

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

XXXXXXXXXXXXXXXXXXXX, by and through,)	
YYYYYYYYYYYYY,)	
)	
Petitioner,)	Filed: 12/06/11
v.)	
NORTH ST. FRANCOIS COUNTY R-I)	
SCHOOL DISTRICT)	
)	
Respondent.)	
)	
NORTH ST. FRANCOIS COUNTY R-I)	
SCHOOL DISTRICT,)	
)	
Petitioner,)	
v.)	
)	Filed: 02/27/12
XXXXXXXXXXXXXXXXXXXX by and through,)	
YYYYYYYYYYYYYYYYY,)	
)	
Respondent.)	

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

The Hearing Panel, after conducting the due process hearing on April 30, May 1-2, 2012, issues the following Findings of Fact, Conclusions of Law, Decision and Order:

FINDINGS OF FACT

The Hearing Panel makes the following Findings of Fact:

The Parties

1. XXXX (“the Student”) was born on #####. The Student is the son of YYYYYYYY (“the Father,” “the Mother” or “the Parents”), all of whom have resided in the boundaries of the North St. Francois County R-I School District (“the District”) at all times relevant to this case. Panel Ex 1.¹

2. The District is a Missouri Public School District which is organized pursuant to Missouri statutes. The District is located in St. Francois County, Missouri and educates

¹ Joint Stipulation of Fact marked and admitted as Hearing Panel Exhibit 1 (Panel Ex.1). See Tr. 79. References to the hearing transcripts are cited as “Tr. [pg#]. “

approximately 3175 students, including 479 middle school students. 2011-2012 Missouri School Directory.

3. The Mother acted *pro se*.

4. Teri B. Goldman and Betsey Helfrich of Mickes Goldman, LLC, 555 Maryville University Drive, Suite 240, St. Louis, MO 63141, represented the District.

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

Pamela S. Wright	Hearing Chairperson
George Wilson	Panel Member (selected by the District) ²
Pamela Walls	Panel Member (selected by the Parents)

Time Line Information and Procedural Background

6. The Mother requested a due process hearing by Complaint to the Department of Elementary and Secondary Education (“DESE”) dated December 6, 2011, which was received by DESE on the same date. (Ex. R-26 at 265).³ In the Complaint, the Mother alleges the District failed to implement his IEP – study guides do not match up with tests and several accommodations are not being followed. Ex. R-26 at 265. The Mother also objected to a change in placement from regular education science to special education science. Ex. R-26 at 265. The Mother invoked the “stay-put” protection of IDEA. Ex. R-26 at 265.

7. On December 7, 2011, the parties had a Resolution Meeting but they failed to reach a settlement. Panel Ex. 1; Tr. 520. The District, however, offered to conduct a reevaluation as a means of resolving the Mother’s due process concerns. Panel Ex. 1 at ¶ 26; Ex. R-27 at 274; Tr. 227.

8. On December 15, 2011, the District filed its response in letter format to the Complaint filed by the Mother on December 6, 2011. Ex. R-39 at 607-608.

9. On January 11, 2012, the Chairperson held a Pre-Hearing Conference with the parties and District counsel. The parties agreed on hearing dates of March 6-7, 2012 and requested an extension of the timeline to March 30, 2012. The parties also reached an agreement regarding the Issues for the Hearing Panel.

10. The Chairperson entered a detailed Scheduling Order on January 23, 2012 setting out the discussion at the Pre-Hearing Conference. Ex. R-39 at 603-605. The Order also provided that each party would have 5.0 hours to present direct and cross-examination. Ex. R-39 at 603-605).

² The District originally selected Dr. Roberta Brennan who had to resign because of family emergency.

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

11. On February 27, 2012, the District, through its counsel, Teri B. Goldman, filed a request for a due process hearing by Complaint dated February 27, 2012, which was received by DESE on the same date. Ex. R-46 at 644-646. In this Complaint, the District seeks a declaration that its most recent re-evaluation is appropriate⁴ and therefore, the Parents' request for an independent educational evaluation ("IEE") should be denied. Ex. R-46 at 443.

12. On or about February 27, 2012, the Missouri DESE assigned Robert Lehrer to chair the three-member panel resulting from the District's February 27, 2012 due process request. Ex. R-47 at 657.

13. On February 29, 2012, the District filed a Motion to Consolidate the due process request filed by the Mother on December 6, 2011, with the separate request filed by the District on February 27, 2012. Panel Ex. 1 at ¶ 33; Ex. R-47 at 657.

14. On February 29, 2012, the District moved to postpone the due process hearing initiated by the Mother so that the matters in dispute in the Mother's due process request and the District's request could be heard simultaneously. Panel Ex. 1 at ¶ 34; Ex. R-47 at 654.

15. On or about February 29, 2012, the Mother opposed the District's Motions to Consolidate and Postpone. Ex. R-47 at 661.

16. On March 2, 2012, the District's Motion to Consolidate and Motion to Postpone were granted. The hearing on the Mother initiated and District initiated due process requests was scheduled for April 30-May 2, 2012. Ex. R-47 at 665.

17. On March 12, 2012, a First Amended Scheduling Order was issued by the Chairperson. The Order memorialized e-mails in which the parties agreed to have new hearing dates of April 30-May 2, 2012 and an extension of the timeline to June 1, 2012. Ex. R-47, at 678-680. The Order also gave each side 7.5 hours to present testimony at the hearing. Ex. R-47 at 678-680. The Order also set out the Issues for the Hearing Panel to resolve. Ex. R-47 at 678-680.

18. The Chair closed the hearing as per the request of the Mother. (Tr. 6).

19. The Mother introduced Exhibits A-U. Tr. 731-739. The District objected to Exhibits F, H, S, T and U. Tr. 731-739. All of Mother's Exhibits except F, S, T and U were admitted. Tr. 731-739.

20. The District offered Exhibits 1-3; 5(revised); 7; 12; 14; 16-22; 24-28; 30-36; 38-50. Tr. 740-751. They were admitted without objection. Tr. 740-751.

21. The Mother presented the following witnesses: AAAAAAAAAA; BBBB BBBB; CCCCCC; DDDDDDD; EEEEEEEE; FFFFFFFF; GGGGGGG; HHHHHH; and Mother.⁵ The

⁴ This evaluation had been offered at the Resolution Meeting. See Finding of Fact ("FF") #7.

⁵ As noted above, FFFFFFFF, the District's speech implementer and GGGGGGG, the District's occupational therapist, testified at the request of the Mother. Tr. 381, 399. Although the Panel finds their testimony credible and further finds that each implemented the Student's IEP as written, their testimony was not relevant to any particular issue before this Panel and, therefore, is not included in any of our Findings.

District presented its case-in-chief primarily through cross-examination of the witnesses called by Mother and also called HHHHHH to testify in its case-in-chief.

22. At the close of the hearing on May 2, 2012, the parties jointly requested extension of the June 1, 2012 timeline to July 16, 2012. (Tr. 754-756). The parties agreed to have their Proposed Findings of Fact and Conclusions of Law filed no later than June 15, 2012. (Tr. 752).

23. On May 7, 2012, the Chairperson issued an Order memorializing the dates referenced in FF #20.

24. The Hearing Panel issues its unanimous decision within the July 16, 2012 time line.

The Issues Heard by the Hearing Panel

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

(a) Did the District violate IDEA by not properly implementing the September 6, 2011 IEP as alleged by the Petitioner in the Due Process Complaint?

(b) Is the change of placement proposed in the December 5, 2011 IEP not reasonably calculated to provide Student with FAPE in the least restrictive environment as alleged by the Petitioner in the Due Process Complaint?

(c) If the Petitioner prevails on one or more of the issues above, what are the appropriate remedies?

(d) Was the re-evaluation as reflected in the Petitioner's Evaluation Report dated February 23, 2012, appropriate?

(e) If the re-evaluation described above is not appropriate, is the Petitioner entitled to an IEE at public expense?

(f) If the re-evaluation as reflected in the Petitioner's Evaluation Report dated February 23, 2012 is found to be appropriate, what weight, if any, should be given to the Evaluation Report by the Hearing Panel in making a decision as to whether the change of placement proposed by the District in the December 5, 2011 IEP was reasonably calculated to provide FAPE in the least restrictive environment?

BACKGROUND FACTS

The Student's Disabilities

26. The Student demonstrated developmental delays in his infant and toddler years. Specifically, he could not hold up his neck until he was 5 months old, he took his first steps at age 25 months, and began speaking at age 3. Panel Ex. 1 at ¶ 6. He has a medical diagnosis of Periventricular Leukomalacia (“PVL”), with cerebral palsy as a symptom of this disability.⁶ Ex.P-A at 3; Ex.R-17 at 202. Developmental concerns of PVL may include but are not limited to motor problems (including coordination and balance), delayed mental development, seizures, specific learning disabilities, short attention span and behavioral problems. Ex.P-A at 3; Ex.R-17 at 202. The Student’s disability adversely affects his speech patterns and also causes a weakening of his fine motor skills, resulting in difficulty performing lengthy writing and/or typing assignments. Ex.P-A at 3; Ex.R-17 at 202. He has an educational diagnosis on his IEP of Traumatic Brain Injury (“TBI”). Ex.P-A at 3; Ex.R-17 at 202.

The Student's Educational History: Early Childhood – 4th Grade School Year (2007-08)

27. The Student was first identified as a student with an IDEA disability when he attended the Grandview, Missouri Consolidated School District (“Grandview”). Panel Ex. 1 at ¶ 7; Ex. R-1.

28. The Student attended the early child program in Grandview four mornings per week and received speech, occupational and physical therapies. Ex. R-5 at 33A.

29. On March 27, 2002, Grandview administered the Stanford-Binet Intelligence Scale, 4th Edition. Ex. R-40 at 615. The Student received an overall score of 101, with a breakdown as follows: Verbal Reasoning – 110; Abstract/Visual Reasoning -78; Quantitative Reasoning - 108 and Short-Term Memory -106. Ex. R-40 at 615.

30. In August 2002, the Student transferred to and enrolled in kindergarten in the North St. Francois County R-1 School District. Panel Ex. 1 at ¶ 8; Ex. R-5 at 33A. After six days of attendance, he was removed from school and attended a Montessori school. Ex. R-5 at 33A. During the 2003-04 school year, his parents reenrolled him in the District’s kindergarten at the Desloge Elementary school. Ex. R-5 at 33A.

31. The Student was identified as a student with an IDEA disability upon entering kindergarten and has received IEP services from the District since that time. Panel Ex. 1 at ¶ 9.

32. During the 2004-05 school year, the Student attended the District as a first-grade student. Panel Ex. 1 at ¶ 10.

⁶ Earlier this year, the Mother provided a letter from Dr. Lawrence Tychsen, an ophthalmologist, indicating a March 9, 2011 medical diagnosis of gaze apraxia – a motor deficit which is manifest as an inability to move his eyes smoothly left to right and/or up and down. Ex.-P-C.

33. In 2004, per the Mother's testimony, the Student suffered a grand mal seizure that lasted over an hour. Tr. 623, 632, 671. The Mother is aware that a significant seizure can cause a decline in IQ. Tr. 635; *but see* Tr. 609 (wherein the Mother testified that she had been informed that IQ scores could not change from a 61 to a 46).

34. In November 2004, the Student was evaluated at St. Louis Children's Hospital's Neuropsychology Services to determine his level of cognitive functioning and assist with treatment planning in light of seizures that he was then experiencing. Ex. R-3 at 23. The evaluation report stated that, from a diagnostic perspective, the Student's symptoms did not indicate a diagnosis of ADHD and his attentional difficulties were part of his underlying neurological disorder and/or a side effect of his medication. Ex. R-5 at 34.

35. In 2004, the District conducted a reevaluation of the Student. Ex. R-2. The evaluation report noted that the Student had a history of seizures and had been diagnosed with mild cerebral palsy. Ex. R-2 at 13. Based on the data collected and reviewed, a multidisciplinary team concluded that the Student continued to meet state and federal criteria to be identified as "other health impaired." Ex. R-2 at 21.

36. During the 2005-06 school year, the Student attended the District as a second-grade student. Panel Ex. 1 at ¶ 11.

37. During the 2006-07 school year, the Student attended the District as a third-grade student. Panel Ex. 1 at ¶ 12.

38. In November 2006, the Student again was evaluated at St. Louis Children's Hospital. As part of the 2006 evaluation, Children's Hospital personnel administered the Wechsler Intelligence Scale for Children – 4th edition, a test of intellectual functioning. On that test, the Student received a verbal comprehension score of 81 (low average); a perceptual reasoning score of 63 (impaired); a working memory score of 52 (impaired); and a processing speed score of 56 (impaired). Given the discrepancy in those scores, the evaluators determined that his full scale IQ was not a valid representation of his intellectual functioning and, therefore, was not reported. Panel Ex. 1 at ¶ 13.

39. In the 2006 St. Louis Children's Hospital evaluation report, the examiner noted that the Student had a history of developmental delays and, in 2004, had begun displaying seizure activity. Ex. R-3 at 23. The report also noted that 2004 test results at that facility indicated intellectual functioning in the borderline range, with a decline in the Student's language skills and working memory compared with a 2002 school-based assessment. *Id.* As noted in the report, "[t]hat discrepancy raised concern that the Student may have been experiencing persisting neurological changes related to two prior episodes of status epilepticus, superimposed on preexisting developmental delays." *Id.*

40. The 2006 Children's Hospital evaluation report further noted that a recent MRI scan showed "mild periventricular leukomalacia" ("PVL"). *Id.* PVL is a softening of the brain near the ventricles. Ex. R-5 at 58A.

41. As part of the 2006 evaluation, an ophthalmology exam by Dr. Lawrence Tyachsen “indicated normal uncorrected visual acuity in both eyes and no need for prescription lenses.” *Id.*

42. In the Impressions section of the 2006 report, the examiner stated that “[t]est results suggest that the Student is a boy whose intellectual functioning is best represented by his borderline to low average verbal expressive/reasoning skills due to neurologically-based deficits associated with his CP and epilepsy.” *Id.* at 26. The examiner also stated that the Student “has shown mild and circumscribed regression in his cognitive efficiency, psychomotor speed and fine motor dexterity. . . . It also is possible that side effects from medications are impacting his cognitive functioning.” *Id.*

43. Children’s Hospital personnel recommended, *inter alia*, that the Parents consult with a family/child psychologist and that the Student receive no corporal punishment. Ex. R-3 at 26-27.

44. During the 2007-08 school year, the Student attended the District as a fourth grade student at the District’s Bonne Terre Elementary school. Panel Ex. 1 at ¶ 14; Ex. R-5 at 33A.

45. In September 2007, the District completed a reevaluation, with assessment, of the Student. Panel Ex. 1 at ¶ 15; Ex. R-5. The Parents and their attorney, Dayna Deck, attended and participated in the reevaluation meeting. Ex. R-5 at 60.

46. In the reevaluation report, the District included a record review of past intellectual/cognitive testing. Ex. R-5 at 40. As part of that review, the District calculated and reported a full-scale IQ of 56 based on the 2006 Children’s Hospital evaluation. Ex. R-5 at 40. As part of the record review, the District also reported the full scale IQ of 61 from the Children’s Hospital 2004 evaluation. Ex. R-5 at 40.

47. As part of the 2007 reevaluation, the District administered the Stanford-Binet Intelligence Scales, 5th Edition. On that instrument, the Student achieved a full scale IQ of 55. Panel Ex. 1 at ¶ 15; Ex. R-5 at 40-41.

48. Based on a review of all data, the 2007 multidisciplinary team concluded that the Student should be identified under the IDEA as having a Traumatic Brain Injury, due to his PVL diagnosis and the resulting effects on his educational progress. Panel Ex. 1 at ¶ 15; Ex. R-5 at 58A.

5th-7th Grade School Years (2008-09; 2009-10; 2010-11)

49. During the 2008-09 school year, the Student attended the District as a fifth-grade student. His IEP for that year provided for him to receive 40-79% of his school day in the regular education environment. Panel Ex. 1 at ¶ 16.

50. During the 2009-10 school year, the Student attended the District as a sixth-grade student. His IEP for that year provided for him to receive 40-79% of his school day in the regular education environment. Panel Ex. 1 at ¶ 17.

51. On or about October 21, 2009, the Parents filed for an IDEA due process hearing with the Missouri Department of Elementary and Secondary Education (“DESE”) on the Student’s behalf. That matter did not proceed to hearing but was resolved by the parties. Panel Ex. 1 at ¶ 18.

52. During the 2010-11 school year, the Student attended the District’s Middle School as a seventh-grade student. During that year, the Student’s IEP provided for him to receive 40-79% of his instruction in a regular education classroom. Panel Ex. 1 at ¶ 19.

53. CCCCCC served as the Student’s special education case manager and one of his special education teachers during the 2010-11 school year. Tr. 298. During that year, CCCCCC and the Mother held different opinions with respect to what accommodations and modifications were required by the Student’s then existing IEP. Tr. 298. For example, CCCCCC believed that the accommodation which required 50% with respect to tests obligated her to reduce the test questions by half; the Mother, on the other hand, thought that the number of concepts tested was to be reduced by half. Tr. 298-99.

54. During the 2010-11 school year, CCCCCC provided the Student with audio texts for social studies as required by his then relevant IEP. Tr. 299-300. However, the Parents never even opened the audio texts and, therefore, the Student never used them. Tr. 300. In CCCCCC’s professional opinion, the Student did not require audio texts in either science or social studies to receive a free appropriate public education. Tr. 300.

55. The Mother testified that the Student used the audio text only one time. Tr. 650. When asked why he needed an audio text, she replied, “because it was agreed upon.” Tr. 650.

56. During the 2010-11 school year, CCCCCC initially provided the Student with an enlarged keyboard pursuant to his then relevant IEP. Tr. 301. However, the Student conveyed that he did not like the enlarged keyboard and, when CCCCCC spoke to the Mother about that issue, the Mother agreed to discontinue that accommodation. Tr. 301. In CCCCCC’s opinion, the Student does not require the use of an enlarged keyboard. Tr. 301.

57. During the fall of 2010, the District conducted a Review of Existing Data to fulfill its obligation to conduct a three-year reevaluation of the Student. Ex. R-12. After reviewing existing data, a multidisciplinary team concluded that sufficient information existed to determine that the Student continued to be a student under the categorical disability of traumatic brain injury (“TBI”). Ex. R-12 at 165.

8th Grade School Year 2011-2012

58. During the 2011-12 school year, the Student attended the District’s Middle School as an eighth-grade student. Panel Ex. 1 at ¶ 20.

59. During his eighth-grade year, the Student attended science, social studies, family and consumer science, physical education and art in a regular education setting. He received specialized instruction in a special education classroom in the areas of math, reading, and communication arts. Tr. 87-88.

60. During the 2011-12 school year, AAAAAAAAAA was the Student's regular education science teacher, with assistance from a paraprofessional who was assigned to four IEP students, including the Student. Tr. 22, Tr. 53, 62, 66, 85. BBBBBBBBBB and CCCCCC were his special education teachers.⁷ Tr. 188, 288, 297. BBBBBBBBBB provided the Student with specialized instruction in communication arts, reading and REC. Tr. 188. CCCCCC provided him with specialized instruction in math. Tr. 297.

September 6, 2011 IEP Meeting

61. On or about September 6, 2011, the Student's IEP team met to review his IEP. The Mother also attended that meeting. Panel Ex. 1 at ¶ 21; Ex. R-17. In addition, HHHHHH, BBBBBBBBBB, Alisha Burger, CCCCCC and Jacob Goeller also participated. Ex. R-17 at 201; *see also* Tr. 350.

62. As the Student's case manager, BBBBBBBBBB drafted the September 6, 2011 IEP and changes were made to the draft including changes requested by the Mother. Tr. 130, 209-10.

63. At the meeting, the Student's IEP team prepared an IEP for implementation during the Student's eighth grade year. Ex. R-17 at 201-02. The IEP reflects that the Student's grade level in communication arts was at a beginning fourth grade level and his math was at a mid-third grade level. Ex. R-17 at 203-07. The present level also indicates that the Student would participate in regular education for science and social studies for the 2011-012 school year but would be provided with a modified curriculum of 50% of the eighth grade level concepts. Ex. R-17 at 203. The IEP includes goals in the areas of written language, math and reading.⁸ Ex. R-17 at 206-08.

64. The IEP also includes approximately 22 accommodations and modifications specifically drafted for the Student's particular needs in the classroom. Ex. R-17 at 215. The IEP also addresses his behavioral issues by providing four accommodations for sensory diet. Ex. R-17 at 215. The IEP multi-purpose page also notes that the Student is to be given modified versions of written tests in certain areas, including science. Ex. R-17 at 215. Test questions are to be read aloud and paraphrased to make sure that he understands the questions in all classes. Ex. R-17 at 215. The test questions must avoid paragraph form but could be in multiple choice, matching/chunking, fill in the blank (but with a provided word bank) and/or completion of a graphic organizer. Ex. R-17 at 215. The Student would be tested on only 50% of the original concepts, with those portions on which he would not be tested, left off his test copy. Ex. R-17 at 215. Two accommodations deal with stretches in PE recommended by his neurologist who treats him for cerebral palsy. Ex. R-17 at 215.

⁷ AAAAAAAAAA, employed by the District for two years, has a Bachelor's degree in education with an emphasis in math and science. Tr. 15. BBBBBBBBBB, a five year District employee, has a Bachelor's degree in special and elementary education. Tr. 129. CCCCCC has a Bachelor's degree in special education. Tr. 287. Prior to her current two year tenure with the District, CCCCCC was employed by the Special School District of St. Louis County as a behavioral analysis therapist. Tr. 288. All were very credible witnesses.

⁸ BBBBBBBBBB testified that the Student's current reading level would be 1.8 [grade level] to beginning 2nd grade level. Tr. 189. The Mother did not dispute that he is reading at the 2nd grade level. Tr. 676.

65. The District made and maintained notes of the September 6th meeting. Ex. R-17 at 197-98. Those notes reflect that the IEP team discussed the possibility of moving the Student from a regular education to a self-contained special education classroom for science to provide more individualization in the curriculum. Ex. R-17 at 198; *see also* Panel Ex. 1 at ¶ 22; Tr. 211, 504. BBBB BBBB, one of the Student's special education teachers, offered to teach him science because he was having difficulty with the general education science concepts. Tr. 199. The decision, in September, to maintain the Student in the regular education science class was at the Mother's request.⁹ Tr. 211. At her request, the team decided that the Student would participate in the general education classroom for social exposure purposes, with assessment toward progress made in the individualized curriculum administered by BBBB BBBB, the Student's special education teacher. Ex. R-17 at 199; Tr. 200. The District did not push for a change in placement/services as it was attempting to be collaborative with the Student's family. Tr. 212; *see also* Tr. 504.

66. The individualized science curriculum prepared by BBBB BBBB was designed to teach the Student about PVL, his medications and what he could expect about his medical conditions. Tr. 20-01. Because of the Student's love of animals and sports, BBBB BBBB proposed to teach the Student about simple machines through the use of sports and anatomy through the use of animals. Tr. 201.

67. Subsequent to the September meeting and with the Mother's permission, BBBB BBBB provided the Student with a packet of material about the human body that he could independently work on under the new proposed curriculum. Tr. 202, 258. The Student enjoyed working on and specifically requested to work on that packet. Tr. 202. However, the Mother later expressed displeasure with the proposed individualized curriculum and stated that she did not want the Student to continue working on the packet. Tr. 201-02, 212. The Mother expressed that, in her opinion, the Student was capable of working at a higher level. Tr. 212.

Implementation of the September 6, 2011 IEP

AAAAAAAAA

68. During the 2011-12 school year, AAAAAAAAAA complied with and implemented the pertinent accommodations and modifications included in the Student's relevant IEPs. Tr. 40-43, 49-51, 57, 71-72, 77-78, 87-90; Ex. R-17, R-34, R-35. For example, AAAAAAAAAA provided the Student with extended time for assignment completion, did not penalize him for spelling errors, ensured that assignments and test questions were read aloud to him, repeated questions to ensure his understanding, provided preferential seating and gave him time to study for tests at the beginning of class periods. Tr. 77-78, 85, 90. She also directed the paraprofessional to provide him with repeated review and drill as needed. Tr. 84. AAAAAAAAAA did not use paragraphs in his tests as per the multi-purpose page in his IEP. Tr. 78. She also omitted from the Student's printed test copy, the parts on which he had no responsibility. Tr. 78.

⁹ By the end of the meeting, HHHHHH thought the Mother was willing to move towards a special education classroom for science but after consulting with the Father overnight, the Parents agreed that the Student needed to stay in regular education science. Tr. 505.

69. Per the IEP, AAAAAAAAAA tested the Student on only 50% of the science concepts taught in her general education classroom. Tr. 71-72; Ex. R-17; R-34. AAAAAAAAAA required approximately 30-45 minutes per test to develop each individualized test for the Student. Tr. 72.

70. Although the Student's IEP required that written assignments and texts be in enlarged font, Ex. R-17 at 215, AAAAAAAAAA did not or was not able to enlarge all the fonts. Tr. 34, 84. The Student, however, was able to read non-enlarged font without difficulty. Tr. 84-85.¹⁰

71. Although the Student's September 2011 IEP provided for him to receive an audio text in science, AAAAAAAAAA did not use a student issued text and did not assign reading from a text in her class. See Ex. R-17 at 215, Tr. 31, 63. Rather, she developed power point presentations based on the text and used those presentations from which students took notes. Tr. 31. AAAAAAAAAA supplemented that curriculum with workbooks, the Internet and other science texts. Tr. 63. Because there were no text book assignments, AAAAAAAAAA did not provide the Student with an audio version of the science text. Tr. 31-32. The failure to provide the audio text did not impact the Student's ability to participate in AAAAAAAAAA's classroom. Tr. 63.

72. During the 2011-12 school year, the Mother and AAAAAAAAAA had disagreements about IEP provisions related to study guides. See Ex. R-17 at 215; Tr. 40-43. In one instance, AAAAAAAAAA did not administer a test to the Student because of the Mother's concerns. Tr. 43. AAAAAAAAAA credibly testified that the Mother wanted the study guide to be the same as the test so he could memorize it. Tr. 77.

73. The Student's presence in her classroom sometimes impacted AAAAAAAAAA's ability to teach her other students at expected levels. Tr. 99.

74. In AAAAAAAAAA's opinion, the Student's disability "absolutely" impacted him in her classroom because he was unable to carry over prior knowledge to current concepts and there was no academic benefit to the Student. Tr. 64, 75. Additionally, his disability impacted his ability to grasp abstract concepts and he was "significantly below the rest of the students in the classroom." Tr. 65. As she testified, with the Student, "[t]here is no carry over from unit-to-unit, or sometimes even day-to-day." Tr. 64.

75. Because the Student was unable to use previously gained knowledge and apply it, he did not do well on even the modified science tests that AAAAAAAAAA administered. Tr. 75.

¹⁰ BBBBBBBBBB testified that it was her understanding that the request for enlarged fonts was for the Mother's benefit and not because the Student required that accommodation. Tr. 210. Additionally, after he went to the eye doctor during the 2010-11 school year, the Student ceased wearing eyeglasses at school, with no discernible difference noted in his ability to see. Tr. 302-03. DDDDDDD, one of the Student's paraprofessionals, also observed that the Student ceased wearing his glasses at school and the Mother informed her that he no longer needed to wear them. Tr. 319. EEEEEEEEE, his other paraprofessional, observed that he never wore glasses after she began working with him in November 2011. Tr. 371. From November 2011 through the end of the 2011-12 school year, the Student never complained about not being able to see the board. Tr. 371.

Although the Student has the ability to memorize, he is unable to apply concepts that he has learned. Tr. 75.

76. AAAAAAAAAA also credibly testified regarding the Student's frustration: he looked confused half the time and while he wants to understand, there is so much that goes over his head. Tr. 96. She concluded that the Student got some social benefit from the regular education science class but did not derive academic benefit from being in the class. Tr. 75-76.

77. At the time of her testimony, the Student had a grade of "C" in AAAAAAAAAA's class. Tr. 92. However, because he was tested on only 50% of the concepts taught, a "C" for the Student reflected learning of only 60% of the reduced concepts taught. Tr. 93. If the Student had been graded on the expectations for the regular education science students, AAAAAAAAAA doubted if the Student would have had passing grades. Tr. 125.

DDDDDDD

78. At the beginning of the 2011-12 school year, DDDDDDD functioned as the Student's paraprofessional and did so until October 2011 when she was hired as the District's Title I Coordinator. Tr. 318. Pursuant to the Student's IEP, the Student to paraprofessional ratio never exceeded 1:4. Tr. 334. From August to October 2011, DDDDDDD attended the Student regular education classes with him and carried the IEP multi-purpose page with her when she did so. Tr. 323, 326. She used that page to ensure that each of his accommodations was being implemented. Tr. 326.

79. Per his IEP, DDDDDDD read tests aloud to the Student. Tr. 328. At Mother's request, she began giving the Student his tests 1:1 and without the presence of the three other Students for whom she served as paraprofessional. Tr. 328. Prior to the administration of tests, DDDDDDD helped the Student review. Tr. 337. The tests administered to the Student were modified and DDDDDDD also paraphrased questions on assignments and tests and would prompt him to make things "a little more understandable for him." Tr. 329, 333-34. The degree of modification for the Student was greater than for the other three IEP Students she assisted and the Student was "required to know less than the other students were." Tr. 334. Although this helped the Student in science, he still was unable to understand the concepts taught in that class. Tr. 328-30. The Student expressed to DDDDDDD his frustration with trying to understand and do the work expected of him in the science class. Tr. 349. In DDDDDDD's opinion and, based on her experience with him, the Student does not have the cognitive ability to understand the concepts and instructions in the regular education setting. Tr. 324-25. In her opinion, he "would benefit greatly by more time in special education." Tr. 340.

80. In addition to the credible testimony referenced above, DDDDDDD testified that although the District provided the Student with an enlarged keyboard pursuant to his IEP, he did not always use it and, in DDDDDDD's opinion, he did not require it. Tr. 330. Indeed, DDDDDDD found the enlarged keyboard to be a hindrance. Tr. 330.

EEEEEEEE

81. In November 2011, EEEEEEEE replaced DDDDDDD as the Student's paraprofessional and remained in that role through the remainder of the school year.¹¹ Tr. 351-52. EEEEEEEE attended science, math, social studies, technology, and physical education with the Student. Tr. 352. The ratio of students to paraprofessional remained 4:1 throughout that time. Tr. 358.

82. EEEEEEEE was provided with a copy of the Student's IEP and she implemented the various accommodations and modifications contained within that IEP. Tr. 357, 362, 373-77. Her assistance included:

(a) She read the Student's tests and assignments to him and scribed for him as necessary. Tr. 355, 362. She also repeated test questions to him for greater understanding. Tr. 363.

(b) Each day that she worked with the Student, EEEEEEEE wrote in his planner what he did that day in each of his classes and circled the applicable color that coded his behavior. Tr. 353, 370. The Mother never informed EEEEEEEE that she desired greater detail or clarity with respect to the planner. Tr. 374

(c) She worked with the Student in BBBB BBBB's classroom on the use of Dragon Speak with the computer.

(d) EEEEEEEE used positive and concrete reinforcements with respect to the Student's frustrations. Tr. 358. She observed that he became frustrated in the regular education classroom because he did not understand the concepts. Tr. 368-69.

(e) In EEEEEEEE's opinion, the Student did not benefit socially from being in the regular education classes because he does not interact with other students unless specifically put into a group – which might happen once per month. Tr. 359. In contrast, he interacts with the other students in CCCCCC's special education math class. Tr. 358-361.

(f) Compared to the other three (3) IEP students in the regular education science class, the Student cannot read the text but the other 3 are able to do so. Tr. 379. The Student is unlike the other students who also understand what they are reading. Tr. 379.

83. EEEEEEEE observed that the Student required much repetition to learn new concepts and was not able to retain knowledge of concepts previously taught. Tr. 369. As a result, EEEEEEEE does not believe that the Student was appropriately placed in regular education science and social studies classes. Tr. 358-39. In her opinion, the Student is more comfortable, both socially and academically, in his special education classes. Tr. 360. Based on the Student's age and disability, EEEEEEEE believes that he should be provided with a functional curriculum and not placed in a regular setting during the 2012-13 school year. Tr. 377.

¹¹ She has a Bachelor's degree in early childhood elementary and special education and is certified to teach in special education. Tr. 351. EEEEEEEE has been employed as a paraprofessional by the District since November 2010. Tr. 351. Her prior employment included four years as a substitute teacher in the Farmington School District. Tr. 351.

Communications between the Mother and District Staff

84. During the 2011-12 school year, AAAAAAAAAA communicated frequently with the Mother. Tr. 98. Indeed, the amount of time that she spent in addressing issues with the Mother took away time AAAAAAAAAA ordinarily would have spent with her other students. Tr. 99. Ms. Burger credibly testified that she was contacted much more frequently by the Mother compared to the parents of other students. Tr. 121.

85. In late September 2011, the Mother engaged in e-mail correspondence with HHHHHH regarding a science test and the study guide provided for that test. Ex. R-20 at 228-29.

86. In late September 2011, the Student did not turn in a science poster because his mother informed him that he did not have to do it. Ex. R-20 at 230.

87. On or about October 14, 2011, the District and the Parents prepared an amendment to the Student's September 6, 2011 IEP that modified the accommodations and modifications page. Ex. R-21; Tr. 508. In part, the amendments addressed the Mother's concern that the Student's test questions and answers not be in paragraph format. Tr. 508.

88. In October 2011, the Mother and AAAAAAAAAA, the Student's regular education science teacher, exchanged e-mail communications regarding the Student's work in the regular education science class. Ex. R-22 at 237-39, 241.

89. In early November 2011, the Mother, AAAAAAAAAA and BBBBBBBBBB exchanged e-mails about the Student's science assignments. Ex. R-22 at 246.

90. In mid-November 2011, the Mother exchanged e-mails with school personnel about tests, grading and assignments in the Student's regular education science class. Ex. R-24 at 249-57.

91. On November 23, 2011, the Mother contacted the District to request an IEP meeting to discuss concerns she had regarding proper implementation of IEP accommodations and modifications. Panel Ex. 1 at ¶ 23; Tr. 510-11. Her concerns included: clarification regarding the grading – thought too much weight given to test results; wanted benchmarks set at 100 instead of 90; complained about the study guides e.g., should not contain paragraphs. Tr. 439-443. *See also* Tr. 428.

December 5, 2011 IEP Meeting

92. On or about December 5, 2011, the Student's IEP team convened to review his IEP. Panel Ex. 1 at ¶ 24. The Mother, HHHHHH, BBBBBBBBBB, IIIIIIIII, and AAAAAAAAAA were among those who attended and participated. Ex. R-25 at 258, 261; Tr. 303.

93. The District kept and maintained notes of the December 5 IEP meeting. Ex. R-25. The notes reflect that the meeting was held at the Mother's request to discuss concerns she

had with respect to implementation of the IEP accommodations and modifications as well as the District's interest in revisiting the Student's placement. Ex. R-25 at 28; Tr. 510-11.

94. When AAAAAAAAAA was present, the Mother relayed concerns she had about science class. Ex. R-25 at 258-59; Tr. 515. After a discussion about those concerns, HHHHHH asked the team whether the regular education setting remained appropriate for science. Ex. R-25 at 259; Tr. 213, 515-16. In response, AAAAAAAAAA indicated that the regular education science curriculum was not appropriate for the Student and that he was merely rote memorizing information but was unable to apply what he learned. Ex. R-25 at 259; Tr. 516. BBBB BBBB agreed with AAAAAAAAAA. Ex. R-25 at 259; Tr. 516.

95. When asked whether the Student would be able to answer questions regarding the science curriculum, without prompt or review, the Mother stated that he probably could not. She also indicated that the science curriculum was probably not something the Student needed for his life and that he was not evidencing meaningful learning. Ex. R-25 at 259; *see also* Tr. 97, 215, 517. The Mother also agreed with AAAAAAAAAA's representation that it would not be possible to modify the coursework on balancing chemical equations to a level that would meet the Student's needs. Ex. R-25 at 259-60; Tr. 517. The Mother seemed receptive to a change in placement but wanted to talk to her husband. Tr. 517-518.

96. After this discussion, HHHHHH asked each team member present whether each thought that the Student was being appropriately served in the regular education science classroom. Ex. R-25 at 260; Tr. 445. Each team member, with the exception of the Mother, agreed that a regular education science class was no longer appropriate for the Student. Ex. R-25 at 260; Tr. 445, 517. BBBB BBBB stated that she would prefer to provide the Student with an individualized and specialized science curriculum to meet his needs. Ex. R-25 at 260; Tr. 213.

97. AAAAAAAAAA agreed with the team's proposal to change the Student's science class to a special education setting. Tr. 94. In her opinion, the Student is not capable of application based learning or inferential thinking as a result of his disability and the special education setting would provide the Student with more functional knowledge that he could use in the future. Tr. 68-69, 75, 95-96. Indeed, AAAAAAAAAA testified that the Student should not be placed in a regular education science class during the 2012-13 school year. Tr. 100.

98. BBBB BBBB supported the decision to change the Student's science class to a special education setting. Tr. 213; *see also* Tr. 198, 203, 205. In her opinion, a specialized science curriculum will provide the Student the necessary foundation for adulthood.¹² Tr. 213. Maintaining him in the general education science class, in contrast, adds to his frustration and low self-esteem. Tr. 213. As BBBB BBBB testified, the Student "knows he's different. He knows. He doesn't need to be reminded every day." Tr. 213.

¹² In November 2011, BBBB BBBB administered to the Student a battery of tests designed to assess his daily living skills. Ex. R-38; Tr. 195-96. The Student's score of 51 on this battery led BBBB BBBB to conclude that the Student was not ready to maintain a job on his own or to even be in an assisted living environment. Tr. 197. That battery of tests also led BBBB BBBB to conclude that the District needed to focus on a life-centered curriculum and to increase the Student's independence. Tr. 19.7

99. CCCCCC also supported the team's decision to place the Student in a special education classroom for science because, in her opinion, he functions at a mid-second to third grade level. Tr. 304-06. He is on the lower end cognitively compared to the other four (4) students in her special education math class. Tr. 306. CCCCCC thinks the Student would be less frustrated and more comfortable in a science class geared to his level. Tr. 311.

100. At the conclusion of the meeting, HHHHHH, the District's Special Services Director, presented the Mother with a Notice of Action proposing to change the Student's science class from regular education to special education. Panel Ex. 1 at ¶ 24; Ex. R-25 at 263-64; Tr. 445, 519. In response, the Mother stated that she wanted to wait to speak to her husband before signing the notice. Ex. R-25 at 260.

Filing for Due Process and the Subsequent Resolution Meeting

101. As noted earlier, the Mother filed a Due Process Complaint the next day after the December 5, 2011 IEP meeting in which she challenged the proposed change in placement for science as well as implementation of the September IEP. Ex. R-26 at 265. She did not, however, challenge the Student's TBI category of educational disability. Tr. 622.

102. Subsequent to the due process request, the District maintained the Student in AAAAAAAA's regular education science class as a result of stay-put and in spite of the fact that there was little educational benefit to the Student in that setting. Tr. 99-100, 519. Thus, the December IEP was never implemented. Tr. 519.

103. The District kept and maintained notes of the resolution meeting held on December 7, 2011. Ex. R-27 at 274. At the conclusion of the resolution meeting, the Mother requested clarification of the District's offer of a reevaluation as the means of resolving the due process complaint. Ex. R-27 at 276; Tr. 520. The Mother did not agree to a reevaluation as a means of resolving the due process complaint, but did indicate that she would like a reevaluation. Ex. R-28; Tr. 521.

104. On or about December 8, 2011, HHHHHH e-mailed the Mother and informed her that, if she thought the team needed more data to better understand the Student's functioning, the District would be willing to conduct a full reevaluation. Ex. R-27 at 276.

105. Subsequent to the December 6th IEP meeting and December 7th resolution meeting, the District finalized a new IEP for the Student that reflected the proposed change in the Student's science class. Ex. R-27 at 280.¹³

106. On or about December 7, 2011, the District provided the Parents with a notice of action refusing the Mother's request for the Student to be kept in the regular education classroom for science and to be provided with a 1:1 paraprofessional in that setting. As the basis for that refusal, the notice states that the Student's "placement in the regular education science class has

¹³ At hearing, HHHHHH clarified that the IEP mistakenly contains a date of December 7, 2011 but that the IEP meeting was actually held on December 5, 2011. Tr. 522.

been found inappropriate due to his inability to evidence meaningful learning and/or connectedness to current cognitive/transition needs.” Ex. R-27 at 299.

107. On or about December 12, 2011, the Mother e-mailed HHHHHH and indicated that, although she wished to “accept” a reevaluation, she was not withdrawing her due process request in response. Ex. R-28; Tr. 521.

Reevaluation of the Student

108. On or about January 11, 2012, the District convened the Student’s IEP team to conduct a Review of Existing Data. Panel Ex. 1 at ¶ 27; Ex. R-31 at 304; Tr. 458, 523, 522. As a result of that review, the team proposed a re-evaluation, with assessment, and the Mother provided written consent to the reevaluation on that same date. Panel Ex. 1 at ¶ 27; Ex. R-31 at 304; Ex. R-42; Tr. 227, 467, 480, 525. The parties agreed to use the same cognitive tests as previously conducted. Tr.458-460.

109. On or about February 16, 2012, the District provided the Parents with a notification of meeting for February 23, 2012. Ex. R-43.

110. On or about February 23, 2012, the District convened the Student’s IEP team to review the results of the reevaluation and finalize an evaluation report. Ex. R-40; Tr. 468, 526. The Mother was present and the report was read word-for-word. Tr. 527. As part of the re-evaluation, the District conducted assessment of the Student’s cognitive and academic levels, social/behavioral and adaptive skills, and transition needs. Ex. R-40.

111. The reevaluation report includes a review of existing data in the area of intellectual/cognition as well as the results of two additional cognitive assessments administered by Danielle Scott, school counselor and licensed psychometrist. R-40 at 615; Tr. 531-32.¹⁴ Ms. Scott administered the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) to the Student. R-40 at 615; Tr. 471, 537. On that instrument, the Student scored as following: Verbal Comprehension Index – 65; Perceptual Reasoning Index – 53; Working Memory Index – 50; Processing Speed Index – 50; and Full Scale IQ – 46. Ex. R-40 at 616; Tr. 475. Ms. Scott also administered the Leiter-R, a non-verbal intelligence test, , which was a second attempt to verify the Student’s cognitive abilities. R-40 at 617; Tr.469; 471; 537. The Student’s full scale IQ on that test also was a 46. Ex. R-40 at 618; Tr. 475.

112. Ms. Scott was present at the February 2012 meeting to explain her testing results. Tr. 538, 539. She administered the tests in accordance with the manual guidelines. Tr. 538. For example, Ms. Scott took numerous breaks and conducted the WISC test over several days. Tr. 472.

¹⁴ As previously noted, Children’s Hospital administered an IQ test in 2006 but did not generate a full scale IQ score. Tr. 463. The District was able to calculate a full scale IQ of 56 based on those 2006 assessment results. Tr. 463. The District did so simply for comparison purposes. Tr. 464. (This 2006 Children’s Hospital report also notes that earlier test results in 2004 showed the Student’s *intellectual functioning in the borderline range*. (emphasis added). Ex. R-3 at 23.)

113. At the February meeting, the team discussed the decline in the Student's IQ scores. Tr. 538.¹⁵ As part of that discussion, the team concluded that the Student's functioning may have plateaued at the same time that educational expectations increased. Tr. 538.

114. In addition to assessing in the cognitive area, the District also administered formal assessments in academic achievement, adaptive behavior, social/emotional/behavior, and transition. Ex. R-40; Tr. 228-30, 545-450.¹⁶ The District also conducted observations of the Student in the special education and regular education settings. Tr. 552.

115. CCCCCC administered the WIAT, an academic achievement test, an instrument that she is qualified to give. Ex. R-40; Tr. 307, 541-42. CCCCCC previously had administered the WIAT approximately a dozen times but, in preparing for the administration to the Student, reviewed the test manual. Tr. 307-09. When administering the test to the Student, she did so in accordance with the manual instructions. Tr. 307-09. In CCCCCC's opinion, the Student put forth his best effort when taking the WIAT and the test results represent a valid and reliable assessment of his academic achievement and abilities.¹⁷ Tr. 308-09; *see also* Tr. 542-43.

116. After reviewing all existing and new data, the Student's team concluded that the Student continued to meet eligibility criteria to be classified as traumatic brain injury based on his medical diagnosis of PVL. Panel Ex. 1 at ¶ 28; Ex. R-40 at 630-31; Tr. 230, 553; *see also* Tr. 708-09.

117. As noted in the evaluation report, the traumatic brain injury adversely affects his performance in cognition, academics, behavior and adaptive skills. Ex. R-40 at 631; Tr. 540. The report also reflects that, due to his significant deficits, the Student exhibits the need for substantially modified curriculum and assessment, and a modified environment. Ex. R-60 at 631.

118. During the February 23, 2012 meeting, the Mother neither asked questions about the administration of the IQ testing nor expressed disagreement with the manner in which the tests were given. Tr. 539. However, she did express concern about the decline in the Student's IQ and stated that she did not think the score was an accurate reflection of his level of functioning. Tr. 539.

119. At the conclusion of the meeting, the Mother indicated that she had spoken to representatives of DESE who informed her of her right to request an independent evaluation at public expense and she indicated to the February 23 team that she desired to request one. Panel Ex. 1 at ¶ 29; Ex. R-46 at 645; Tr. 554-55. The Mother was then informed that the District could either agree to pay for an IEE or could initiate a due process hearing to demonstrate that its evaluation was appropriate. Ex. R-46 at 645.

¹⁵ Subsequent to the February meeting, the District received a communication from Children's Hospital that suggested that the Student's cognitive decline might be attributable to his seizures. Ex. R-48 at 685; Tr. 531.

¹⁶ Regarding the Student's adaptive behavior, the results of the Vineyard Adaptive Scale, Version Two indicated that the Student is functioning well below his grade equivalency, and in the moderately low to low levels of functioning, which is commensurate with his cognitive skills. Tr. 544-545.

¹⁷ The WIAT results showed a significant deficit between the Student's academic ability and his same grade peers. All academic areas were found to be in the very low range. Ex. R-40 at 620.

120. The Mother confirmed her IEE request in an e-mail to HHHHHH subsequent to the February 23rd meeting. Panel Ex. 1 at ¶ 30; Ex. R-45. If the Mother were granted an IEE, she would test only in the area of cognitive. Tr. 656.

121. At the due process hearing, HHHHHH testified that, in her opinion, the District's reevaluation was appropriate and an IEE at public expense, therefore, was not required. Tr. 455-47, 477.

122. Per BBBB BBBB's testimony regarding the reevaluation, there is no reason to question its validity. Tr. 231. The District administered assessments in all necessary areas, those assessments were properly administered, and the test results were consistent with BBBB BBBB's knowledge of the Student. Tr. 231-32.

Additional Witness Testimony

123. In addition to her testimony referenced earlier, BBBB BBBB testified credibly to the following:

(a) In her opinion, the Student's TBI impacts his reading, language, comprehension, math, behaviors, motors skills, socialization and ability to understand science and social studies. Tr. 187-88. Because of his TBI, it is difficult to maintain the Student's current educational levels. Tr. 189-90. His cognitive level is well below his peers. Tr. 190. In her opinion, the Student's disability will continue to inhibit his ability to make greater academic progress and he may, educationally, have reached the limits of his ability.¹⁸ Tr. 190-91. As a result, BBBB BBBB has discussed with the Student's Parents the need to move away from a strictly academic program to a life skills, functional program. Tr. 192. She has known the Student for nearly five (5) years and he is "just not built for the regular education environment." Tr. 262.

(b) The accommodation of being tested on only 50% content limits what he learns from the basic curriculum and it is not a strong foundation for the future. Tr. 273-274. It is difficult for the Student to memorize, maintain and generalize any information that he is given in science and social studies. Tr. 274.

(c) She usually sees a strong decline in the Student's skills every August. Tr. 275. Unless the District gets a full summer of ESY, the staff sees a decline. Tr. 275. BBBB BBBB has sent copies of the Student's reading books home to work over the summer. Tr. 275. The Mother, however, did not use the books in the same way as BBBB BBBB did; and, thus, it was not as effective at home. Tr. 275.

(d) In response to her conversations about a life skills program, the Parents have informed BBBB BBBB that one of the reasons they do not support a move to a functional curriculum is because they have a daughter who is gifted. Per the Mother, a physician has informed them that the Student should be at least average since their other child is gifted. Tr. 193. The Parents also have expressed to BBBB BBBB that, in spite of his brain injury and the continuing seizures, they believe that the Student should be able to read on grade level. Tr. 193.

¹⁸ For example, he has been confused over the value of a nickel for four (4) years. Tr. 192.

(e) In BBBBBBBBBB's opinion, the Parents' increased expectations for the Student have negatively impacted him and have caused behavioral issues. Tr. 193, 222. The Student is aware of his ability level compared to his nondisabled peers and his sister and this, too, contributes to his behavioral problems. Tr. 194-95. For example, when his sister receives an award, the District staff knows to be cautious or "he will have a tantrum, he will be upset, he will cry." Tr. 93. The Mother's insistence on the Student being given a grade rather than pass/fail in the core classes also has contributed to his behavior. Tr. 222. He is aware of the grades such as a D or F being bad. Tr. 223. If the Student has a bad grade on a test or an assignment, the District seals the envelope to send home. Tr. 222. If he should learn of the bad grade, the Student will have a meltdown at home. Tr. 222. The District staff has also observed that more of the Student's problematic behaviors occur in the general education setting versus the special education setting. Tr. 194.

(f) The District was implementing the accommodations required by the Student's September 2011 IEP. Tr. 136-37, 220. Even if some technical failure to implement occurred, that omission did not negatively impact the Student's ability to receive an appropriate education. Tr. 220-22.

(g) The Mother communicates with BBBBBBBBBB by e-mail when she has concerns or questions and also has talked with BBBBBBBBBB in the school setting. Tr. 208. BBBBBBBBBB communicated at least weekly with the Mother. Tr. 224. If the Mother had questions about the information in the Student's planner, she contacted or could contact BBBBBBBBBB. Tr. 207-08.

124. The Mother and the District called HHHHHHH to testify. Tr. 411, 701. In addition to the testimony referenced above, the Panel finds that HHHHHHH credibly testified to the following:

(a) HHHHHHH has a bachelor's degree in elementary and special education and a master's degree in educational leadership. Tr. 412. Currently, she has earned 36 hours towards her doctorate. Tr. 412. At the time of the due process hearing, HHHHHHH served as the District's special education process coordinator for grades 5-12 and had been employed by the District for five years. Tr. 411-12.

(b) HHHHHHH testified that the Student's seizure activity, his TBI and his medical needs have impacted and interfered with his normal cognitive development. Tr. 566. In her opinion, the Student's PVL impacts him cognitively. As a result, HHHHHHH believes that the Student functions in the intellectually deficit range but that the Mother has not yet come to accept that fact. Tr. 540; *see also* Tr. 704-05. HHHHHHH has also concluded that the Student's learning ability has plateaued. Tr. 565.

(c) HHHHHHH communicated with the Mother more during the 2011-12 school year than with any other parent. Tr. 502. In HHHHHHH's opinion, the Mother's level of involvement in the Student's education has hindered him. Tr. 502-03.

(d) In HHHHHHH's opinion, not all of the accommodations and modifications included in the Student's IEP are necessary for him to receive a FAPE. Tr. 484. Thus, even if there were

items on that page of his IEP that were not always implemented, that technical failure would not deprive the Student of a FAPE. Tr. 484. For example, although the Student's IEP requires audio texts for science and social studies, those are not necessary because the science class does not utilize a primary text. Tr. 482. Moreover, the Student's prior history demonstrated that he did not use the audio text that previously was provided and an audio text would not have overcome the impact of his other deficit areas. Tr. 483, 705. Finally, the inclusion of the audio texts in the September 2011 was actually an oversight. Tr. 483.

(e) He could not complete the planner because he cannot process the information to put on the planner. Tr. 702.

(f) While his very low reading level impacts his ability to be successful in regular education, he has other deficits as noted in the WISC results [e.g., processing speed, perceptual reasoning, verbal comprehension]. Tr. 704-705. Reading is a manifestation of those weaknesses, not the other way around. Tr. 704.

(g) With respect to science, HHHHHH testified that the Student's regular education science tests were actually doubly modified and that such a level of modification was unrealistic to maintaining a student in the regular education environment. Tr. 486-87. Typically, children who need that significant amount of modification receive a functional curriculum in a special education setting. Tr. 488.

(h) HHHHHH stated that between September 6, 2011 and December 5, 2011, extensive observation and data collection established that the Student was not developing or functioning at a level that provided him with real true life learning. Tr. 446. He was simply memorizing, regurgitating and forgetting information. Tr. 446.

(i) At this time, HHHHHH believes that the Student requires a functional curriculum and as a result of his cognitive deficits and level of frustration, the regular education setting is not appropriate for him. Tr. 498. Rather he needs a slower paced curriculum geared towards the functional skills that he will need in the future. Tr. 498. Students in need of a functional curriculum still have opportunities to integrate with their non-disabled peers during the school day. Tr. 488. She also testified that her programming recommendations would not vary if his cognitive test scores in the reevaluation had been 61 versus 46. Tr. 580.

(j) If the Student remains in the District for the 2012-13 school year, HHHHHH would propose that he receive all core curriculum instruction in the special education classroom using a life skills/functional program. Tr. 514, 580, 713. In her opinion, the Student will need IEP services until the age of 21 with a focus on transition planning. Tr. 713. She also thinks a lofty goal for the Student would be assisted living and maybe a sheltered workshop – she expressed some reservations in part because of his interpersonal/behavioral issues. Tr. 564; 581-582.

125. The Mother testified during her case-in-chief in narrative fashion and was cross-examined by the District's attorney. The Panel finds her testimony to be of mixed credibility. In addition to her testimony referenced above, the Mother also testified to the following:

(a) The Mother stated that she considered home schooling the Student for the 2011-2012 school year and is considering same for the next year. Tr. 680. She understands that other than residential placement, home schooling is the most restrictive placement for a student. Tr. 681.

(b) The Mother initially testified that she is unsure whether the Student receives social benefit from his peers at school. Tr. 681-682. She subsequently indicated that she does not see a big socialization among the regular/special education students and the Student. Tr. 682-683. She also added that in the past he has not commingled with his classmates after school. Tr. 683.

(c) With respect to the regular education science curriculum, the Mother testified that she believed that the Student would benefit and would need it for his future high school classes. Tr. 603. She further testified that the Student needed to learn the metric system in the event the United States ever began using the metric system. Tr. 603. The Panel does not find this testimony to be credible.

(d) When asked why it was so important to her for the Student to be in the regular education science classroom, the Mother testified that the Student's doctors have informed her that the Student was capable of learning and recommended a regular education setting with modification. Tr. 636. However, the Mother was not able to identify any letters from the Student's physicians that included such a recommendation. Tr. 638, 647, 672. She called no physicians to testify in person, by telephone or by deposition.

(e) The Mother acknowledged that an IQ under 70 is considered intellectually deficient. Tr. 636. She understands that many children with an IQ of 70 or less need to receive their curriculum instruction in a special education classroom so that they can get the slower pace of learning and a modified classroom. Tr. 636.

(f) In her opinion, the Student is capable of learning the same curriculum as his nondisabled peers with the right accommodations and pacing. Tr. 619. Based on a preponderance of the evidence, the Panel disagrees and finds this testimony not to be credible.

(g) We also reject her testimony that the Student is not frustrated in a regular education class where he cannot do the same work as everybody else. Tr. 664-665. Similarly, her testimony regarding the Student's ability to retain information was not credible. Tr. 684-685.

(h) The Mother asked for the Student to learn only half the concepts taught in the regular education science classroom based on advice she allegedly received from Jackie Bruner at DESE. Tr. 619. The Mother conceded, however, that Ms. Bruner did not have copies of any of the Student's records when making this recommendation nor did Ms. Bruner speak to school personnel to get an accurate picture of the Student and his disability. Tr. 619.

(i) The Mother refused to acknowledge the hindrance to future learning when she insisted that the Student be expected to learn only 50% of the concepts taught in the regular education science and social studies classes. Tr. 687-688. She stubbornly denied the building block process of learning and naively assumed that his deficits would be remedied at the high school level through a review of the material. Tr. 688.

(j) The Mother wrongly concluded that HHHHHH got tired of the Mother's active involvement in the Student's education and retaliated by serving her with a notice of action for change of placement for his science class. Tr. 601; 701; Petitioner's Post Hearing Brief. We heard no evidence in support of this allegation.

CONCLUSIONS OF LAW

The Hearing Panel makes the following Conclusions of Law:

The Parties

1. The District is a Missouri Public School District which is organized pursuant to Missouri statutes.
2. The Student and his Parents are now and have been during all times material to this proceeding, residents of the District, as defined by Section 167.020 RSMo.
3. Article IX § 2(a) of the Missouri Constitution states in pertinent part that "[t]he supervision of instruction in the public schools shall be vested in a state board of education. . . ." The State Board of Education for the State of Missouri is the "State Educational Agency" ("SEA") for the State of Missouri, as that term is defined in the IDEA, 20 U.S.C. § 1401(28).

Due Process Complaints and The IDEA's Burden Of Proof

4. If parents of a "child with a disability" believe that the educational program provided for their child fails to meet FAPE, they may obtain a state administrative due process hearing. 34 C.F.R. § 300.506; *Thompson v. Board of the Special School District No. 1*, 144 F.3d 574, 578 (8th Cir. 1998); *Fort Zumwalt School District v. Clynes*, 119 F.3d 607, 610 (8th Cir. 1997), *cert. denied* 523 U.S. 1137, 118 S.Ct. 1840, 140 L.Ed 2d 1090 (1998).
5. The Student and his Mother filed the due process complaint that initiated this matter on December 6, 2011. The complaint alleges the District: (a) failed to properly implement Student's September 6, 2011 IEP and (b) proposed a change of placement in the December 5, 2011 IEP that is not reasonably calculated to provide FAPE in the least restrictive environment.
6. The District filed its due process complaint on February 27, 2012. The District seeks a declaration that its most recent re-evaluation is appropriate and therefore, the Mother's request for an independent education evaluation ("IEE") should be denied.
7. The burden of proof in an administrative hearing arising under the IDEA is properly placed upon the party seeking relief. *Schaffer ex rel. Schaffer v. West*, 546 U.S. 49, 126 S.Ct. 528, 537 (2005). The standard of proof in this administrative proceeding, as in most civil cases, is proof by a preponderance of the evidence. *Tate v. Department of Social Services*, 18 S. W. 3d 3, 8. (Mo. App. E. D. 2000). The burden of proof in the Mother's initiated case rests with the Parents and the burden of proof in the District initiated case is on the District.

Free Appropriate Public Education

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

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

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

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

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

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

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

12. The IDEA is designed to enable children with disabilities to have access to a free appropriate public education which is designed to meet their particular needs. *O'Toole by O'Toole v. Olathe District Schools Unified School District No. 233*, 144 F.3d 692, 698 (10th Cir. 1998). The IDEA requires the District to provide a child with a disability with a "basic floor of

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

Least Restrictive Environment

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

"(2) Each public agency must ensure that --

(1) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and,

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

14. Mainstreaming in the regular classroom environment to the maximum extent possible is not required by IDEA but rather the Act mandates mainstreaming to the maximum extent appropriate. *See e.g., Pacht v. Seagren*, 453 F.3d 1064; 1067 (8th Cir. 2006); *A.W. v. Northwest R-I Sch. Dist.*, 813 F.2d 158; 163 (8th Cir. 1987). Courts also recognize that IDEA's mainstreaming provision must be balanced with another purpose of IDEA – providing disabled students an educational placement and program tailored to their special needs. *Placentia-Yorba Linda Unified Sch. Dist.*, 306 Fed. Appx. 397, 399, 2009 WL 20958 **2 (9th Cir. 2009).

Procedural Compliance with IDEA

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

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

17. The Parent alleges that the District committed a procedural violation by failing to implement all the accommodations and/or modifications of the Student's September 2011 IEP. It is axiomatic that a district is required to implement an IEP as written. However, a failure to provide all of the services and modifications included in an IEP does not constitute a *per se* violation of the IDEA where the IEP is substantially implemented and the student receives educational benefit. *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000), *cert. denied*, 531 U.S. 817 (2000).

18. As explained in detail later in this Decision, we unanimously conclude the District substantially implemented the 22 accommodations and/or modifications in the September 2011 IEP. There is no competent evidence in the record that any act of the District either (a) impeded the Student's right to a free appropriate public education or (b) caused a deprivation of an educational benefit for the Student. Put another way, the District fully complied procedurally with IDEA. Accordingly, we find in favor of the District with respect to the issue of failure to implement the September 2011 IEP.

Substantive Compliance with IDEA

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

20. The Panel unanimously concludes that the Parent has failed to meet her burden to show that the team's December 2011 proposed change of placement was inappropriate. The Panel finds that more than a preponderance of the evidence supported the team's decision to move the Student to a special education setting for his science class. The evidence conclusively demonstrated that the nature and severity of the Student's disability is such that he has not and cannot meaningfully participate in the regular education science class and curriculum even with supplementary aides and services and significant modification.

21. As noted above and for reasons detailed later in this Decision, we unanimously conclude that the proposed December 2011 IEP providing for a change in placement from regular education science to special education science is reasonably calculated to provide some educational benefit for Student in the least restrictive environment and therefore, substantively complies with the IDEA requirement of FAPE.

Remedies

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

Appropriateness of the Reevaluation

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

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

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

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

27. As discussed in more detail later in this Decision, we conclude the re-evaluation as reflected in Student's Evaluation Report dated February 23, 2012 met the IDEA requirements set out in Conclusions of Law ("CL") # 22-25 in that the District conducted a comprehensive and appropriate re-evaluation. The District also timely filed a due process complaint to defend the re-evaluation after the Mother requested an IEE. Accordingly, the Mother is not entitled to an IEE at public expense.

Other Issues

28. While the Hearing Panel unanimously concludes that the reevaluation conducted by the District was comprehensive and appropriate, we have given the reevaluation (as reflected in the Evaluation Report dated February 23, 2012), little weight in our review of the change of placement proposed by the District in the December 2011 IEP. *See e.g., J.S. v. North Colonie Cent. Sch. Dist.*, 586 F. Supp.2d 74 (N.D. N.Y. 2008) (contains a list of decisions for and against considering retrospective information in evaluating whether an IEP was reasonably calculated to benefit the child at the time that the IEP was developed).

DECISION

Implementation of IEP

The Student's September 6, 2011 IEP detailed twenty –two (22) accommodations and/modifications to be provided to the Student. Ex. R-17 at 215. Many of the accommodations/and or accommodations are summarized in FF #63-64. The IEP accommodations and/or modifications which the Mother has alleged the District failed to provide the Student included: (1) audio texts in Science and Social Studies; (2) the Student's planner was not completed on a daily basis; (3) enlarged fonts on study guides, assignments and texts; and (4) the study guides were not devoid of paragraphs and did not match up with the material on which he was to be tested.

As we have noted in FF #124 (a), audio texts were not provided for several reasons. The inclusion of this accommodation in the September 2011 was merely an oversight. Second, the Student's prior history demonstrated that he did not use the audio text. Third, the science class does not use a primary text. Even if audio texts had been provided and if the Student had actually used them, this accommodation would not have helped him overcome the impact of his other deficit areas.

Regarding the Student's planner, we have reviewed same and note that there are a *few* days when it does not include a lot of information filled in on science. Ex. P-B, pages 1-100; Tr. 113. After a meeting in October, 2011, the District personnel started providing more detail.¹⁹ Tr. 113. We have also noted in FF #84-90, the frequent communications between the staff and the

¹⁹ The Mother's criticism that there is not enough detail in the daily planner seems to suggest that the Student, age 15, is not capable of reporting what happened in class and what are his upcoming assignments and tests. The obvious inquiry to be discussed later – if he cannot tell his Mother what took place in regular education science— should he be in that placement?

Mother regarding Student's performance at school. The Mother clearly had opportunities in her numerous emails to ask questions arising from her review of his daily planner.

The Mother also expressed concern regarding a lack of enlarged fonts to his assignments and texts. As we noted in FF #70, Ms. Burger did not or was not able to enlarge all the fonts. There was no evidence, however, that the Student had any difficulties with reading the non-enlarged font. He also did not wear glasses in the 2011-2012 school year so this may well have been an unnecessary accommodation that was carried over from a previous IEP.²⁰

The study guides were the subject of extensive discussion between the Mother and the District staff. The Mother insisted on no paragraphs in the study guides even though the Multi-Purpose Page describing the 22 accommodations and modifications makes reference to test and assignments to avoid paragraphs. Ex. R-17 at 215. There is no mention that the study guides could not contain paragraphs and in any event, the teachers ceased using paragraphs in the study guides. The IEP contains no requirement that the study guide match up exactly with the test material. Common sense tells us that having a study guide follow precisely the exam questions would simply promote rote memorization and not enhance real learning or critical thinking.

As we have found in CL #15-18, a party challenging the implementation of an IEP must show that the school failed to implement substantial or significant portions of the IEP. Note, however, very few provisions of an IEP will be insignificant or insubstantial and the Bobby R standard set out in CL #17 should not be interpreted to permit district officials to differentiate abstractly between important and unimportant IEP sections. *See Van Duyn ex rel. Van Duyn v. Baker Sch. Dist*, 2005 WL 50130, at *1 (D. Or. 2005). As noted by the Court in *Catalan v. District of Columbia*, 478 F. Supp.2d 73, 74 (D.D.C. 2007): “[A]ll the requirements in an IEP

²⁰ We previously noted in FF #26 that the Mother presented a January 19, 2012 report from an ophthalmologist regarding the Student's gaze apraxia diagnosis given back in March 2011 -- the District, however, had not previously received this information from the Parents . Ex. P-C.

are significant, and educators should strive to satisfy them. It is in the contextual, *ex post* analysis-i.e., whether the requirements are feasible and in the best interest of the child as she progresses—that questions of substantiality and significance arise.” *Id.*

The Mother failed to show beyond a preponderance of evidence that any failures here were material and resulted in a procedural violation of IDEA. We find the omissions were *de minimis* and did not constitute a deprivation of FAPE: (1) the audio texts were either not available as in science or had no history of being used and being helpful to the Student; (2) the absence of a thoroughly completed daily planner did not prevent the Mother from having sufficient information to monitor (or more accurately, to micro-manage) the Student’s education; (3) absence of some enlarged fonts did not cause educational harm to a student who had ceased wearing glasses; and (4) the minor problems with the study guides did not contribute to the Student’s struggles in the science classroom.

Proposed Change in Placement

As previously noted, the Mother objected to the proposed December 2011 IEP changing the September 2011 IEP placement from regular education science to special education science. Her position is summarized in her Post-Hearing Brief: nothing changed from September 2011 to December other than her complaints regarding the modifications/ accommodations not being implemented caused the District officials to retaliate for her advocacy for the Student. She further alleges in the Brief that the retaliation continued on February 23, 2012 when the District provided skewed data results from the reevaluation to support their position.²¹

Assuming we give little weight to these so-called skewed data results of the reevaluation as per CL #28, there is still very strong evidence that the Student is functioning intellectually in the borderline range. *See e.g.*, FF #38-39; 42; 46-47; 98. Additional indications of his intellectual

²¹ We have previously found no evidence to support a claim of retaliation. FF #125(i).

deficits include that the Student, age 15, is reading at a beginning 2nd grade level, his communication arts is at the beginning 4th grade level and math is a mid-3rd grade level. FF #63; 123(a). As further evidence of his lack of math skills – the Student he is still confused over the value of a nickel. FF #63.

In addition to considering whether the Student has the intellectual strength to perform in the regular education science class, we note other considerations regarding whether the continued placement in that class was appropriate for the Student. One, the Student clearly became frustrated because he did not understand the concepts. FF #82 Secondly, the Student's presence impacted the teacher's ability to teach her other students at expected grade levels. FF #73. Thirdly, his paraprofessional testified very credibly that he did not interact socially with the other students in the science class. FF #82. We also heard testimony from the Mother that she sees does not see a big socialization between the Student and his peers, irrespective of whether they are regular education or special education students. FF #125(b). Finally, there was very strong testimony that the Student was unable to use previously gained knowledge and apply it to tests that were doubly modified. FF #74, 124(g).

The question for the Hearing Panel is whether the proposed placement in the special education science class is consistent with the IDEA's least restrictive mandate, popularly known as mainstreaming. Courts have emphasized that mainstreaming in the regular classroom environment to the maximum extent possible is not required by IDEA but rather the Act mandates mainstreaming to the maximum extent appropriate. *See e.g., Pacht v. Seagren*, 453 F.3d 1064; 1067 (8th Cir. 2006); *A.W. v. Northwest R-I Sch. Dist.*, 813 F.2d 158; 163 (8th Cir. 1987). While including students in the regular classroom as much as is practicable is undoubtedly a central goal of IDEA, schools must attempt to achieve that goal in light of the

equally important objective of providing an education appropriately tailored to each student's particular needs. *See Bd. of Educ. of Murphysboro v. Ill. Bd. Of Educ.*, 41 F.3d 1162, 1168 (7th Cir. 1994)(stating that LRE requirement “was not developed to promote integration with non-disabled peers at the expense of other IDEA educational requirements.”)

The Mother expressed concern regarding the functional skills to be introduced in a special education science classroom. The parents of a child with Down syndrome made a similar challenge to a proposed IEP in *J.D.G. v. Colonial Sch. Dist.*, 748 F. Supp.2d 362 (D. De. 2010). The parents argued as Student's Mother does here --- the District's responsibility is to introduce academic content to student. *Id.* at 381. In the *J.D.G.* case, the student had not mastered certain goals and objectives so the IEP team wanted to shift focus from rote memorization and repetitive drills preferred by the parents to more functional skills to be used in the school and community setting. *Id.* The Court upheld the hearing panel decision in favor of the school district. *Id.*

Similar issues faced the Court in *Greenwood v. Wissahickon Sch. Dist.*, 571 F.Supp.2d 654 (E.D. Pa. 2008). The parent insisted on the student being returned to a regular education setting rather than continuing in life skills classes. The student, who was low functioning on an intellectual scale, had received a very modified curriculum in terms of content, quantity and materials and had access to a paraprofessional who assisted her. *Id.*, at 664-665. There was considerable testimony by the teachers and others who worked with the student that: she made no meaningful educational progress in the regular classes; she did understand the material from the regular classes even as substantially modified; and she did not benefit socially in the classes. *Id.* For these reasons, the Court upheld the student's continued placement in the life skills setting. *Id.*, at 666.

The Mother failed to provide any expert testimony contradicting the multiple opinions of the District staff who worked with the Student on a daily basis that the Student was not benefitting from his participation in the general education science class. She had nothing to offer but her vague opinion that doctors had told her that the Student could learn. At the IEP meeting in December 2011, the Mother conceded the Student was not evidencing meaningful learning in the general education science class. We heard overwhelming evidence that despite a litany of accommodations/modifications provided to the Student by the District, he could not do the work in the science class; he was frustrated over his inability to grasp the concepts; and he gained little socially from being in the class. Equally important, there was substantial evidence that he would be less frustrated and more comfortable in a class geared to his ability. The Student also critically needs a functional skills curriculum to help him advance toward an independent life after graduation.

Ultimately, the allegations of Student's Mother do not show that the proposed December 2011 IEP was not reasonably calculated to provide FAPE in the least restrictive environment. As Student's Mother, she desires the best possible instruction for her child that will maximize his potential but an IEP developed under the IDEA is not required to guarantee maximization of potential. *Fort Zumwalt Scho. Dist. v. Clynes*, 119 F.3d 607, 610 (8th Cir. 1997), *cert. denied* 523 U.S. 1137, 118 S.Ct. 1840, 140 L.Ed 2d 1090 (1998). The record shows that the District has struggled mightily to meet the Mother's unreasonable standards. Even if she is not satisfied with that effort, we conclude that the District's December 2011 IEP proposed FAPE to Student in the least restrictive environment.

Appropriateness of Re-evaluation

The District initiated a due process complaint seeking to show the re-evaluation conducted in early 2012 was appropriate and therefore, the Parents request for an IEE should be denied. In arguing for an IEE, the Mother simply contends that the tests results regarding the Student's cognitive skills are inaccurate. She has not offered any evidence other than to state her opinion that there should not be a fifteen point decline since the last testing.

When the District re-evaluated Student in 2012, the multi-disciplinary team had the benefit of considerable data on Student's history of performance in the school setting as well as his medical condition. The District had the two prior evaluations conducted by the District in 2004 and in 2007. FF #35-45. The District had also conducted a Review of Existing Data in 2010 and concluded sufficient information existed to continue his TBI categorical disability. FF# 57. The District also had the benefit of two outside evaluations conducted by Children's Hospital in 2004 and in 2006. FF #34-38. All the cognitive tests in these evaluations show the Student to be at best very below average in intellectual capacity. *See e.g.*, FF#46.

The various courts and administrative panels that have addressed the appropriateness of district evaluations focus on whether the evaluation satisfied the requirements set out in Section 300.304 (summarized in CL #26). In *P. P. v. West Chester Area Sch. Dist.*, 585 F.3d 727, 739 (3rd Cir. 2009) the Court found the District evaluation to be appropriate even though it did not contain all the assessments requested by parents – areas that were not identified as suspected disabilities. In a case involving another Pennsylvania school district, *Blake B v. Council Rock Sch. Dist.*, 2008 WL448979 (E. D. Pa. October 3, 2008), noted the thoroughness of the re-evaluation, including using a variety of assessment tools such as conversations with parents, teacher reports, review of student's educational records and all previous evaluations. *Id.* at*3. In

finding the re-evaluation in compliance with IDEA, the Court emphasized the District did not rely on a sole instruments as the basis for any of its conclusions; the District evaluated the student in all areas of suspected disability and appropriately used technically sound instruments administered by those experts credentialed and trained in the administration of the specific instruments. *Id.* at *6-8; 10-11.

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

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

Id.

The Panel unanimously concludes more than a preponderance of the evidence demonstrates that the District's 2012 re-evaluation of the Student was appropriate. The evidence clearly shows that the assessment tools utilized in the Student's evaluation were technically sound and all testing was conducted by trained and knowledgeable personnel according to appropriate instructions. *See* 34 C.F.R. § 300.304. The tests used were selected and administered so as to accurately reflect the Student's aptitude, abilities, and skills. *See* 34 C.F.R. § 300.304. In short, the evidence showed that the District's comprehensive re-evaluation more than satisfied the IDEA's evaluation requirements. No single procedure was utilized to determine the Student's current level of functioning and the re-evaluation fully complied with

IDEA standards. Further, the tests administered represent a valid and reliable assessment of the Student's academic achievement skills and were reflective of his ability levels. Tr. 308-309.

The District has more than satisfied its burden of proof on this issue. In addition, the Mother presented no credible evidence to even remotely suggest that the District's re-evaluation was not appropriate. Therefore, the Mother is not entitled to an independent evaluation at public expense.

CONCLUSION

We unanimously conclude that the Petitioner failed to carry her burden of proof on the procedural and substantive issues of FAPE involving the September 6, 2011 and the December 5, 2011 IEPs. Because the Petitioner failed to show beyond a preponderance of evidence that the District failed to provide FAPE under Issues 25 (a) and (b) (set out earlier in the FF section), we decline to address the issue in 25(c) dealing with remedies if FAPE had been denied to the Student.

We also unanimously find that Respondent carried its burden of proof on the issue of the appropriateness of the re-evaluation as reflected in the Student's Evaluation Report dated February 23, 2102 and therefore, the Student is not entitled to an IEE.

ORDER

The Due Process Complaint filed by the Petitioner is dismissed and judgment is entered against Petitioner and judgment is entered in favor of North St. Francois County R-I School District. Judgment is entered in favor of Respondent and against the Petitioner on the Due Process Complain filed by the Respondent.

APPEAL PROCEDURE

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

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

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

Dated this 12th day of July, 2012.

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

/s/
George Wilson, Panel Member

/s/
Pamela Walls, Panel Member

CERTIFICATE OF SERVICE

Copies of the foregoing Opinion were mailed via certified mail, return receipt requested (and by electronic mail to YYYYYYYY and Ms. Goldman) via regular US Mail to Mr. Wilson, Ms. Walls and Ms. Aaron on this 12th day of July, 2012:

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