

to Strike the District's Response as untimely which the Chairperson denied on November 15, 2010. (HPEX 1). Respondent challenged the sufficiency of the Second Complaint, and the Panel Chairperson found the Complaint sufficient on November 15, 2010. (HPEX 2).

On October 26, 2010, the District filed District's Motion to Consolidate Cases (DEX 23 at 628-630) and on November 9, 2010, the Hearing Chair issued her Order on Motion to Consolidate Cases finding that Petitioners' Due Process Complaints filed on September 15, 2010 and October 20, 2010 should be consolidated. (DEX 23 at 661-665 and HPEX 3).

The parties conducted resolution sessions on each complaint (Deposition of J.K. at 83-85) at the District's Administrative Offices. The resolution sessions were unsuccessful.

The Student and his Parents were represented at the hearing by Deborah S. Johnson Esq., and the District was represented by Ransom A. Ellis, III, Esq., Ellis, Ellis, Hammons & Johnson, P.C. The Hearing Panel for the due process proceeding was Janet Davis Baker, Chairperson, and Patty Smith and Sandra Brooks Scott, panel members.

The hearing was conducted at the offices of the School District on February 12-14, 2011. The following witnesses testified on behalf of Petitioners: M.F., M.U., Mother, L.M. and J.L. The following witnesses testified on behalf of Respondent: J.K., K.R., J.T. and L.B.

In addition to the live testimony, the Chairperson allowed certain deposition testimony into the record pursuant to Order of the Hearing Panel Chairperson on Admission of Petitioners' Proffered Deposition Testimony Not Submitted During Case in Chief or During Cross Examination dated June 30, 2011 (HPEX 4) and Supplemental Order of Hearing Chairperson on Admission of Petitioners' Proffered Deposition Testimony Not Submitted During Case-in-Chief or Cross-Examination dated July 21, 2011. (HPEX 5). Testimony was accepted in this fashion from depositions taken by Petitioner of: T.A., L.B., E.F., S.G., J.K., T.O., S.O., K.R., P.A.R., S.S., J.T. and T.W. Because of the extent of the testimony proffered, the portions that were admitted are not recited herein. The Orders referenced above are attached to this Decision as Exhibits 1 and 2 and are incorporated herein by this reference.

During the due process hearing the following documents were admitted into evidence and are a part of the record in this case:

A. Petitioners' Exhibits ("PET"): PET pp. 1-6, 290-310, 314-332, 334-341, 342-442, 444, 832-859, 872, 890, 896-900, 915-947, 950-956, 961-976, 1000-1852, 1930, 1999-2300, 2720-2724, 3000-3075, 4000 and 4152.

B. Petitioners' Exhibits ("PETDEX"²): PETDEX pp. 555-562.

C. District's Exhibits ("DEX"): DEX 1-14; 15 (pages 281-295); 16-21; 22 (pages 491-494; 498-499; 522-523; 526-534; 537); 24-37.

² Petitioners described documents that they contended were received from the School District as "PETDEX" meaning Petitioner and District joint documents, but they were not admitted in total by stipulation and were originally proffered by the Petitioners. Transcript of due process proceeding, hereinafter "Tr." followed by colon and page number(s), at page 755.

Following the due process hearing the following documents were admitted into evidence pursuant to the Order of Hearing Panel Chairperson on Admission of Petitioners' Exhibits Not Submitted during Case-in-Chief or During Cross-Examination dated June 24, 2011 (HPEX 6) and are a part of the record in this case:

A. Petitioners' Exhibits ("PET"): PET pp. 860, 873-889, 893-895, 901-914, 949-958, 2672-2719, 3076-3078, 3222-3237, 3242-3243, 3249-3256, 3258-3260, 3263, 4028, 4030-4043, 4110-4137, 4153-4155, 4157-4160, 4166-4169, 4171-4173, 4176-4179, 4181-4182, 4185-4186, 4207-4218, 4220-4221, 4223-4320 and 4044-4045.

B. Petitioners' Exhibits ("PETDEX"): PETDEX pp. 2-53, 54-65, 66-243, 272-292, 296-331, 338-413, 434-450, 452-493, 595-605, 611-671, 701-702, 704-929, 1174-1340, 1577-1601, 1627-1629, 1631-1671, 1673-1695, 1752-1758, 1760-1785, 1787-1820 and 1908-1938.

In total, the following documents were admitted into evidence and are a part of the record in this case:

A. Petitioners' Exhibits ("PET"): PET pp. 1-6, 290-310, 314-332, 334-341, 342-442, 444, 832-860, 872-890, 893-947, 949-958, 961-976, 1000-1852, 1930, 1999-2300, 2672-2724, 3000-3078, 3222-3237, 3242-3243, 3249-3256, 3258-3260, 3263, 4000, 4028, 4030-4043, 4110-4137, 4152-4155, 4157-4160, 4166-4169, 4171-4173, 4176-4179, 4181-4182, 4185-4186, 4207-4218, 4220-4221, 4223-4320 and 4044-4045.

B. District's Exhibits ("DEX"): DEX 1-14; 15 (pages 281-295); 16-21; 22 (pages 491-494; 498-499; 522-523; 526-534; 537); 24-37.

C. Petitioners' Exhibits ("PETDEX"): PETDEX pp. 2-53, 54-65, 66-243, 272-292, 296-331, 338-413, 434-450, 452-493, 555-562, 595-605, 611-671, 701-702, 704-929, 1174-1340, 1577-1601, 1627-1629, 1631-1671, 1673-1695, 1752-1758, 1760-1785, 1787-1820 and 1908-1938.

In addition to the Orders referenced above, there were other Orders issued by the Chairperson that although not relevant to this Decision, may be relevant upon judicial review and are thus included as part of the record of the case:

1. Order of Hearing Panel Chairperson on Motion for Continuance, Motion for Disqualification of Marilyn McClure, Five Day Disclosure Rule, Use of Depositions at Hearing and Other Pre-Hearing Matters, dated December 7, 2010. (HPEX 7).

2. Amended Order of Hearing Panel Chairperson on Motion for Sanctions and Additional Orders, dated February 3, 2011 (HPEX 8), which replaced the original Order of January 31, 2011.

B. Time-Line Information.

On October 26, 2010, at the request of the District, the Chairperson extended the time lines for the case through March 30, 2011. (DEX 23 at 664). On February 16, 2010, the parties made a joint request for an extension of the time lines in this case through May 31, 2011 and the Hearing Chair granted the request. (Transcript of due process proceeding, hereinafter “Tr.” followed by colon and page number(s), at pages 775-776). Following the hearing, on May 18, 2011, the District made a written request to extend the time lines in this matter through September 6, 2011. On May 18, 2011, the Hearing Chair granted the request and extended the time lines through September 6, 2011.

C. Statement of Issues.

The issues before the Panel upon which evidence was presented during the hearing and through acceptance of certain portions of deposition testimony, arise out of the compliance of the School District with the requirements of the Individuals with Disabilities Education Act (“IDEA”) as implemented in the State of Missouri, regarding the School District’s provision of a free appropriate public education (“FAPE”) to Student through an individualized education program (“IEP”) developed by the School District for Student. Both Complaints assert that the Student is qualified for special education services as a child with a disability in the category of Young Child with Developmental Delay as a result of severe oral and verbal apraxia.

The parties were unable to stipulate as to the issues prior to the hearing; consequently, the Chairperson found the issues to be as stated by the Petitioners in their Complaints as follows:

1. The September 16, 2008 and October 21, 2008 IEPs do not comply with the requirements of the IDEA because they are not reasonably calculated to provide FAPE and can be interpreted in such a way such that their implementation does not provide Student FAPE and because they do not enable the Parent to monitor the progress of the Student in a way that is meaningful and useful to Parent and with respect to the October 21, 2008 IEP, in a way that is meaningful and useful to private service providers.
2. The District did not comply with the procedural requirements of the IDEA in creating the IEPs in the following ways:
 - a. The IEPs are vague and unclear in the areas of special education services, related services, accommodations, modifications, identifying assistive technology and its use, supports for school personnel, and the extent to which Student will participate in the general curriculum.
 - b. The District did not provide Parent a copy of Alternate Form 1 that is referenced in the IEPs and the IEP teams did not discuss regular classroom adaptations, grading, materials, methods or test taking.
 - c. The present levels of performance were not accurate and/or complete.

d. For the October 21, 2008 IEP, the District did not provide Mother notices of action in response to denying requests related to her concerns that she made at the meeting to develop the IEP.

The effect of the above was to deny the Parents' ability to participate in the decision making process and interfered with Student's right to FAPE.

3. With respect to the October 21, 2008 IEP, the District failed to provide Mother with information sufficient for her to understand and participate in the decision making processes involved with developing the IEP including each required IEP component, and in so doing the District significantly impaired the Parents' ability to participate in the decision making processes and interfered with the Student's right to FAPE.

4. The IEPs did not place Student in the least restrictive environment. The placement was more restrictive than necessary.

5. During the entire time that the IEPs were implemented, the IEPs were not properly implemented because in the course of implementing the IEPs, the District interpreted them in such a way that the Student did not receive benefits that would have been received if the IEPs had been interpreted in such a way as to provide FAPE.

6. For resolution, the Parents requested that 1) the District be ordered to take action that will help insure that future IEPs are defined in such a way that they are accurate, clear and meaningful; 2) that the District be ordered to clarify the IEPs consistently with what the District believed at the time the IEPs were required to provide and to correct the present levels of performance such that they contain all information required by the IDEA and are accurate based upon information known to the District at the time the IEPs were developed; and 3) for the October 20, 2010 Complaint regarding the October 21, 2008 IEP, that the District be ordered to provide compensatory and remedial services.

(DEX 23 at 592-95, 616-19, 622).

Essentially, both complaints set forth the same issues: Were the IEPs at issue³ reasonably calculated to provide FAPE and did their implementation provide FAPE; were there IDEA procedural violations in the IEP development process or in the IEPs themselves; did the Respondent impair the ability of the Parents to participate in the decision making process for Student; and was the educational placement set forth in the IEPs the least restrictive environment (LRE)?

The IEPs were developed for the 2008-09 school year and there was a subsequent IEP developed for Student on April 1, 2009, that is not an issue in this case. Consequently the Hearing Panel reviewed the IEPs and their implementation from respective date of implementation through April 1, 2009. (Tr. 22.)

³ While Petitioners refer to the October 21, 2008 IEP as a separate IEP, the evidence supports that the October 21, 2008 "IEP" was an Addendum to the September 16, 2008 IEP as only the service minutes were changed and not the content of the September 16, 2008 IEP. See further discussion *infra*.

There is a two year statute of limitations under the IDEA for due process complaints which runs from the time the parent or public agency (the School District), “knew or should have known about the alleged action that forms the basis of the due process complaint.” 34 C.F.R. § 300.511(e). This deadline has exceptions, however, if the parent was prevented from filing a complaint because the public agency made specific misrepresentations that it had resolved the problem forming the basis of the complaint or that the public agency withheld information from the parent that was required to be provided to the parent.⁴ 34 C.F.R. § 300.511(f). There are no allegations by Parents of any exceptions to the two year statute and no dispute regarding the timeframe for the relevant evidence concerning the issues before the panel. While an analysis of IDEA violations may only go back two years, testimony and evidence relating to the Student prior to that time provides the hearing panel with relevant background and context.

II. FINDINGS OF FACT

A. The Parties.

1. Student is the son of Parents. The Student’s date of birth is April 9, 2003. During all times material to this due process proceeding, the Student resided with his Parents who reside within the boundaries of the District. The primary mode of communication of the Student and his Parents is written and spoken English. (DEX 2 at 18-19).

2. The District is a Missouri Public School District which is organized pursuant to Missouri statutes. The District is located in Jackson County, Missouri and maintains approximately twenty eight (28) educational buildings. The District educates approximately seventeen thousand three hundred (17,300) students of which approximately one thousand eight hundred (1,800) students receive special education and related services. (Tr. 535-536).

B. Background Facts – Prior To September 15, 2008.

(1) School Year 2005-2006.

3. On January 23, 2006, the District conducted a Transition Meeting for the Student to discuss his transition from the First Steps Program to the District’s Early Childhood program. Among those present at this meeting were the Student’s Parents, D.C. (Special Education Process Coordinator), H.S. (Early Childhood Teacher), K.B. (speech and language pathologist, “SLP”), A.C. the OT (occupational therapist, “OT”) and K.L. (Autism Specialist). Also present were C.E. (Private SLP) and M.P. (private behavioral therapist). (DEX 17 at 362). During the meeting:

⁴ There was e-mail correspondence and discussion before the hearing about the Parents’ alleged inability to receive complete records for the Student at the times required by the IDEA. However, upon inquiry from the Chairperson, the Petitioners proceeded with the hearing. (Tr. 10-11). The failure to receive records was not an issue in either due process complaint.

A. Those present reviewed current information regarding the Student and discussed the process for the transition to the District's early childhood program and the additional evaluations needed.

B. The Student's Team (defined for this purpose as the IEP Team⁵ and other qualified professionals as appropriate) prepared a Summary of Existing Data/Evaluation Plan for the Student (DEX 2 at 21-23) and the District subsequently received written consent from the Parents dated March 17, 2006, for an additional assessment of the Student (DEX 2 at 27).

C. The Parents were provided with a copy of the Procedural Safeguards. (DEX 18 at 446).

4. On March 17, 2006, the Student's Team met to complete the Evaluation Report for the Student and to review and complete the initial IEP. (DEX 2 at 26; DEX 17 at 363). After reviewing the data collected during the Student's Evaluation, the Student's Team made the following determination, which is contained in the Evaluation Report:

After reviewing the eligibility criteria for all 16 categories [the Student] meets the eligibility criteria to be diagnosed with Young Child with Developmental Delay (YCDD) due to a significant delay at or below 1.5 standard deviations or equivalent levels of the mean in a combination of any two (2) or more of the following areas, or below 2.0 standard deviations in any one (1) of the following areas:

Communication:	As determined by the PSL-3
Cognitive:	As determined by the HELP
Social/Emotional:	As determined by the HELP & ABLLS
Adaptive:	As determined by the HELP & ABLLS

The impact documented above is not the result of a lack of instruction in reading or math or limited English proficiency.

(DEX 2 at 35).

5. On March 17, 2006, following preparation of the Student's Evaluation Report, the Student's Team prepared the IEP for the Student. Appropriate goals were prepared for the Student and the Student's Mother stated that she wanted to have the Student split his time in Early Childhood Special Education and Early Childhood programs. The Student's Team agreed that an appropriate placement for him was Part-Time Early Childhood/Part-Time Early Childhood Special Education. (DEX 3 at 45; DEX 17 at 363). The Student's Parent signed a Notice and Consent for Initial Placement. (Tr. 446-448; DEX 3 at 47).

⁵ The term "IEP Team" is a term of art under the IDEA and is "interdisciplinary" and includes the student's parent(s), at least one of the student's regular and special education teachers, a representative of the district ("local education agency" or "LEA"), an interpreter of evaluation results, and such other individuals who have knowledge or special expertise, at the invitation of the parents or district. 34 C.F.R. § 300.321.

(2) School Year 2006-2007.

6. On September 22, 2006, approximately one month into classes for school year 2006-07, an IEP meeting was conducted. According to the notes taken by a Team member in attendance (DEX 17 at 365-368), District staff who were part of the Student's IEP Team reported that the Student had adjusted to the school setting and was attending to the educational program. The Student's Mother asserted that the Student had regressed in his speech since the beginning of school and complained about a private speech therapist who had previously worked with the Student. The Student's Mother further requested that the Present Levels of Academic Achievement and Functional Performance ("PLAAFP") section of the IEP be amended with a statement that the Student did not need "ABA"⁶, unless the Student "changes." The Student's Mother stated that she was stopping the Student's private ABA sessions in October because he only needed ABA about half of the time. The Student's parents also stated that they were taking the Student to Central Missouri State University ("CMSU") for an Assistive Technology evaluation. The Parents also stated they were happy with the notes coming home from the District's program as they were better than they had expected but requested a monthly review of data that the District said it would check the ability to do this. (DEX 17 at 365-368). The District provided the Student's Parent with a copy of the Procedural Safeguards. (DEX 18 at 446).

7. On October 6, 2006, approximately one and one-half months into classes for school year 2006-07, an IEP meeting was conducted. The Parent was accompanied to the meeting by child advocate R.P. with Missouri Protection and Advocacy. (Tr. 447-448). The Parents reported that the Student had been to CMSU and CMSU was going to recommend an augmentative communication device. The Parents also reported that the Student had been seen at the Mayo Clinic by Dr.S., an apraxia specialist. The Parents requested that the Student's speech therapy services minutes be increased to four times a week which was agreed to by the Student's Team and an additional oral/motor goal was added to the Student's IEP. (Tr. 369, 449). The District also offered to have the Student receive more time in the "STARS" (Early Childhood Special Education classroom) room so his needs could be met and the Parents' desire for a more structured, intensive instructional setting could be provided. The Parents agreed to the revisions made to the Student's IEP. (DEX 5 at 51-62; DEX 17 at 369).

8. On or around January 19, 2007, the Student's Mother requested that the Student be moved to a full-time placement in the Early Childhood classroom with a one-on-one aide because of his limited communication skills and concern about the learning of inappropriate behaviors in the special education room. The Student's IEP Team considered and rejected the request because the Team believed that "[the Student's] current placement of part-time early childhood classroom/part-time special education classroom is most appropriate to meet [the Student's] behavioral and communication needs in the least restrictive environment." A Notice of Action was prepared and provided to the Parents. (DEX 6 at 63).

9. On or around February 9, 2007, the Student's Mother and parent advocate R.M. met with District staff members to review the classroom data concerning the Student. The Student's

⁶ "ABA" is an acronym for Applied Behavioral Analysis, a program used to improve communication skills. (Tr. 21, 169).

Mother alleged that the District was not allowing her to look at data. The Student's Mother was told that the District would arrange another meeting to provide more time for her to review and discuss the data and have the Student's therapists present so the Student's Mother could ask questions concerning the data. (DEX 17 at 371-372).

10. On or around February 16, 2007, the Student's Mother made a number of requests to change the Student's program of special education and related services. (Tr. 450-455). These requests and the District's responses were as follows:

A. The Student's Mother requested that the Student be provided with a one-on-one aide to replicate his summer program and assist him to decrease his task avoidance behaviors. The Student's IEP Team considered and rejected the request ". . . because the Team believes [the Student's] current placement of part-time early childhood classroom/part-time special education classroom is most appropriate to meet [the Student's] behavioral and communication needs in the least restrictive environment." A Notice of Action was prepared and provided to the Parents. (DEX 6 at 64).

B. The Student's Mother requested that the Student participate in a typical preschool program with age appropriate peers for an additional one hour daily. The Student's IEP Team considered and rejected the request because "[the Student's] current program provides opportunity for daily integration with typical peers in the least restrictive environment." (DEX 6 at 65).

C. The Student's Mother requested that the Student's programming replicate that of his First Steps program. The Student's IEP Team considered and rejected the request because "[p]rogramming at Great Beginnings Early Education Center has been developed to provide educational benefit for [the Student] in the least restrictive environment [and] his current program is provided individually, and in small and large group settings." (DEX 6 at 66).

D. The Student's Mother requested that the Student's program include 600 minutes of one-on-one instruction in the home, 30 minutes itinerant services outside the home or regular early childhood setting, as well as an additional 600 minutes of one-on-one instruction. The Student's IEP Team considered and rejected the request because "[p]rogramming at Great Beginnings Early Education Center has been developed to provide educational benefit for [the Student] in the least restrictive environment [and] his current program is provided individually, in small and large group settings." (DEX 6 at 67).

E. The Student's Mother requested a treatment plan which outlined how the SLP would conduct therapy with [the Student]. The Student's IEP Team considered and rejected the request because "[t]he treatment plan is the Individual Education Plan." (DEX 6 at 68).

F. The Student's Mother requested that assistive technology be used as an instructional model. The Student's IEP Team considered and rejected the request because

“[t]here is no data to indicate that assistive technology is an appropriate model at this time.” (DEX 6 at 69).

G. The Student’s Mother requested that the Student “. . . receive 120 minutes of occupational therapy weekly.” The Student’s IEP Team considered and rejected the request because “[t]he Team believes 60 minutes of occupational therapy weekly is appropriate to meet [the Student’s] needs and provide educational benefit in the least restrictive environment.” (DEX 6 at 70).

H. The Student’s Mother requested that the District provide a summary of the SLP’s experience with students with apraxia, the number of students she has treated, their severity, ages and progress rates. The Student’s IEP Team considered and rejected the request because the District had previously provided the Student’s Mother with the SLP’s credentials which allow her to work in Missouri schools and the remaining information is confidential regarding other students. (DEX 6 at 71).

I. The Student’s Mother requested a consultation with Judevine Center to address sensory issues and task avoidance behaviors. The Student’s IEP Team considered and rejected the request because “[the Student] is currently receiving occupational therapy as well as sensory activities embedded in his classroom activities to address his sensory needs.” (DEX at 72).

J. The Student’s Mother requested 30 minutes weekly consultation with an assistive technology specialist. The Student’s IEP Team considered and rejected the request; however, the Student’s Team did agree to meet with the assistive technology consultant on an as-needed basis that may not be every week. (DEX 6 at 73).

11. On March 7, 2007, an IEP meeting was convened to review and revise the Student’s IEP. The Student’s Mother was accompanied by R.M., parent advocate. Prior to the meeting the Student’s Mother requested that the Student be removed from S.J.’s STARS classroom. The District representative K.M. (DEX 5 at 52) explained the effect of withdrawal of consent to the Student’s Mother and urged her to complete the IEP and make appropriate changes rather than withdrawing the Student from the Early Childhood Program. The Student’s Mother stated she did not want the Student in the STARS classroom because of her belief this classroom was for autistic children and it was not Student’s LRE. S.J. indicated that Student “is a different child now than at the beginning of the year” and described the progress he made during the school year. The Student’s Team indicated they were willing to complete the assistive technology evaluation, but needed the consent of the Parents and advised that Parents could consent when they met on March 8, 2007 to review data. (DEX 17 at 374-376).

12. On March 8, 2007, the Student’s Mother and R.M. met with C.L., principal of the Early Childhood Center (DEX 5 at 52), to review classroom data. (DEX 17 at 372).

13. On March 12, 2007, the Student’s Mother met with K.M. and C.L. and expressed her dissatisfaction with K.B., the Student’s SLP. (DEX 17 at 377).

14. On March 14, 2007, K.M. arranged a meeting between the Student's Mother and K.B. to discuss the Mother's dissatisfaction with K.B. (DEX 17 at 377).
15. On April 17, 2007, the Student was removed from school by his Parents and placed in Lee Ann Britain Center. (DEX 6 at 74; DEX 7 at 77).
16. As of April 17, 2007, the Student had made progress in his program of special education and related services. The draft Present Levels of Academic Achievement and Functional Performance ("PLAAFP") for the Student's IEP which was proposed on November 2, 2007 (DEX 7 at 77) describes the Student's progress prior to April 17, 2007 while in the District's program.
17. On April 19, 2007, the Student's Mother had a telephone conversation with C.L. and stated that she had observed a number of behaviors from the Student at home that were new exhibiting what she believed were autistic behaviors and felt this had come from the District's STARS program although the Student's Mother had no specific evidence that the behaviors were linked to attendance in the District's program. C.L. suggested that the Student's Mother keep a record of the behaviors so they could be discussed with staff at the next meeting. (DEX 17 at 377).
18. On April 25, 2007, the District completed an Assistive Technology evaluation of the Student which recommended trial use of augmentative communication devices to determine if any are appropriate for the Student. (DEX 7 at 78).
19. On April 26, 2007, a Parent/Teacher conference was conducted. During the conference, K.B. stated that the Student had a major breakthrough for speech during the previous period in that he was able to close his lips and produce a phoneme sound many times on command. The Student's portfolio was reviewed by the Student's Mother who expressed concerns that Student had picked up behaviors from other students in the STARS classroom, including hand flapping and the Student was also observed to play with his toys more at home. The Student's Mother stated that the Student needed to be at school due to the lack of stimulation at home. The Student's Mother shared her journal of observed behaviors. C.L. stated that she believed the Student is making progress in his current program. (DEX 17 at 378-379).
20. On May 1, 2007, the District issued a Notice of Action form to the Student's Mother. Prior to that date, the Student's Mother had removed the Student from school on April 17, 2007 and requested that he continue to receive Occupational Therapy services. The Student's IEP Team considered and rejected the request of the Student's Mother because the Student could not access the related services of speech therapy and occupational therapy without accessing the rest of his curriculum. (DEX 6 at 74).
21. On May 15, 2007, the Student's Mother telephoned K.M. and stated that she had been talking with the Missouri Department of Elementary and Secondary Education ("DESE") who first said she could access related services if she told the District she wanted to Home School the Student and later called her back to say they were not sure that was correct. The Student's

Mother stated that therefore she did not have a request to make until she heard back from DESE. (DEX 17 at 381).

(3) School Year 2007-2008.

22. On October 8, 2007, K.M. called the Student's Mother regarding arrangements for an IEP meeting on October 12, 2007. The meeting date was changed by agreement to October 22, 2007. During the conversation, the Student's Mother indicated that the Student had been receiving speech services two times a week in Warrensburg, Missouri with B.Z. and that L.M. no longer worked with the Student. The Student's Mother further stated that the Student was attending a private school three and one-half days a week, but would not provide the name of the school to K.M. K.M. asked to be allowed to observe the Student during his private speech therapy sessions prior to the IEP meeting but the Student's Mother stated she could not provide a response to that request at that time. (DEX 17 at 383).

23. On October 10, 2007, the District provided the Student's Mother with a copy of the Procedural Safeguards when it sent out the Notification of Meeting for the October 22, 2007, IEP meeting. (DEX 18 at 446).

24. On October 22, 2007, an IEP Meeting was conducted. The District provided a draft IEP. (DEX 7 at 75-90). The meeting was held even though the Student had not been in attendance in the District since April 17, 2007. (Tr. 456; DEX 7 at 77). The Student's Mother was accompanied to this meeting by child advocate R.M. (Tr. 456). The parties were unable to agree on an IEP for the Student. The District provided the Student's Mother with a copy of the Procedural Safeguards. (DEX 18 at 446).

25. On November 27, 2007, another IEP Meeting was conducted. The parties were not able to agree to an IEP for the Student. (DEX 17 at 385-386).

26. On March 27, 2008, the Student's Parents re-enrolled him in the District. The Student began attending school again in the District in August, 2008. The Student did not attend school in the District from April 17, 2007 through August, 2008. (DEX 8 at 92-94, 96).

(4) School Year 2008-2009.

27. On August 6, 2008, S.S., Special Education Process Coordinator for the District's Prairie View Elementary School, called the Student's Mother to set up an IEP meeting to receive the transfer paperwork from the Student's private school. (DEX 17 at 389).

28. On August 8, 2008, S.S. sent a Notification of Meeting form to the Parents which scheduled a meeting for August 18, 2008 for the purpose of a Transfer Meeting to review IEP information and to review/revise the Student's IEP. (DEX 9 at 97a).

29. On August 11, 2008, the Student's Mother sent an e-mail message to S.S. The message stated that there would be no need to have a meeting to complete the transfer paperwork and review the Student's education plan since the Student was "not attending a private or public

school.” The e-mail further stated that the Student had been “receiving therapy at the LeAnn [sic] Britain Center, a community outreach program provided through Shawnee Mission Medical Center.” (DEX 22 at 479-481).

30. On August 12, 2008, T.W., regular education teacher, called the Student’s Mother to discuss the beginning of the new school year. The Student’s Mother stated she was not sure whether she would attend the Meet Your Teacher meeting because she was not sure whether she “would be having him attend if things could not be worked out.” The Student’s Mother also stated that she did not agree with the placement in the STARS program when the Student previously attended Great Beginnings. (DEX 17 at 388).

31. On August 14, 2008, S.S. sent a second Notification of Meeting form to the Student’s Mother which scheduled a meeting for August 18, 2008, but changed the time of the beginning of the meeting. (DEX 9, p. 97).

32. On August 18, 2008, an IEP Meeting took place. Present at this meeting were: S.S.; T.W.; K.R., special education teacher; S.W., District autism coordinator and special education teacher; J.T., District speech and language pathologist; P.R., principal of the elementary school; T.A., assistant principal; J.K., Executive Director of Special Services for the District; Shelli Guin (District’s Attorney); the Student’s Mother; M.P. (private behavior therapist); S.T. (Parent’s friend); L. S. (Parent’s attorney) and C.S. (described as a KCRO Service Coordinator). According to the minutes taken by the District (DEX 17 at 390-392), during this meeting the following occurred:

A. S.S. requested that the Student’s Mother share information about the Student. The Student’s Mother provided a packet of information from various private service providers for the Student including A.C. and L.W. at the Lee Ann Britain Center and M.P., the Student’s Behavioral Specialist, for the period August 2006 through June, 2008. This information was discussed by the Student’s Team and S.S. requested releases from the Student’s Mother so additional information could be collected and discussed with the Student’s private service providers.

B. The Student’s Mother indicated that the Student had been using an assistive technology device. The Student’s Team asked questions concerning the device, which was not working correctly at the time of the meeting.

C. S.S. passed out the Student’s last IEP, dated October, 2006, and indicated that initially the Student’s services would be based on that IEP until additional information was gathered to determine the Student’s present levels to allow for the development of an updated IEP. J.K. stated that the information gathering process should not take longer than four to six weeks and the Student’s IEP Team would be able to meet and revise his IEP consistent with the updated information.

D. The Student’s Mother stated she wanted to attend school with the Student because he was non-verbal and she would “not hand over a non-verbal child without being in attendance.” J.K. and Shelli Guin stated that the Mother’s presence created a

confidentiality issue for the District with respect to other students in the classroom. J.K. stated that the District would be willing to contract with the Student's private behavior therapist, M.P., to assist the District's staff to get to know the Student. The Student's Mother stated that she would "not be excluded" and wants to come with the Student for three hours a day, until the Student is comfortable with the programming. J.K. offered to contract with M.P. for 5-10 hours per week. M.P. stated that "it was not beneficial for the Student for [the Student's Mother] to attend with him." Ultimately, the District contracted with M.P. for 10-12 hours per week during the transition period. (Tr. 602; DEX 9 at 103-104).

E. The Student's IEP Team discussed increasing his speech therapy minutes from the 90 minutes per week which was on the October, 2006 IEP, to 150 minutes a week. Speech/Language Pathologist J.T. stated that the speech therapy would be delivered in one-on-one therapy sessions and some small group sessions.

F. The Student's IEP Team discussed the occupational therapy minutes and Occupational Therapist L.B. stated that she felt the number of minutes in the October, 2006, IEP were acceptable as a starting point.

G. S.S. stated the District would investigate the assistive technology device similar to the one the Student had tried out. K.R. stated that she was familiar with the Dyna Vox device.

H. K.R. described the setting the Student would be in as having five students – four who are non-verbal and one who uses some verbalizations.

I. S.S. shared a proposed transition plan (DEX 9 at 103-104), which started with the Student attending school for one hour a day with M.P. providing support. The purpose of the transition plan was to provide ". . . a graduated plan as far as the number of hours that he attended school. That he would start with [K.R.] and then we would gradually increase the hours and include some time in the regular kindergarten classroom as well as speech services and A.C. the OT services." (Tr. 597).

J. The Student's IEP Team determined that the appropriate placement for the Student was: "Inside regular class less than 40% of time."

K. M.P. provided K.R. with a copy of the Student's Current Target List which were the skills that she and the Student were working on in August, 2008. (Tr. 603; DEX 24 at 691-696).

L. The District provided the Student's Parent with a copy of the Procedural Safeguards. (DEX 18 at 447).

(DEX 17 at 390-392; DEX 9 at 98-104).

33. On August 18, 2008, after the IEP meeting that day, the Student's Mother met with K.R. and toured her classroom, the speech therapy room and the Kindergarten classrooms. (DEX 17 at 394).

34. On August 18, 2008, after the IEP meeting that day, the Student's Mother sent an e-mail message to S.S. The message stated that the Student would not be attending school on August 19, 2008 because of the "concerns" of the Student's Mother "regarding what will his program at PVE [Prairie View Elementary] look like and my concerns over the district's inability to communicate with [the Student]." (DEX 22 at 485-486).

35. On August 22, 2008, S.S. wrote a letter to the Student's Mother which transmitted the updated IEP sections, a copy of the October, 2006 IEP, a Notice of Action and a graduated transition plan to the Parents. The letter also states that if the Parents wish to observe the classroom they will need to use the parent observation procedure set forth in the Student Handbook. (DEX 9 at 105).

36. On August 25, 2008, the Student's Mother sent an e-mail to S.S. which stated she was unwilling to sign the Notice of Action that had been provided to her in S.S.'s August 22, 2008 letter and sets out her disagreement with the proposed IEP and requested changes. (DEX 22 at 488-489).

37. On August 26, 2008, K.R. met with the Student's Mother, M.P. and the Student in the elementary school. The Student hugged M.P. and held hands with K.R. and M.P. while they walked down the hall to K.R.'s Life Skills classroom. L.B., J.T., S.M. and T.W. were in the classroom while the Student was there. The Student explored the room and materials, went into other student learning areas and into the medical privacy area. M.P. demonstrated how she presented tasks to the Student and gave S.M., the District's autism specialist, a copy of the current skill sets for the Student. The Student was scheduled to return for school on August 27, 2008. (Tr. 607-609; DEX 17 at 394, 402).

38. On August 28, 2008, the Student returned to school in K.R.'s Life Skills Classroom. (Tr. 607).

39. K.R. described her Life Skills Classroom as follows:

In a life skills classroom, it doesn't apply to every single child because every child is individual and has their own unique needs and learning the child's abilities and strengths and weaknesses. But as a general overall statement, the children need more intense services, more structured support, more adult support, smaller class sizes. Their – a lot of the prelearning and preacademic skills, those are very difficult for them, so we're working on those. They often lack daily living skills and self-care skills, such as eating – or doing these things independently: Eating, bathrooming, grooming, dressing. They need tasks whether it's daily living or prelearning or preacademic or academic skills broken down into very small, incremental steps, and those steps are taught either forward chaining or backward

chaining. The students even with modifications and accommodations still have a difficult time understanding a regular education curriculum.

(Tr. 613-614).

40. K.R. described the Student as he presented to her when he was first assigned to her classroom:

. . . even from the meetings . . . prior to even him coming on the very first day it was decided that he would need one-on-one adult support from the moment he arrived until the moment he left. He did have some good prelearning skills such as he was able to sit in a chair, contract for reinforcers, scan and array. He still had difficulty with some prelearning skills such as following directions. Preacademic skills that he had difficulties with was matching, imitation, play skills, receptive. He had some receptive identification but it was less than 10 items. He was not independent in any daily living skills. He needed assistance with eating with utensils. He needed assistance with dressing if he had snaps on or engaging his coat, the zipper on his coat to zip it. He wasn't able to do buttons. In the area of grooming, brushing his teeth, brushing his hair. In the area of bathrooming, he came in a diaper and we worked on potty training. . . .We did modifications and accommodations so they had access to the general curriculum, and still the skill levels and things that we were working on were prelearning.”

(Tr. 614-615).

41. On August 28, 2008, the Student's Mother observed K.R.'s Life Skills classroom while K.R. and M.P. worked with the Student. (DEX 17, p. 393; DEX 22 at 493.).

42. On August 29, 2008, S.S. sent a letter to the Parents which responded to the e-mail of the Student's Mother dated August 25, 2008. In her letter, S.S. indicates that the District gave the following assurances:

A. The date of the next IEP meeting is not listed on the IEP, just the date of the annual review meeting. The District is in the process of scheduling the next IEP meeting at this time.

B. The use of Assistive Technology is listed in three places in the IEP – Considerations and Special Factors (Items 6 and 12) and Modifications/accommodations and the frequency was changed to daily.

C. Access to the General curriculum and regular education participation were not discussed in the meeting and will need to be discussed and added to the replacement IEP.

D. Quarterly progress reports will be provided to the Parents as noted on the IEP. In addition, a daily log will be provided for the Student.

E. The IEP correctly reflects the speech service minutes provided weekly.

(DEX 22 at 497).

43. On September 2, 2008, the Student's Mother observed K.R.'s Life Skills classroom while K.R. and M.P. worked with the Student. (DEX 22 at 498-499).

44. On September 5, 2008, S.S. sent a Notification of Meeting form to the Parents for an IEP meeting on September 16, 2008, to review/revise the Student's IEP. (DEX 17 at 393; DEX 10 at 108).

45. On September 8, 2008, the Student's Mother wrote a letter to D.M., the District's Superintendent, which complained about correspondence she had from District staff "where statements were attributed to myself that I did not utter." The letter requested that she be allowed to tape record IEP meetings in the future. (DEX 22 at 506).

46. On September 11, 2008, S.S. sent a letter to the Parents which provided them with a copy of the draft IEP which was going to be discussed at the IEP meeting scheduled for September 16, 2008. (DEX 22 at 508; DEX 10 at 109-126).

47. On September 12, 2008, the Student's Mother sent a letter to S.S. which indicated she had received the draft IEP sent on September 11, 2008, and enclosed a copy of "Questions, Comments and Suggested Changes to the Draft IEP." (DEX 22 at 509; DEX 10 at 126c-126d).

C. Facts During the Relevant Period – September 15, 2008 Through April 1, 2009.

48. On September 16, 2008, D.M. responded to the letter he had received from the Student's Mother dated September 8, 2008, and recommended that in the future she provide copies of her meeting notes so there will be "a complete record of what everyone garnered from the meeting and prevent the need to revise the district's meeting notes." D.M. denied the request of the Student's Mother that he grant a variance to the District's Board of Education Policy KKB, which prohibits recording of meetings. (DEX 22 at 512).

49. On September 16, 2008, an IEP Meeting took place. Present at this meeting were: the Student's Mother; J.K., Shellie Guin, S.S., Mother, S.T., L.B., P.R., K.R., J.T., S.M., M.P., T.W., L. S. (Parents' attorney by phone); and C.S.. During this meeting the following occurred:

A. The District provided the Student's Mother with a copy of the Procedural Safeguards. (DEX 18 at 447).

B. A copy of the Meeting Agenda (DEX 10 at 126a) was provided to all participants.

C. The Student's IEP Team discussed the Present Levels of Academic Achievement and Functional Performance ("PLAAFP", sometimes referred to as "Present Levels") section of the IEP. The concerns of the Student's Mother and M.P. were discussed and changes were made to the draft IEP at their request and the suggestion of other Team

members which resulted in language changes to the IEP draft to add language concerning the Student's: (1) Difficulty with generalizing skills across settings, instructors, unfamiliar people and materials; (2) Ability/lack of ability to follow directions; (3) Off task behaviors and descriptions of those behaviors; (4) Resistant behaviors with entering school; (5) Ability to utilize assistive technology devices; and (6) The need for functional communication skills. Student's Mother requested, and was given the opportunity to add a "parent concerns" section to the Present Levels. The Present Levels section of the Student's IEP was agreed upon by the Team. (DEX 17 at 396-397, 400).

D. The Student's IEP Team discussed the Student's Goals. The Team had the following discussions:

(1) A language goal related to receptive identification was added at the request of M.P.

(2) The proposed goal concerning readiness skills using puzzles was discussed and the Team agreed to leave it as written.

(3) The Student's Mother requested that data collection be done bi-monthly but would accept at least monthly and shared with Parents. K.R. and the Student's Team agreed to monthly.

(4) The Student's Mother requested an additional goal which would incorporate ten instructional functional tasks in one goal. The Team discussed the proposed goal and K.R. noted that many of the proposed elements of the goal were already built into the Student's school day. The Team agreed to review these proposed goals again when the IEP was rewritten.

(5) The Student's Mother indicated a concern that the Student tends to lose skills he has gained. K.R. discussed her maintenance time lines that track mastery levels.

(6) S.M. suggested an additional goal that would track the Student's use of his assistive technology device to greet others. Changes were made to the draft by agreement of the Team.

The Student's Team accepted the goals as discussed. (DEX 17 at 397-399).

E. The Student's IEP Team discussed Special Factors for the Student. The Team had the following discussions:

(1) The Student's Mother requested that the District provide the Student with an assistive technology device after the Student's borrowed one was returned. J.K. stated that the District would provide a similar device.

(2) Transportation accommodations were discussed. The Student's Mother requested that the Student be provided with a seat belt and is not comfortable with the safety harness without her looking at it. The Team agreed that the box indicating a need for accommodations will be marked to include a seatbelt.

(3) Adult support was discussed. The Student's Team agreed that the Student needed adult one-on-one support during transition times, to give specific directions for task completion, to be with him on the playground for safety and to teach him the rules and routines. The Team added a statement to the Present Levels section regarding adult assistance.

(DEX 17 at 399).

F. The Student's IEP Team discussed the Program minutes. The District personnel recommended that the Student transition to a full day program. The Student's Mother felt that a full day program was too much for the Student at this time. M.P. suggested that the Student transition into a full day program and as appropriate the Student's time could be increased by writing an Addendum to the IEP. The Team agreed to initially extend the Student's time at school by one hour per day (five hours per week) at this time and reevaluate the Student's readiness for additional time in two to three weeks. K.R. explained the Student's current schedule and the special education and regular education minutes were totaled. The Team determined that initially the Student would have 1200 total minutes per week – with 925 minutes in Special Education consisting of 150 minutes in Speech Therapy, 60 minutes in Occupational Therapy and 715 minutes in specialized instruction. (DEX 17 at 399-400).

G. The Student's IEP Team discussed and completed the Regular Education Participation/Placement page of the IEP. The Student's Mother stated that she believed that the Student would disrupt the regular education classroom. The Team determined that the appropriate placement for the Student was Inside the Regular Education Setting less than 40% of the time. (DEX 17 at 400).

H. The Student's Mother requested that the District continue to utilize the services of M.P. S.S. stated that the District would continue to use M.P. on an as-needed basis. (DEX 17 at 400).

I. The Student's Mother requested a written treatment plan from the SLP to address the apraxia issues. J.K. advised that some general guidelines could be written and that the data shared monthly will indicate the progress being made. The Student's Mother stated that good communication is what she really wants and she will wait on a formal treatment plan on the apraxia until the data is shared and she can determine if that will be enough information. (DEX at 400).

The Student's Mother was provided with a Notice of Action which indicated that the Student's program of special education and related services had changed in the following ways: Present Level, Goals, Minutes Special Factors and Classroom and Testing accommodations. The

Student's Mother signed and returned the consent section of the Notice of Action and indicated that she wished to waive the ten day period for initiation of the IEP. (Tr. 475-476; DEX 10 at 147-148).

50. On September 25, 2008, S.S. sent a letter to the Parents. The letter contained a copy of the Student's September 16, 2008, completed IEP and a transition plan "to reference as we move toward a full day program for [the Student]." (DEX 10 at 127-150; DEX 17 at 401).

51. On September 26, 2008, an IEP Addendum was prepared which proposed a change to the minutes of participation for the Student consistent with the Transition Plan that had been agreed to by the Student's Mother. The September 26, 2008, IEP Addendum was transmitted to the Parents by S.S. (DEX 1 at 151-154). The September 26, 2008, IEP Addendum proposed the following changes in the Student's participation minutes:

A. Increase the Total Minutes of participation for the Student from one thousand two hundred (1,200) minutes to one thousand seven hundred (1,700) minutes per week.

B. Increase the Student's Minutes in Regular Education Classes from two hundred seventy five (275) minutes to three hundred seventy five (375) minutes per week.

C. Increase the Student's Minutes in the Special Education Classroom from seven hundred fifteen (715) minutes to one thousand fifteen (1115) minutes per week.

(DEX 10 at 127; DEX 11 at 152). The proposed initiation date for the change in participation minutes was October 6, 2008. (DEX 11 at 152). The Parents were provided with a Notice of Action indicating a proposed change in services and minutes on the current IEP. The Student's Mother signed the Notice of Action on October 1, 2008, and indicated she wished to waive the ten day initiation period. (DEX 11 at 153-154).

52. On October, 1, 2008, the District sent a Springboard AT device home for the Student to try out. (DEX 22 at 522-523).

53. On October 3, 2008, J.T. sent an e-mail to the Parents which updated them on the Student's progress during the week. (DEX 22 at 524).

54. On October, 8, 2008, K.R. e-mailed the Parents. In the e-mail, K.R. proposed to again increase the participation minutes for the Student. (DEX 22 at 526-529).

55. On October, 13, 2008, the District received a Tango AT device for the Student to try out. The Parents were notified of the arrival of the device by J.T. and K.R. (DEX 22 at 530-533). The Tango AT device was transported to the Student's home on October 14, 2008 by K.R. (DEX 17 at 403).

56. On October 17, 2008, J.T. e-mailed the Student's Parents and set forth the Student's progress during the week. (DEX 22 at 534).

57. On October, 21, 2008, a parent-teacher conference was conducted concerning the Student. While the meeting began as a parent-teacher conference, the Student's Mother stated that S.S. requested it be widened to an IEP meeting to discuss service minutes for the Student and she agreed. (Tr. 470-471). Present at this meeting were: K.R., J.T., L.B., T.A., S.S., T.W., P.R., S.M., the Student's Mother and her friend, S.T. During the meeting K.R. and T.W. discussed the Student's progress on the goals in his IEP. During this meeting the District proposed the following changes in the Student's participation minutes:

A. Increase the Total Minutes of participation for the Student from one thousand seven hundred (1,700) minutes to two thousand one hundred (2,100) minutes per week, which is a full time school week.

B. Increase the Student's Minutes in Regular Education Classes from three hundred seventy five (375) minutes to four hundred seventy five (475) minutes per week.

C. Increase the Student's Minutes in the Special Education Classroom from one thousand fifteen (1115) minutes to one thousand four hundred fifteen (1,415) minutes per week.

(DEX 11 at 151-154; DEX 12 at 155-158; DEX 15; DEX 17 at 403-405).

The parties agreed that they would meet every month to review the Student's progress and the data collected on his goals. (Tr. 655). Student's Mother asked why Student's grade card was marked "see IEP." K.R. explained that more information on the Student's progress is contained on the goals section of the IEP and that Student would have difficulty with the Kindergarten skills at this time. (DEX 17 at 405).

The proposed initiation date for the change in participation minutes was October 27, 2008. (DEX 12 at 156). The Parents were provided with a Notice of Action indicating a proposed change in services and minutes on the current IEP. The Student's Mother signed the Notice of Action on October 21, 2008, and indicated she wished to waive the ten day initiation period. (DEX 12 at 157-158). On October 22, 2008, S.S. sent a copy of the October 21, 2008 IEP Addendum home to the Student's Parents. (DEX 17 at 404).⁷

58. K.R., Life Skills special education teacher for the District has been with the District for twelve years in this capacity. (Tr. 594). She was Student's special education teacher during the period of Petitioners' complaint. She holds a teaching certification in Missouri in "mild/moderate cross-categorical in severe developmental disabilities." (Tr. 596). She also has a master's degree in special education. (Tr. 594).

⁷ While the Second Complaint refers to the October 21, 2008 document as an IEP of that date, the Student's Mother acknowledged receipt of the IEP Addendum dated October 21, 2008 (DEX 12 at 155-156) and acknowledged that the only change between this document and the September 16, 2008 IEP was the change in service minutes. (Tr. 468-474). In fact, Student's Mother acknowledged that there were no changes from the September 16, 2008 IEP through the April 1, 2009 IEP other than in the number of service minutes. (Tr. 485.)

59. T.W. was the Student's regular education kindergarten teacher during the period of Petitioners' complaint. (Tr. 397; Deposition of T.W. at 7). Student's paraprofessional, S.G., attended her room each day with the Student. (Deposition of T.W. at 10). She had regular contact with K.R. about the Student as well as the other service providers, including L.B. and J.T. (Deposition of T.W. at 9-10).

60. L.B. has worked for the Lee's Summit School District for 16 years and is a certified Occupational Therapist. (Tr. 730). She has a master's degree in occupational therapy. (Tr. 730-731). She was responsible for providing certain services to the Student as indicated in the Student's IEP. (Tr. 732).

61. J.T. is a speech-language pathologist and has been employed for 14 years with the Lee's Summit School District. (Tr. 702:12-18). She has a master's degree and holds a Certificate of Clinical Competence through the American Speech Language Hearing Association and is licensed in the State of Missouri. (Tr. 702-703). She has experience with non-verbal children including those who appear to have apraxia. (Tr. 704). She was responsible for providing certain services to the Student as indicated in the Student's IEP. (Tr. 705-708).

62. On October 23, 2008, J.T. sent an e-mail to the Student's Parents regarding the Student's progress. (DEX 22 at 537).

63. On October 23, 2008, S.S. exchanged e-mail with the Student's Mother to arrange a parent-teacher conference to review data on November 18, 2008. (DEX 22 at 536).

64. On October 24, 2008, the Student's Mother sent an e-mail to S.S. raising questions concerning whether the Student should receive a grade card. (DEX 22 at 538-539). On October 30, 2008, S.S. responded to the e-mail from the Student's Mother and addressed the questions she raised in her October 24 e-mail. (DEX 22 at 545). S.S. stated the reason why the Student did not receive a regular grade card as follows:

Students that receive intensive support due to their individual functioning levels frequently have the grade card marked as "see IEP". This is due to the student's individual needs and their ability to work on grade level curriculum. [The Student's] progress was reviewed using his IEP goals.

S.S.'s e-mail further stated:

[The Student] will continue to have access to the general education curriculum while in the Special Education setting or the regular education setting, as determined by his IEP. [The Student] has access to grade level academic content this is based upon alternate achievement standards that link functional curriculum (his goals and objectives) to academic skills. Yes, the alternate standards set different expectations for student mastery of grade-level content and the content may take the form of introductory or prerequisite skills, as in [the Student's] case where we are working on developmentally appropriate skills.

65. On October 31, 2008, J.T. sent an e-mail to the Student's Parents which detailed the Student's progress during the week. (DEX 22 at 546).

66. On November 17, 2008, K.R. telephoned the Student's Mother to confirm the scheduled IEP data review day on November 18, 2008. (DEX 17 at 406).

67. On November 18, 2008, a parent-teacher conference was held with the following persons in attendance: K.R., L.B., T.A., S.S. and the Student's Parents. During the conference the following occurred:

A. Progress on goals was shared by K.R. and the Student's Team reviewed the program and progress on the IEP.

B. The Student's Mother expressed concerns about information that had been provided to the Parents concerning the Student's use of the Alternate Curriculum and ALT-GLF and why that was not in the Student's IEP. A discussion was had concerning how the ALT-GLFs bridge the IEP and the Kindergarten curriculum.

C. K.R. said she would prepare a list of Kindergarten curriculum to which the Student was being exposed in her room.

D. The Student's Mother indicated that the Student knew all of his colors and 10 letters this summer. K.R. stated that the information provided by M.P. indicated the Student knew 1-2 colors and 3 numbers. K.R. asked the Student's Mother to show her where M.P.'s data indicated something different.

(Tr. 657; DEX 17 at 406).

68. On November 20, 2008, K.R. called the Student's Mother to get more input from her on what she envisioned the Kindergarten regular education time to look like. The Student's Mother said she wanted the Student to be exposed to the Kindergarten curriculum. K.R. reminded the Student's Mother that she was working on Kindergarten skills in her classroom. The Student's Mother requested copies of the Kindergarten work sheets. K.R. said she would get extra copies of the Kindergarten work sheets for her. (DEX 17 at 407).

69. On November 24, 2008, the Student's Mother e-mailed K.R. and stated that the information K.R. had sent to her was "the type of information that I am looking for [the Student] to have exposure to during his school day" and that further she did not have any questions and thanked K.R. for her hard work. (DEX 22 at 548).

70. On December 10, 2008, the Student's Mother sent an e-mail to K.R. reporting that the Student had used the bathroom without assistance and said the word "mo" for "more" at dinner. (DEX 22 at 551).

71. On December 17, 2008, a parent-teacher conference was held with the following persons in attendance: K.R., S.M., S.S., J.T., T.A. and the Student's Mother. During the conference the following occurred:

A. Progress on goals and data collected on the progress was provided and discussed by the Student's Team.

B. The Student's Mother was provided a copy of the Procedural Safeguards. (DEX 17 at 408; DEX 18 at 447).

C. The Student's Team discussed the re-evaluation of the Student, prepared an evaluation plan and the Student's Mother signed the Notice of Action and indicated she wished to waive the ten day initiation period. (DEX 13 at 159-165).

(DEX 17 at 408).

72. On January 9, 2009, J.T. sent an e-mail to the Student's Parents providing information concerning the Student's work with her in the classroom. (DEX 22 at 555-556).

73. On January 27, 2009, a parent-teacher conference was held with the following persons in attendance: K.R., S.S., J.T., L.B., T.A., T.W., S.M., the Student's Mother and S.T. During the conference the following occurred:

A. Progress on goals and data collected on the progress was provided and discussed by the Student's Team.

B. The Student's Mother expressed concern about the Student needing to be introduced to writing skills and academics. K.R. provided the Student's Mother with a copy of an alignment of skills document that she had prepared which compared the skills the Student was receiving with the Kindergarten skill levels. K.R. stated that the Student was doing academics in her classroom – letters, numbers, shapes and colors – which are recorded on the data sheets and provided to the Student's Mother. (DEX 16 at 323-336).

(DEX 17 at 407-409).

74. On February 3, 2009, K.R. sent an e-mail to the Student's Mother concerning suggested programming for the Student Assistive Technology device. (DEX 22, p. 566).

75. On February 4, 2009, K.R. responded to an e-mail sent by the Student's Mother which expressed a concern that the Student was reluctant to go with his classroom aide that morning. K.R. informed the Student's Mother that she observed the Student "smiling and laughing" and that he was in a "good mood" that morning. (DEX 22 at 570-571).

76. On February 18, 2009, the Student's Mother wrote a letter to the Student's IEP Team which requested that copies of "relevant evaluative information" be provided to her prior to the March 3, 2009, meeting to discuss the results of the Student's re-evaluation. (DEX 22 at 574).

77. On February 28, 2009, a parent-teacher conference was held with the following persons in attendance: K.R., J.T., L.B., T.A., S.S., S.M., the Student's Mother and S.T. During the conference the following occurred:

- A. Progress on goals and data collected on the progress was provided and discussed by the Student's Team.
- B. A report concerning the Student's progress on his Occupational Therapy goals were provided by L.B.
- C. A report concerning the Student's progress on his Speech/Language goals were provided by J.T.
- D. The Student's Mother shared information she had received from other agencies concerning the Student's ability to sort information.

(Tr. 658; DEX 17 at 409).

78. On March 3, 2009, an evaluation staffing meeting was held with the following persons in attendance: S.S., K.R., J.T., L.B., S.M., T.W., T.A., the Student's Mother, S.T. and Mrs. B. (brought by Student's Mother). During the meeting the following occurred:

- A. The Student's Mother was provided a copy of the Procedural Safeguards. (DEX 17 at 410; DEX 18 at 447).
- B. The Evaluation Report was provided and discussed. (DEX 13 at 167-219). The Evaluation Team determined that the Student qualified for the categorical disability of "Other Health Impaired." The Evaluation Report states as follows:

Other Health Impairments. Based on the result of this evaluation, [the Student] meets eligibility requirements to be diagnosed as Other Health Impaired. A Child displays a Health Impairment when:

- A. A health impairment has been diagnosed by a licensed physician, licensed psychologist, licensed professional counselor, or licensed clinical social worker;
- B. The health impairment adversely affects the child's educational performance.

Based on the diagnosis of:

- Severe Oral and Verbal Apraxia by B.Z., August, 2006
- Autistic Disorder by Dr. K, September, 2007

[the Student] has been diagnosed with a health impairment. The impact documented above is not the result of a lack of instruction in reading or math or limited English Proficiency.

(DEX 13 at 217).

C. The Student's Mother was provided with a Notice of Action which documented the "Change in Diagnosis" and the Student's Mother signed the Notice of Action and indicated she wished to waive the ten day initiation period. (DEX 13 at 219-220).

D. The Team scheduled March 26, 2009 date for the review/revision of the Student's IEP. (DEX 14 at 221.)

(DEX 17 at 410).

D. The Composition of the Student's September 16, 2008 IEP, as Amended.

79. The Student's September 16, 2008 IEP, as amended, contains the following required elements:

A. A statement of the Student's present levels of academic achievement and functional performance, including how the Student's disability affects his involvement and progress in the general education curriculum, and how the disability affects his participation in appropriate activities. The Present Levels section of the IEP also contains a statement of "Parent Concerns" that was provided by the Student's Mother. (DEX 10 at 128-130).

B. A statement of measurable annual goals, including academic and functional goals designed to meet the Student's needs that result from his disability to enable him to be involved in and make progress in the general education curriculum. The Student's IEP team developed twelve Goals and Objectives for the Student, (DEX 10 at 131-142).

C. A statement of the special education and related services and supplementary aids and services to be provided to the Student, and a statement of the program modifications or supports for school personnel that will be provided to enable the Student:

- 1) To advance appropriately toward attaining the annual goals;
- 2) To be involved in and make progress in the general education curriculum;
- 3) To participate in extracurricular and other nonacademic activities; and,
- 4) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this paragraph.

(DEX 10 at 127-146).

D. A statement of the Student's needs for transportation as a related service. (DEX 10 at 144).

E. A Consideration of Special Factors section (DEX 10 at 143-144) and a Modifications and Accommodations section (DEX 10 at 146), which with the Goals and Objectives (DEX 10 at 131-142), provide a statement of the special education and related services, supplementary aids and services and a statement of the program modifications or supports that will be provided to the Student to enable him to receive educational benefit.

F. A statement of the Student's participation in physical education. (DEX 10 at 143).

G. An explanation of the extent, if any, to which the Student will not participate with nondisabled children in the regular class and in the activities. (DEX 10 at 143-146).

H. A statement that the Student's age group does not take State or District assessments. (DEX 10 at 144).

I. The projected date for the beginning of the services and modifications described in the IEP, and the anticipated frequency, location, and duration of those services and modifications. (DEX 10 at 127, 145-146).

J. A description of how the Student's progress toward the annual goals will be measured, and when periodic reports on his progress toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided. (DEX 10 at 131-142).

K. A listing of the individuals who attended the IEP meeting and their role. (DEX 10 at 126b-127).

L. A statement indicating the Student's eligibility or ineligibility for extended school year services. (DEX 10 at 144).

M. A statement of the placement considerations and decision. (DEX 10 at 145).

E. The Student's Progress On The Goals And Objectives In His IEP – September 15, 2008 Through April 1, 2009.

80. The Student's September 16, 2008, IEP contains twelve educational goals and objectives. (Tr. 619; DEX 10).

81. Goal Number 1 on the Student's September 16, 2008, IEP and its objectives were as follows:

Goal Number 1 – Activities Of Daily Living – Given Instruction, [the Student] will increase daily living skills by completing self care tasks with 100% accuracy on 3 out of 4 opportunities across 3 consecutive date periods.

Objectives:

Objective 1: After instruction, [the Student] will improve his skills for manipulating fasteners by independently starting, zipping and opening a zipper with 100% accuracy on 3 out of 4 opportunities across 3 consecutive data periods.

Objective 2: After instruction, [the Student] will improve his skills for manipulating fasteners by independently fastening and unfastening medium sized buttons with 100% accuracy on 3 out of 4 opportunities across 3 consecutive data periods.

Objective 3: After instruction, [the Student] will improve his skills for manipulating fasteners by independently fastening and unfastening snaps with 100% accuracy on 3 out of 4 opportunities across 3 consecutive data periods.

(DEX 10 at 131).

A. Occupational Therapist L.B. had primary responsibility for working on this goal and its objectives, although, K.R. also worked on this goal. (Tr. 622-623).

B. L.B. described how she implemented this goal as follows:

I had some direct teaching sitting at the table, simply hand over hand showing him how to button or snap or zip. We started with snapping. That tends to be a little easier. I had activities that were requiring him to snap. . . . We used a jacket or a vest and I would just help him until he figured it out. He had trouble engaging but could zip up and down.

(Tr. 737-738).

C. The Student made progress, but did not master the entire goal. The record indicates the following progress was made by the Student on this goal and its objectives:

(1) The progress reports contained on the Student's IEP indicate that the Student was making progress on the goal during the three quarters involved in this proceeding. (DEX 10 at 131; Tr. 659-660). The progress notes also indicate that on December 18, 2008, the Student was progressing with the goal and "buttons [were] introduced." (DEX 10 at 131).

(2) On the Student's April 1, 2009, IEP, the PLAAFP states that the Student:

. . . can independently unsnap his pants and pull them up and down as well as adjust them. [The Student] will assist with putting his coat on and can unzip his coat and zip it once it is engaged.

(DEX 14 at 247). These functions are elements of Goal Number 1 and its objectives and according to K.R. and L.B. represents progress from the beginning of the school year. (Tr. 660-662, 739).

(3) K.R. testified as follows with respect to the Student's progress on Goal Number 1:

He was able to - on the first one he was able to do everything but start the zipper. On the second objective he was unfastening -- or unfasten -- or the third one 'cause I didn't write specifically about the buttons. But the fasteners he was able to unfasten the snaps but not fastening.

(Tr. 662-663).

(4) The comparison Assessment of Basic Language & Learning Skills ("ABLLS") chart (DEX 15 at 287-294) which was prepared by K.R. to chart the Student's progress on the September 16, 2008 IEP (Tr. at 681-683) indicates that the Student had progressed in the areas of "undo and fasten snaps independently," "fasten buttons on clothing independently," "coat on and off" and "pullover shirts on and off." (DEX 15 at 293).

(5) L.B. testified that the Student was able to use snaps but had not mastered the use of zippers or buttons. (Tr. 738).

82. Goal Number 2 on the Student's September 16, 2008, IEP and its objectives were as follows:

Goal Number 2 – Articulation – [The Student] will increase his ability to imitate 6 oral motor actions with and without sound at 80% accuracy for each on 3 consecutive data days.

Objectives:

Objective 1: [The Student] will increase oral motor coordination by imitating 3 movements with 80% accuracy on 3 consecutive data days.

Objective 2: [The Student] will increase ability to imitate 3 speech sounds with 80% accuracy on 3 consecutive data days.

(DEX 10 at 132).

A. Speech Pathologist J.T. had primary responsibility for working on this goal and its benchmarks. (Tr. 623).

B. J.T. described this goal as follows:

For children who are basically nonverbal, we would work on some oral-motor volitional movement, working on imitation, precursor speech movements.

(Tr. 705-706). And further:

We were working on just some basic things like blowing bubbles, learning to blow a whistle, sucking through a straw, those kinds of things.

(DEX 32 at 844 – Deposition of J.T.).

C. The Student made progress on this goal as follows:

(1) The progress reports contained on the Student's IEP indicate that the Student was making progress on the goal during the three quarters involved in this proceeding. (DEX 10 at 132).

(2) J.T. testified as following concerning the Student's progress on this goal:

These are articulation goals, was about the oral-motor and sound production. Very difficult. [The Student's] performance was inconsistent. Some days, obviously, when you look at the chart we would do well but the next day we would not do well. It was just a very hard goal for him.

(Tr. 719).

This result was consistent with Student's results on the tests administered by J.T. of the Student's speech and language abilities. (Tr. 710-718). On the Preschool Language Scale-4 given in February 2009, the Student had an Auditory Comprehension score age equivalent of 1 year 6 months), an Expressive Communication score age equivalent of 11 months and a Total language Standard score age equivalent of 1 year 2 months. (DEX 13 at 198, Tr. 711-712). Similar results were attained through J.T.'s administration of the Peabody Picture Vocabulary Test-4 to Student, taken in January, 2009, which found that his age equivalence for the test was at less than two years of age. (Tr. 714-716; DEX 13 at 199).

(3) In her deposition, J.T. testified that when she first started working with the Student he made very few speech sounds. During the work on the September 16,

2008, IEP, J.T. was able to get him to increase his imitation of bilabial sounds (lip sounds) and linguadental sounds (tongue/roof of mouth sounds). (DEX 32 at 848-851 – Deposition of J.T.).

(4) On the Student’s April 1, 2009, IEP, the PLAAFP states that the Student has “increased vocalizing” but needs to continue to improve in “volitional speech sounds/movement” and “receptive language skills.” (DEX 14 at 247).

(5) The ABLLS which was prepared during the Student’s re-evaluation in March, 2009, indicates that the Student was emerging in the areas of “imitates sounds on request.” (DEX 13 at 190).

(6) The comparison ABLLS chart (DEX 15 at 287-294) which was prepared by K.R. to chart the Student’s progress on the September 16, 2008 IEP (Tr. 681-683) indicates that the Student had progressed in the area of “imitates sounds on request.” (DEX 15 at 288).

83. Goal Number 3 on the Student’s September 16, 2008, IEP and its objectives were as follows:

Goal Number 3 – Language/Vocabulary – [The Student] will increase receptive and expressive identification of items and activities using his communication device with 80% accuracy on 3 consecutive data days.

Objectives:

Objective 1: [The Student] will receptively identify up to five named items on one layer of communication device with 80% accuracy on 3 consecutive data days.

Objective 2: [The Student] will expressively label up to five items on one layer of communication device with 80% accuracy on 3 consecutive data days.

Objective 3: [The Student] will receptively identify up to five named items on second layer of communication device with 80% accuracy on 3 consecutive data days.

Objective 4: [The Student] will expressively label up to five items on second layer of communication device with 80% accuracy on 3 consecutive data days.

(DEX 10 at 133).

A. Speech Pathologist J.T. had primary responsibility for working on this goal and its benchmarks. (Tr. 623-624, 706).

B. J.T. described this goal as follows:

We identify pictures or things of interest to [the Student] that would be motivating for him to learn to use his communication device. I conferenced with people that had worked with him previously and his mother to determine pictures that would be relevant and pertinent to him.

(Tr. 706). Further she testified:

I wanted to teach him how to mand for things that he was – that were reinforcing to him, things that he enjoyed, so we used [the communication device] a lot to work on those kinds of things, to identify reinforcers or things that he liked.

(DEX 32 at 857 – Deposition of J.T.).

C. The Student made progress on this goal as follows:

(1) The progress reports contained on the Student's IEP indicate that the Student was making progress on the goal during the three quarters involved in this proceeding. (DEX 10 at 133).

(2) On the Student's April 1, 2009, IEP, the PLAAFP states that the Student has "increased vocalizing" but needs to continue to improve in "volitional speech sounds/movement" and "receptive language skills." (DEX 14 at 247).

(3) The ABLLS which was prepared during the Student's re-evaluation in March, 2009, indicates that the Student was emerging in the area of "select on of two pictures of common items," which are relevant to the work performed on this goal. (Tr. 722-723; DEX 13 at 189).

(4) The comparison ABLLS chart (DEX 15 at 287-294) which was prepared by K.R. to chart the Student's progress on the September 16, 2008 IEP (Tr. 681-683) indicates that the Student had progressed in the area of "select one of two pictures of common items." (DEX 15 at 287).

84. Goal Number 4 on the Student's September 16, 2008, IEP and its objectives were as follows:

Goal Number 4 – Language/Vocabulary – [The Student] will increase his ability to receptively identify up to 10 pictures and objects from a field of three with 80% accuracy on 3 data days.

Objectives:

Objective 1: [The Student] will receptively identify 5 objects from a field of two with 80% accuracy on 3 consecutive data days.

Objective 2: [The Student] will receptively identify 5 objects from a field of three with 80% accuracy on 3 consecutive data days.

Objective 3: [The Student] will receptively identify 5 pictures from a field of two with 80% accuracy on 3 consecutive data days.

Objective 4: [The Student] will receptively identify 5 pictures from a field of three with 80% accuracy on 3 consecutive data days.

(DEX 10 at 134).

A. Speech Pathologist J.T. had primary responsibility for working on this goal and its benchmarks. (Tr. 624).

B. J.T. testified that the Student met a portion of this goal. (Tr. 723-725).

C. The Student made progress, but did not master the entire goal. The record indicates the following progress was made by the Student on this goal and its objectives:

(1) The progress reports contained on the Student's IEP indicate that the Student was making progress on the goal during the three quarters involved in this proceeding. The progress report further states that the Student has met the first objective – “receptively identify 5 objects from a field of two with 80% accuracy.” (DEX 10 at 134).

(2) The Student's Goal Tracker data sheets indicate that the Student was able to receptively identify five (5) objects from a field of two by October, 2008. (DEX 37 at 1276).

(3) On the Student's April 1, 2009, IEP, the PLAAFP states that the Student has “increased vocalizing” but needs to continue to improve in “volitional speech sounds/movement” and “receptive language skills.” (DEX 14 at 247).

(4) The ABLLS which was prepared during the Student's re-evaluation in March, 2009, indicates that the Student had mastered “follow instructions to give named object,” and was emerging in “select one of two pictures of common items.” (Tr. 725-726; DEX 13 at 189).

(5) The comparison ABLLS chart (DEX 15 at 287-294) which was prepared by K.R. to chart the Student's progress on the September 16, 2008 IEP (Tr. 681-683) indicates that the Student had mastered “follow instructions to give named

object,” and was emerging in “select one of two pictures of common items.” (DEX 15 at 287).

85. Goal Number 5 on the Student’s September 16, 2008, IEP and its objectives were as follows:

Goal Number 5 – Language/Vocabulary – [The Student] will increase his expressive communication skills by independently accessing his AAC device on 4 out of 5 opportunities across 3 consecutive data days.

Objectives:

Objective 1: [The Student] will independently access his AAC device to participate in the Pledge of Allegiance on 4 out of 5 opportunities across 3 consecutive data days.

Objective 2: [The Student] will independently access his AAC device to greet peers and adults on 4 out of 5 opportunities across 3 consecutive data days.

(DEX 10 at 135).

A. Speech Pathologist J.T. wrote this goal and the goal was worked on in the classroom by T.W., regular education teacher. The Student’s one-on-one Classroom Aide, S.G., also helped with the benchmarks on this goal. (Tr. 624, 707).

B. Classroom Aide S.G. testified in the deposition taken by Petitioners’ Counsel that the Student had an opportunity to use his AAC device everyday to say the Pledge of Allegiance. She also testified that “many people in the school would greet [the Student in the hall]. If we were walking down the hall, a teacher would acknowledge, say ‘Hi, [Student].’ We would stop. I would give him the device and I would wait to see if he would independently do it and, if not, then I would prompt.” (DEX 33 at 908 – Deposition of S.G.).

C. The Student made progress, but did not master the entire goal. The record indicates the following progress was made by the Student on this goal and its objectives:

(1) The progress reports contained on the Student’s IEP indicate that the Student was making progress on the goal during the three quarters involved in this proceeding. (DEX 10 at 135).

(2) The Student’s one-on-one Aide, S.G., testified that the Student worked on the Pledge of Allegiance benchmark on a daily basis and if the Student did not use his AAC device she would provide him with a verbal prompt or gesture prompt. (DEX 33 at 906-908 – Deposition of S.G.).

(3) On the Student's April 1, 2009, IEP, the PLAAFP states that the Student: ". . . continues to need improvement with the following skills: . . . using AAC device." (DEX 14 at 247).

(4) The March 3, 2009, ABLLS which was a part of the Student's re-evaluation indicates that the Student has mastered "returns greetings." (DEX 13 at 184).

86. Goal Number 6 on the Student's September 16, 2008, IEP and its objectives were as follows:

Goal Number 6 – Manipulating Classroom Materials – Given instruction, [the Student] will increase the ability to manipulate classroom tools by completing coloring and cutting tasks with at least 80% accuracy on 3 out of 4 opportunities across 3 consecutive data periods.

Objectives:

Objective 1: After instruction, [the Student] will grasp and manipulate scissors to perform forward cutting motions to cut at least 80% of a 3 inch square in half on 3 out of 4 opportunities.

Objective 2: Given instruction, [the Student] will sustain coloring movements to fill in 80% of a 4 inch defined space on 3 out of 4 opportunities.

(DEX 10 at 136).

A. Occupational Therapist L.B. had primary responsibility for working on this goal and its benchmarks. (Tr. 625).

B. L.B. testified as follows concerning her work with the Student on this goal:

[The Goal is] manipulating classroom tools. Specifically manipulating scissors to move them forward. And then coloring movements to fill at least 80 percent of a 4-inch space. With cutting, we worked on how to hold the scissors and move them forward. I used index cards with a line. Sometimes just an index card or other materials to practice cutting. He started by snipping and then we were able to gain forward cutting motions. With the coloring, I typically use color pages, Toy Story figures he liked, and I had a 4-inch square that was a target for him to fill the space. . . . That space, I had a grid that was in -- divided into 100 squares and I would mark and count how many he marked through, how many squares he marked through.

(Tr. 740-741).

C. The Student made progress, but did not master the entire goal. The record indicates the following progress was made by the Student on this goal and its objectives:

(1) The progress reports contained on the Student's IEP indicate that the Student was making progress on the goal during the three quarters involved in this proceeding. The Progress Report also indicates that as of December 16, 2008, the Student was progressing on the goal and a "nut/bolt assembly" and opening containers was introduced. (DEX 10 at 136).

(2) L.B. testified that the Student "did better with the scissors" and made progress on coloring but did not enjoy the coloring activity. (Tr. 741). L.B. testified in her deposition that the Student had mastered some of the cutting and they were working on the coloring. (DEX 31 at 811 – Deposition of L.B.).

(3) On the Student's April 1, 2009, IEP, the PLAAFP states that the Student has accomplished: ". . . snips with scissors in a forward motion, . . . filling in at least 80% of a defined space when coloring." (DEX 14 at 247).

(4) The March 3, 2009, ABLLS which was a part of the Student's re-evaluation indicates that the Student has mastered "mark on paper with crayon" and "snips with scissors." (DEX 13 at 197).

(5) The comparison ABLLS chart (DEX 15 at 287-294) which was prepared by K.R. to chart the Student's progress on the September 16, 2008 IEP (Tr. 681-683) indicates that the Student had mastered "mark on paper with crayon" and "snips with scissors." "marks on paper with a crayon" and "snips with scissors." (DEX 15 at 295).

87. Goal Number 7 on the Student's September 16, 2008, IEP and its objectives were as follows:

Goal Number 7 – Perception – After instruction, [the Student] will increase his ability to perform a variety of fine motor manipulation tasks by independently completing 100% of a 10 piece task on 3 out of 4 opportunities across 3 consecutive data periods.

Objectives:

Objective 1: After instruction, [the Student] will increase his ability to perform a fine motor manipulation task by independently stringing 10 beads with 100% accuracy on 3 out of 4 opportunities across 3 consecutive data periods.

Objective 2: After instruction, [the Student] will increase his ability to perform a fine motor manipulation task by independently stacking 10 pegs with 100% accuracy on 3 out of 4 opportunities across 3 consecutive data periods.

Objective 3: After instruction, [the Student] will increase his ability to perform a fine motor manipulation task by independently placing 10 clothespins with 100% accuracy on 3 out of 4 opportunities across 3 consecutive data periods.

Objective 4: After instruction, [the Student] will increase his ability to perform a fine motor manipulation task by independently placing 10 chips in a tub with 100% accuracy on 3 out of 4 opportunities across 3 consecutive data periods.

(DEX 10 at 137).

A. Occupational Therapist L.B. had primary responsibility for working on this goal and its objectives. (Tr. 625).

B. L.B. described this goal as follows:

This is a fine motor manipulation type of goal, specifically looking at some of those tasks that are related to coloring and writing and manipulation. The first one was stringing beads. The second objective, stacking pegs, the third placing clothespins, and the fourth placing chips in a box. And again, I set the items out in front of him, modeled what I needed him to do. At times when he was first learning hand over hand at that, but he did very well with these tasks.

(Tr. 743).

C. The Student made progress, but did not master the entire goal. The record indicates the following progress was made by the Student on this goal and its Objectives:

(1) The progress reports contained on the Student's IEP indicate that the Student was making progress on the goal during the three quarters involved in this proceeding. The Progress Report also indicates that as of December 16, 2008, the Student was progressing on the goal and a "nut/bolt assembly" and opening containers was introduced. (DEX 10 at 137).

(2) On the Student's April 1, 2009, IEP, the PLAAFP states that the Student has accomplished:

. . . completes at least 10 repetitions of fine motor manipulation tasks (including stringing beads, placing and removing clothespins, placing chips into a box and placing pegs into a pegboard.

(DEX 14 at 247).

(3) L.B. testified in her deposition that the Student had mastered stringing beads and stacking. (DEX 31 at 811 – Deposition of L.B.).

(4) The March 3, 2009, ABLLS which was a part of the Student's re-evaluation indicates that the Student has mastered "place pegs in peg board," clothespins on line" and "string beads." (DEX 13 at 188, 197).

(5) The comparison ABLLS chart (DEX 15 at 287-294) which was prepared by K.R. to chart the Student's progress on the September 16, 2008 IEP (Tr. 681-683) indicates that the Student had mastered "place pegs in peg board," clothespins on line" and "string beads." (DEX 15 at 295).

88. Goal Number 8 on the Student's September 16, 2008, IEP and its objectives were as follows:

Goal Number 8 – Readiness Skills – When presented with his name in a field of 3 and a verbal cue ("Find, [the Student]", "Get [the Student]") [the Student] will increase receptive name recognition skills by findings and handing his name to instructor with 80% accuracy across 3 consecutive data days.

Objectives:

Objective 1: When presented with his name (picture attached) with a blank distractor, and a verbal cue, [the Student] will hand his name to instructor with 80% accuracy across 3 consecutive data days.

Objective 2: When presented with his name (picture attached) in a field of 3 with name distractors (not beginning with S), and a verbal cue, [the Student] will hand his name to instructor with 80% accuracy across 3 consecutive data days.

Objective 3: When presented with his name with a blank distractor, and a verbal cue, [the Student] will hand his name to instructor with 80% accuracy across 3 consecutive data days.

Objective 4: When presented with his name in a field of 3 with name distractors (not beginning with S), and a verbal cue, [the Student] will hand his name to instructor with 80% accuracy across 3 consecutive data days.

(DEX 10 at 138).

A. Special education classroom teacher K.R. had primary responsibility for working on this goal and its benchmarks. (Tr. 625-626).

B. K.R. described the method she used to implement the goal as follows:

. . . the goal was for [the Student] to recognize his name, and the objectives listed out below show the incremental steps that we needed to take to get to that to meet that goal. So the first one was that he had his

picture attached to his name and a blank distractor. And that means that they were the same size cards, his name was on it with his picture on one, and the other one had nothing on it. And then we moved to taking the blank distractor out and putting another name distractor in there, but it did not begin with S and it did not also have three letters. And then for the second one, it was -- or the third objective under there was his name without his picture on it. And what we actually ended up doing is taking small incremental little cuts were taken each day, kind of cut out that he had mastered it. We'd take a little bit off his picture so that all of a sudden his picture wasn't gone. That was little steps to take away that cue from him. And then, you know, he was able to find his name in a field of three without his picture attached to his name and that was the goal and he met that goal.

(Tr. 626-627).

C. The Student mastered this goal by March 13, 2009, as follows:

(1) The progress reports contained on the Student's IEP indicate that the Student met this goal on March 13, 2009. (DEX 10 at 138; Tr. 664-665).

(2) On the Student's April 1, 2009, IEP, the PLAAFP states that the Student: "Has accomplished: receptive identification of his first name...." (Tr. 664-665; DEX 14).

(3) Information provided to the Student's Parents by K.R. states that the Student is "able to find his name in a field of 3 with no picture and other names do not begin with S." (DEX 16 at 334).

(4) The comparison ABLLS chart (DEX 15 at 287-294) which was prepared by K.R. to chart the Student's progress on the September 16, 2008 IEP (Tr. 681-683) indicates that the Student had progressed in the area of "responds to own name." (DEX 15 at 287).

89. Goal Number 9 on the Student's September 16, 2008, IEP and its objectives were as follows:

Goal Number 9 – Readiness Skills – When presented with various pieces that have specific locations, [the Student] will increase task completion skills by placing the piece in the intended location by looking and positioning with 80% accuracy across 3 consecutive data days.

Objectives:

Objective 1: When presented with one inset puzzle with a least 5 single uniquely shaped puzzle pieces, [the Student] will place the piece into the inset frame by looking and positioning with 80% accuracy across 3 consecutive data days.

Objective 2: When presented with shaped sorter or form box with 5 pieces (of a least 3 different shapes), [the Student] will place the piece into the corresponding hole by looking and positioning with 80% accuracy across 3 consecutive data days.

(DEX 10 at 139).

A. Special education classroom teacher K.R. had primary responsibility for working on this goal and its objectives. (Tr. 627-628).

B. K.R. described the implementation of this goal as follows:

This was a Perceptual Motor 1 dealing with puzzles and a form box. . . . The puzzles, it was a -- they were inset puzzles, so it was a puzzle that had the pieces cut out. That only one puzzle piece could fit in there and they were set out over here. And at first we started giving him just one puzzle and covering the others. Or one puzzle piece and cover all of them up so he just had to put it in that. Then we augmented that to where he had to fill the two. So that's what he did with that. And he couldn't like guess. It wasn't kind of like I can just put it in, he had to look at the puzzle piece, look at the shape and where it went and put it in with just looking and positioning instead of just trial and error.

(Tr. 669-670).

C. The Student made progress, but did not master the entire goal. The record indicates the following progress was made by the Student on this goal and its objectives:

(1) The progress reports contained on the Student's IEP indicate that the Student was making progress on the goal during the first three quarters and that the goal was deleted when the April 1, 2009 IEP was developed. (Tr. 669-670; DEX 10 at 139).

(2) On the Student's April 1, 2009, IEP, the PLAAFP states that the Student: "Has accomplished: . . . visual performance by placing 4 pieces into an inset frame by looking and positioning, placing 2 shapes into 2 fields in a form box by looking and positioning. . ." (DEX 14 at 247; Tr. 670-671).

(3) The March 3, 2009, ABLLS which was a part of the Student's re-evaluation indicates that the Student ability to use the "form box" was "emerging." (DEX 13 at 178, 189).

(4) Information provided to the Student's Parents by K.R. states that the Student is "working in a field of four to look and find the matching piece in the inset frame" and is "working in a field of 3 with 3 shapes" in the Form box. (DEX 16 at 334).

(5) K.R. testified that the Student was "making pretty good progress" on this goal. The Student "was able to place four pieces into the inset frame by looking and positioning. And the goal was for five pieces so that's why it wasn't mastered. And he was placing two shapes into two fields and he needed to do three shapes." (Tr. 671).

(6) The comparison ABLLS chart (DEX 15 at 287-294) which was prepared by K.R. to chart the Student's progress on the September 16, 2008 IEP (Tr. 681-683) indicates that the Student had progressed in the area of "Form box." (DEX 15 at 287).

90. Goal Number 10 on the Student's September 16, 2008 IEP and its objectives were as follows:

Goal Number 10 – Readiness Skills – When presented with 5 objects or pictures/iconic representations of an object and given a verbal cue to match, [the Student] will increase matching skills by matching identical objects/objects and pictures/pictures in an array of 3 with 80% accuracy across 3 consecutive data collection days.

Objectives:

Objective 1: When presented with identical objects and given a verbal cue to match, [the Student] will match 5 objects when presented in an array of 2 with 80% accuracy across 3 consecutive data collection days.

Objective 2: When presented with identical objects and given a verbal cue to match, [the Student] will match 5 objects to objects when presented in an array of 3 with 80% accuracy across 3 consecutive data collection days.

Objective 3: When presented with identical pictures/iconic representations of objects and given a verbal cue to match, [the Student] will match 5 pictures to pictures when presented in an array of 2 with 80% accuracy across 3 consecutive data collection days.

Objective 4: When presented with identical pictures/iconic representations of objects and give a verbal cue to match, [the Student] will match 5 pictures to

pictures when presented in an array of 3 with 80% accuracy across 3 consecutive data collection days.

(DEX 10 at 140).

A. Special education classroom teacher K.R. had primary responsibility for working on this goal and its benchmarks. (Tr. 630).

B. K.R. described the method she used to implement the goal as follows:

The goal was actually matching and matching is one of the core things of the brain to be able to organize information and see how it all fits together. And sequentially you should be able to match an object to an object, a picture to an object, the object to the picture, and a picture to a picture. They're all different levels of skills. And so, the two that we were focusing on was object to object and [the Student] actually met those two objectives. He did not meet the goal because he was not able to match pictures to pictures.

(Tr. 630-631).

C. The Student made progress, but did not master the entire goal. The record indicates the following progress was made by the Student on this goal and its objectives:

(1) K.R. testified that the Student had “mastered both the first and second objectives” and had “met the object to object . . . with several sets of five. So he went beyond what I had written but was still having difficulties matching picture to picture. (Tr. 673-674).

(2) On the Student’s April 1, 2009, IEP, the Present Level of Academic Achievement and Functional Performance states that the Student: “Has accomplished: . . . matching object to object in a field of 3. . . .” (Tr. 674; DEX 14 at 247).

(3) Information provided to the Student’s Parents by K.R. states that with respect to matching objects to objects, the Student is “able to match various sets of objects across several locations. We have moved to pic/pic matching.” (DEX 16 at 334). With respect to matching picture to picture, “we are currently working on matching pictures, of the objects he mastered in the obj/obj match in a field of 2.” (DEX 16 at 334).

(4) The comparison ABLLS chart (DEX 15 at 287-294) which was prepared by K.R. to chart the Student’s progress on the September 16, 2008 IEP (Tr. Vol. 681-683) indicates that the Student had progressed in the areas of “match identical objects to sample” and “match identical pictures to sample.” (DEX 15 at 287).

91. Goal Number 11 on the Student's September 16, 2008, IEP and its objectives were as follows:

Goal Number 11 – Readiness Skills – When shown a specific item, from any of 5 items, and it is removed for a 2 second delay, and two items are presented (one being the same as the original item). [the Student] will increase memory/retention/attending skills by finding the initial item when presented in an array of 2 within 3 seconds with 80% accuracy across 3 consecutive data collection days.

Objectives:

Objective 1: When shown a specific item, and it is removed for a 2 second delay, and two items are presented, [the Student] will find the initial item when presented in an array of 2 within 6 seconds with 80% accuracy across 3 consecutive data collection days.

Objective 2: When shown a specific item, and it is removed for a 2 second delay, and two items are presented, [the Student] will find the initial item when presented in an array of 2 within 3 seconds with 80% accuracy across 3 consecutive data collection days.

(DEX 10 at 141).

A. Classroom teacher K.R. had primary responsibility for working on this goal and its benchmarks. (Tr. 631).

B. K.R. described the method she used to implement the goal as follows:

This . . . was a delayed find of an object and we would have focused on two different sets. One would have been his reinforcers and the other set would have been just normal everyday objects. And what I would do would -- so he was really into Toy Story at that time, and so I had Geno, Buzz and Woody and Slinky Dog. And I would show him like Woody and say look. And then I would put it, you know, behind my back or under the table. And what is it -- it was for two seconds, one, two, and I would put it back out on the table with another object and tell him to get the object that he saw. So we did that with reinforcers and with everyday things and he met the goal for the two-second delay and to be able to respond within three seconds.

(Tr. 632).

C. The Student mastered this goal as follows:

(1) K.R. testified that the Student met this goal. (Tr. 675-676). The Student's September 16, 2008 IEP indicates that the goal was met by March 13, 2009. (DEX 10 at 141).

(2) On the Student's April 1, 2009 IEP, the PLAAFP states that the Student: "Has accomplished: . . . delay find of objects. . . ." (DEX 14 at 247).

(3) Information provided to the Student's Parents by K.R. states that with respect to delay find of objects, the Student "is shown an object, it is briefly taken away, he is asked to get the object he was shown. (DEX 16 at 334).

(4) The comparison ABLLS chart (DEX 15 at 287-294) which was prepared by K.R. to chart the Student's progress on the September 16, 2008 IEP (Tr. 681-683) indicates that the Student had progressed in the area of "delayed finding a sample." (DEX 15 at 287).

92. Goal Number 12 on the Student's September 16, 2008, IEP and its objectives were as follows:

Goal Number 12 – Readiness Skills – When presented with a model and verbal prompt ("Do this," "Do what I'm doing", "Copy me.") [the Student] will increase imitation skills by performing 10 actions with or without objects when instructed with 80% accuracy across 3 consecutive data collection days.

Objectives:

Objective 1: When presented with a model, objects, and verbal prompt ("Do this", "Do what I'm doing", "Copy me,"), [the Student] will imitate 5 actions with objects (i.e. functional skills-brush teeth, brush hair, put on shoes, drink from cup, stir, play skills-block design, stacking items, rolling cars, instruments, etc.) with 80% accuracy across 3 consecutive data collection days.

Objective 2: When presented with a model, objects and verbal prompt ("Do this", "Do what I'm doing", "Copy me,"), [the Student] will imitate 5 1-step gross motor actions (i.e. clap, arms up, hands on head, stomp foot, kick) with 80% accuracy across 3 consecutive data collection days.

(DEX 10 at 142).

A. Special education classroom teacher K.R. had primary responsibility for working on this goal and its benchmarks. (Tr. 633).

B. K.R. described the method she used to implement the goal as follows:

It was an imitation. So we were . . . working on two separate types of imitation. One was imitation with objects and the other one was gross motor imitation.

(Tr. 633).

C. The Student mastered this goal as follows:

(1) K.R. testified that the Student met this goal by March 13, 2009. (Tr. 676). The Student's September 16, 2008, IEP indicates that the goal was met by March 13, 2009. (DEX 10 at 142).

(2) On the Student's April 1, 2009, IEP, the PLAAFP states that the Student: "Has accomplished: . . . imitation of gross motor skills (including imitation of peers), imitation of actions with objects (including imitation of peers)" (DEX 14 at 247).

(3) The March 3, 2009, ABLLS which was a part of the Student's re-evaluation indicates that the Student has mastered "varied imitation instructions." (DEX 13 at 180).

(5) The comparison ABLLS chart (DEX 15 at 287-294) which was prepared by K.R. to chart the Student's progress on the September 16, 2008 IEP (Tr. 681-683) indicates that the Student had progressed in the areas of "imitates with a variety of instructions," "imitates legs and foot movements," "imitates gross motor movement with verbal prompts" and "imitates a motor activity using objects." (DEX 15 at 288).

F. Summary Of The Student's Progress On The Goals And Objectives In His IEP - September 15, 2008 Through April 1, 2009.

93. When the Student first came to K.R.'s classroom in August, 2008, "he came in a diaper" and was not potty trained. (Tr. 614-615). By April, 2009, the Student was able to stay dry during school. (Tr. 668-669, DEX 14 at 247).

94. When the Student first came to K.R.'s classroom in August, 2008, he needed assistance with eating and utensils. (Tr. 614). By April 1, 2009, the Student was "independently able to feed himself and will eat a variety of foods." (DEX 14 at 247).

95. By April 1, 2009, the Student had mastered three of the goals on his September 16, 2008, IEP, including:

A. **Goal 8** – "Readiness Skills – When presented with his name in a field of 3 and a verbal cue ("Find, [the Student]", "Get, [the Student]"), [the Student] will increase receptive name recognition skills by findings and handing his name to instructor with 80% accuracy across 3 consecutive data days." (Tr. 664-665; DEX 10 at 138).

B. **Goal 11** – “Readiness Skills – When shown a specific item, from any of 5 items, and it is removed for a 2 second delay, and two items are presented (one being the same as the original item). [the Student] will increase memory/retention/attending skills by finding the initial item when presented in an array of 2 within 3 seconds with 80% accuracy across 3 consecutive data collection days.” (Tr. 675-676, DEX 10 at 141).

C. **Goal 12** – “Readiness Skills – When presented with a model and verbal prompt (“Do this.” “Do what I’m doing”, “Copy me”), [the Student] will increase imitation skills by performing 10 actions with or without objects when instructed with 80% accuracy across 3 consecutive data collection days.” (Tr. 676, DEX 10 at 142).

96. By April 1, 2009, the Student had mastered/met objectives, but not the entire goal as follows:

A. **Goal 1, Objective 3** – The Student mastered the third objective of Goal number 1 – “[the Student] will improve his skills for manipulating fasteners by independently fastening and unfastening snaps with 100% accuracy on 3 out of 4 opportunities across 3 consecutive data periods.” (Tr. 738).

B. **Goal 4, Objective 1** – The Student mastered the first objective of Goal number 4 – “receptively identify 5 objects from a field of two with 80% accuracy on 3 consecutive data days.” (Tr. 723-725; DEX 10 at 134).

C. **Goal 6, Objective 1** – The Student mastered the first objective of Goal number 6 – “grasp and manipulate scissors to perform forward cutting motions to cut at least 80% of a 3 inch square in half on 3 out of 4 opportunities.” (DEX 31 at 811 – Deposition of L.B.).

D. **Goal 7, Objective 1** – The Student mastered the first objective of Goal number 7 – “increase his ability to perform a fine motor manipulation task by independently stringing 10 beads with 100% accuracy on 3 out of 4 opportunities across 3 consecutive data periods.” (DEX 31 at 811 – Deposition of L.B.).

E. **Goal 7, Objective 2** – The Student mastered the second objective of Goal number 7 – “increase his ability to perform a fine motor manipulation task by independently stacking 10 pegs with 100% accuracy on 3 out of 4 opportunities across 3 consecutive data periods.” (DEX 31 at 811 – Deposition of L.B.).

F. **Goal 7, Objective 3** – The Student mastered the third objective of Goal number 7 – “[the Student] will increase his ability to perform a fine motor manipulation task by independently placing 10 clothespins with 100% accuracy on 3 out of 4 opportunities across 3 consecutive data periods.” (DEX 13 at 188).

G. **Goal 10, Objective 1** – The Student mastered the first objective of Goal number 10 – “[the Student] will match 5 objects when presented in an array of 2 with 80% accuracy across 3 consecutive data collection days.” (Tr. 673-674).

H. **Goal 10, Objective 2** – The Student mastered the second objective of Goal number 10 – “[the Student] will match 5 objects to objects when presented in an array of 3 with 80% accuracy across 3 consecutive data collection days.” (Tr. 673-674).

97. By April 1, 2009, the Student had made meaningful progress on the goals and objectives contained in his September 16, 2008, IEP, as amended.

G. Other Facts Relevant to Allegations Raised By Petitioners.

98. DESE discontinued the use of Alternate Form I so it was not included with the copy of the Student’s IEP that was provided to the Student’s Parents. (Deposition of J.K. at 78-79). According to J.K., Alternate Form I was the DESE form that:

. . . specifically addressed modifications and accommodations on the state assessments. And that form has a different letter now, and that's what was confusing about that. And we didn't change it on our IEP forms. But that, as I understand, wouldn't have been applicable to [the Student] because there are no state assessments that the State of Missouri currently does for kindergarten eligible students.

(Deposition of J.K. at 225).

99. In August, 2008, when the Student was re-enrolled in the District, the Student had not attended the schools in the District since April 17, 2007. (DEX 6 at 74). The Present Levels of Academic Achievement and Functional Performance contained in the Student’s September 16, 2008, IEP (DEX 10 at 128-129) was developed with input from the District personnel, the Student’s parents and the Student’s outside service providers. (DEX 10 at 126c-126d; DEX 17, at 396-397). The Student’s Parents also provided a “Parent Concerns” document which was attached to the IEP and provided additional current information concerning the Student. (DEX 10 at 130). The Student’s Mother provided written consent for services on September 16, 2008 (DEX 10 at 148), October 1, 2008 (DEX 11 at 154) and on October 21, 2008 (DEX 10 at 158). In all three cases, the Student’s Mother waived the ten (10) day implementation period.

100. The Child Complaint filed by the Student’s Mother on October 9, 2009 (DEX 20) and the Complaint she filed with the United States Department of Education’s Office for Civil Rights on October 15, 2009 (DEX 21) made no mention that the District had allegedly failed to provide Notices of Action for requests made by the Student’s Mother.

101. During school year 2008-09, through March 31, 2009, the District provided the Student’s Mother with timely and relevant information concerning the Student’s program of special education and related services, including the following:

- A. The Student's Mother frequently contacted S.S. S.S. indicated that the Student's Mother contacted her more frequently than other parents with whom she was working. (DEX 30 at 782). The Student's Mother frequently corresponded by electronic mail during the school year with District Personnel including K.R., T.W. and J.T., concerning the progress made by the Student. (DEX 22).
- B. During the September 16, 2008, IEP meeting the District agreed to conduct Parent-Teacher conferences on a monthly basis to review the Student's progress and supporting data. (Tr. 655; DEX 17 at 398). Parent-Teacher conferences were held on: October 21, 2008 (Tr. 470-471, 656; DEX 17 at 403-405); November 18, 2008 (Tr. 657; DEX 17 at 406); December 17, 2008 (DEX 17 at 408); January 27, 2009 (DEX 17 at 407, 409); and February 18, 2009. (Tr. 658; DEX 17 at 409).
- C. In January, 2009, K.R. provided the Student's Mother with a copy of alignment of skills document which compared the skills the Student was receiving with the Kindergarten skill levels. (DEX 16 at 323-336).
- D. The Student's Mother was provided with copies of the Kindergarten Classroom lesson plans (DEX 16 at 337-361) and Kindergarten classroom work sheets at the request of the Student's Mother. (DEX 17 at 407).
- E. On a daily basis during the school year, District personnel provided the Student's Mother with a Daily Classroom Log which set forth information regarding the Student's day at school. (PETDEX 704-929).
- F. The District provided the Student's Parents with written notification for all meetings. (DEX 9 at 97-97a; DEX 10 at 108; DEX 13 at 159; DEX 14 at 221-222).
- G. The District provided the Student's Parents with a finalized copy of the September 16, 2008 IEP on September 25, 2008. (DEX 10 at 149).
- H. The Student's Mother provided written consent for services on September 16, 2008 (DEX 10 at 148), October 1, 2008 (DEX 11 at 154) and on October 21, 2008 (DEX 10 at 158) and in all cases waived the ten (10) implementation period.
- I. The Student's Mother provided written consent for the change in the Student's educational diagnosis on March 5, 2009. (DEX 13 at 219-220).
- J. During the period beginning on August 1, 2008 and through April 1, 2009, the District provided the Student's Parents a copy of the Procedural Safeguards on six (6) occasions: August 18, 2008, September 16, 2008, December 17, 2008, March 3, 2009, March 26, 2009 and April 1, 2009. (DEX 18 at 447).
- K. The Student's Mother visited and viewed K.R.'s Life Skills classroom on at least three (3) occasions, including August 18, 2008 (DEX 17 at 394); August 28, 2008 (DEX 17 at 393; DEX 22 at 493-494); and September 12, 2008. (DEX 22 at 498-499).

L. The Student's Mother was provided copies of the Kindergarten work sheets by K.R. at the request of the Student's Mother. (DEX 17 at 407).

M. The Student's Mother participated in all meetings concerning the Student which were scheduled from August, 2008 through April 1, 2009.

N. The District took all reasonable steps to ensure that the Student's Parents were present for all IEP meetings, including but not limited to: (1) notifying the Student's Parents of the meetings early enough to ensure that they would be available to attend the meeting; and, (2) scheduling the meeting at a mutually agreed on times and places. (DEX 9 at 97-97a; DEX 10 at 108; DEX 13 at 159; DEX 14 at 221-222).

H. Additional Information Considered by the Panel.

102. Parents presented testimony of J.L., who is a certified teacher, not a special education teacher and had taught for one year of kindergarten. (Tr. 299-300). She is related to Parents and the Student through marriage. (Tr. 345). She testified as to her opinion on whether the IEP for the Student was deficient for lacking certain academic goals. (Tr. 303-304). J.L. testified that the present level of performance was not an accurate representation of Student's ability at the time because it was vague and did not show what he could do. (Tr. 306-307).

103. J.L. testified that in reviewing the present level as written by the school district, it would have been her understanding that the District saw him as being much lower functioning and could not handle academics, and based on the data, she disagrees. (Tr. 308).

104. Petitioners called M.F. to testify, who is a speech language pathologist for the District who had never served the Student (Tr. 46). She was called upon to testify as to her interpretation of the IEP since according to Petitioners, the IEP is supposed to be written so anyone can pick it up and use it. (Tr. 36). M.F. testified that if called upon to implement an IEP, she would review the goals and look at data. (Tr. 41-42).

105. Petitioners called M.U., a special education instructor who teaches in Prairie View Elementary School within the District, in the resource room primarily serving learning disabled children. (Tr. 53-56). She testifies how she would work with students in her classroom modifying the regular curriculum to accommodate special needs, according to "alternate grade level expectations." (Tr. 54-55).

106. L.M. testified on behalf of the Petitioners. She is a board certified behavior analyst (BCBA) (Tr. 135-136) and is the Student's home behavior consultant who provided Student services prior to August 2008 and after March of 2009. (Tr. 134-135). She has not ever taught public school. (Tr. 215-216). She does consulting for school districts as well as works directly with parents and children. (Tr. 233). She has a college degree in communication disorders and special education with an emphasis in autism. (Tr. 136).

107. Based on her observations of Student, L.M. testified that he has cognitive ability of being high functioning and had that cognitive ability from 2006 to present. (Tr. 149).

108. L.M. testified that she believed the Student could not make meaningful progress unless he was taught by the use of ABA methods and when she looked at the video of K.R. working with Student, these methods were not properly applied. (Tr. 175-176).

109. The Student's Mother also testified. She is college educated. She has recently been an instructor at Longview Community College, in the Kansas City area, in an ACED program. Since 2008, the Student's Mother has been the President of the Lee's Summit Autism Support Group and has served as a parent/student advocate on a number of occasions in the District and for parents in other area school districts. (Tr. 442-445; PET 836).

110. The Student's Mother had other prior experience with the special education processes, including the evaluation and preparation of IEPs for children with disabilities in that the Student's older brother is a child with a disability, attends school in the District and has been evaluated by the District and has had an IEP throughout his educational career. (Tr. 438-442). Student's Mother estimated that she could have attended at least 50 IEP meetings. (Tr. 442).

111. The primary mode of communication of the Student and his Parents is written and spoken English. (DEX 2 at 19).

III. DISCUSSION AND DECISION RATIONALE

The burden of proof in a due process hearing is on the party initiating the challenge to the IEP to prove a denial of FAPE. *Schaffer ex rel. Schaffer v. Weast*, 456 U.S. 49, 126 S.Ct. 528, 537 (2005). Accordingly, the burden of proof in this case is on the Petitioners to establish that the IEP at issue did not provide FAPE to Student. Petitioners must sustain their burden of proof by a preponderance of the evidence, the standard appropriate to most civil proceedings and the standard utilized by reviewing courts of hearing decisions. *Blackmon*, 198 F.3d at 654; 20 U.S.C. § 1415(i)(2)(B); *Doe v. Defendant I*, 898 F.2d 1186, 1191 (6th Cir. 1990) (finding Student has the burden of proving by a preponderance of the evidence that the IEP was inadequate; citing *Tatro v. State of Texas*, 703 F.2d 823, 830 (5th Cir.), *aff'd in part and rev'd in part sub nom., Irving Independent School District v. Tatro*, 468 U.S. 883 (1984)).

A. General Legal Principles of FAPE, LRE and Private School Placement.

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

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

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

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

Federal courts interpreting *Rowley* have held that *Rowley* does not require a school district “to either maximize a student’s potential or provide the best possible education at public expense.” *Fort Zumwalt School District v. Clynes*, 119 F.3d 607, 612 (8th Cir. 1997), *cert. denied*, 523 U.S. 1137 (1998). A school district is not required to provide a program that will “achieve outstanding results” (*E.S. v. Independent School District No. 196*, 135 F.3d 566, 569 (8th Cir. 1998)) or one that is “absolutely best” (*Tucker v. Calloway County Board of Education*, 136 F.3d 495, 505 (6th Cir. 1998)) or one that will provide “superior results” (*Ft. Zumwalt*, 119 F.3d at 613); *see also Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 658 (8th Cir.1999). However, the *Rowley* requirement of consideration of the unique needs of the handicapped child

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

To achieve its goals, the IDEA "establishes a comprehensive system of procedural safeguards designed to ensure parental participation in decisions concerning the education of their disabled children and to provide administrative and judicial review of any decisions with which those parents disagree." *Honig v. Doe*, 484 U.S. 305, 308 (1988). The primary vehicle for carrying out the IDEA's goals in the provision of FAPE is the Individualized Education Program ("IEP"). 20 U.S.C. §§ 1414(d), 1401(8). An IEP must be in effect for each child with a disability who has been deemed eligible for services no later than the child's third birth date. 34 C.F.R. § 300.323; State Plan, Regulation IV, Pages 42-43. An IEP is a written document containing, among other things:

- (a) a statement of the child's present levels of academic achievement and functional performance; including for preschool children, how the child's disability affects the child's participation in appropriate activities;
- (b) a statement of measurable annual goals, including academic and functional goals designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum, and meet each of the child's other educational needs that result from the disability; and
- (c) a statement of the special education, related services, supplementary aids and services, and modifications and accommodations to be provided to the child to enable the child to advance appropriately toward attaining those annual goals, to be involved and progress in the general curriculum, to be educated and to participate with other children in these activities, both disabled and nondisabled.

20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.320; State Plan, Regulation IV, Page 42-43. For children who are deaf or hard of hearing, the statute and regulations and State Plan require the consideration of the communication needs of the child, including the child's language and communication mode, "including opportunities for direct instruction in the child's language and communication mode." 20 U.S.C. § 1414(d)(3)(B); 34 C.F.R. § 300.324(a)(2)(iv). A school district is not required to put more into an IEP than is required by law. *Lathrop*, 611 F.3d at 425.

Under *Rowley*, there are two components to the FAPE analysis, one procedural and the other substantive. An educational program can be set aside for failure to provide FAPE on procedural grounds under three circumstances: (1) where the procedural inadequacies have "compromised the pupil's right to an appropriate education"; (2) when the district's conduct has "seriously

hampered the parents' opportunity to participate in the formulation process"; or (3) when the procedural failure has resulted in "a deprivation of educational benefits." *Independent School District No. 283 v. S.D.*, 88 F.3d at 556; *Lathrop R-II School District v. Gray*, 611 F.3d 419, 424 (8th Cir. 2010). Where this type of harm is found, the substantive question of whether the IEP provided FAPE is not addressed by the hearing panel. *W.B. v. Target Range School District*, 960 F.2d 1479, 1485 (9th Cir. 1991). Assuming no denial of FAPE on procedural grounds, the analysis turns to the substance of whether the IEP provides FAPE as defined by the *Rowley* standard.

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

It is also well settled that the determination of whether an IEP is appropriate and reasonably calculated to confer an educational benefit must be measured from the time it was offered to the student. *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1035 (3d Cir. 1993). As noted by the *Fuhrmann* court, "[n]either the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement." *Id.* at 1040. Therefore, in determining whether a particular IEP was reasonably calculated to confer educational benefit, the actions of the IEP team should not be judged in hindsight. *Roland M. v. Concord School Committee*, 910 F.2d 983, 992 (1st Cir. 1990). "An IEP is a snapshot, not a retrospective . . . [i]n striving for 'appropriateness,' an IEP must take into account what was and was not objectively reasonable when the snapshot was taken, that is at the time the IEP was promulgated." *Id.*

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

Each public agency shall ensure that-

- (1) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are non-disabled; and
- (2) Special classes, separate schooling or other removal of children with disabilities from the general educational environment occurs

only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

34 CFR § 300.114.

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

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

To the maximum extent appropriate, disabled and severely disabled children shall be educated along with children who do not have disabilities and shall attend regular classes, except that in the case of a disability resulting in violent behavior which causes a substantial likelihood of injury to the student or others, the school district shall initiate procedures consistent with state and federal law to remove the child to a more appropriate placement. Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment shall occur only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Section 162.680.2 R.S.Mo.

Each school district must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. The placement options for children ages three (3) to five (5) include individual, early childhood settings, early childhood special education classes in settings with children who are nondisabled, early childhood special education in settings with only children with disabilities, multiple settings, and residential settings. 34 CFR § 300.115; State Plan, Regulation IV, Page 52. The least restrictive environment should always be considered in determining whether a parentally preferred placement is appropriate. *Independent School District No. 83 v. S.D.*, 88 F.3d at 556, 561 (8th Cir. 1996); *see also Reese v. Board of Education*, 225 F.Supp.2d 1149, 1159 (E.D. Mo. 2002)

(holding that although parents seeking an alternative placement for their child may not be subject to the same mainstreaming requirements as a school board, “the ‘IDEA’s requirement that an appropriate education be in the mainstream to the extent possible remains a consideration that bears upon a parent’s choice of an alternative placement and may be considered by the hearing officer in determining whether the placement was appropriate.’”) (*quoting M.S. v. Board of Education*, 231 F.3d 96, 105 (2nd Cir. 2000)). Parents who choose a private school for their child which only offers a restrictive non-mainstream environment have the burden of proving that such an environment is needed to provide their child with an appropriate education. *Id.*

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

The 1997 amendments to the IDEA specifically address unilateral private placements by parents. The amendments recognized that parents may be reimbursed for a private placement if the school district was unable to provide FAPE but provided standards for Parents seeking reimbursement of these costs; notably, prior notice to the school district before placing their child. 20 USC § 1412(a)(10)(C); 34 CFR § 300.148. The 2004 amendments to IDEA provide that privately placed students are entitled to services as service plan students within the public school district where the private school is located. 20 USC § 1412(a)(10)(A)(i); 34 CFR § 300.132.

The starting analysis is not whether the parents gave the prior notice. Rather, the analysis is first, did the District offer FAPE, and if not, was the private placement appropriate and if so, should reimbursement be reduced or denied if notice was not given.

B. Procedural Issues.

As case law has established that in the event of substantial procedural harm that the substantive question of whether the IEP provided FAPE is not addressed by the hearing panel, the panel first turns to the Parents’ procedural arguments.

1. The IEPs are vague and unclear in the areas of special education services, related services, accommodations, modifications, identifying assistive technology and its use, supports for school personnel, and the extent to which Student will participate in the general curriculum.

There is no specific requirement under the IDEA that an IEP must be clear and not vague or for that matter not be confusing to the parents. A school district’s “failure to apprehend and rectify that confusion” is not a procedural violation. *Blackmon*, 198 F.3d at 657. There is a presumption that if IEPs contain all procedural elements that they will comply with the law and

by definition be considered clear. The question is whether they were able to be understood by the persons entrusted with implementing them and there was sufficient evidence presented that all of the Student's service providers did in fact implement the September 16, 2010 IEP as amended.⁸ There are remedies if a parent does not believe the IEPs are clear – requesting that the team be reconvened is the logical step. The record is clear that the Parents, primarily the Student's mother, met frequently with District personnel both formally and informally. Efforts were made at least monthly to provide the Student's Mother with information she requested regarding the success in implementing the IEP.

The panel finds no procedural violation with respect to alleged vagueness or lack of clarity in the IEPs.

2. *The District did not provide Parent a copy of Alternate Form I that is referenced in the IEPs and the IEP teams did not discuss regular classroom adaptations, grading, materials, methods or test taking.*

The District's Executive Director for Special Services J.K. testified that there is no such form anymore. The District can't be required to provide something that does not exist. The September 16, 2008 IEP at DEX 10 at 144, does make reference to Alternate Form I in the context of *regular* classroom adaptations. As J.K. testified, this was an incorrect reference. The accommodations for the regular classroom are contained on Form F, which was a part of the September 16, 2008 IEP. (DEX 10 at 146, Deposition of J.K. at 225-228). The IEP at DEX 10 at 144 indicates that district-wide assessments are not administered for the Student's grade level. The evidence is clear that the IEP teams did discuss regular classroom adaptations as are contained on DEX 10 at 146 in an IEP meeting, as well as according to the notes the District staff took at parent-teacher meetings and in e-mails to and from the Student's Mother. (DEX 17, 22).

Even if such a form existed in some fashion, the failure to provide it to the Parents would not have been a material violation of the IDEA's procedural requirements. This would be akin to a minor technical violation of the Act.⁹ The panel finds no procedural violation with respect to Alternate Form I.

3. *The present levels of performance were not accurate and/or complete.*

According to the Missouri State Plan, an IEP must include "a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum." State Plan Regulation IV, page 43.

⁸ The panel will sometimes refer to the September 16, 2008 IEP and the October 21, 2008 Addendum as IEPs. Regardless of whether they are two discrete IEPs or one is an amendment or addendum to the other has no bearing on this decision.

⁹ A minor technical procedural violation should not lead to a finding of a denial of FAPE. *Independent School District No. 283*, 88 F.3d at 567. (As another court has noted, "[t]o hold that technical deviations from the IDEA's procedural requirements render an IEP entirely invalid would 'exalt form over substance.'" *Doe v. Defendant I*, 898 F.2d 1186, 1190 (6th Cir. 1999).

According to the Eighth Circuit in *Lathrop*, 611 F.3d at 425, “even the entire absence of present level of performance does not deny a student of FAPE if the parties involved knew the information through other means.” *Id.*, citing *Doe v. Defendant I*, 898 F.2d 1186, 1189-91 (6th Cir. 1990).

What the IDEA does require is for IEPs to contain “[a] statement of the child’s present levels of academic achievement and functional performance, including how the child’s disability affects the child’s involvement and progress in the general education curriculum.” 34 C.F.R. § 300.320. The Western District specifically held that neither the statute nor regulations require more. The Western District in *Lathrop* admonished the hearing panel for adding baseline requirements to the unambiguous statute. See also *O’Toole v. Olathe District Schools Unified School District No. 223*, 963 F. Supp. 1000 (D. Ks. 1997), *aff’d*, 144 F.3d 692 (10th Cir. 1998) (rejecting parent argument that IEPs contained insufficient present level and finding also that parents actively participated in the formulation of the IEPs during which the present levels were thoroughly discussed and explained); *Logue v. Shawnee Mission Public School Unified School District No. 512*, 959 F. Supp. 1338 (D. Ks. 1997), *aff’d*, 153 F.3d 727 (10th Cir. 1998) (holding that present level was not too broad in describing student’s present levels of functioning and concluding that the IDEA did not require any more specificity).

The panel finds that the Present Levels of Academic Achievement and Functional Performance sections (“PLAAFP”) in the September 16, 2008 IEP met the requirements of the IDEA and State Plan as well as the *Lathrop* holding. The Parents were allowed to submit their own information about present levels that were included in the IEP and the IEP team made changes to the PLAAFP and goals to address parental and staff concerns. If the Parents believed that the information was inaccurate, there were sufficient opportunities to bring this to the District’s attention in subsequent meetings, which the Parents did not do. The panel finds no procedural violation with respect to the PLAAFP as present in the IEP.

4. *For the October 21, 2008 IEP, the District did not provide Mother notices of action in response to denying requests related to her concerns that she made at the meeting to develop the IEP.*

The only reference to these concerns in the transcript or Petitioners’ Post Hearing Brief is that Mother had concerns and questions about the curriculum and regular education report card. (Tr. 398). However the Student’s Mother testified that the only change between the Student’s September 16, 2008 IEP and the Addendum of October 21, 2008 was an increase in minutes. The Student’s Mother signed the Notice of Action on October 21, 2008, and indicated she wished to waive the ten day initiation period. (DEX 12 at 157-158).

Pursuant to the IDEA regulations at 34 C.F.R. Section 300.503, a Notice of Action is required when, among other things, there is a change in placement or the services provided. The Parents’ concerns regarding curriculum or a regular education report card would not fit in these categories. Missouri State Plan, Regulation V, page 60. The panel believes the notices of action that were sent were sufficient to comply with the requirements of 34 C.F.R. § 300.504(a) in that they included an explanation of the procedural safeguards available to the parents, a description

of the action proposed or refused, an explanation of why the action was proposed or refused, a description of any options the school considered and why those options were rejected, a description of the evaluation procedures used to form the basis of the proposal or the refusal, and a description of other relevant factors. 34 C.F.R. § 300.505(a). The panel notes that if the Student's Mother believed at that time that there were other requests she made relative to services that were ignored by the IEP Team, that she could have pressed the point at the time. In fact there was discussion and e-mail communication regarding these very issues but they did not involve placement or services. The panel notes further that the Student's Mother's child complaint and complaint to OCR regarding alleged procedural violations committed by the District did not include complaints regarding the notices of action. (DEX 20, DEX 21).

5. *The effect of the above was to deny the Parents' ability to participate in the decision making process and interfered with Student's right to FAPE. With respect to the October 21, 2008 IEP, the District failed to provide Mother with information sufficient for her to understand and participate in the decision making processes involved with developing the IEP including each required IEP component, and in so doing the District significantly impaired the Parents' ability to participate in the decision making processes and interfered with the Student's right to FAPE.*

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

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

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

The panel finds no violation of the IDEA in the area of parental participation. The Parents were notified of all IEP meetings and actively participated in all IEP meetings. In fact, Parents can be characterized as being allowed to play an “aggressively participative role” in the IEP development process. *Independent School District No. 283*, 88 F.3d 556, 562 (8th Cir. 1996).

Specifically:

A. The Student’s Mother is college educated and a college instructor. Since 2008, the Student’s Mother has been the President of the Lee’s Summit Autism Support Group and has served as a parent/student advocate on a number of occasions in the District and for parents in other area school districts. (Tr. 442-445; PET 836).

B. The Student’s Mother had other prior experience with the special education processes, including the evaluation and preparation of IEPs for children with disabilities in that the Student’s older brother is a child with a disability, attends school in the District and has been evaluated by the District and has had an IEP throughout his educational career. (Tr. 438-442). Student’s Mother estimated that she could have attended at least 50 IEP meetings. (Tr. 442).

C. During the period beginning on August 1, 2008, and through April 1, 2009, the District provided the Student’s Parents a copy of the Procedural Safeguards on six (6) occasions: August 18, 2008, September 16, 2008, December 17, 2008, March 3, 2009, March 26, 2009 and April 1, 2009. (DEX 18 at 447).

D. The Student’s Mother participated in all meetings concerning the Student which were scheduled from August, 2008, through April 1, 2009.

E. The District took all reasonable steps to ensure that the Student’s Parents were present for all IEP meetings, including but not limited to: (1) notifying the Student’s Parents of the meetings early enough to ensure that they would be available to attend the meeting; and, (2) scheduling the meeting at a mutually agreed on times and places. (DEX 9 at 97-97a; DEX 10 at 108; DEX 13 at 159; DEX 14 at 221-222).

F. The District provided the Student’s Parents with a finalized copy of the September 16, 2008 IEP on September 25, 2008. (DEX 10 at 149).

G. The Student’s Mother provided written and signed consent as follows:

(1) On September 16, 2008, the Student’s Mother provided signed consent for the Student’s September 16, 2008, IEP and placement of the Student. (DEX 10 at 147-148).

(2) On October 1, 2008, the Student’s Mother provided signed consent for the change of services and change of minutes in the Student’s September 26, 2008, Addendum to the Student’s September 16, 2008, IEP. (DEX 11 at 153-154).

(3) On October 21, 2008, the Student's Mother provided signed consent for the change of services and change of minutes in the Student's October 21, 2008, Addendum to the Student's September 16, 2008, IEP. (DEX 12 at 157-158).

(4) On March 5, 2009, the Student's Mother provided signed consent for the change in diagnosis in the Student's March 3, 2009, re-evaluation. (DEX13 at 219-220).

H. The Student's Mother frequently contacted S.S. S.S. indicated that the Student's Mother contacted her more frequently than other parents with whom she was working. (DEX 30 at 782). The Student's Mother frequently corresponded by electronic mail during the school year with District Personnel including K.R., T.W. and J.T., concerning the progress made by the Student. (DEX 22).

I. During the September 16, 2008, IEP meeting the District agreed to conduct Parent-Teacher conferences on a monthly basis to review the Student's progress and supporting data. (Tr. 655; DEX 17 at 398). Thereafter, Parent-Teacher conferences were held on: October 21, 2008 (DEX 17 at 403-405); November 18, 2008 (Tr. 657; DEX 17 at 406); December 17, 2008 (DEX 17 at 408); January 27, 2009 (DEX 17 at 407-409); and, February 28, 2009 (Tr. 658; DEX 17 at 409).

J. In January, 2009, K.R. provided the Student's Mother with a copy of alignment of skills document which compared the skills the Student was receiving with the Kindergarten skill levels. (DEX 16 at 323-336).

L. The Student's Mother was provided with copies of the Kindergarten Classroom lesson plans (DEX 16 at 337-361) and Kindergarten classroom work sheets at the request of the Student's Mother. (DEX 17 at 407).

M. On a daily basis during the school year, District personnel provided the Student's Mother with a Daily Classroom Log which set forth information regarding the Student's day at school. (PETDEX 704-929).

N. The Student's Mother visited and viewed K.R.'s Life Skills classroom on at least three (3) occasions, including August 18, 2008 (DEX 17 at 394); August 28, 2008 (DEX 17 at 393, DEX 22 at 493-494); and September 12, 2008. (DEX 22 at 498-499).

O. The Student's Mother was accompanied by various persons, including legal counsel, at nearly every meeting held with the District concerning the Student, including:

(1) August 18, 2008 IEP meeting: The Student's Mother was accompanied by L. S. (Parent's attorney); C.S. (KCRO Service Coordinator); M.P. (private behavior therapist) and S.T. (Parent's friend).

(2) September 16, 2008, IEP meeting: The Student's Mother was accompanied by L. S. (by telephone); C.S.; M.P. and S.T.

(3) October 21, 2008, Parent/Teacher Conference: The Student's Mother was accompanied by S.T.

(4) November 18, 2008, Parent/Teacher Conference: The Student's Mother was accompanied by S.T.

(5) January 27, 2009, Parent/Teacher Conference: The Student's Mother was accompanied by S.T.

(6) February 28, 2009, Parent/Teacher Conference: The Student's Mother was accompanied by S.T.

(7) March 3, 2009, evaluation staffing meeting: The Student's Mother was accompanied by S.T. and Mrs. B.

There is no evidence that Parents or their advocate when in attendance were precluded from providing their input or opinions about the IEP components. There was no evidence that the District failed to answer any questions of Parents; rather, the District's answers may not have been the ones Parents wanted to hear. Parents received notice of their due process rights and acknowledged receiving same at every IEP meeting. Parents also were provided written notices of action as required. The Petitioner's feeling that the School District never seriously considered their input does not equate to a procedural violation. Again, merely not acceding to parental demands is not a denial of FAPE. *Blackmon*, 198 F.3d at 657. In fact, the evidence shows that the District changed the proposed draft IEP for September 16, 2008 to accommodate some parental requests as well as those of M.P. and District staff. The Parents were also allowed to add their specific concerns to the IEP. While consensus on all elements of the IEP is indeed the most desirable result, the desire to obtain consensus should not result in a school district abandoning its professional judgment in order to give in to parental demands. *Id.* A school district's consideration and ultimate rejection of a parental request does not constitute a procedural violation of the IDEA. *Id.* at 657-58.

During all times relevant to this proceeding, the actions of the District with respect to the Student and his Parents have met the procedural requirements of the IDEA and State Plan. The panel finds no procedural violations by the District.

C. Substantive Argument.

Petitioners' substantive allegations of IDEA violations are as follows:

1. *The September 16, 2008 and October 21, 2008 IEPs do not comply with the requirements of the IDEA because they are not reasonably calculated to provide FAPE and can be interpreted in such a way such that their implementation does not provide Student FAPE and because they do not enable the Parent to monitor the progress of the Student in a way that is meaningful and useful to Parent and with respect to the October 21, 2008 IEP, in a way that is meaningful and useful to private service providers.*

2. *The IEPs did not place Student in the least restrictive environment. The placement was more restrictive than necessary.*

3. *During the entire time that the IEPs were implemented, the IEPs were not properly implemented because in the course of implementing the IEPs, the District interpreted them in such a way that the Student did not receive benefits that would have been received if the IEPs had been interpreted in such a way as to provide FAPE.*

Other than the LRE argument, the Petitioners basically raise the same issues as both procedural and substantive violations. The relevant analysis for the panel is whether FAPE was offered through the District's IEP. The analysis of all IEPs as stated by the Eighth Circuit, is whether the program offered an educational program "reasonably calculated to enable the child to receive educational benefits." *Fort Zumwalt*, 119 F.3d at 611 (quoting *Rowley*, 458 U.S. at 206-07). The question before the panel is whether the IEP offered "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Rowley*, 458 U.S. at 203. The goal of FAPE is addressed "through the development of an IEP for each child setting forth her present level of performance, annual goals and objectives, specific services to be provided, an explanation of the extent to which she will not receive education with nondisabled children, a statement of modifications to district-wide assessment procedures needed in order for her to participate in such assessments, transition services needed, the projected dates and duration of proposed services, and objective criteria and evaluation procedures." *Blackmon*, *supra*, 198 F.3d at 658; 20 U.S.C. §1414(d).

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

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

From testimony at the hearing, it appears that Parents are contending that the School District's IEPs were inadequate because they were not exclusively based on the applied behavior analysis ("ABA") approach advanced by L.M. The ABA approach is a methodology. An IEP that is otherwise appropriate cannot be invalidated based upon a school district's choice of methodology. In *Gill v. Columbia 93 School District*, 217 F.3d 1027 (8th Cir. 2000), the Eighth Circuit determined that the parents were not entitled to dictate the use of the Lovaas method of instruction, which is a one-on-one training method, for their autistic child. That Court held:

Federal courts must defer to the judgment of education experts who craft and review a child's IEP so long as the child receives some educational benefit and is educated alongside his non-disabled classmates to the maximum extent possible. Here, Matthew's program was modified in response to the Gills' requests to provide more one-on-one therapy, but the District believed that the proposed private program would deprive him of social interaction necessary for his intellectual development. Parents who believe that their child would benefit from a particular type of therapy are entitled to present their views at meetings of their child's IEP team, to bring along experts in support, and to seek administrative review. The statute set up this interactive process for the child's benefit, but it does not empower parents to make unilateral decisions about programs the public funds. Since Matthew received a free appropriate public education, the Gills have not made out a claim against the District or the Department.

Id. at 1038. See also *E.S. v. Independent School District No. 196*, 135 F.3d 566 (8th Cir. 1998) (FAPE not denied because the school district refused to mandate only the use of a certain methodology in the IEP for a dyslexic child); *Fort Zumwalt School District v. Clynes*, 119 F.3d 607, 614 (8th Cir. 1997), *cert. denied*, 523 U.S. 1137 (1998) ("As long as a student is benefiting from his education, it is up to the educators to determine the appropriate educational methodology", citing *Rowley*, 458 U.S. at 208). Further, the Comments to the IDEA Regulations, *Federal Register*, Vol. 71, No. 156, p. 46665 (2006) confirm that the IDEA does not require that an IEP contain a description of "specific instructional methodologies" for its goals and objectives. The comment follows:

Comment: A few commenters recommended that the regulations clarify that the reference to "peer-reviewed research" does not require an IEP to include instructional methodologies. However, a few commenters recommended that the regulations require all elements of a program provided to a child, including program methodology, to be specified in the child's IEP.

Discussion: ***There is nothing in the Act that requires an IEP to include specific instructional methodologies. Therefore, consistent with section 614(d)(3)(A)(ii)(1) of the Act, we cannot interpret section 614 of the Act to require that all elements of a program provided to a child be included in an IEP.*** The Department's longstanding position on including instructional methodologies in a child's IEP is that it is an IEP Team's decision. Therefore, if

an IEP Team determines that specific instructional methods are necessary for the child to receive FAPE, the instructional methods may be addressed in the IEP.”

[Emphasis added].

Although the Parents did not specifically allege a denial of FAPE based on the District’s refusal to provide a full-time 1:1 paraprofessional which is apparently a part of the ABA strategy, that would also constitute a methodology subject to the discussion of authorities above. In fact there was a 1:1 paraprofessional who attended to the Student during his time in the regular classroom environment. The IDEA does not require a school district to furnish “every special service necessary to maximize each handicapped child’s potential.” *Rowley*, 458 U.S. at 199. Rather, the purpose of the IDEA is to facilitate the provision of “a "basic floor of opportunity" by opening the door of public education to disabled children, with the hope of integrating them in regular classrooms as much as possible.” *Yankton School District v. Schramm*, 93 F.3d 1369, 1373 (8th Cir. 1996) (*quoting Rowley*, 458 U.S. at 92).

Also, although not specifically alleged as a denial of FAPE, there was testimony about the use of alternate grade level assessments and the Student’s exposure to grade level curriculum and whether these were appropriately included in the IEPs.

There is commentary to the IDEA regulations addressing the alternate assessments, *Federal Register*, Vol. 71, No. 156, p. 46663 (2006). The commentary states that no provision of the IDEA requires a child’s IEP goals to be aligned with the State’s alternate assessment or achievement standards. The Comments state as follows:

Comment: One commenter recommended clarifying that goals and objectives must be aligned with the State's alternate assessment.

Discussion: Section 612(a)(16)(C)(ii) of the Act requires alternate assessments to be aligned with the State’s challenging academic content standards and academic achievement standards, and if the State has adopted alternate academic achievement standards permitted under 34 CFR § 200.1(d), to measure the achievement of children with disabilities against those standards. Section 614(d)(1)(A)(i)(II) of the Act requires the IEP to include a statement of measurable annual goals, including academic and functional goals, designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum. However, ***there is nothing in the Act that requires a child’s IEP goals to be aligned with the State’s alternate assessment based on alternate achievement standards.*** Additionally, for some children, goals may be needed for activities that are not closely related to a State’s academic content and academic achievement standards.”

[Emphasis added].

Parents claim that the District's program was not implemented in a manner that provided FAPE. The program provided by the IEP is not required to maximize the educational benefit to the child, or to provide each and every service and accommodation that could conceivably be of some educational benefit. *Rowley*, 458 U.S. at 199; *Ft. Zumwalt*, 119 F.3d at 612; *E.S. v. Independent School District No. 196*, 135 F.3d 566, 569 (8th Cir. 1998). A local educational agency fulfills the requirement of FAPE by "providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Rowley*, 458 U.S. at 203. Although an educational benefit must be more than de minimis to be appropriate, *Doe v. Board of Education.*, 9 F.3d 455, 459 (6th Cir. 1993), *cert. denied*, 128 L.Ed.2d 665 (1994), an appropriate educational program is one that is "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 207. In articulating the standard for FAPE, the *Rowley* Court concluded that "Congress did not impose any greater substantive educational standard than would be necessary to make such access meaningful." *Id.* at 192.

Although parental preferences must be taken into consideration in deciding IEP goals and objectives and making placement decisions, parental preference, standing alone, "cannot be the basis for compelling a school district to provide a certain educational plan for a handicapped child." *Brougham v. Town of Yarmouth*, 823 F. Supp. 9 (D. Me 1993); see also *Blackmon*, 198 F.3d at 658 ("IDEA mandates individualized 'appropriate' education for disabled children, it does not require a school district to provide a child with the specific educational placement that [his] parents prefer."). Accordingly, the Panel's review must focus on the District's proposed placement and not on the placement proposed by the Parents.

A determination of whether an IEP is appropriate and reasonably calculated to confer an educational benefit must be measured from the time it was offered to the student. *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1035 (3rd Cir. 1993). As noted by the *Fuhrmann* court, "[n]either the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement." 993 F.2d at 1040.

A determination of whether an IEP is valid is "a necessarily *prospective* analysis" [emphasis in original] and "consideration of proof of whether an IEP meaningfully contributed to the child's education is not altogether proper." *D.F. v. Ramapo Central School District*, 430 F.3d 595, 598 (2nd Cir. 2005). The *Ramapo* court cites with approval to *Roland M. v. Concord School Committee*, 910 F.2d 983, 992 (1st Cir. 1990), where the First Circuit stated:

Moreover, appellants' argument misperceives the focus of an inquiry under [IDEA]: the issue is not whether the IEP was prescient enough to achieve perfect academic results, but whether it was "reasonably calculated" to provide an "appropriate" education as defined in federal and state law. This concept has decretory significance in two respects. For one thing, actions of school systems cannot, as appellants would have it, be judged exclusively in hindsight. An IEP is a snapshot, not a retrospective. In striving for "appropriateness," an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated. *Id.* at 992 (internal quotation marks and citations omitted). See also *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 530 (3d Cir. 1995) ("In any event, appropriateness is judged

prospectively so that any lack of progress under a particular IEP, assuming *arguendo* that there was no progress, does not render that IEP inappropriate."); *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999) ("Instead of asking whether the [program] was adequate in light of the [child's] progress, the district court should have asked the more pertinent question of whether the [program] was appropriately designed and implemented so as to convey... a meaningful benefit. We do not judge [a program] in hindsight; rather, we look to the [program's] goals and goal achieving methods at the time the plan was implemented and ask whether these methods were reasonably calculated to confer ... a meaningful benefit.").

In a pertinent discussion of the issue of progress under an IEP, the Third Circuit in *Carlisle* discounted the parents arguments that because IEPs for successive years were similar that they were somehow inappropriate. The student's failure to make progress on an earlier IEP, "a judgment made retrospectively", does not render either that IEP or the successive IEP inappropriate. The Court stated that "if a student had failed to make any progress under an IEP in one year, we would be hard pressed to understand how the subsequent year's IEP, if simply a copy of that which failed to produce any gains in a prior year, could be appropriate." 62 F.3d at 534. While there were in some instances what seemed to be identical goals in Student's April 2008 IEP and the December 2007 IEP, the IEPs themselves are not identical. As with the *Carlisle* case, the Third Circuit found the differences between the 1992-93 IEP and the 1991-92 IEP for the student in question to be "not merely formal; they reflect the very essence of an IEP. As we have explained, the statute requires that school districts prepare the IEP's based on the student's needs; so long as the IEP responds to the needs, its ultimate success or failure cannot retroactively render it inappropriate." *Id.* Thus the issue according to these courts is not *progress* under an IEP but whether the IEP is designed to confer a *meaningful benefit*.

In a recent case from the Southern District of California, *M.P. v. Poway Unified School District*, 2010 WL 2735759 (S.D. Cal. 2010), the district court considered Parent's argument that the IEP was not designed to provide meaningful educational benefit because student progress was minimal at best and it was likely that an identical IEP would not have accomplished much going forward. However, the school district's witnesses did testify to progress and that therefore student must have received some meaningful benefit. The court upheld the administrative law judge's holding as follows:

The Court, therefore, agrees with the ALJ [administrative law judge] and finds that Plaintiffs have not sufficiently established by a preponderance of the evidence that the IEP did not address Student's needs and/or that Student did not receive "meaningful benefit" or make "meaningful progress" towards his goals in violation of the IDEA's substantive prong. To be sure, Student did not meet all his goals or reach the level of an average, proficient student according to the testing, his report card, and Goals Progress Report. That, however, does not indicate that "meaningful progress" was not made. In fact, all the District witnesses who directly observed Student indicated that progress *had* been made.

Id. at *11.

Applying the above-referenced law to the evidence in this case, it is clear that the relevant IEPs developed for Student offered him FAPE in the least restrictive environment (“LRE”). The evidence at hearing demonstrated that Student IEPs contained appropriate goals and objectives that addressed all of his disability-related needs. Moreover, those IEPs were reasonably calculated to provide educational benefit and those that were implemented prior to Student’s departure from the District did provide him with benefit, although this is not the primary analysis. The documentary evidence prepared close in time to the implementation of the IEPs prior to Student leaving the School District, conclusively demonstrated that Student mastered several of his goals and objectives and made meaningful progress on the majority. Courts generally give deference to reports of progress from teachers and school staff who have day-to-day contact with that student. *Heather S. v. State of Wisconsin*, 125 F.3d 1045, 1057 (7th Cir. 1997); *Christopher M. v. Corpus Christi Independent School District*, 933 F.2d 1285, 1292 (5th Cir. 1991); *King v. Board of Education*, 999 F. Supp. 750, 778 (D. Md. 1998) (noting that courts have commented on the importance of testimony by teachers and staff who have daily contact with students).

The IEPs also provided FAPE to Student in the LRE. 34 C.F.R. §§ 300.114-120. Pursuant to the IDEA, states must ensure that disabled and nondisabled children are educated together “to the maximum extent appropriate” and that “special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114. The LRE determination is made in accordance with the child’s abilities and needs.

Although the LRE provision expresses a Congressional preference for educating disabled students in the regular classroom, the mainstreaming preference is not an “absolute commandment.” *Poolaw v. Bishop*, 67 F.3d 830, 836 (9th Cir. 1995); *A.W. v. Northwest R-1 School District*, 813 F.2d 158, 162 (8th Cir. 1987). The Supreme Court has recognized that “[d]espite this preference for mainstreaming handicapped children. . . Congress recognized that regular classrooms simply would not be a suitable setting for the education of many handicapped children.” *Rowley*, 458 U.S. at 181. Accordingly, the mainstreaming preference must be “balanced with the primary objective of providing handicapped children with an appropriate education.” *Wilson v. Unified School District of Pima County*, 735 F.2d 1178, 1183 (9th Cir. 1984); see also *Mark and Ruth A. v. Grant Wood Area Education Agency*, 795 F.2d 52, 53 (8th Cir. 1986) (noting that Eighth Circuit has rejected the “view that the mainstreaming provisions of the Act are satisfied only if a handicapped child is educated in the same classroom with non-handicapped children”). Thus, a more restrictive environment may be the least restrictive environment for a particular child. *Carter v. Florence County School District Four*, 950 F.2d 156, 160 (4th Cir. 1991), *aff’d*, 510 U.S. 7 (1993) (“where necessary for educational reasons, mainstreaming assumes a subordinate role in formulating an educational program”). Mainstreaming in the regular classroom environment to the maximum extent possible is not required by IDEA; rather the law requires mainstreaming to the maximum extent appropriate. *Beth B. v. Van Clay*, 282 F.3d 493, 499 (7th Cir. 2002), *Board of Education v. Michael R.*, 2005 WL 2008919, 17-18 (N.D. Ill. 2005).

Parents presented little or no evidence that the placement and services described in his IEPs were not appropriate for Student. Parents were seemingly in agreement with the amount of special education time that Student received as they signed off on the Notices of Action increasing time in the special education environment. While testimony was not provided regarding the services Student receives at his current placement, the IEPs provide the Student with the opportunity to be educated to the maximum extent appropriate with his nondisabled peers and access to the general curriculum as required by the IDEA.

The District met the requirements of the IDEA Regulations, including but not limited to 34 C.F.R. § 300.324(a) when it developed Student's September 16, 2008 IEP, as amended, in that during that process the Student's IEP Team considered: (a) the strengths of Student; (b) the concerns of the Parents for the Student's education; (c) the results of the evaluation of Student; and, (d) the academic, developmental and functional needs of the Student.

The proposed placement for the Student which is contained in his September 16, 2008, IEP is an appropriate placement in the least restrictive environment as required by the IDEA and its Regulations, 34 C.F.R. § 300.114 in that the Student's placement, "Inside Regular Class less than 40% of the time," ensures that to the maximum extent appropriate, the Student would be educated with children who were non-disabled.

In summary, the program of special education and related services in the Student's September 16, 2008, IEP, as amended on September 26, 2008, and October 21, 2008, was appropriate and was reasonably calculated to, and did provide him with educational benefit and a free appropriate public education in the least restrictive environment as defined by the IDEA, and its Regulations, 34 C.F.R. § 300.17, and to provide the Student with educational benefit, in the least restrictive environment in that:

- A. The Student's IEP met the content requirements set forth in 34 C.F.R. §300.320.
- B. The Present Levels of Academic Achievement and Functional Performance contained in the Student's IEP accurately reflected the information possessed by the District regarding the Student's unique needs and present levels of performance and included a description of how the Student's disability affected his involvement and progress in the general education curriculum as required by the Regulations of the IDEA, 34 C.F.R. § 300.320(a)(1)(i).
- C. The goals and objectives/benchmarks contained in the Student's IEP were appropriate and were reasonably calculated to provide him with a free appropriate public education and educational benefit.
- D. The Service Minutes for special education and related services were appropriate. The service minutes for the related services of Occupational Therapy and Speech/Language Therapy were appropriate and sufficient and were the amount required to assist the Student to benefit from his program of special education and related services, in compliance with the IDEA, the Regulations of the IDEA, including 34 C.F.R.

§300.34(a) and were therefore reasonably calculated to provide Student with a free, appropriate public education and educational benefit.

E. The Student's placement, "inside the regular class less than 40% of the time," was an appropriate placement in the least restrictive environment.

The panel concludes that Parents have not met their burden of proof by to establish an IDEA violation regarding the provision of FAPE through the District IEPs.

IV. CONCLUSIONS OF LAW

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

1. The Lee's Summit R-VII School District did not deny FAPE to Student by procedural errors.
2. The District's IEPs provided FAPE to Student.
3. Because the District's IEPs provided FAPE to Student, Petitioners are not entitled to their requested relief.

V. DECISION

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

1. Proceedings for review may be instituted by filing a petition in the state circuit court of the county of proper venue within forty-five (45) days after the receipt of the notice of the agency's final decision and are governed by Chapter 536, R.S.Mo., to the extent not inconsistent with other provisions of Chapter 162 R.S.Mo. or 34 C.F.R. Part 300.
2. The venue of such cases shall be at the option of the plaintiff, be in the Circuit Court of Cole County, or in the county of the plaintiff's residence.
3. You also have a right to file a civil action in federal or state court pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. § 1415(i)(2) and 34 C.F.R. § 300.516.

IT IS SO ORDERED this _____ day of September, 2011.

JANET DAVIS BAKER
Chairperson

Accord:

PATTY SMITH

SANDRA BROOKS SCOTT

Copies sent this date to:

_____ Petitioners (by regular and certified mail)
Respondent (by regular and certified mail)
Deborah Johnson, attorney for Petitioners (by regular mail and electronic mail)
Ransom Ellis III, attorney for Respondent (by regular mail and electronic mail)
Patty Smith (by regular mail and electronic mail)
Sandra Brooks Scott (by regular mail and electronic mail)
Jackie Bruner, DESE (by regular mail)
Wanda Allen, DESE (by electronic mail)