BEFORE THE THREE MEMBER DUE PROCESS PANEL
EMPOWERED BY THE MISSOURI STATE BOARD OF EDUCATION
PURSUANT TO RSMo. §162.961

STUDENT, by and through Grandmother,	)	
	)	November 6, 2012
Petitioners,	)	
vs.	)	
SCHOOL DISTRICT,	)	
Respondent.	)	

DECISION

On September 7, 2012, Respondent filed a "Motion to Dismiss Complaint or, in the Alternative, for Summary Judgment, and Suggestions in Support Thereof" ("Motion"). In response thereto, on September 11, 2012, Petitioners/Complainants ("Complainants") filed an "Opposition to Motion to Dismiss" ("Opposition"). Thereafter, on September 12, 2012, Respondent filed a Response to Complainants' Opposition to Respondent's Motion ("Reply").

On September 13, 2012, the Chairperson conducted a telephone conference with the parties' attorneys during which time Respondent's Motion, Complainant's Opposition, and Respondent's Reply were discussed. At the conclusion of the telephone conference, the Chairperson ordered that the Motion would be taken with the case and that the hearing would be bifurcated with the parties first presenting evidence regarding issues raised in Respondent's Motion. It was further ordered that upon the presentation of such evidence, the panel would caucus and render its decision as to whether Respondent's Motion should be granted. Upon hearing evidence on September 17th and 18th, the Panel unanimously concluded that Respondent's Motion should be granted.

The basis of Respondent's Motion goes to the jurisdiction of the Panel. In essence, Respondent ("District") maintains that when the Request for Due Process ("Complaint") was filed (August 25, 2011), Student had been removed from the District's schools and placed at a private school, and thus Complainants' request for relief is barred.

I. STATEMENT OF UNCONTROVERTED MATERIAL FACTS

1. Student, at all relevant times, has resided within the geographical boundaries of the District.

2. Student, seven years of age, attended a District Head Start program at Hanthorn Early Education Center ("Hanthorn") through the 2009-2010 school year and attended kindergarten within the District during the 2010-2011 school year at the Sugar Creek Elementary School.

3. On August 16, 2011, Student began attending a private school which has no affiliation with Respondent. The private school is geographically located within the District's boundaries.

4. Complainants filed their first due process complaint on August 25, 2011.

5. At no time prior to filing the due process complaint did Complainants provide District with written notice of the intent to withdraw Student and place her in a private school.

6. Student was not re-enrolled in the District for the 2012-2013 school year.

7. Student is attending the private school during the 2012-2013 school year.

II. SUBSTANCE OF MOTION

It is within the context of these facts that Respondent filed its motion, primarily relying on the case of *Thompson v. Bd. Of Special School Dist. No. 1*, 144 F.3d 574, (8th Cir. 1998) and subsequent decisions rendered by the Eighth Circuit.

In *Thompson Id.*, in addressing the justifiability of post-transfer due process hearing cases, the Eighth Circuit concluded that the transfer of a student from a public school district to a charter school before a due process complaint was filed rendered the controversy moot ("Thompson rule"). The court stated:

> [Student] has not stated a cause of action under the IDEA because his request for review comes after he left the District previously responsible for his education. . . If a student changes school districts, and does not request a due process hearing, his or her right to challenge prior educational services is not preserved. Subsequent challenges to the student's previous education become moot . . .

Thompson, Id., p. 578-579.

After the Thompson decision was rendered, Minnesota changed its implementing statute to make the conduct of due process hearings the responsibility of the state, Minn. Stat. §1258.091, Subd. 12(a) (2008). Given this change, when subsequent *Thompson* defenses were raised by school districts in the Minnesota federal courts, the question arose whether the *Thompson* rule still applied. The Eighth Circuit has held that, indeed, the *Thompson* rule still applies. *C.N. v. Willmar Public School, Independent School District No. 347,* 591 F.3d 624, (8th Cir. 2010).

As a component of Petitioners' opposition to the Motion, cases are cited for the proposition that, on numerous occasions, a Missouri due process panel has rendered decisions

even though the student had been placed elsewhere before the due process complaint was filed. Cases cited in support of this proposition were:

1. *Ft. Osage R-I School District v. Simms, ex rel. B.S.,* 641 F.3d 996, 1000-05 (8th Cir. 2011). In this case, the due process panel considered violations of the IDEA allegedly occurring at a June 2006 IEP meeting where the student ceased attending the district after May 2006. The due process complaint was filed in April of 2007. Distinguishing this case from ours is the fact that prior to the Student's removal from the School District, Petitioners had given the ten day notice as provided for in 20 U.S.C. §1412(a)(10)(C); 34 C.F.R. §300.148(d)(1)(ii).

2. *Fitzgerald v. Camdenton R-III School District*, 439 F.3d 773, 774-775 (8th Cir. 2006), wherein the court reviewed a due process panel decision concerning a student who never attended school in the district. This case involved the filing of a due process case by the district in an effort to have the child evaluated under the "Child Find" requirement. 20 U.S.C. §1412(a)(3)(A). See also 20 U.S.C. §1412(a)(10)(A)(ii)(1).

3. *J.L. v. Francis Howell R-III School District,* 693 F.2d 1009, 1017 (E.D. Mo. 2010), wherein the court reviewed a due process panel decision where the complaint was filed in December 2007 and student attended private school in another state after August 2007. The Court of Appeals of Missouri did not address the timelines of the filing of the Complaint.

4. *Independent School District No. 284 v. A.C.,* 258 F.3d 769, 774-775 (8th Cir. 2011). In this case, the court found that the due process case was not moot even though the student moved to another district. However, in reviewing the *A.C.* case *Id.*, the Court determined that the due process complaint related back to prior due process hearing and the relief requested flowed from that hearing.

Complainants cited additional cases from other jurisdictions where school districts may be required to compensate a student for IDEA violations that occurred before the movement from the school district; however, given the mandate of the Eight Circuit Court cases, the cases cited from other jurisdictions are not controlling authority.

Complainants also argued that the whole purpose of the *Thompson* rule was founded upon the district receiving appropriate prior notice to enable the district to address the problems being presented. Indeed, in this case, the District had prior notice of Complainants' concerns. However, the Eighth Circuit has not recognized this concept of prior notice, as specifically, in the *C.N.* case, *Id.*, the District had unrefuted notice that the teacher had inappropriately restrained the student, was abusive to the student including not allowing the child to go to the bathroom. In spite of prior notice of concerns, the *Thompson* rule was applied.

Complainants also raise the concept that because Student still remained within the boundaries of the District, even though attending a private school, the *Thompson* rule should not apply. In the case of *M.P. v. Indep Sch. Dist. No. 77,* 326 F.3d 975 (8th Cir. 2003), which presented a similar factual scenario, this argument was rejected.

III. DECISION

Having concluded that the *Thompson* rule is still viable, the Panel considered possible exceptions to that rule. The *C.N.* case, *Id.,* provides a possible exception. In that case, the Eighth Circuit considered Petitioner's claim that, notwithstanding her requested hearing occurred after leaving the district, an immediate transfer was necessary for Student's physical and psychological safety. In ruling that removal of the student from the District prior to the

filing of the due process complaint barred the Petitioner's requested relief, the Court stated at a footnote on page 632, the following:

> FN8. The concurring opinion suggests establishment of an "equitable" exception to the *Thompson* rule. Our opinion for the court, however, deals only with the facts before us in this litigation. According to the complaint, an allegedly offending teacher was educationally separated from the pupil almost two months before the parent saw fit to remove the pupil from the District into a private school. Then, after removing the pupil from the District, the parent waited *ten months* to request a due process hearing. So, whether or not an equitable exception to the rule can be validly formulated given the statutory mandated considered in *Thompson*, there is clearly no case for reaching such issue today.

In the concurring opinion in the *C.N., Id.,* case, Judge Colloton gave further credence to an equitable exception to the *Thompson* rule and opined that the *M.P.* case did not preclude such an exception by stating:

> I agree with the court, on this record, that no exception to *Thompson* is warranted, because *C.N.* has not pleaded facts that plausibly support a reasonable inference that continued enrollment at the Willmar school during the course of a due process hearing under the IDEA was likely to result in physical harm or serious emotional harm. *See ante*, at 632 n.8; *Ashcroft v. Iqbal,* --- U.S. ----, 129 S.Ct. 1937, 1949-50, 173 L.Ed.2d 868 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-5, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). The court's decision, however, deals only with the facts of this action, *ante,* at 632 n. 8, and does not foreclose the recognition of an equitable exception to the judicially-created *Thompson* rule on an appropriate set of facts. Nor does the decision in *M.P. ex rel. K. v. Independent School District No. 721*, 326 F.3d 975 (8th Cir. 2003), preclude an exception to *Thompson*. The court in *M.P.* never considered how the *Thompson* notice requirement should apply in cases of likely physical or serious emotional harm. *See M.P.*, 326 F.3d at 980-81. Although the facts in *M.P.* might have supported an argument for an exception to *Thompson*, the point was not raised by the appellant or resolved by the court, and the decision is therefore not controlling on this question. *See Webster v. Fall*, 266 U.S. 507, 511, 45 S.Ct. 148, 69 L.Ed. 411 (1925). ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.").
>
> *C.N.,* id., p. 636.

Judge Colloton concluded his concurring opinion by stating:

> In sum, while *Thompson* creates an equitable requirement that a student must request a due process hearing under the IDEA while still enrolled in the allegedly offending school district, this court has not considered the appropriateness of an exception to the notice requirement where continued enrollment likely would result in physical harm or serious emotional harm to the child. It seems unlikely that Congress contemplated that a student in that situation must either (1) forfeit equitable remedies to which the child is entitled under the IDEA by leaving the offending district to avoid physical or serious emotional harm, or (2) remain in an abusive environment that is likely to result in physical or serious emotional harm in order to pursue these equitable remedies. I concur on the understanding that the parameters of the *Thompson* rule in this context remain open for consideration.

C.N., id., p. 637.

In the *C.N. id.,* case, the Court cited the *M.P.* case, *Id.* In the *M.P.* case, a student was verbally harassed and physically assaulted by his classmates after a district employee disclosed his mental health condition to school authorities. *Id*. at 977-81. Although the student's parents engaged in repeated discussions with school authorities and otherwise tried to remedy the "intolerable situation," they did not request a due process hearing until after removing student from the district, and, on this basis, the Court dismissed the claim citing the *Thompson* rule.

Given the *Thompson* rule and the possible recognition of an equitable exception thereto, that if a transfer is required due to a likely result in physical harm or serious emotional harm to the Student, the Panel's task was to analyze the potential application of said equitable exception based on the facts of this case.

The starting point was to analyze whether Complainants pled facts that would plausibly support a reasonable inference that continued enrollment at the District during the course of the due process hearing under the IDEA would likely result in physical or serious emotional

harm to the Student. The Panel concluded that Complainants did allege such facts in their Second Amended Complaint which included:

1. The District did not provide "Door to door bus services that accommodates (Student's) visual and safety needs as set forth by the Disabilities Act."

2. The District "Failed to provide chronic lung medication on multiple occasions endangering (Student's) health on two separate occasions causing a hospital visit and/or a lengthy absence."

3. "[Student] has been physically and mentally harassed in Independence causing extreme distress. She has stopped sitting under the table, hurting herself, and is starting to feel safe again."

4. "…Student comes home with hand prints that lasted more than five hours."

5. "The school was supposed to remove Student's coat before placing her on the bus. They failed to do this on many occasions, because of (Student's) extreme prematurity, her body was unable to regulate temperature like a normal child."

6. Student's grandmother, when picking up Student from school one day, observed that "…(Student) was very excited and was slightly running. I called her to stop and out of nowhere, Ms. Mumford stepped out of a doorway and took it upon herself to interfere in a situation that I was already handling. By interfering with my parental rights as a parent, she physically grabbed (Student's) arm from behind, swung her around, and I proceeded to reprimand her."

7. "…towards the middle of the year, (Student) started coming home with multiple untreated injuries. After speaking with Ms. Farmer [teacher], I learned (Student) never told her she was hurt."

8. "On two separate occasions, the nurse did not give (Student) her medication. She became extremely ill and missed more than a week of school each time."

TESTIMONY/EVIDENCE

Given the parameter of the hearing, evidence was produced regarding potential physical and/or emotional harm to Student.

1. Testimony of Student's Grandmother ("Grandmother"). Student, as well as her mother, reside with Grandmother and due to Student's mother's significant medical problems, Student's grandmother was more than actively involved in all aspects of Student's life, including her education.

a. Safety while Student attended Hanthorn.

Grandmother testified that while attending Hanthorn, there was a failure on many occasions to give Student medication for breathing. This revelation became apparent perhaps as early as 2008. Also, while at Hanthorn, according to Grandmother, a bus driver was not advised of Student's extreme lung problems and, on at least one occasion, the District failed to remove Student's coat, and given her heat control issue, it resulted in Student's body being overheated causing her extreme weakness and problems. Also, while at Hanthorn, Student was riding the bus for more than an hour which resulted in Student being totally exhausted. Failure to provide lung medication on multiple occasions according to Grandmother endangered Student's health on two separate occasions causing a hospital visit and/or lengthy absence.

While at Hanthorn, Student was to receive a breathing treatment from a lung machine at a specific time which, according to Grandmother, was not done. In regards to the complaint that Student had been physically and mentally harassed which caused extreme distress, Grandmother testified that very early at Hanthorn, large handprints on both sides of Student's body were noticed. There was an indication she had a discussion with the Hanthorn principal, Ms. Monfort, who, according to Grandmother, insisted that she (Ms. Monfort) knew what the issue was and told Grandmother that there was a very large child in Student's classroom who was picking up the smaller children. According to Student's Grandmother, Ms. Monfort indicated that she would take care of the situation. Putting the timeframe in context, it seems that the handprints became apparent to Grandmother around the fall of 2008. Grandmother further testified that while attending Hawthorn, Student was "slightly" running. Grandmother observed this incident and instructed Student to slow down. Suddenly, Ms. Monfort stepped out of the doorway and grabbed Student "really hard."

b. <u>While Student was attending kindergarten at Sugar Creek</u>.

Grandmother testified that Student did not receive her appropriate medication while Student was in kindergarten and that the District did not honor the request for bus services while Student was in kindergarten. The request was made out of safety concerns for the Student. Student's Grandmother also testified that she had concerns about Student being physically and mentally harassed while in kindergarten. The substance of this testimony was that there were a lot of kids in the class that harassed Student, and one particular very disruptive child pushed Student around. When Grandmother requested that they place Student at a different table from the disruptive child, the request was denied. Grandmother

further testified that while Student was in kindergarten, she came home with multiple untreated knee injuries caused by falls resulting from Student's lack of peripheral vision and when this was discussed with Student's teacher, Rebecca Farmer, Grandmother was told that Student never told Ms. Farmer that she was hurt. Grandmother further testified that Student, on two separate occasions, was not given her breathing medication and became extremely ill and missed school.

Further, Student's Grandmother testified that for most of the kindergarten school year, when Student was taken to school, she was in tears, and that Student did not want to go to school. Further, Student's Grandmother testified that she had concerns with Student walking to the bus stop because there are no sidewalks in their neighborhood and Student's hearing and vision defects impaired her ability to safely navigate her neighborhood alone.

Cross-examination of Student's Grandmother by District's attorney established the following.

When Student started kindergarten at Sugar Creek, the District agreed to continue providing her with services in her IEP that she had when she was attending Hanthorn (with the exception of door-to-door bus service) while it conducted a comprehensive assessment to determine if Student continued to meet categorical eligibility criteria. On November 15, 2010, a meeting was held wherein there was a discussion whether Student would continue receiving special education services. From the Panel's perspective, this date is important as Grandmother testified that Student started coming home crying, would sit at the dinner table and bang her head drawing blood and stating that she did not want to go to school and this progressed to Student picking up a knife, sitting in a corner and kicking her dog within ten days

to two weeks after the District made a determination that the special education services provided at Hanthorn would be discontinued. Accordingly, as early as November 2010, if not before, significant issues concerning Student's health from Grandmother's perspective were evident. The due process complaint was filed on August 25, 2011, some nine months later.

Student's Grandmother became aware of the existence of the due process complaint process in or about January 2011 at the latest.

Petitioners' Complaint stated that "…offering only three accommodations and no door-to-door services were the main two reasons a due process complaint was filed."

Grandmother's concern about Student's safety due to the denial of door-to-door service arose in August of 2010.

Supporting the notion that Student has exhibited behaviors of concern predating November 15, 2010 (Respondent's Exhibit 39) is a report from Dr. Colliton stating:

> She will cry inappropriately at times and sometimes she will have self-injurious behaviors almost in the form of temper tantrums, which she certainly should be growing out of at this time. In regard to stress, [Student] is unable to handle stress with ease and usually again have crying outbursts when she is in a stressful situation. At times [Student] however can be quite sweet and easy going but for the most part she has a moderate amount of a stressful behavioral situations that can cause panic for her. Perhaps her health issues have contributed to this stressful situation including her poor psychosocial skills.

Student's Grandmother, in her testimony, minimized the statement indicating that that behavior was totally different than the behavior observed after the District stopped providing special education, as thereafter, Student's head banging resulted in bleeding with the cries "I'm stupid, the teacher thinks I'm dumb, I can't write."

Prior to the meeting of November 15, 2010 when the District determined the Student did not meet categorical eligibility criteria resulting in a cessation of special education and

related services, a meeting was held on September 27, 2010 to review existing data and to develop a comprehensive assessment plan.

Student's Grandmother requested mediation from the Missouri Department of Elementary and Secondary Education (DESE) on February 14, 2011. After the parties participated in mediation, the District agreed to independent educational evaluations ("IEE").

One IEE was a psychological evaluation report (Petitioners' Exhibit 28). Said psychological evaluation was done by the University of Missouri at Kansas City on May 17 and May 19 of 2011. Student's Grandmother provided input for the evaluation by providing historical information concerning Student. All information reported to the evaluators came from either Student or her Grandmother. The psychological evaluation report indicates that Grandmother expressed concern over Student's ability to perform adequately at school as well as Student's dislike of attending school. Her Grandmother also reported that Student becomes "stressed out" and anxious when she gets lost at school or has a bad day for other reasons. Grandmother further stated that Student will sit under the table and cry when she has these "bad days." These behaviors observed of Student were observed at home, but not at school. Grandmother further testified that Student sometimes becomes withdrawn when scolded or criticized, experiences mood difficulties including the following behaviors which occurred "sometimes:" cries, sleeps excessively, decreased school performance and conflicts with others. The psychological evaluation report also stated that the Student and the Student's Grandmother denied any physical or sexual abuse history.[1] The psychological evaluation report

[1] The only evidence presented in this case concerning the suggestion of physical abuse was the presence of hand marks on the Student which occurred when the Student attended Hanthorn and Grandmother testified that she was told by a staff member at Hanthorn that it was probably done by a another Student.

referred to Dr. Colliton's report which stated the Student cries inappropriately at sometimes and sometimes will have self-injurious behaviors almost in the form of temper tantrums and has crying outbursts when she is in a stressful situation and that Student has a moderate amount of stressful behavioral situations that cause panic attacks. Dr. Colliton further indicated that Student's health issues perhaps contributed to Student's stressful situation including her poor psychosocial skills. The psychological evaluation report further indicates that Student's Grandmother said Student became frustrated and upset when she did not understand something in class, due to her disabilities gets lost in class, and has missed a lot of school due to her medical issues.

Student's Grandmother also indicated per the report that Student had been in distress since special education services were removed in November of 2010.

Although the psychological evaluation report is very comprehensive and includes a detailed history from both Student and her Grandmother, noteworthy is the fact that nowhere in the history provided is there any mention at this point in time (as of May 2011) that Student was engaging in such severe self-injurious behaviors as drawing blood, banging her head, threatening herself with a knife or kicking the dog. The psychological evaluation report concluded with the presentation of recommendations. Nowhere in the recommendations was there any indication that Student was in threat of physical or serious emotional harm or that Student should be removed from the District.

Petitioners' Exhibit 42 is an Affidavit signed by Student's Grandmother. Said Affidavit was signed on September 10, 2011. Paragraph 7 of said Affidavit reads: "But for the District's refusal to provide special education services and transportation to [Student], she would be

attending District schools." Respondent's counsel focused on this statement by asking the question "And that's true, isn't it, if the District determined that she was eligible for the service that provided the transportation, she would be attending school in the District?" The answer provided by Student's Grandmother was "Probably. I would say 99% chance" (Tr. p. 132).

On the same date the District advised Student's Grandmother that Student did not qualify for special education (November 15, 2010), Student was referred for a Section 504 evaluation which was subsequently conducted and a determination was made that Student was eligible under Section 504.

The private school where Student commenced attending in August of 2011 did not provide any special education services and did not have any certified special education staff members.

There was no testimony that the private school in which Student became enrolled provides transportation.

2. Testimony of Dr. Beth Bazin – Complainants called witness Dr. Beth Bazin, an Optometrist, who in her professional capacity, treated Student and performed a Visual Information Processing Evaluation ("Evaluation ") of Student. Said Evaluation was done at Complainants' request and the District paid for the Evaluation. In conjunction with the Evaluation, Dr. Bazin did an Acuity test, fixation ability, focusing ability, I-teaming, and visual development testing. Dr. Bazin testified that given Student's lack of focusing ability, there is an impact on safety issues such as her getting from one place to the next. Dr. Bazin further testified that Student's vision problems would come into play in ascertaining such distinctions of where steps stop and curbs drop. Dr. Bazin also testified that she performed a test for

auditory processing screening for Student and the Student failed miserably. Further, Dr. Bazin testified that visual skills, not just her peripheral vision loss, but her visual skills in general, are unstable and she has concerns about Student's balance.

Based upon Dr. Bazin's screening and testing of Student, and her expertise, Dr. Bazin made 14 separate recommendations concerning Student and submitted a report that was given to the District. It was marked as Petitioner's Exhibit 29 (Respondent's Exhibit 64) and introduced into evidence. Said report is very comprehensive and sets forth 14 recommendations:

1. Seating preference was given so that Student is in one of the front rows in the classroom. It is highly important for her to be placed centrally in the room, so that she can mover her eyes from left to right to follow the teacher without obstruction of children or objects.

2. Sitting on an exercise ball rather than a chair will increase proprioceptive and vestibular feedback and will help Student attend to the tasks requiring visual motor skill.

3. Glasses should be worn full-time in the classroom.

4. A reduction in the amount of copying required during the school day. Copying will be made easier by allowing Student to use a 20 degree slanted desk top. The 20 degree slanted desk top (pattern enclosed) is to help, but not if it makes Student feel uncomfortable.

5. In addition, a copy of what is written on chalkboard should be provided to her at her desk for direct copying.

6. Student should always have enlarged print to enable her to perform her best when reading and writing in all subjects.

7. Under no conditions should Student be penalized for not completing written work on time by missing recess. Recess allows a release from the stress of periods of writing and copying.

8. Student may need more time to complete homework assignments that are written. If the amount of written work is not reduced to accommodate her visual and grapho-motor problems, she may need extra days to complete the homework assignments.

9. Encourage Student to use a plain white bookmarker when reading to allow her eyes to follow across the page. This may be phased out over time, depending on Student's visual skill development.

10. Assistance in organization in getting homework assignments copied accurately. Again, this is best handled in a manner to not make Student feel uncomfortable and may be phased out over time.

11. Student may benefit from additional time to complete tests. These are stressful situations and her ability to process information, both visual and auditory breaks down under stress.

12. Having test directions read aloud to Student may increase her ability to complete tests and give a better indication of her understanding of the material.

13. Adaptations to her physical education classes that make it less difficult for her to throw, catch, run and play ball sports. This needs to be accomplished on a sport by sport basis. Remember that large ball sports where the ball moves slowly are easier than small ball sports where the ball is faster. Student's visual motor planning skills may be slower than other

children's. Competitive ball sports are not in her best interests, as further eye injuries could create more visual challenges.

14. Occupational therapy support to better improve her gross and fine motor development and control. Addressing residual primitive reflexes with exercises for home will benefit Student and help lower her frustration with herself.

With reference to safety issues, Dr. Bazin's report states: "She (Student's Grandmother) reports that since Student's special services have been reduced, she has started to withdraw and hurt herself at times." As indicated above in this Decision, these services were reduced in November of 2010.

Under cross-examination, Dr. Bazin stated that she was unaware of what services were being given Student, did not have any communications with Student's teachers to determine her classroom performance, did not review any of the District's records regarding Student, and did not observe Student in an educational setting. The information provided Dr. Bazin came exclusively from Student's Grandmother. Although Dr. Bazin testified that she had some concerns relating to Student's safety, she was not aware of any concerns from the school staff regarding Student's participation and active play. None of Dr. Bazin's recommendations addressed Student's travel to and from the bus stop. Dr. Bazin's recommendations included no recommendation that Student be removed from the District. Dr. Bazin did not raise concerns about there being a threat of physical harm or serious emotional harm to Student if she remained in the District.

The District's testimony in regard to the potential threat of physical and/or emotional harm came from several sources:

1. Student's teacher, Rebecca Farmer, testified that she had Student approximately 6 hours a day and did not see significant stress or behavioral issues. Further, Ms. Farmer testified that Student got along with her peers, became a teacher helper, never saw her cry, never observed any self-injurious behaviors, and was not withdrawn from activities.

2. Janet Knapp, the District's 504 Coordinator, testified that she observed Student during recess while Student attended the District's summer school program and that Student was a very happy child, running across different levels of terrain, jumping, skipping, running, interacting with other children.

Ms. Knapp, in her capacity as the District's 504 Coordinator, becomes aware of students experiencing stressful and emotional problems. At no time did she receive any word from any staff member at school in which Student attended of any concerns regarding Student.

3. Labon Dyer, the school nurse, was assigned to provide Student with medication for breathing problems. Nurse Dyer testified that she never witnessed any respiratory distress and that Student never wanted to leave the classroom to access her inhaler.

4. Jamie Pelzl, the District's Guidance Counselor and Student Assistance Team Coordinator, testified by telephone that she received no concerns regarding Student and received no referrals concerning Student.

Further supporting the District's position that there was no threat of imminent physical or emotional harm, the Student attended summer school at a District school immediately prior to Student's enrollment in the private school long after November 15, 2010.

The Missouri State Board of Education Special Education Regulation ("State Plan") specifically states that public agencies in Missouri are not required to provide FAPE to the

following children and youth: "D. Parentally placed private school children with disabilities." State Plan, Article IV, 1, p. 41.

The Panel believes that to apply an equitable exception to the *Thompson* rule due to the threat of physical harm or emotional harm requires urgency. Herein, it appears that Student's symptoms of such displayed at home, as depicted by her Grandmother, occurred in November of 2010, some nine months before the Complaint was filed.

The burden of proof in an administrative hearing arising under the IDEA is properly placed upon the party seeking relief. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 537 (2005). Thus, the burden of proof in this case rests with the Complainants. The U.S. Supreme Court's reference is to the burden of persuasion, which means that the Complainants lose at the conclusion of the case if the evidence on both sides is evenly balanced. The standard of proof in this administrative proceeding, as in most civil cases, is proof by a preponderance of the evidence. *Tate v. Department of Social Services*, 18 S.W.3d 3, 8. (Mo. App. E.D. 2000).

From the evidence presented, the Panel cannot be persuaded that a transfer prior to the filing of the due process complaint was necessitated by a threat of physical and/or emotional harm to the Student.

Based upon the uncontroverted facts of this case, the testimony adduced at the hearing, and the law applicable thereto, the Panel grants Respondent's Motion for Dismissal/Summary Judgment.

Appeal Procedure

This is the final decision of the Department of Elementary and Secondary Education in this matter. A party has a right to request a review of this decision pursuant to the Missouri Administrative Procedures Act, §§536.010 *et seq.* RSMo. A party also has a right to challenge this decision by filing a civil action in federal or state court pursuant to the IDEA. *See* 20 U.S.C. §1415(i).

Dated: _____

_____
Richard H. Ulrich, Chairperson

_____
Patty Smith, Hearing Panel Member

_____
Jerry Keimig, Hearing Panel Member

Given by Order of :

Richard H. Ulrich, Hearing Chair, on this
6th day of November, 2012
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CERTIFICATE OF SERVICE

I do hereby certify a copy of the foregoing was sent via certified U.S. Mail, return receipt requested, this 6th day of November, 2012 to:

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