student's paraprofessional, SY, also assisted in the process. (Ex. R-24 at 397-400). The data that was collected showed that, on some occasions, Student either did not or refused to use her magnification tools. (Ex. R-12 at 301; Tr. 726). In addition, Student did not request help or to use the available equipment to enlarge font. (Ex. R-12 at 301). During the time when data was taken, Student independently completed and received 100% on a worksheet with 11 point font. (*Id.*, at 302). The data further reflected that, even though Student was capable of completing her homework, her mother sometimes scribed for her. (*Id.*, at 304).

62. SY's data reflected that, on several occasions, Student communicated that she did not like and/or hated Braille and, on one specific occasion, stated "Why can't I read it with my eyes? I can see it." (Ex. R-24 at 397). Student also reported to SY that her mother had told her she had to learn Braille but not to ask why. (*Id.*). She also informed SY she did not practice her Braille. (*Id.*, at 397-98).

63. In October 2010, the District reconvened Student's multidisciplinary team and conducted a review of existing data. (Ex. R-13 at 306-09). Mother, KS, Ms. Dalton and AW were among those persons who participated. (Ex. R-13 at 308; Tr. 284). AW recommended additional functional vision and learning media assessments.<sup>16</sup> (Tr. 284). She did not recommend an orientation and mobility assessment as there were no concerns in that area.<sup>17</sup> (Tr. 285). She also did not recommend an assistive technology assessment because one was not needed in light of the information already available and Mother did not request assessment in that area. (Tr. 945). After reviewing existing data, the team concluded that the following assessments were needed: functional vision assessment, learning media assessment and low vision evaluation. (Ex. R-13 at 309; Tr. 25). No one, including the Parents, requested any additional assessment. (Tr. 25-26).

64. On or about October 15, 2010, the District provided Mother with a written notice proposing re-evaluation. (Ex. R-13 at 310). Mother elected to take the form home to discuss it with her husband. (*Id.*; Tr. 26, 908).

65. On or about October 20, 2010, the Parents provided informed written consent to the proposed re-evaluation. (Ex. R-13 at 310; Tr. 27).

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<sup>15</sup> Ms. Dalton offered to meet with Mother the next day to discuss Student's progress in Braille but Mother never followed up with a call or meeting. (Tr. 973).

<sup>16</sup> Mrs. Willeke initiated the re-evaluation process because she wanted an update on Student. (Tr. 21). Student and Mrs. Willeke were struggling with the Braille instruction and as a result, Mrs. Willeke wanted to see if she was using the wrong approach. (Tr. 21).

<sup>17</sup> Because of her age, Student did not go out into the community by herself such as crossing streets or highways. (Tr. 308; 401-402). Student was also getting around her classroom and the school without difficulty. (Tr. 308). Therefore, contrary to the arguments advanced by the Parents in their Proposed Findings of Fact and Conclusions of Law, Student did not require an orientation and mobility assessment to be included in the re-evaluation.

66. On or about December 1, 2010, Student was evaluated by Dr. John Metzger at Alphapoint Association for the Blind. (Ex. R-14 at 311). The District recommended Dr. Metzger's functional vision evaluation. (*Id.*). In his report, Dr. Metzger noted that Student was reading at grade level, was doing well in school and should continue to do so with proper visual aids and considerations.<sup>18</sup> (*Id.*, at 311-12).

67. On or about December 2, 2010, the District provided the Parents with a notification for a meeting to review the re-evaluation results. (*Id.*, at 313).

68. On or about December 13, 2010, Student's IEP team convened to review the results of the re-evaluation. (Ex. R-15 at 314; Tr. 30). Parents, Ms. Dalton, KS, AW, Ms. Hanlon and EW were among those in attendance. (Ex. R-15 at 355; Tr. 28-29, 35, 72 153). The evaluation report that was prepared reflects the results of the various assessments that were completed. (Ex. R-15 at 314).

69. The report includes the results of a functional vision assessment that AW conducted in November 2010. (Ex. R-15 at 371-20; Tr. 32). The functional vision assessment examined visual acuity, visual responses to light and objects, peripheral vision, color vision, contrast discrimination skills, sensitivity to light, and visual perception. (Ex. R-15 at 317-20).

70. The report also reflects AW's classroom observations of Student. (*Id.*, at 321-322). During that observation, Student was able to follow all instructions and participate in the P.E. games. (*Id.*, at 321). During her Tier II reading group, Student did not use her magnifier and was able to read a book with 18 point font with little to no difficulty. (*Id.*, at 322).

71. The report also includes the results of the learning media assessment conducted by EW. (*Id.*, at 323-26). EW used observation and a reading inventory to assess Student's ability to access printed material. (*Id.*, at 323). EW's assessment notes that Student used both large and regular print books in her classroom and that the regular education teacher, KS, reported Student progressed in the second grade curriculum without difficulty. (*Id.*).

72. As part of the learning media assessment, EW observed Student in her regular education classroom. (*Id.*). During that observation, Student's working distance was about 6 inches. (*Id.*). When KS wrote on the board, she wrote using 2-4 inch enlarged letters. (*Id.*). Student sat six to eight feet from the board and appeared to be able to read what KS wrote. (*Id.*; Tr. 134-35). When a different teacher wrote on the board using smaller letters, Student appeared to auditorially rely on the teacher provided information rather than the text on the board. (*Id.*; Tr. 134-35). EW observed that Student did exhibit some behaviors that might indicate visual fatigue. (*Id.* at 324; Tr. 135-36). She also observed that Student did not use any of the magnification devices available to her, such as the CCTV or dome magnifier, and Student did not appear to have a need for those.<sup>19</sup> (Tr. 137-38). In EW's professional opinion, Student's

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<sup>18</sup> Dr. Metzger's report, consistently with the reports from other optometrists or ophthalmologists who have examined Student, does not contain a recommendation for Braille instruction. We recognize, however, that the medical personnel: (a) may not have been asked to render an opinion on the subject or (b) may have felt the issue was best left for the schools to resolve.

<sup>19</sup> Student has indicated to AW that she did not need these devices. (Tr. 331). Similarly, she does not use her line reader unless encouraged to do so. (Tr. 337). Student refuses to use the slant board. (Tr. 337-340). AW also

primary learning mode appeared to be visual, with auditory being secondary and tactile being tertiary. (*Id.*, at 325; Tr. 150).

73. EW also administered an individual reading inventory, the John's, to assess Student's ability to read printed material and to determine the best reading medium for her. (Ex. R-15 at 325; Tr. 34, 143). On a first grade word list with 12 point font, Student scored 18 of 20. (Ex. R-15 at 325). She scored 17 of 20 on a second grade word list. (*Id.*). On each, her reading distance was approximately four inches. (*Id.*). EW also used larger print for comparison. (Ex. R-15 at 325; Tr. 144). On the first grade enlarged list, Student scored 19 of 20 and 16 of 20 on the second grade list. (Ex. R-15 at 325). With respect to comprehension, Student was able to read 78 words per minute with one miscue on an 18 point first grade reading passage but scored 100% on comprehension. (*Id.*). On a second grade passage, she read 71 words per minute. (*Id.*). Based on the results of her assessments, EW concluded that there appeared to be little difference in Student's performance when reading first grade passages in regular or large print. (Ex. R-15 at 325; Tr. 145). In EW's professional opinion, Student was able to access curriculum materials using either regular or large print materials. (Ex. R-15 at 325).

74. EW also tested Student's Braille reading skills.<sup>20</sup> (*Id.*). On a pre-primer word list, Student was only able to read 9 of 20 words successfully. (*Id.*; Tr. 148). Consistent with standard protocol and because Student did not score at 90% or better on that list, EW did not administer the higher level reading passages. (*Id.*). Based on this portion of the evaluation, EW concluded that Braille was not an efficient method for Student to gain access to school curriculum. (Ex. R-15 at 325-26).

75. EW additionally assessed Student's writing ability. (Ex. R-29). Student did not have any difficulty with a task in which she was asked to copy words and definitions from her large print science text book. (*Id.*). In EW's professional opinion, Student was able to write the words at a speed commensurate with her classmates and her handwriting compared favorably to those students. (*Id.*; Tr. 152).

76. During the December 13, 2010 meeting, the Parents and their invitees were given the opportunity to participate in the discussion that occurred. (Tr. 35-36). Neither the Parents nor their advocates raised any concerns with respect to the appropriateness of the evaluations that were reviewed. (Tr. 291). Moreover, neither the Parents nor their advocates requested any additional assessments, including one in the area of assistive technology. (Tr. 945). After the various assessments and observations were reviewed and discussed, the team concluded that Student continued to meet eligibility for visual impairment/blindness. (Ex. R-15 at 334; Tr. 35).

77. On or about December 21, 2010, the District provided the Parents with written notification for an IEP meeting to be held on January 10, 2011. (Ex. R-16 at 336). Because of

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testified that in response from a suggestion by Dr. Metzger, the District purchased a monocular (like a telescope) in April but the teachers did not get a chance to instruct Student on it before school ended. (Tr. 331-332).

<sup>20</sup> The purpose of the test was to see if Braille was the best media for her to learn. Thus, contrary to the position taken by the Parents in their Proposed Findings of Fact and Conclusions of Law, EW did not need the number of Braille contractions that Student could read or write, her finger strength for Braille to draw a conclusion as to whether Braille was the appropriate media for Student.

inclement weather, the meeting had to be rescheduled to January 19, 2011 and a new notification was provided to the Parents. (*Id.*, at 336-37; Tr. 37).

78. On or about January 19, 2011, the District convened Student's IEP team to review and revise her IEP. (*Id.*, at 338). The Parents, Ms. Dalton, Ms. Hanlon, AW, EW, KS and Rhonda McMillen, the Parents' advocate, were among those who participated. (*Id.*, at 361; Tr. 37). At one point during the meeting, Ms. McMillen indicated that she was unable to continue participation. (Ex. R-16 at 338; Tr. 38). The Parents then indicated they did not want to continue their participation without Ms. McMillen. (*Id.*; Tr. 38). The team, therefore, adjourned and scheduled a new meeting to continue development of the IEP.

79. The January 2011 IEP present level noted that Student continued to resist the use of Braille. (Ex. R-16 at 347, 390). The IEP also noted that Student was able to read 10 words per minute using Braille compared with the ability to read 78 words per minutes with 100% comprehension when using print.<sup>21</sup> (*Id.*, at 339, 353). At the meeting, EW explained that the font size Student used in the classroom was comparable to that of her same aged peers and Student took longer to complete assignments using Braille. (*Id.*, at 340).

80. The team also discussed that Student did not use her available magnification aids in the classroom and was nevertheless able to achieve at a level that exceeded or satisfied grade level expectations. (*Id.* at 343). The IEP present level further noted Student did not use the CCTV or other magnification devices at school unless required to do so. (*Id.*, at 346). As the team discussed the use of Braille, EW advanced her opinion that Student read print better than Braille and would never advance as far with Braille as she did with print. (*Id.*, at 343).

81. On or about January 24, 2011, the District provided the Parents with notification of an IEP continuation meeting for February 2, 2011. (*Id.*, at 364). Because of inclement weather, the meeting was not held and an additional notification was sent for a meeting on February 22, 2011. (*Id.*, at 364-65).

82. On or about February 22, 2011, the District convened Student's IEP team to complete the IEP process begun on January 19. (*Id.*, at 367). The Parents, Nicole Hanlon, Rhonda McMillen, AW, EW, KS and Ms. Dalton were among those who participated. (*Id.*; Tr. 40). Gary Wunder, a parent advocate from the Federation of the Blind, also attended at the Parents' invitation. (Ex. R-16 at 367).

83. During the meeting, the team discussed the need for Braille. (*Id.*). District staff informed the team that Student's slow progress in Braille was due, in part, to her resistance to instruction in that area. (*Id.*, at 368). AW stated her professional opinion that Student did not need Braille to be successful. (*Id.*). After discussion, AW recommended that the IEP team remove Braille instruction from Student's IEP based on her classroom progress, the doctor's reports, and the recently completed re-evaluation. (Tr. 664). EW agreed with that

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<sup>21</sup> Form A: Blind and Visually Impaired included in the January 2011 IEP also adds: "Her reading distance is approximately 4 inches. [Student] is able to write at a speed commensurate with her peers. She is able to complete writing tasks legibly and efficiently when compared to her peers.[Student] is able to complete classroom assignments with large print materials. She reads print at an adequate rate with needed accuracy and comprehension and is able to use print to access general education curriculum. " (Ex R-16 at 353).

recommendation. (Tr. 666). As a result of those recommendations and based on Student's current and future needs, the team proposed a new IEP that included a goal for Student to demonstrate the use of low vision devices in the classroom. (Ex. R-16 at 359). The team further proposed 90 minutes of consultation two times a month in the regular classroom. (*Id.*, at 356-57). The IEP did not include any instruction in Braille. (*Id.*).

84. At some point during the February 22nd meeting, the Parents refused to continue to participate because of their disagreement with the decision to remove Braille. The team continued the meeting, after the Parents' departure, and completed the IEP process without them. (Ex. R-16 at 362; Tr. 41).

85. During the meeting and prior to their premature departure, the Parents gave Ms. Dalton a letter in which they stated they were requesting an IEE based on disagreement with the District's recently completed re-evaluation. (Ex. R-17 at 373; Tr. 78.) In that letter, however, the Parents did not articulate a specific disagreement with the District's evaluation but, instead, stated a disagreement with the team's decision to remove Braille. (Ex. R-17 at 373).<sup>22</sup>

86. On or about February 25, 2011, the District provided the Parents with two written notices of action in which the District proposed removing Braille instruction and refused the Parents' request to keep Braille instruction. (Ex. R-18 at 374-75).

87. On or about March 2, 2011, Ms. Dalton corresponded with the Parents in response to their request for an independent evaluation. (Ex. R-19 at 374; Tr. 43). Ms. Dalton informed the Parents that the District was considering whether to grant their request for an independent evaluation or whether to initiate due process. (*Id.*). Ms. Dalton provided the Parents with a copy of the District's independent evaluation policy and procedures and a list of potential evaluators. (*Id.*, at 376).

88. On that same date, Ms. Dalton attempted to converse with Mother to determine the basis for the Parents' disagreement with the District's evaluation but Mother refused to provide an explanation. (Tr. 144).

89. On March 3, 2011, Ms. Dalton corresponded with the Parents and informed them of the District's decision to initiate due process. (Ex. R-19 at 385; Tr. 45).

## **CREDIBILITY OF WITNESSES**

### **Shelbie Dalton**

90. At the time of her testimony, Ms. Dalton had been employed as the District's Director of Special Programs for three years. (Tr. 12). Ms. Dalton obtained her Bachelor's degree in elementary education with an emphasis in special education. (Tr. 13). Ms. Dalton also has a Master's degree in higher education administration as well as a specialist's degree in

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<sup>22</sup> The District has taken issue with this "pre-prepared" letter but the Parents had reason to conclude from the evaluation results meeting in December 2010 and the previous IEP meeting in January 2011, the District might recommend the discontinuation of Braille instruction. (Tr. 95-96;102). Thus, we decline to assign any sinister motive by the Parents for the drafting of the letter ahead of the meeting on February 22, 2011.

special education administration. (*Id.*). Ms. Dalton has certifications for grades 1-9 in Learning Disabilities, a principal certification for grades K-8 and special education director certification for grades K-12. (*Id.*).

91. Ms. Dalton became familiar with Student's educational program during the summer of 2008, the summer before Student entered kindergarten. (Tr. 18). Since that time, Ms. Dalton has attended all of Student's IEP meetings as well as all of the meetings to discuss her educational evaluations. (Tr. 19).

92. Ms. Dalton testified very credibly to the following:

- a) Although not obligated to do so under the IDEA, the District re-evaluated Student more than every three years. (Tr. 20). Based upon Ms. Dalton's knowledge of assessment in the area of low vision, the functional vision assessment and the learning media assessment conducted by AW and EW were appropriate tools to use for the re-evaluation and were administered by knowledgeable people.<sup>23</sup> (Tr. 34-35, 47).
- b) During the December 13, 2010 re-evaluation meeting, the Parents did not express any disagreement with the way in which the re-evaluation was conducted nor did they express disagreement with the results of the testing that had been completed. (Tr. 36). The Parents mentioned nothing about any assessment being too short or too brief. (Tr. 945). Additionally, neither the Parents nor their advocates expressed disagreement with the re-evaluation process or the results of the re-evaluation during the IEP meetings held on January 19 or February 22, 2011. (Tr. 38, 41).
- c) The District used a variety of assessment tools and strategies to gather relevant functional development and academic information about Student for purposes of its 2010 re-evaluation. (Tr. 46). The re-evaluation included information provided by the Parents and information related to enabling Student to be involved in and access the general curriculum. (*Id.*). The December 13, 2010 re-evaluation used tools and strategies to help the team determine the content of Student's future IEPs. (*Id.*). Finally, the re-evaluation was sufficiently comprehensive to identify all of Student's special education and related service needs. (Tr. 47-48).
- d) The IEP completed in February 2011 complied with IDEA requirements and provided Student with a free and appropriate public education in the least restrictive environment. (Tr. 952-53).

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<sup>23</sup> Contrary to the position taken by the Parents in their Proposed Finding of Facts and Conclusions of Law, we conclude that Ms. Dalton properly relied upon the expertise of AW and EW in conducting the re-evaluation. This is especially true considering the 2010 functional vision assessment accurately reflected Student's functional vision performance within the school setting. (Tr. 32).

- e) If the District was able to implement the 2011 IEP, Student would continue to receive meaningful educational benefit without Braille instruction. (Tr. 953). The decision to remove Braille instruction took into account Student's future educational needs. (*Id.*).
- f) In her professional opinion, Mother's desire that Student have regular print, large print and Braille all available to her as Student gets older is not feasible or realistic for her. (Tr. 946). There is nothing to prevent her IEP team in the future to look at an e-reader type device to adjust the print size or type face. (Tr. 948).
- g) Ms. Dalton also expressed concerns about the missed class time when Student had Braille instruction. (Tr. 949). Ms. Dalton also had reservations about trying to incorporate the Braille into the classroom so that regular instruction would not be missed: (1) Student does not want to be seen as different and (2) she is not proficient in Braille at this point to have her textbooks reworked in Braille. (Tr. 950).

### **Mother's Testimony**

93. Mother testified ( Tr. 72; 831) with mixed credibility as follows:

- a) Mother consented to the December 13, 2010 re-evaluation. (Tr. 74). Mother expressed concerns regarding the assessments used as part of the December 13, 2010 re-evaluation process. (Tr. 73). Mother stated she questioned EW regarding the learning media assessment and the font sizes that had been used in conducting the assessment. (*Id.*). However, she acknowledged she was comfortable with the explanation she received. (*Id.*). Mother also testified she raised concerns regarding the Braille portion of the assessment as she felt it was very brief and did not feel complete. (*Id.*). She explained she felt as though there was a lot of material regarding Student's ability to read print, but once it was determined Student could not read the pre-primer Braille, that portion of assessment stopped. (Tr. 74). Mother acknowledged EW had explained the protocol associated with testing Braille that dictated she cease that portion of the assessment. (*Id.*).
- b) Mother testified Student needed orientation and mobility to be successful in the future but conceded she did not request for assessment in that area. (Tr. 891-92). Mother further acknowledged she had not requested the District conduct any other assessments after the December 13, 2010 re-evaluation was conducted. (Tr. 74-75).
- c) Mother felt the District set up Student to fail with regard to the Braille portion of the test as EW used a word list with the letter "T" in it, a letter Student was unfamiliar with for Braille purposes. (Tr. 83). Mother believed EW should not have singled spaced the assessment as every assignment Student had

completed with Braille was double spaced. (Tr. 84-85). Mother did acknowledge EW had attempted to double space the assessment to accommodate Student. (Tr. 85-86). When asked what other portions of the re-evaluation she took issue with, Mother testified she would have asked for CCVI or Kansas School for the Blind to re-administer the John's Reading Inventory. (Tr. 88). Mother also testified she felt the functional vision assessment focused on Student holding items as opposed to reading. (*Id.*). However, Mother acknowledged her main concern with the December 13, 2010 re-evaluation was that Braille would be taken away. Tr. 95.

- d) Mother had no explanation for why the Parents waited from December 13, 2010 to February 22, 2011 to request an IEE. (Tr. 76). She admitted the Parents' February 22, 2011 letter does not specifically state what areas in the re-evaluation were not acceptable to them. (Tr. 80). Mother also acknowledged receipt of the March 2, 2011 letter from Ms. Dalton to discuss the re-evaluation but she did not respond as per the advice of her advocate, Ms. McMillen. (Tr. 81).
- e) Mother acknowledged Student received an "E," for exceeds, in reading during her second grade year. (Tr. 92). She also acknowledged Student's print reading was considerably better than her Braille reading. (*Id.*).
- f) Mother acknowledged Student's eye condition was stable. (Tr. 863). She also testified she has not received anything in writing stating Student's acuity would worsen.<sup>24</sup> (Tr. 864). Mother acknowledged Student was able to color and draw sitting at her desk using normal paper and tools. (Tr. 865). She also conceded that when Student was evaluated in October 2005 at age 3, she was able to string ½ to 1 inch beads together without difficulty; she colored 85-90% of a simple picture while remaining inside the lines and was able to trace near (within ¼ to ½ inch) straight and curved lines. (Tr. 867-869) (Ex. R-2 at 28). She admitted that these skills have not worsened. (Tr. 869).
- g) Mother was vague regarding the amount of time spent working with Student reinforcing her Braille instruction during her Kindergarten and 1<sup>st</sup> Grade school years. (Tr. 869-871). She also conceded that she did not have any kind of structured plan in the summer of 2010 (before 2<sup>nd</sup> grade) to reinforce Braille instruction. (Tr. 906-907). She did not ask AW to provide any customized Braille books for her to read that summer. (*Id.*). Mother only worked with Student on Braille several minutes a week at the beginning of Student's second grade year.<sup>25</sup> (Tr. 871). Once she believed the IEP team was going to take away Braille instruction, she increased the amount of time

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<sup>24</sup> Similarly, Mother admitted that she has no information from a medical doctor to suggest when Student is 15 years old, she will not be able to successfully and fluently read print at the proper size. (Tr. 913).

<sup>25</sup> This testimony regarding the summer of 2010 and the fall of 2<sup>nd</sup> grade clearly conflicts with the following parental concerns set out in the May 17, 2010 IEP: "Parents want [Student] to be more fluent with Braille. They will practice on a daily basis at home to help her achieve the fluency." (EX. R-10 at 282).

she was working with Student on Braille. (*Id.*). Mother acknowledged there was a connection between Student's growth using Braille during the second semester of her second grade year when she worked with Student more on Braille at home. (*Id.*). Mother admitted she had worked more on print reading with Student than she had with Braille reading. (Tr. 872).

- h) Mother acknowledged her primary reason for wanting Student to receive Braille instruction was due to her classification as legally blind. (Tr. 877-78). Mother conceded Student's report cards for kindergarten, first and second grade were all very good and that they were based upon her being a print reader. (Tr. 878; 913). Mother admitted Student has been successful thus far in her education and that Student had progressed beyond expectations in second grade in reading. (Tr. 894, 907).
- i) Mother acknowledged accommodations and modifications were in place in 2<sup>nd</sup> grade to insure that Student had proper font size. (Tr. 879). Mother testified to concerns about the increased font size for Student's 3<sup>rd</sup> grade work but conceded there is technology that will allow Student to have the print size that she needs to continue to be a proficient reader. (*Id.*). Mother also admitted that she has not asked Gary Wunder or Nicole Hanlon what is available in enlarged materials.<sup>26</sup> (Tr. 886-887).
- j) Mother admitted the IEP meetings held in January and February 2011 meetings each lasted over two hours, with a lot of the time spent discussing Braille instruction. (Tr. 911). She conceded that a lot of the discussion came from the Parents, Mr. Wunder, Ms. Hanlon and Ms. McMillan. (*Id.*)
- k) Mother acknowledged the testimony from AW, EW, Ms. Dalton and KS regarding their professional opinions that Student does not need Braille instruction. (Tr. 931-932). Mother conceded that she did not think that these professionals were pressured to say something different than they believe. (*Id.*).
- l) Mother conceded that Student misses a total of 210 minutes per week from the classroom, including writing, Science and Social Studies, when she receives Braille instruction. (Tr. 933-935).

## EW

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<sup>26</sup> Remarkably, the Parents had no discussion with their advocate, Ms. McMillen, who has a title of assistive technology specialist (emphasis added), regarding what resources would be available to assist with the font size issue that was so important to the Parents. (Tr. 888-889; 942). Similarly, Ms. McMillen failed to bring up any assistive technology options such as the Amigo or an e-reader to the IEP team at the two meetings [held in January and February]. (*Id.*). She also did not mention obtaining custom large print books for Student at those meetings. (*Id.*).

94. At the time of her testimony, EW worked for the Multi-District Program for the Visually Impaired (“Coop”) which is administered by the Raytown School District. (Tr. 115). EW has worked with children with visual impairments for 26 years and has served approximately 75 students during that time. (Tr. 117, 203). At the time of hearing, EW’s title was a teacher for the visually impaired. (Tr. 117). EW’s responsibilities are to teach students how to read Braille as well as to teach students who have low vision how to use assistive technology. (Tr. 118). EW also consults with classroom teachers, paraprofessionals and administrators on how to best serve students with vision impairments. (*Id.*). EW also is responsible for conducting educational evaluations of children who are blind or visually impaired. (*Id.*). Over EW’s 26 year career, she has participated in over 50 evaluations for children with vision impairments. (*Id.*). EW began working with Student when she was enrolled in the early childhood program. (Tr. 119).

95. EW testified very credibly:

- a) There are a standard set of test instruments and/or measures typically used for children who have visual impairments. (Tr. 122). One such instrument is a functional vision assessment. (*Id.*). The functional vision assessment is used to determine a student’s daily functional vision in the classroom. (*Id.*). A functional vision assessment is not a standardized test; rather, the assessment uses a standard protocol or criteria to assess the student’s functional vision. (*Id.*). A functional vision assessment helps a school district plan seating arrangements for the student as well as provides practical information for the classroom teacher on what to look for to help aid the student in the classroom such as how to best present curriculum materials to a student. (Tr. 126).
- b) Another protocol typically used with visually impaired students is a learning media assessment. (Tr. 123). A learning media assessment is a series of observations and a report of performance to find the best media for a particular student. (Tr. 123-124). The options for media include print, large print, Braille (tactile) and auditory. (Tr. 124). A learning media assessment also uses a standard protocol from the American Printing House for the Blind. (*Id.*). The learning media assessment looks specifically at print, the size of print and Braille. (Tr. 126-27). A learning media assessment includes three components: 1) an observation, 2) documentation regarding the use of sensory channels, and 3) a reading inventory using different medias and reading medias. (Tr. 133). The learning media assessment typically involves spending about 3 hours with a student of comparable visual acuity to Student. (*Id.*). In Student’s case, EW also conducted a fourth component, a writing component per the request of Ms. Dalton. (Tr. 134).
- c) EW has conducted approximately 30 learning media assessments in her 26 years of working with children who have visual impairments. (Tr. 131). A teacher for the visually impaired would need to administer both the functional vision assessment as well as the learning media assessment. (Tr. 125). Additionally, while a teacher for the visually impaired would need to conduct

the learning media assessment, the teacher does not need to know the student who is the subject of the assessment. (Tr. 225). EW would only need to know the student's eye condition from a report prepared by the student's ophthalmologist and information from a functional vision assessment. (Tr. 236).

- d) There is a difference between a student who is visually impaired and a student who is legally blind. (Tr. 127). A student with low vision has a vision of 20/70 to 20/200. (*Id.*). A legally blind student has vision of 20/200 or less. (*Id.*). A student who is legally blind may still see. (Tr. 128). A person with vision of 20/200 can generally read 12-14 point font without assistance and can ambulate around the school without assistance in most cases. (*Id.*).
- e) EW obtained an accurate picture of Student using the John's Reading Inventory. (Tr. 140). This test is typically administered to assess a student's overall reading skills, including strengths and weaknesses in comprehension and listening. (Tr. 142;185-187). In this case, however, EW used the test for one purpose: to find a successful reading medium for Student.<sup>27</sup> (Tr. 186). The Braille portion of the John's Reading Inventory was a valid assessment of Student's ability to read Braille. (Tr. 148). Student can use regular print for the primary grades, but may need large print books as she progresses into the higher grades. (Tr. 149).
- f) Although subjective in nature, the sensory portion of the learning media assessment was a valid analysis of Student's use of sensory channels. (Tr. 150). Student's learning mode is visual with her secondary learning mode being auditory. (*Id.*). Braille was Student's third learning mode. (*Id.*). In EW's opinion, the learning media assessment she administered November 10, 2010, December 3, 2010 and January 2011 were valid and reliable.<sup>28</sup> (Tr. 151). The writing assessment in January showed that Student writes larger but legibly and efficiently with few errors and neater than many of her classmates. (Tr. 151-152).
- g) Of the 80-90 students the Coop serves who are visually impaired, only five, including Student, receive Braille services. (Tr. 204-205). Three of the other four students receiving Braille have vision worse than Student's. (Tr. 205).
- h) The vast majority of visually impaired students are print readers. (Tr. I06). In her 26 years of teaching, EW has taught only one other student with albinism to read Braille and that person does not currently use Braille. (Tr. 238). A

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<sup>27</sup> Therefore, contrary to the position of the Parents in their Proposed Findings of Fact and Conclusions of Law, we did not expect EW to know: Student's reading levels in independent, structural and frustration; Student's reading weaknesses; Student's accuracy, fluency and comprehension.

<sup>28</sup> Consistent with the experience of the classroom teacher, EW observed during conducting the learning media assessment that Student used no low vision aids even though a closed-circuit TV and dome magnifier were available to Student in the classroom. (Tr. 137).

person with albinism is not typically someone who would need to read Braille as albinism is a stable condition. (*Id.*).

- i) Whether a child is motivated to learn Braille impacts EW's recommendations on whether Braille should be taught. (Tr. 224). In Student's case, the fact Student was not motivated to learn Braille was a factor in EW's recommendation that Student did not require Braille. (*Id.*). In terms of the future need for Braille, Student will not need Braille even as she progresses in her schooling and as font sizes become smaller. (Tr. 225, 227). EW based her decision in that regard upon her 26 year career, her knowledge of albinism, and the fact that Student was successful in accessing the general curriculum using her vision. (Tr. 238).
- j) Braille textbooks take up a large amount of space. (Tr. 225-226). For example, a typical pocket dictionary in Braille takes up three to four feet of shelf space on 11-by-11 paper with the volumes being three inches thick. (Tr. 226). A typical reading book in Braille is usually four or five volumes. (Tr. 227).

#### AW

96. At the time of her testimony, AW worked for the Multi-District Program for the Visually Impaired ("Coop") which is administered by the Raytown School District. (Tr. 270). AW has worked for the Coop as a teacher for the visually impaired for five years. (Tr. 270-71). AW's responsibilities as a teacher for the visually impaired include working with school district teams for students who are blind or have low vision. (Tr. 271). She provides individualized instruction in Braille and the use of assistive technology. (*Id.*). AW is certified by the State of Missouri to teach children with visual impairments. (Tr. 272). She also is involved in the evaluation process. (Tr. 273). AW has 28 years of experience teaching in the special education field. (Tr. 274).

97. AW testified very credibly as follows:

- a) AW became familiar with Student when she attended the Belton early childhood program and then again when Student was in first and second grade. (Tr. 275; Tr. 640). While at the Belton program, AW provided Student with pre-Braille instruction twice a month for 30 minutes. (Tr. 275-276). AW also consulted with Student's classroom teacher during that time. (Tr. 275). Further, AW observed Student and conducted functional vision and learning media assessments of Student in 2008, 2009 and 2010. (Tr. 286).
- b) When conducting a functional vision assessment, the person administering the assessment follows guidelines/protocols provided to them. (Tr. 287). AW followed the guidelines/protocols when she conducted the functional vision assessment for the December 13, 2010 re-evaluation. (*Id.*). When conducting a functional vision assessment, the person administering the assessment does

not place everything they know about the student in the assessment report. (Tr. 403). The functional vision assessment was an appropriate tool to use with Student as part of her overall re-evaluation because the assessment gave a good representation of her students. (Tr. 289-290).

- c) AW did not have any concerns regarding the December 2010 re-evaluation or believe the December 2010 re-evaluation to be lacking in any area. (Tr. 290-91). AW believed that re-evaluation satisfied the requirements of the IDEA. (Tr. 292). The functional vision assessment contained a statement of Student's disability, a synthesis of information, a basis for making the determination of Student's eligibility as a child with a visual impairment and a list of people who participated in the meeting, all necessary criteria under the IDEA. (Tr. 408). All of the recommendations AW gave at the end of the November 2010 functional vision assessment were based on Student's current and future needs. (Tr. 404). The recommendations noted in the November 2010 functional vision assessment were based upon AW's experience working with Student. (Tr. 405).
- d) AW's recommendation to conduct a re-evaluation in October 2010 was not solely to justify a subsequent decision to remove Braille instruction from Student's IEP but because Student was due for an annual re-evaluation. (Tr. 395). She also testified that it is important to monitor with some frequency visually impaired students to see if adjustments need to be made [in their educational program]. (Tr. 273-274).<sup>29</sup>
- e) During Student's second grade year, she performed academically at grade level. (Tr. 397). Most of the children with Student's type of visual impairment perform at grade level. (*Id.*). Student will not require a scribe for note taking as she progresses through her academic career, but if she does have issues there are a number of recording devices Student would be able to use. (Tr. 410). AW testified Student would not require a scribe as Student was very precocious, desired to be successful in school and would do her best to be on grade level. (Tr. 411). AW also testified that Student's handwriting is very legible, including to Student. (Tr. 323;325).
- f) The District had sufficient information regarding Student's use of or ability to use assistive technology and therefore, did not assess in that area. (Tr. 397). At no point during the re-evaluation process did the Parents or any of their advocates request for AW or any other District official to conduct an assistive technology evaluation of Student. (Tr. 402).
- g) Based on AW's experience in Braille instruction, she believed Student's vision hindered her ability to learn Braille because she wanted to visually read the dots. (Tr. 622-623).

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<sup>29</sup> The first page of the Evaluation Report indicated the re-evaluation was performed to gain new information for programming. (Ex. R-15 at 314).

- h) A first grade student dependent on Braille would either complete the first grade Braille curriculum or would come close to completing it. (Tr. 650). Students who are also print readers typically take longer to get through the Braille curriculum. (Tr. 650-51). At the end of first grade, Student was still struggling to make it past the first part of the first grade curriculum. ( Tr. 651). Student was very resistant to Braille instruction at this time. (*Id.*). In terms of print, Student had mastered the first grade curriculum by the end of first grade. (*Id.*). AW testified Student was not receiving enough practice at home to help her progress in her Braille fluency. (Tr. 655).
- i) There are other ways to reduce eye fatigue than teaching a student Braille. (Tr. 661). For instance, using magnification or allowing the student to take breaks will suffice. (*Id.*). Additionally, a student can listen to a book on tape or other device. (*Id.*). AW has not observed eye fatigue with Student.<sup>30</sup> (Tr. 386). She conceded that sustained reading can contribute to eye fatigue, especially if not using the right size print. (Tr. 387-388).
- j) When the decision to remove Braille arose, AW considered Student's future needs for Braille. (Tr. 666). Student would be able to continue to progress if her most recent IEP were implemented without Braille. (*Id.*). Further, even though Student had begun to progress in her Braille instruction in January or February of 2011, AW still believed Student did not require Braille. (Tr. 672-673). AW testified the reason why Student began to progress in Braille was due to the practice she was receiving at home. (Tr. 673).
- k) Her recommendation in January 2011 to discontinue Braille instruction was based on Student's progress in the classroom; the eye doctor's report; the functional vision assessment; the learning media assessment; Student's grades and test scores.<sup>31</sup> (Tr. 664).
- l) Based upon AW's experience, a child who does not receive Braille instruction until later in life can become proficient and efficient with Braille. (Tr. 678). She admitted, however, if Braille is a visually impaired person's reading medium, the individual needs to learn it sooner rather than later. (Tr. 390).

**Nicole Hanlon**

98. The Parents called Ms. Hanlon to testify in the District initiated case. (Tr. 447). She testified as follows:

- a) She obtained her Bachelor's Degree in Psychology from Missouri State University. (Tr. 447). Ms. Hanlon took one college course in the field of education when she was working towards being certified as a teacher for the

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<sup>30</sup> None of her teachers has reported eye fatigue by Student. (Tr. 350).

<sup>31</sup> See Student's scores for the Stanford test reported in the January 2011 IEP. (Ex. R-16 at 348).

visually impaired but never obtained that certification. (Tr.475). She is not certified to teach in any state. (*Id.*). Ms. Hanlon has taught only one student how to read Braille. (Tr. 510).

- b) Ms. Hanlon has worked for Rehabilitation Services for the Blind (“RSB”) for approximately eleven years as a rehabilitation teacher. (Tr. 447-48). As part of her responsibilities, she manages a caseload of approximately 80 clients ranging in age from 18 to 99. (Tr. 448). Her primary responsibility is to help teach her clients how to perform daily living activities and remain independent. (Tr. 448).
- c) Ms. Hanlon is totally blind now. (Tr. 451). She was a print reader until age 12 when she began Braille instruction. (Tr. 498; 502). Ms. Hanlon believes that she is proficient and fluent in Braille. (Tr. 498).
- d) Ms. Hanlon has not received any training in assessing visually impaired or blind children’s educational needs. (Tr. 476). Ms. Hanlon has no formal training on the IDEA. (Tr. 476). Ms. Hanlon is not qualified to administer a functional vision assessment or a learning media assessment. (Tr. 477). Ms. Hanlon also has no formal training with albinism. (Tr. 484).
- e) Ms. Hanlon has limited experience working with children. (Tr. 448). Ms. Hanlon is familiar with Student as a result of monitoring the children’s caseload at RSB for approximately two years. (*Id.*). Ms. Hanlon has met Student three times: twice in the family home and once in the school setting to observe a Braille instruction. (Tr. 477-478). She attended the Evaluation meeting held in December 2010 as well as IEP meetings for Student after 2009 when Student was added to Ms. Hanlon’s caseload. (Tr. 454-455).
- f) Ms. Hanlon believed the re-evaluation was deficient because the Braille assessment component of the learning media assessment was too brief but conceded she had no familiarity with the protocols for testing Braille skills. (Tr. 497).
- g) Ms. Hanlon was concerned that the re-evaluation failed to address Student’s future needs but admitted that the following, included in the reevaluation report, were relevant to future needs: (1) use of a monocular telescope; (2) bifocal lenses as an alternative to magnifiers; (3) print size decreasing over time; (4) Student’s visual response to objects and to light; (5) Student’s ability to discriminate in her need for contrast, in terms of colors; (6) Student’s visual perception skills; (7) Student’s sensitivity to light; (8) Student’s near and distance acuity and discrimination skills; (9) use of or refusal to use magnification; (10) breaks for Student when she has to do sustained reading; (10 Student’s ability to advocate for herself; (11) the need for large print books; and (12) current and future font size for Student. (Tr. 486-490).

- h) Ms. Hanlon had 5 or 6 children with albinism whose acuity was comparable to Student on her caseload. (Tr. 508-509). Only one of those children receives Braille instruction from a public school. (Tr. 509). Of the 35 children with visual impairments comparable to Student on her caseload, only 10 received Braille instruction from public school districts. (*Id.*).
- i) Ms. Hanlon stated that a determining factor whether Braille will become the primary mode for learning or reading is how well the child is able to use vision that he or she has. (Tr. 491-492). Despite knowing that Student is a very successful print reader now, she still offered the opinion that Student's primary learning and reading mode in the future will be Braille. (Tr. 491).

99. We reject Ms. Hanlon's testimony that it is not important to know whether a child's visual impairment is stable or progressive when determining a child's future needs. (Tr. 485-486).

### **Gary Wunder**

100. Parents called Gary Wunder with respect to their due process complaint. (Tr. 523). He testified as follows:

- a) He holds a degree in electronics technology and currently works as the editor of Braille Monitor Magazine. (Tr. 523). He worked for 30 years as a computer programmer. (*Id.*).
- b) Mr. Wunder has been associated with the National Federation for the Blind ("NFB") since 1972 and has served as president of the organization since 1983. (*Id.*). He is now a staff member who works on [NFB's] magazine. (*Id.*).
- c) Mr. Wunder is, and has always been, totally blind – without light or object perception. (Tr. 529; 547-548). He reads Braille. (Tr. 529).
- d) He attended the IEP meeting in February 2011. (Tr. 532). The District's decision to stop Braille instruction was based on the concern that Braille was getting in the way of teaching the curriculum and that Student could pick up Braille later if needed. (*Id.*; 539).
- e) Mr. Wunder thinks that Student should learn to read both print and Braille. (Tr. 542). He was not aware medical doctors consider Student's condition to be stable and not progressive. (Tr. 558). He was not aware that she could read 12 point type before he attended the IEP meeting. (Tr. 559). Mr. Wunder had no information in February 2011 regarding how Student felt about being seen as different than her peers. (*Id.*) He did not know that Student showed resistance when Braille was incorporated into the classroom. (Tr. 573).

- f) Mr. Wunder has never received training on the IDEA and the requirements of that law. (Tr. 550). He does not have any certifications or licenses in the field of education. (*Id.*). Mr. Wunder also has no experience teaching in a public school. (Tr. 551). He has never been trained on the methods of teaching Braille nor has he been trained on how to evaluate a visually impaired student to determine the student's Braille instructional needs. (Tr. 551-552).

101. We reject Mr. Wunder's testimony that students who learn Braille at an older age never reach a strong level of proficiency. (Tr. 560). Additionally, the Panel rejects Mr. Wunder's testimony that any child whom the law presumes to be legally blind should learn to be an efficient Braille user. (Tr. 563). Further, the Panel rejects Mr. Wunder's testimony that anyone with an acuity level of 20/200 or worse must become an efficient Braille user regardless of whether the child's doctor anticipates subsequent vision loss. (*Id.*).

### KS

102. The Parents called KS to testify in their due process complaint. (Tr. 721). She testified very credibly as follows:

- a) KS obtained her Bachelor's degree in elementary education at Kansas State University. (Tr. 721). She has been employed by the District for approximately 14 years and she is currently a second grade teacher in the District. (*Id.*). KS became familiar with Student when Student was a student in her second grade classroom. (Tr. 723). KS received some training at Alphapointe Association for the Blind for students with low vision when she became aware Student would be in her classroom. (*Id.*).
- b) Student performed very well in KS's classroom and was an above-average student. (Tr. 723-724). Student was able to participate successfully in the second grade curriculum and was eventually promoted to the third grade. (Tr. 767). Student never received an "N," for needs improvement. (Tr. 769). KS characterized Student's overall achievement as above average and very successful. (*Id.*). Student finished in the top seven in her class. (*Id.*).
- c) KS met Student's needs in the classroom by writing in large print on the dry-erase board. (Tr. 765-766). KS placed Student's desk near the dry-erase board so Student would have easy access to leave her seat to look at the board. (Tr. 766). KS also enlarged assignments for Student. (*Id.*).
- d) Student was able to advocate for herself when she required assistance and was a good evaluator of her own visual needs. (Tr. 772-773). Student chose not to use the slant board, her magnifier, closed circuit TV or highlighting strip because she did not want to be seen as different. (Tr. 724-725; 736). Student's refusal to use her assistive technology, however, did not negatively impact her achievement in KS's classroom. (Tr. 773). She always completed her assignments and followed instructions. (Tr. 735).

- e) During second grade, KS estimated Student missed approximately 80-85% of the curriculum for science, social studies and writing due to removal from class for Braille instruction. (Tr. 773-775). While Student was able to make up her assignments in those subjects, KS felt there was value in being present during the instruction that Student missed and that her grades had suffered. (Tr. 775; 798).
- f) KS was aware from AW that eye fatigue could become an issue throughout the day so KS changed paper/pencil [assignments] to more interactive [work] to lessen the eyestrain for Student. (Tr. 732). She never saw Student rub her eyes or lay her head down on the desk. (Tr. 733). Student never told KS her eyes were tired and she did not want to read. (Tr. 776). In fact, Student was an enthusiastic reader. (*Id.*).
- g) While using the District's computers, Student never chose to enlarge the font size on the screen and was able to use the regular keyboard. (Tr. 779).
- h) Student entered KS's second grade classroom with an oral reading fluency level which exceeded expectations. (Tr. 781-785). Given Student's end of the year fluency for second grade, it was KS's belief that print was a viable learning medium for Student. (Tr. 786). Student will be successful as she proceeds in her educational career without the use of Braille. (Tr. 793).
- i) Student was able to correct her own handwriting. (Tr. 787). She does not use any special writing paper or writing utensil.<sup>32</sup> (Tr. 740).
- j) KS did not have concerns regarding Student's ability to use the playground equipment or to navigate the school environment. (Tr. 771-772).

### **CONCLUSIONS OF LAW**

The Hearing Panel makes the following Conclusions of Law:

#### **The Parties**

1. The District is a Missouri Public School District which is organized pursuant to Missouri statutes.
2. The Student and her Parents are now and have been during all times material to this proceeding, residents of the District, as defined by Section 167.020 RSMo.
3. Article IX § 2(a) of the Missouri Constitution states in pertinent part that “[t]he supervision of instruction in the public schools shall be vested in a state board of education. . . .”

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<sup>32</sup> AW also testified that Student uses regular paper and pencil to write. (Tr. 354-355).

The State Board of Education for the State of Missouri is the "State Educational Agency" ("SEA") for the State of Missouri, as that term is defined in the IDEA, 20 U.S.C. § 1401(28).

### **Due Process Complaints and The IDEA's Burden Of Proof**

4. If parents of a "child with a disability" believe that the educational program provided for their child fails to meet FAPE, they may obtain a state administrative due process hearing. 34 C.F.R. § 300.506; *Thompson v. Board of the Special School District No. 1*, 144 F.3d 574, 578 (8<sup>th</sup> Cir. 1998); *Fort Zumwalt School District v. Clynes*, 119 F.3d 607, 610 (8<sup>th</sup> Cir. 1997), *cert. denied* 523 U.S. 1137, 118 S.Ct. 1840, 140 L.Ed 2d 1090 (1998).

5. The Student and her Parents filed the due process complaint that initiated this matter on March 10, 2011. The complaint alleges the District failed to take into account the future needs of Student when the IEP team terminated Braille instruction in the February 22, 2011 IEP.

6. The District filed its due process complaint on March 14, 2011. The District seeks a declaration that its most recent re-evaluation is appropriate and therefore, the Parents' request for an independent education evaluation ("IEE") should be denied.

7. The burden of proof in an administrative hearing arising under the IDEA is properly placed upon the party seeking relief. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 537 (2005). The standard of proof in this administrative proceeding, as in most civil cases, is proof by a preponderance of the evidence. *Tate v. Department of Social Services*, 18 S. W. 3d 3, 8. (Mo. App. E. D. 2000). The burden of proof in the Parents' initiated case rests with the Parents and the burden of proof in the District initiated case is on the District.

### **Free Appropriate Public Education**

8. The IDEA, its regulations and the *State Plan for Part B of the Individuals With Disabilities Education Act* (2007), ("State Plan") constitute regulations of the State of Missouri which further define the rights of Petitioner and his Parents and regulate the responsibilities of educational agencies, such as the District, in providing special education and related services to children with disabilities.

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

10. The IDEA requires that a disabled child be provided with access to a "free appropriate public education." ("FAPE") *See Board of Education of the Hendrick Hudson Central School District, Board Of Education, Westchester County v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 3049, 73 L.Ed.2d 690 (1982). The term "free appropriate public education" is defined by 34 C.F.R. § 300.17 as follows:

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

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

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

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

12. The IDEA is designed to enable children with disabilities to have access to a free appropriate public education which is designed to meet their particular needs. *O'Toole by O'Toole v. Olathe District Schools Unified School District No. 233*, 144 F.3d 692, 698 (10<sup>th</sup> Cir. 1998). The IDEA requires the District to provide a child with a disability with a "basic floor of opportunity. . . which [is] individually designed to provide educational benefit to the handicapped child." *Rowley*, 102 S.Ct. 3034, 3047. In so doing the IDEA does not require that the District "either maximize a child's potential or provide the best possible education at public expense," *Rowley*, 102 S.Ct. 3034, 3049; *Fort Zumwalt School District v. Clynes*, 119 F.3d 607, 610 (8<sup>th</sup> Cir. 1997), *cert. denied* 523 U.S. 1137, 118 S.Ct. 1840, 140 L.Ed 2d 1090 (1998) and *A.W. v. Northwest R-1 School District*, 813 F.2d 158, 163-164 (8<sup>th</sup> Cir. 1987). Likewise, the IDEA does not require the District to provide a program that will, "achieve outstanding results," *E.S. v. Independent School District No. 196*, 135 F.3d 566, 569 (8<sup>th</sup> Cir. 1998); that is "absolutely [the] best," *Tucker v. Calloway County Board of Education*, 136 F.3d 495, 505 (6<sup>th</sup> Cir. 1998); that will provide "superior results," *Fort Zumwalt School District v. Clynes*, 119 F.3d 607, 613; or, that will provide the placement the parents prefer. *Blackmon v. School District of Springfield, R-12*, 198 F. 3d 648 (8<sup>th</sup> Cir. 1999); *E.S.*, 135 F.3d 566, 569. *See also: Tucker*, 136 F.3d 495, 505; and, *Board of Education of Community Consolidated School District No. 21 v. Illinois State Board of Education*, 938 F. 2d 712, 716-17 (7<sup>th</sup> Cir. 1991).

### **Appropriateness of the Re-evaluation**

13. The IDEA and the Missouri State Plan for Part B of the IDEA contain extensive provisions describing how an evaluation should be carried out. *See* 34 C.F.R. § 300.301-300.306 (2006); Missouri State Plan for Part B of the IDEA (2010) at 31-39.

14. Included among the IDEA's extensive procedural safeguards is a provision that allows the parents of a child with a disability to request an IEE at public expense if the parent disagrees with an evaluation conducted by the school district. *See* 34 C.F.R. § 300.502 (2006); 20 U.S.C. §§ 1415(b)(1), (d)(2)(A). When a school district is presented with a parental request for an IEE at public expense, the district must either pay for the IEE as requested, or initiate a due process proceeding to demonstrate that its evaluation is appropriate. *See* 34 C.F.R. § 300.502(b)(2) (2006). If a district initiates a due process proceeding and prevails, the parent may obtain an independent evaluation, but not at public expense. *See* 34 C.F.R. § 300.502(b)(3) (2006).

15. When a parent requests an independent evaluation, the public agency can ask the parent why he or she disagrees with the district's evaluation, but the district cannot require such explanation and may not "unreasonably delay" either providing the IEE or initiating a due process hearing to defend the district's evaluation. 34 C.F.R. § 300.502(b)(4) (2006); *see also Hampden-Wilbraham Reg'l Sch. Dist.*, 37 IDELR 20 (SEA Mass. 2002); *Bd. of Educ. of Monticello Cent. Sch. Dist.*, 37 IDELR 143 (SEA N.Y. 2002). *See also, Letter to Anonymous*, 55 IDELR 106 (OSEP 2010) (a school district may not deny reimbursement based on a parent's failure to discuss the school district evaluation at an IEP meeting or a parents' failure to provide a written statement of disagreement with the evaluation.)

16. To assess the adequacy of a district's evaluation, the Panel must determine whether that evaluation meets the criteria set forth by the IDEA. This inquiry focuses primarily on procedural compliance, rather than delving into the substance of the evaluation itself. *See, e.g., Grapevine-Colleyville Indep. Sch. Dist. v. Danielle R.*, 31 IDELR 103 (N.D. Tex. 1999). More specifically, the IDEA requires that: (1) the evaluation be conducted by qualified persons; (2) the testing and assessment materials and procedures must be selected and administered so as not to be racially, culturally, or sexually discriminatory, and should be provided and administered in the student's primary language or other mode of communication; (3) any standardized tests used must have been validated for the specific purpose for which they were used; (4) testing must be administered by trained and knowledgeable personnel in accordance with any instructions provided by the producers of the tests; (5) evaluation materials must be tailored to assess specific areas of educational need, rather than merely provide a single general intelligence quotient; (6) tests must be selected and administered so as to ensure that the results accurately reflect the aptitude or achievement level of a child with impaired sensory, manual, or speaking skills; (7) no single procedure may be used as the sole criterion for determining whether a child is disabled, or for determining an appropriate educational program for the child; (8) the child must be assessed in all areas related to the suspected disability; (9) the evaluation must be sufficiently comprehensive to identify all of the child's special education and related services needs; (10) the evaluator must use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors; and (11) the evaluator must use assessment tools and strategies that provide relevant information that directly assists persons in developing the content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum. *See* 20 U. S. C. § § 1414(b)(3) and 1414(c)(2008); 34 C.F.R. § § 300.304 and 304.305 (2006).

17. As discussed in more detail later in this Decision, we conclude the re-evaluation as reflected in Student's Evaluation Report dated December 13, 2010 met the IDEA requirements set out in Conclusions of Law# 13-16 in that the District conducted a comprehensive and appropriate re-evaluation. The District also timely filed a due process complaint to defend the re-evaluation after the Parents requested an IEE. Accordingly, the Parents are not entitled to an IEE at public expense.

### **Procedural Compliance with IDEA**

18. An IEP does not violate the IDEA (a) if the procedures set forth in the IDEA are followed and (b) the IEP is formulated to enable the child to receive educational benefits. *Rowley*, 102 S. Ct. at 3034. The *Rowley* standard continues to be applicable, and not a higher standard, for determining FAPE under IDEA. *M. M. ex rel. L.R. v. Special School District. No. 1*, 512 F. 3d 455, 461 (8th Cir. 2008). Substantive violations of IDEA result in the denial of FAPE but procedural violations do not necessarily equate to a denial of FAPE. *See, e.g., A. K. ex rel. J. K. v. Alexandria City Sch. Bd.*, 484 F. 3d 672, 684 (4<sup>th</sup> Cir. 2007), *reh'g denied*, 497 F. 3d 409 (4<sup>th</sup> Cir. 207), *cert. denied*, 128 S. Ct. 1123 (2008).

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

20. In the development a child's IEP, the IEP team, must consider (1) the strengths of the child; (2) the concerns of the parents for enhancing the education of their child; (3) the results of the initial evaluation or most recent evaluation of the child; (4) and the academic, developmental and functional needs of the child. 20 U. S. C. §1414(d)(3)(A). The IEP team shall in the case of a child who is blind or visually impaired., provide for instruction in Braille and the use of Braille unless the IEP Team determines, after an evaluation of the child's reading and writing skills, needs and appropriate reading and writing media (including an evaluation of the child's future needs for instruction in Braille or the use of Braille), that instruction in Braille or use of Braille is not appropriate for the child. 20 U. S. C. §1414(d)(3)(B).

21. Based on Conclusion of Law #20, the District was required to consider Student's future needs or use for Braille instruction. As explained in detail later in this Decision, we conclude the District did consider Student's future needs or use for Braille instruction when the District re-evaluated her and also in developing the February 22, 2011 IEP which contained a provision to terminate Braille instruction.

### **Substantive Compliance with IDEA**

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

23. For reasons further explained later in this Decision, we conclude that the February 22, 2011 IEP, without a provision for continued Braille instruction, is reasonably calculated to provide some educational benefit for Student and therefore, substantively complies with the IDEA requirement of FAPE.

### **Other Issues**

24. Because the Student and Parents failed to show beyond a preponderance of evidence that FAPE was denied either procedurally or substantively under IDEA, we decline to address the remedy issues set out in FF#23 (e).

## **DECISION**

### **Appropriateness of Re-evaluation**

The Panel first heard evidence dealing with the re-evaluation reflected in Student's Evaluation Report dated December 13, 2010. The District initiated a due process complaint seeking to show the re-evaluation conducted in the fall of 2010 was appropriate and therefore, the Parents request for an IEE should be denied.

The District evaluated Student a number of times before the 2010 re-evaluation in question: (1) the initial evaluation occurred in October 2005 to see if she was eligible for special education services (FF#25); (2) in December 2005, a functional vision assessment was conducted followed by an orientation and mobility assessment as well as learning media assessment shortly thereafter (FF#29; 30; 31); (3) the April 10, 2008 re-evaluation report contained the results of a functional vision assessment and learning media assessment (FF#39-41); (4) in April 2009, Student's multidisciplinary team, after conducting a review of existing

data, recommended another re-evaluation, which included a functional vision assessment, an orientation and mobility assessment as well as classroom observations (FF 46, 48-50). Included in the above evaluations were a number of reports from ophthalmologists or optometrists who examined her and offered their medical opinions and recommendations: Dr. Hug in September 2005, October 2007 and October 2008 (Ex. R-2 at 29; FF#36 and 45) and Dr. Murray in January 2008 (FF#38).

When the District re-evaluated Student in the fall of 2010, the multi-disciplinary team had the benefit of considerable data on Student's history of performance in the school setting as well as her medical condition. In developing an Evaluation Plan, the team, including the Parents, concluded no additional assessments were needed in these areas: health; motor; assistive technology; hearing; speech/language; cognitive/intellectual; adaptive behavior; academic; social/emotional behavioral. (Ex. R-13 at 306-309). The team also recognized that she did not need an orientation and mobility assessment because one had been done in May 2009 and also Student navigated the school setting without difficulty. (*Id.*); (FF#63). The team agreed that Student needed an updated evaluation in the area of vision, with functional vision and learning media assessments as well as a low vision evaluation to be conducted. (*Id.*).

As part of the re-evaluation in the fall of 2010, the District recommended a low vision evaluation by Dr. John Metzger at Alphapoint Association for the Blind. His detailed report is set in Ex. R-14 at 311. We have previously noted the thoroughness of the functional vision and learning media assessments conducted by AW and EW. (FF#69-75; 95; 97). The stellar credentials for AW and EW have also been acknowledged. (FF#94; 96).

In the Parents' Proposed Findings of Fact and Conclusions of Law on pages 13 and 14, they allege a laundry list of deficiencies with the re-evaluation, some of which have been

specifically addressed earlier: (1) absence of an orientation and mobility assessment (FF#63, footnote 17); (2) failure to identify Student's Braille knowledge base (FF#74 and footnote 20); (3) reading comprehension and listening weaknesses (FF#95 and footnote 27); eye fatigue (FF# 97 and 29). The Parents also claim the re-evaluation failed to address Student's future needs or use for Braille instruction but their own witness, Nicole Hanlon conceded the re-evaluation did so in at least 12 areas. (FF#98 and Tr. 486-490). Dr. Metzger also addressed her future needs in his report, which is part of the Evaluation Report.(Ex. R-14 at 311). The evaluation team also had the benefit of previous medical reports indicating that Student's vision is stable. (FF#36;38;;45;57). Put another way, Student does not have a progressive eye disease. (Tr. 864; 913).

While not requesting an assistive technology assessment when the Parents clearly had a chance to do so in the fall of 2010, they now complain the re-evaluation is deficient because it does not contain one as well as not identifying which low vision aids are used by Student. The current aids were noted in the Evaluation Plan (Ex. R-13 at 306-309) and AW saw no need for one. (FF#63). The Learning Media Assessment specifically mentions that she does not use the low vision aids -- CCTV and dome magnifier. (Ex. R-29 at 2).

Other parental complaints regarding the re-evaluation: did not include her level of writing stamina; failed to include whether she could correct her handwriting and finally, no assessment of Student's social skills. The Addendum to the Learning Media Assessment addressed her handwriting skills plus her classroom teacher testified that Student can correct her own handwriting. (Ex. R-27) (FF#102). We conclude there was no need for an assessment of Student's social skills because none of the school personnel expressed ANY concerns in this area.

The various courts and administrative panels that have addressed the appropriateness of district evaluations focus on whether the evaluation satisfied the requirements set out in Section 300.304 (summarized in Conclusion of Law #16). In *P. P. v. West Chester Area Sch. Dist.*, 585 F.3d 727, 739 (3<sup>rd</sup> Cir. 2009) the Court found the District evaluation to be appropriate even though it did not contain all the assessments requested by parents – areas that were not identified as suspected disabilities. In a case involving another Pennsylvania school district, *Blake B v. Council Rock Sch. Dist.*, 2008 WL448979 (E. D. Pa. October 3, 2008), noted the thoroughness of the re-evaluation, including using a variety of assessment tools such as conversations with parents, teacher reports, review of Student’s educational records and all previous evaluations. *Id.* at\*3. In finding the re-evaluation in compliance with IDEA, the Court emphasized the District did not rely on a sole instrument as the basis for any of its conclusions; the District evaluated student in all areas of suspected disability and appropriately used technically sound instruments administered by those experts credentialed and trained in the administration of the specific instruments. *Id.* at \*6-8; 10-11.

In *Concord Public Schools*, 53 IDELR 342 (SEA MA 2010), the Hearing Officer noted the oft-cited purposes of an evaluation is to assess whether a student has educational disabilities and if so found, to enable the development of an appropriate IEP. The Hearing Officer then stated:

I consider whether Concord’s educational evaluation was appropriate and comprehensive for these purposes and within this context. It is not relevant that the educational assessment might have included additional testing (even testing that might have been requested by Parents or might have enhanced the evaluation) or could have been written more thoroughly or more accurately, so long as Concord’s evaluation met the applicable standards of comprehensive and appropriate. (emphasis added)

*Id.*

As the evidence showed, Student is a student with a visual impairment and the Parents did not suggest that Student had any additional educational disabilities that merited evaluation. Accordingly, the District's evaluation was properly focused on Student's visual impairment and the educational needs resulting from that disability. Moreover, the District's evaluation – in light of the Parents expressed concerns about Student's current and future need for Braille – properly concentrated on that area.

In sum, the Panel concludes that the District assessed in all areas of suspected disability and used sound instruments and qualified examiners in conducting its re-evaluation. Further and although the District did not utilize standardized assessments as that term is commonly understood, the District did utilize standardized protocols that are used with children with visual impairments and those protocols were used in an appropriate fashion. The evidence also clearly demonstrated the tests and protocols were administered by trained and knowledgeable personnel. Finally, no single procedure was used to determine whether Student continued to have a disability and to identify her possible special education and related services needs. Moreover, the District timely initiated due process in response to the Parents' request for an independent evaluation. The Panel unanimously concludes more than a preponderance of the evidence demonstrated that the District's December 2010 re-evaluation was appropriate and fully complied with all IDEA standards and therefore, the Parents are not entitled to an IEE.

#### **Consideration of Student's Future Needs for Braille Instruction or For the Use of Braille**

As noted in Conclusion of Law #20, the IEP team was required to consider Student's future needs for Braille instruction or for the use of Braille. In completing *Form A: Blind and Visually Impaired* to the February 22, 2011 IEP, the team noted that she does not need Braille instruction and then indicated the decision was based upon the following factors: (1) the

Learning Media Assessment indicated that Student is a visual learner and (2) her current reading and writing skills (as we have detailed in footnote 21). Ideally, the team should have included a more specific statement regarding the future need (or lack thereof in this case) for Braille.

Even if the IEP team could have more thoroughly documented Form A regarding future need or use for Braille, the discussion took place as evidenced by the notes of the meeting. (Ex. R-16 at 367). The District and Coop participants all testified to discussing: her current reading abilities, both visually and with Braille; whether eye fatigue was a current issue as well as a future one as the workload increased and the font-size decreased; the impact of Braille instruction and the missed class time in writing, Science and Social Studies; Student's lack of interest in using the visual aids available to her; Student unwillingness to be seen as different; the doctors' reports regarding the stability of Student's visual impairment. (FF#80;83; 92; 95; 97; 102). The IEP team also considered input from (a) the Parents about their concerns regarding the future need for Braille (FF#93); (b) Ms. Hanlon who offered her opinion on the importance for Braille instruction now and Student's future use for Braille (FF#98); and (c) Mr. Wunder who expressed concern that a student who learns Braille at an older age will never reach a level of proficiency and that all legally blind persons should learn Braille. (FF#100).

Even if the IEP team did not ultimately adopt the recommendations of the Parents and their witnesses and decided to terminate Braille instruction, the District considered all sides of the issue and thus, procedurally complied with 20 U. S. C. §1414(d)(3)(B) of the IDEA. Stated another way, the Parents failed to prove beyond a preponderance of evidence that the District committed a procedural violation of IDEA.

**FAPE under the February 22, 2011 IEP**

The Parents contend that the District's decision to terminate Braille instruction in the February 22, 2011 IEP results in the IEP as not being reasonably calculated to provide FAPE. The Panel concludes that the Parents have not shown beyond a preponderance of evidence that a substantive violation occurred under IDEA when the District discontinued the Braille instruction in the February 22, 2011 IEP.

We base our decision on a number of factors. While Student has done well in school despite missing 80-85% of the 2<sup>nd</sup> grade curriculum for science, social studies and writing as a result of removal for Braille instruction, we are concerned that she is missing the basic foundation for these three subjects that are critical to long term academic success. Student's Braille skills are not strong enough for her to access the third grade textbooks so she would continue to miss classroom instruction for the foreseeable future. The re-evaluation clearly showed that Student does very well as print reader and not well as Braille reader. (Ex. R-15 at 314; FF# 72). She uses no vision aids – either because she does not need them or simply does not want to be seen as different from her classmates. (FF# 72; 74; 80). Remarkably, she operates a computer without enlarging the font size on the screen and is able to use a regular keyboard. (FF#102). Mother's desire that Student become proficient with regular print, large print and Braille and have all available to Student is just not feasible and realistic. (FF#92).

The IEP team properly took into account when terminating Braille instruction that Student's eye condition is essentially stable and unlikely to deteriorate. This conclusion is based on Student's medical reports as well as the opinions from two educational experts - EW and AW who confirm that as a practical matter, students with albinism typically do not need to read Braille because albinism is not a progressive condition. (FF#95-96). Ms. Hanlon acknowledged

that of the 5 or 6 children with albinism (and visual acuity comparable to Student's) on her caseload, only one received Braille instruction from a public school. (FF#98).

We recognize the opinions of Mr. Wunder and Ms. Hanlon regarding the need and benefit of Braille instruction for Student. They expressed concern that Student needs to learn Braille at an early age to become proficient. (FF#100). We note, however, that Ms. Hanlon learned Braille at age 12 and considers herself to be proficient and fluent in Braille. (FF#99). Neither Mr. Wunder nor Ms. Hanlon had much knowledge regarding IDEA requirement of FAPE. (FF#99-100)

We also acknowledge the concerns of the Parents, Mr. Wunder and Ms. Hanlon regarding potential eye fatigue as Student's workload increases as she progresses through school. None of the teachers, particularly the classroom teacher who saw her daily, observed eye fatigue. (FF#102). Student never complained to anyone regarding this issue.

In *Marshall Joint School District No. 2 v. C. D.*, 616 F.3d 632 (7<sup>th</sup> Cir. 2010), the Court addressed the issue of fatigue having a potential impact on educational performance. C. D., with an educational diagnosis of Other Health Impaired because of a serious genetic disease, had an IEP, which his team terminated after a subsequent re-evaluation indicated that his medical condition no longer impacted his educational performance. *Id.*, at 637. The Court reversed the Administrative Law Judge's holding that the IEP team had failed to consider the possibility that pain and/or fatigue could affect his educational performance. *Id.* The Court stressed that the test "is not whether something, when considered in the abstract, *can* adversely affect a student's educational performance, but whether in reality it *does*." *Id.* (internal citations omitted) As in the *Marshall* case, we decline to second guess Student's IEP team on the issue of theoretical eye strain on Student.

An Administrative Judge in *Clarksville-Montgomery Sch. System*, 55 IDELR 58 (SEA TN. 2010) rejected the claim of parents that the IEP team incorrectly formulated IEPs without taking into account the students' potential blindness. Parents wanted students assigned to the Tennessee for the Blind even though they could assess the curriculum with the help of specialized glasses and accommodations. The Judge concluded that the IEPs offered a meaningful benefit and emphasized that the District was not required to maximize a student's benefit. We make a similar conclusion here.

### **CONCLUSION**

We unanimously conclude: (a) Respondent carried its burden of proof on the issue of the appropriateness of the re-evaluation as reflected in the Student's Evaluation Report dated December 13, 2010 and therefore, Student is not entitled to an IEE; and (b) Petitioners failed to carry their burden of proof on the procedural and substantive issues of FAPE involving the February 22, 2011 IEP.

Because the Petitioners failed to show beyond a preponderance of evidence that the District failed to provide FAPE under Issues 23 (c) and (d) (set out earlier in the Findings of Fact section), we decline to address the issue in 23(e) dealing with remedies if FAPE had been denied to Student.

### **ORDER**

Judgment is entered in favor of Respondent and against the Petitioners on the Due Process Complaint filed by the Respondent. The Due Process Complaint filed by the Petitioners is dismissed and judgment is entered against Petitioners and judgment is entered in favor of Midway R-I School District.

**APPEAL PROCEDURE**

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

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

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

Dated this 26th day of August, 2011.

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

\_\_\_\_\_  
/s/

Dr. Terry Allee, Panel Member

/s/  
\_\_\_\_\_  
Pamela Walls, Panel Member

**CERTIFICATE OF SERVICE**

Copies of the foregoing Opinion were mailed via certified mail, return receipt requested (and by electronic mail to Ms. Sutherland, Mr. Cayou and Ms. Goldman) via regular US Mail to Dr. Allee, Ms. Walls and Ms. Williams on this 26th day of August, 2011:

Ms. Teri B. Goldman  
555 Maryville University Drive, Suite 240  
St. Louis, Missouri 63141

[tgoldman@mickesgoldman.com](mailto:tgoldman@mickesgoldman.com)

Ms. Lisa M. Sutherland  
Mr. Daniel R. Cayou  
Missouri Protection and Advocacy Services  
3100 Main Street, Suite 207  
Kansas City, Missouri 64114  
[lisa.sutherland@mo-pa.org](mailto:lisa.sutherland@mo-pa.org)  
[daniel.cayou@mo-pa.org](mailto:daniel.cayou@mo-pa.org)

Dr. Terry Allee  
Allee Consulting Services, LLC  
5 Apache Dr.  
Lake Winnebago, MO 64034

Ms. Pamela Walls  
Rt. 2, Box 2530  
Sedgewickville, MO 63781

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

/s/

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Pamela S. Wright