Joyce Hainen Crandon
Attorney at Law
406 Corine St.
California, MO 65018
phone 573-796-2240
fax 573-796-2175
joycehainen@sprintmail.com
Chairperson of the Panel

THE STATE BOARD OF EDUCATION
BEFORE THE THREE MEMBER HEARING PANEL
[Pursuant to Section 162.961 RSMo.]

In the Matter of:
" " by and through her parents,
and
Ft. Zumwalt R-II School District

FINAL DECISION

1. This matter involves the education of, and is before the three-member due process hearing panel empowered pursuant to 20 U.S.C. ß 1415 and RSMo. ß 162.961.
2. is a student with disabilities for purposes of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. ß 1400 et seq.
3. is a now -year-old (DOB:) female student who resides with her parents, in the Fort Zumwalt School District (the District). (Ex. R-1).
4. At birth, was diagnosed with Downs Syndrome. (Ex. R-1). At approximately six weeks to two-months of age, she began receiving services (including physical, occupational and speech therapies) through the First Steps program at United Services in St. Charles, Missouri (Ex. R-2; Tr. 333-34). The First Steps program is an early intervention program for children aged zero to three who have developmental delays. (Tr. 333).
5. Billy Collier, the Executive Director of United Services for the Handicapped, testified. (Tr. 951). United Services is a nonprofit organization that began in 1975. United Services provides educational and therapeutic services to children who are not of school age so as to prepare those children for inclusion into public school at the relevant time. (Tr. 951-52). At the present time, United Services contracts with three school districts in St. Charles County, including the Fort Zumwalt School District. (Tr. 952).
6. United Services offers services for children from approximately six weeks of age up to school age. (Tr. 953). United Services also has operated a day care program since 1989 for families who have children with special needs. (Tr. 953).
7. United Services is a nonprofit organization that began in 1975. United Services provides educational and therapeutic services to children who are not of school age so as to prepare those children for inclusion into public school at the relevant time. (Tr. 951-52). At the present time, United Services contracts with three school districts in St. Charles County, including the Fort Zumwalt School District. (Tr. 952).

8. United Services offers services for children from approximately six weeks of age up to school age. (Tr. 953). United Services also has operated a day care program since 1989 for families who have children with special needs. (Tr. 953).
9. Each preschool classroom at United Services has an early childhood special education teacher, each of whom has an early childhood degree and also is certified in early childhood special education. Many of the teachers also have masters degrees in early childhood special education. (Tr. 957).
10. United Services utilizes a curriculum for its early childhood program which is developmentally appropriate for preschoolers and includes language, social and motor development. (Tr. 954-55, 1025). In this curriculum, the children learn colors, the alphabet and numbers, but the United Services curriculum does not use rote memorization to teach those skills. (Tr. 954-55). Within this setting, the program addresses pre academics by starting with where the individual child is developmentally and proceeds from that point. (Tr. 972-73). The program is structured and the teachers have lesson plans that are developed by a team that includes the therapists employed by the facility. (Tr. 956).
11. Ms. Peri Bozdech is employed by United Services as a certified occupational therapy assistant and has been so employed for over 7 years. (Tr. 1133). Ms. Bozdech has known since she was around two months old, when she was asked to help with her feeding program in the day care setting at United Services. (Tr. 1134). Ms. Bozdech has provided occupational therapy services to from that time through the summer of 1998. (Tr. 1135). As a certified occupational therapy assistant providing services to , Ms. Bozdech has had the opportunity to regularly observe in the United Services setting. (Tr. 1136). According to Ms. Bozdech, had no verbal language (i.e., did not use words) through the age of two. (Tr. 1137). More specifically, Ms. Bozdech testified that, at that age, she did not recall spontaneously using or imitating words. (Tr. 1137-38). She occasionally would use some limited sign language in an imitative manner. (Tr. 1138).
12. Peri Bozdech, a United Services employee who worked with from six weeks to five years of age. Ms. Bozdech testified that she did not observe any regression. (Tr. 1132-46).
13. As a certified occupational therapy assistant providing services to , Ms. Bozdech has had the opportunity to regularly observe in the United Services setting. (Tr. 1136). According to Ms. Bozdech, had no verbal language (i.e., did not use words) through the age of two. (Tr. 1137). More specifically, Ms. Bozdech testified that, at that age, she did not recall spontaneously using or imitating words. (Tr. 1137-38). She occasionally would use some limited sign language in an imitative manner. (Tr. 1138).
14. Ms. Bozdech is employed by United Services as a certified occupational therapy assistant and has been so employed for over 7 years. (Tr. 1133). Ms. Bozdech has known since she was around two months old, when she was asked to help with her feeding program in the day care setting at United Services. (Tr. 1134). Ms. Bozdech has provided occupational therapy services to from that time through the summer of 1998. (Tr. 1135). As a certified occupational therapy assistant providing services to , Ms. Bozdech has had the opportunity to regularly observe in the United Services setting. (Tr. 1136). According to Ms. Bozdech, had no verbal language (i.e., did not use words) through the age of two. (Tr. 1137). Ms. Bozdech testified that, at that age, she did not recall spontaneously using or imitating words. (Tr. 1137-38). She occasionally would use some limited sign language in an imitative manner. (Tr. 1138).
15. Between three and four, and probably closer to four, Ms. Bozdech observed making some babbling sounds and adding additional sign language. Ms. Bozdech did not recall that

ever had a working vocabulary that allowed her to speak in two-to-four word sentences. (Tr. 1139).

16. Ms. Bozdech testified that made progress from infancy to age three. For example, although she was delayed, she had learned by age three to walk and manipulate toys, participate in groups and classroom activities, cut with scissors, and interact with teachers. (Tr. 1141-42). When Ms. Bozdech worked with one-on-one, she used a sing/song voice to get 's attention. She further used music to teach motor skills. (Tr. 1143). In addition to music, Ms. Bozdech used dolls, swings and the trapeze and other motor activities as motivators for . (Tr. 1143). During the entire time that Ms. Bozdech worked with , the s never expressed concern that 's speech/language skills had regressed. (Tr. 1146).

17. participated in the First Steps program until age three, at which time she became eligible for early childhood special education services (ECSE)

18. participated in the First Steps program until age three, at which time she became eligible for early childhood special education services (ECSE) pursuant to the IDEA.

19. On or about April 6, 1995, Jeanne O'Keefe, with the Missouri Department of Mental Health, referred to the Fort Zumwalt School District for ECSE services. (Ex. R-7). Pursuant to the IDEA, children with disabilities become eligible for services through the public school system at age three (Tr. 864), and, at hearing, the s conceded that they were not claiming that any alleged regression prior to age three was attributable to the Fort Zumwalt School District. (Tr. 864).

20. On or about September 1995, the District conducted an initial evaluation of to determine her eligibility for ECSE pursuant to the IDEA. (Ex. R-11). As part of that evaluation, the s were asked to complete a family information form (Ex. R-13). In that form, the s note that does not speak in sentences. (Id. at 106). Further, the s note that 's language is delayed due to Downs Syndrome. (Id. at 107). Notably, the s also indicate that has no difficulties interacting with other children, that she generally is happy and affectionate and plays cooperatively in a group, enjoys new experiences, and is social, trusting and active (Id. at 110-11;Tr. 922). At hearing, Mr. acknowledged that he and Mrs. completed the family information form at around the time was turning three. He further acknowledged that they did not report any regression at that time. (Tr. 918-19, 922).

21. On or about October 1995, the District prepared a diagnostic summary to report the results of 's initial evaluation. (Ex. R-14). As a result of that evaluation, the District's multidisciplinary team concluded that qualified for early childhood special education services due to delays in speech, language, motor, fine-motor and cognitive/pre academics. (Id. at 116).

22. Dorothy Nix testified at hearing. At all relevant times, Ms. Nix was the Early Childhood Special Education Coordinator for the Fort Zumwalt School District. Ms. Nix has a bachelors degree in elementary education, a masters degree in curriculum and instruction and has completed her coursework for a doctorate. In addition, she is certified as an elementary education teacher and as a school psychological examiner. (Tr. 1052-54). At hearing, Ms. Nix confirmed that the District contracts with United Services to provide ECSE programming for the District's three-to-five year old special education students. (Tr. 1054-55). Ms. Nix testified that, during the time a special education student is of preschool age, the State does not allow the child to receive a specific categorical educational diagnosis. Thus, children aged three to five simply receive a classification of early childhood special education. Because of the State's rules with respect to categorical diagnosis for ages three to five, could not have received an educational diagnosis of autism through the District until she turned regular school age. (Tr. 1056, 1106). Moreover, during the time that attended United Services through the District's early childhood

special education [ECSE] program, the s never provided Ms. Nix with any correspondence from 's physicians stating that she was autistic. The s never presented Ms. Nix with a report from the Judevine Center for Autism suggesting that might be autistic. The s never requested the District (through Ms. Nix) to educationally diagnose with autism during the time she was in ECSE. (Tr. 1057-58).

23. Ms. Nix testified that received educational benefit and a free appropriate public education during the time she attended the ECSE program. (Tr. 1093-95). Ms. Nix testified that, in her professional opinion, did not require direct music therapy to benefit from her special education, (Tr. 1094, 1116), and further testified that the United Services records do not reflect any period of regression around the ages of two or three. (Tr. 1094-95).

24. On or about October 9, 1995, 's IEP team met to prepare an initial IEP based on the evaluation results. (Ex. R-16). Mrs. attended and participated in that meeting. (Id.) The IEP includes goals and objectives in the area of language. The IEP indicates that will improve giving appropriate responses to yes/no questions and identifying common objects and pictures. (Id. at 122). The October 1996 review of those objectives indicates that was making progress on each. (Id. at 122; Tr. 1458-63). 's October 1995 IEP contains a goal to improve speech intelligibility with respect to the phonemes /p,b,m/. The October 1996 review demonstrates that this goal/objective was mastered as of October 1996. (Id. at 123). Further, the October 1995 IEP shows that, as of October 1996, had met the objective to match object to object and was making progress with respect to objectives requiring her to give personal information and to match common attributes. (Id. at 125). The October 1995 IEP also contains additional goals and objectives in the areas of pre-math, fine and gross motor, attention span and social emotional. (Id.) Based on these goals and objectives, the IEP team concluded that should receive 540 minutes per week in a center-based early childhood special education program with 60 minutes per week each of speech, occupational and physical therapy. (Ex. R-16). The annual review of these goals and objectives in October 1996 documents that met many of her objectives and was making progress on the majority of the remainder. (Tr. 1122-24).

25. The October1995 IEP was reasonably calculated to provide educational benefit to and that received a free appropriate public education.

26. On or about October 9, 1995, Mrs. gave written consent to 's initial placement in special education. (Ex. R-15).

27. During the time attended the ECSE program at United Services, she received quarterly progress reports with respect to her IEP goals and objectives. (See, e.g., Ex. R-18, 19). Those progress reports reflect progress from the preceding three months. (Tr. 984). Thus, for example, 's January 1997 progress report reflects her progress for the three months preceding January 1997. (Tr. 985; Ex. R-25).

28. On or about October 15, 1996, 's IEP team met to prepare an IEP for the 1996-97 school year. Mr. and Mrs. were in attendance and participated in that IEP meeting. (Ex. R-24). The October 1996 IEP provides with 540 minutes per week of special education in the ECSE program with 60 minutes per week each of speech, occupational and physical therapy. (Ex. R-24). As noted in the Present Level of Performance, continues to make progress towards her speech and language goals. Her progress has been slow but steady. has had numerous ear infections this past year, which may have impacted her language development (Id. at 156). The October 1996 IEP includes goals and objectives in the areas of language, speech intelligibility, communication, cognition, attention span, social/emotional, behaviors, self-help, fine and gross motor. (Ex. R-24). The s did not express any disagreement at that time with the IEP goals and objectives or the services offered. (Tr. 1008).

29. 's October 1996 IEP is reasonably calculated to provide with educational benefit and offers a free appropriate education in the least restrictive environment. The 's allegation that 's IEP goals and objectives remained identical from age three through five (Tr. 231) is without merit. At hearing, Respondent's witness, Linda Burke, testified extensively with respect to the numerous additions, deletions and modifications that were made from year to year with respect to 's IEP goals and objectives. (Tr. 1458-65). The various annual IEP documents demonstrate that the IEP team was making appropriate changes to the IEPs as needed.

30. During the October 1996 IEP meeting, the s raised the issue of music therapy as a service for . Significantly, the s did not request that the District provide direct music therapy, but merely requested that the District look into music therapy as a possible service. (Tr. 226, 770-71). Lesa Johnson, the United Services Early Childhood Special Education Coordinator (Tr. 971), acknowledged that music therapy did come up at this meeting, but that the s did not request the provision of that service in October 1996. (Tr. 989-990). In response, Ms. Johnson referred the s to Dorothy Nix, the District employee who could respond to the issue. (Tr. 990). Ms. Nix testified at hearing that she was made aware of the 's interest in music therapy because Ms. Johnson had made a notation on the file folder that was shared with Ms. Nix. On the inside of the file folder was a note that indicated, "mom, interested in music therapy. Told her to call you" (Tr. 1070). Although Mrs. telephoned Ms. Nix to request an IEP meeting for January 1997, she did not specifically inform Ms. Nix that she wanted direct music therapy provided to at that time. (Tr. 1070).

31. Mr. and Mrs. both conceded at hearing that they did not make a specific request for direct music therapy at that meeting. Accordingly, the District was not required to provide them with a written notice of action, but instead appropriately responded by investigating the use of music therapy as a related service pursuant to the IDEA.

32. On or about January 6, 1997, Marcia Behr, a private music therapist retained by the s, conducted a music therapy assessment of . (Ex. R-26; Tr. 238). Neither United Services or Fort Zumwalt staff had input into Ms. Behr's assessment. (Tr. 1467). In her assessment report, Ms. Behr reports that she used the WESTPLATE test to conduct the assessment. Ms. Behr recommended that receive direct music therapy to benefit from her educational program and more specifically, recommended that receive individual music therapy services for 60 minutes per week as well as collaborative music therapy an additional 60 minutes per week. (Ex. R-26).

33. At hearing, Ms. Behr testified that she no longer uses the WESTPLATE to assess a student's need for music therapy. (Tr. 548). Indeed, she testified that she has never conducted an appropriate music therapy assessment of . (Tr. 646-47). Without such an assessment, Ms. Behr cannot state that requires direct music therapy as a related service, pursuant to the IDEA. (Tr. 646-47). Further, Ms. Behr testified that she has reviewed the three additional outside music therapy assessments that the s have had conducted. (Tr. 646-47). However, the panel finds that the District certainly used Marcia Behr's evaluation even if it was to refuse the recommendation.

34. In addition, at hearing, Respondent's had Ms. Behr view two videotaped home music therapy sessions that Ms. Behr conducted with in approximately September 1997 and September 1998. (Tr. 598, 608; Ex. R-141; Pet. tape). After watching the earlier of the two tapes, Ms. Behr conceded that the tape contained an example of what she considered a good music therapy session. (Tr. 602). However, she conceded that controlled that session and that the activities she used during that session could be used in a classroom setting. (Tr. 605). With respect to the September 1998 videotape, Ms. Behr acknowledged that her therapy techniques had changed since the earlier session and some of 's somewhat increased skills could have been attributable to her change in techniques rather than the use of music therapy. (Tr. 610-11).

35. At the 's request, the District held an IEP meeting for on or about January 7, 1997. At that meeting, Marcia Behr presented the results of her music therapy assessment. (Tr. 240-41, 991, 1071, 1466). However, the team did not reach a decision with respect to music therapy. (Tr. 1071, 1468). Rather, the team agreed to reconvene in February. (Tr. 244). Subsequent to the January meeting, District personnel contacted the Missouri Department of Elementary and Secondary Education and were informed by DESE that the state would not approve or fund music as a related service. (Tr. 1071-72).

36. Marcia Behr began providing one half-hour session of direct music therapy to in the home on or about January 21, 1997. (Tr. 240, Ex. R-66). Ms. Behr's sessions increased to twice a week in April 1998. (Tr. 401). The s used funding provided by the Missouri Department of Mental Health's Regional Center to pay for portions of the in-home music therapy. (Tr. 402; 517-18; 535-36).

37. At hearing, Mr. and Mrs. and other Petitioner's witnesses testified that, after the initiation of direct music therapy, began to make excellent progress in language and behaviors. (Tr. 309, 424, 830). For example, Mr. testified that, with the initiation of music therapy, demonstrated a phenomenal attention span. (Tr. 830). Mrs. reported that began speaking in sentences at home as a result of the music therapy (Tr. 424) and , 's aunt, testified that she observed a remarkable increase to hundreds of words in 's vocabulary. (Tr. 722).

38. United Services and District personnel did not report such progress in the school setting. The January 1997 quarterly progress report indicates that had demonstrated a notable increase in progress prior to the initiation of music therapy. (Ex. R-25).

39. On or about February 4, 1997, 's IEP team convened. (Ex. R-28).

40. At that meeting, the team increased 's time in individual speech therapy to 90 minutes per week and, therefore, reduced her time in the center-based special education program to 510 minutes per week. (Ex. R-28). Mr. and Mrs. attended and participated in that meeting and agreed to the increase in speech therapy time. (Tr. 1009, 1074). In addition, the IEP team changed some of the objectives and criteria in the IEP to include music as a motivator. (Tr. 431). The IEP team also agreed to provide one hour per month of consultative music therapy. (Ex. R-28 at 192, 203; Tr. 431, 991, 1009, 1076, 1469-70). The team proposed consultative rather than direct music therapy based on a consensus of the team that United Services used music as a integral part of the ECSE program across all disciplines and that , therefore, did not require direct music therapy as a related service. (Tr.1075-76; 1112-13, 1470).

41. The February 1997 IEP offered FAPE.

42. Marcia Behr was hired to provide the consultative music therapy for at United Services. (Tr. 992). Ann Neuner was 's classroom teacher at United Services during the 1997-98 school year. (Tr. 1192). At hearing, Ms. Neuner testified that she observed the consultative music therapy sessions with Ms. Behr. Ms. Neuner stated that she was familiar with most of the ideas that Ms. Behr presented through the consultation (Tr. 1197) and informed Lesa Johnson that, in her opinion, some of the songs used by Ms. Behr during the consultative sessions were not appropriate for the age of the children in the classroom. (Tr. 993).

43. On or about April 7, 1997, 's IEP team again convened to revisit the issue of direct music therapy. (Tr. 1080, 1471). Mrs. attended and participated in that IEP meeting. (Ex. R-31). At the meeting, additional goals and objectives were prepared for in the area of language. (Ex. R-31 at 229). Although the s requested direct music therapy at that meeting (Tr. 250-51), the IEP team disagreed and continued to provide only for consultative music therapy. (Tr. 250-51). The s' only objection to the April 1997 IEP was based on the team's refusal to provide direct music therapy. (Tr. 1010).

44. In April 1997, United Services staff prepared a progress report with respect to the prior quarter. (Ex. R-32). That progress report notes the additional of new goals and objectives in the speech and language area. The progress report further notes (contrary to the phenomenal gains reported by the s) that is repeating some two-word phrases verbally with modeling and that she is repeating 1-2 words in rhymes and songs that are interspersed with babbling. (Ex. R-32).
45. At hearing, Lesa Johnson testified that that she had reviewed a videotaped music therapy session of with Marcia Behr that apparently was prepared at around this time. (Tr. 996; Ex. R-141). In viewing that videotape, Ms. Johnson did not observe any changes in that tape that indicated progress with respect to 's language skills. Moreover, Ms. Johnson expressed concern that Ms. Behr was reinforcing 's inappropriate behaviors as exhibited on the tape. (Tr. 996). Ms. Johnson also reviewed a videotape of a subsequent music therapy session with Ms. Behr. (Tr. 996). Ms. Johnson testified that, in her professional opinion, the songs that Ms. Behr used with during the later music therapy session were more developmentally appropriate and showed some increase in her attention span. However, Ms. Johnson was unable to hear any additional recognizable language. (Tr. 996). Ms. Nix also viewed the same videotaped music therapy sessions and testified that, she, too, did not see that received any educational benefit from the music therapy sessions. (Tr. 1083).
46. On or about June 2, 1997, the s first requested a due process hearing by writing to the Missouri Department of Elementary and Secondary Education (DESE). (Ex. R-39). Notably, in that request, the s indicated that the only issue for hearing was whether music therapy should be provided as a direct service for . (Id.) At that time, the s were not alleging that should be educationally diagnosed as autistic. (Ex. R-39; Tr. 875).
47. In response to the s' request for due process, the Missouri Department of Elementary and Secondary Education appointed Dr. Gerard Fowler to serve as the Chairperson of the three-member panel, with Mary Matthews and Christine Montgomery being named as the other two panel members. (Ex. R-42).
48. On or about June 19, 1997, the s and Respondent District engaged in a mediation with respect to Petitioners' June 1997 due process request. (Ex. R-44). The mediation was held as a direct result of the s' request for due process. (Tr. 1232). Dr. George Yard served as mediator. (Tr. 1232, 1278). The parties agreed to, inter alia, the following terms: (1) the District agreed to complete a reevaluation of in a timely manner; and (2) the District agreed to employ two consultants in the areas of speech/language therapy and music therapy to review data concerning and to report to the District and Petitioners as to her expressive language needs. The reevaluation and consultants' report were independent of one another. (Tr. 1249, 1262). More specifically, the two consultants were to address whether required music therapy as a direct service. (Ex. R-44; Tr. 1232-33). The parties agreed that the two consultants' decision was nonbinding on the parties. (Tr. 264, 1232).
49. At the conclusion of the mediation, Dr. Yard requested the s to withdraw their due process request. (Tr. 1278). However, they did not, even though on or about June 30, 1997, Petitioners purportedly corresponded with DESE to inform DESE of their intention to withdraw their due process request. (Tr. 1278; Ex. R-46). However, the District never received any official notification from DESE that the due process request had been formally withdrawn (Tr. 1278) and, indeed, Chairperson Fowler continued to be employed to conduct the hearing. (Tr. 1278).
50. On or about July 1, 1997, the District prepared an evaluation plan in accordance with the mediation agreement. (Ex. R-48).

51. On or about July 11, 1997, Respondent's counsel corresponded with Chairperson Fowler to inform him that the s had never formally withdrawn their request for due process. (Ex. R-50; Tr. 1278).

52. On or about July 23, 1997, the District prepared a Diagnostic Summary Report to reflect the results of the reevaluation that was conducted pursuant to the mediation agreement. (Ex. R-57; Tr. 1472-75). The purpose of the diagnostic staffing meeting on July 23 was to determine a school age categorical diagnosis for . (Tr. 1473, 1058). As part of the reevaluation, the District administered the Leiter International Performance Scale to assess 's cognitive level. The Leiter is a nonverbal test of intelligence. (Tr. 1059). The results of that test demonstrate that attained a non-verbal IQ of 47. (Ex. R-57; Tr.1059-60). The Diagnostic Summary also indicates that ìinitiate[s] interactions with adults in the classroom, such as taking an adult to something that she wants, sitting on a lap during group time, wanting a hug or wanting to look at a book with a teacher (Ex. R-57 at 324). The District also administered the PreSchool Language Scale-3 to assess 's expressive and receptive language skills. obtained standard scores of 50 with respect to her expressive language and auditory comprehension. (Ex. R-57 at 325). School employee Linda Burke conducted the requisite observation for the reevaluation. In the Diagnostic Summary report, Ms. Burke reports that initiated interaction with her during the observation. (Ex. R-57 at 326-27; Tr. 1457, 1475-80). As a result of the reevaluation, 's multidisciplinary team concluded that met the Missouri Department of Elementary and Secondary Education's criteria to be classified as moderately mental retarded and noted that 's language skills, adaptive behavior skills and academic achievement were consistent with her measured cognitive level of 47. (Ex. R-57at 328; Tr. 1060, 1482). At that time, the s did not disagree with the team's diagnosis. (Tr. 1084).

53. On or about July 23, 1997, Chairperson Fowler extended the timelines for the due process requested in June 1997. (Ex. R-58).

54. On or about August 20, 1997, Dr. Patricia Moore, the District's Deputy Superintendent (until June 30, 1998) (Tr.1227-28), prepared a Job Description regarding the Mediation Review for Jeanine Jesberg and Maria Carron, the two consultants who were selected to conduct the mediation review. (Ex. R-59 at 338; Tr. 1234). The written job description provides that the two consultants were to review all data, including recent re-evaluation data, interview appropriate personnel including Lesa Johnson, Karen Finnegan, Dona Wiebler of United Services and Dr. Pat Moore, Linda Burke and Dorothy Nix of the District as well as the parents. The job description further notes that the mediation agreement was not binding on either party. (Ex. R-59). Significantly, the consultants were not hired to complete a music therapy assessment of and did not do so. (Tr. 676).

55. At hearing, Dr. Moore testified that, in presenting the job description to Ms. Jesberg and Ms. Carron, she explained that she wanted them to review all the material, the files, the information, the written information, but I also asked them if they would be certain to visit with personnel of United Services and Fort Zumwalt District, as well as the family (Tr. 1234-35). Dr. Moore expressed to the two consultants that it was her intention that they interview all the individuals listed in the job description and Ms. Carron and Ms. Jesberg agreed to do so. (Tr. 655, 663-65, 1236).

56. During the 1997-98 school year, attended United Services through the ECSE program. Laura Davidson was her speech/language therapist during that academic year. (Tr. 1160). Ms. Davidson is a speech/language pathologist who has a masters degree in communications disorders and is licensed by the state to provide speech/language therapy. (Tr. 1158-59). During the 1997-98 school year, 's IEP called for direct (1:1) speech therapy 90 minutes per week. This

therapy was provided in an individualized as well as a group setting. (Tr. 1161). During the therapy sessions, was able to produce some one and two word phrases, but her overall progress in this area was limited primarily because of her mental retardation. (Tr. 1162-63). Ms. Davidson testified that the IEP goals and objectives in the area of speech/language at this time were appropriate for . She noted that she used and found verbal praise as well as food to sometimes be effective in reinforcing these objectives. However, Ms. Davidson did not find that music motivated with respect to her speech and language objectives. (Tr. 1165-66). Prior to the hearing, Ms. Davidson had the opportunity to review a videotape of a music therapy session that Marcia Behr conducted with . During her review of that videotape, Ms. Davidson did not observe any progress in 's spontaneous speech production. (Tr. 1168).

57. On or about September 15, 1997, Petitioners corresponded with DESE confirming that the due process before Chairperson Fowler remained pending and had not been withdrawn. (Ex. R-65).

58. On or about September 16, 1997, Ms. Jesberg and Maria Carron presented their written mediation review report to Dr. Moore. (Ex. R-66). The report reflects that the consultants reviewed data and observed at United Services and in a music therapy session in her home. More specifically, the report quotes extensively from 's January 1997 progress report and notes that that progress report reflects improvement in eye contact and more awareness of sounds and people. (Ex. R-66 at 359). With respect to the January 1997 progress report, the consultants state that was receiving 60 minutes per week of speech/language therapy and private music therapy in her home at this time (Ex. R-66 at 359; Tr. 682-83). The consultants concluded that benefited from individual music therapy. (Ex. R-66 at 360).

59. Although the mediation review report indicates that interviews were completed with personnel from 's current school placement, (Ex. R-66 at 362), the payroll sheets that the consultants submitted for reimbursement demonstrates that they did not interview all enumerated individuals. (Ex. R-70, 81; Tr. 1483). In addition, the mediation review report as well as the payroll reports submitted demonstrate that the consultants went beyond the agreement with the District and not only interviewed the s but also interviewed additional parent-affiliated individuals who were not enumerated in the job description to which the consultants had agreed. (Ex. R-70, 81).

60. Further, although the consultants indicate in their report that the persons interviewed stated that showed a steady decline in her communication and social skills around the age of 2 years that continued until January 1997, the mediation review report does not delineate the individuals who reported such decline and further fails to cite to any educational records documenting such decline. (Ex. R-66 at 362).

61. At hearing, Dr. Moore emphasized that the parties had agreed that the mediation report would not be binding on the District. (Tr. 1232). Moreover, after Dr. Moore received the consultants' report, she shared that report with staff and sent a copy to the s along with a letter indicating that she would like to speak with them about the report. (Tr. 1237; Ex. R-66, 69). After discussing the report with relevant staff, Dr. Moore concluded that the report was flawed and biased. (Tr. 1237-38, 1246). Dr. Moore reached this conclusion because some of the information in the report was inaccurate, but primarily because the consultants had failed to interview all of the individuals specified in the job description and did not speak to those individuals who had been directly involved in working with . (Tr. 1237-38, 1289-90).

62. When Dr. Moore sent the mediation report to the s, she requested an opportunity to meet and discuss the report with them. (Ex. R-69 ; Tr. 1256). In response to Dr. Moor's letter, Mrs. called and asked what type of meeting Dr. Moore was suggesting. Dr. Moore stated that she

intended to hold a non-IEP meeting simply to discuss the report. However, the s instead insisted on an IEP meeting. (Tr. 1239-40, 1256; 1298-99). As a result, Dr. Moore never had an opportunity to hold a non-IEP meeting to discuss the report with the s. (Tr. 1298-99).

63. On October 29, 1997, 's IEP team convened to address the development of goals and objectives for the 1997-98 school year. (Ex. R-77). At that time, the parties were still in due process litigation. (Tr. 1279-80). The purpose of the IEP meeting was not to go over the mediation report. (Tr. 1297). The meeting lasted approximately six hours. (Tr. 265, 782, 986, 1086, 1484). Everyone present at the meeting participated in the development of the IEP, including the s, Marcia Behr, and United Services and Fort Zumwalt staff. (Tr. 381, 986-87, 1005, 1086-87, 1484-85). The staffing report prepared to reflect the team discussion indicates that continued to make progress in speech and language. (Ex. R-77 at 378). At that meeting, the parents reported approximately 100 signs in the home, but had not been observed to spontaneously use that number of signs in the school environment. (Ex. R-77 at 378; Tr. 786). Rather, 's teachers and other United Services staff reported that the majority of her verbal responses were imitative in nature. (Ex. R-77 at 379). During the meeting, the team discussed the use of music and music therapy with respect to 's educational programming and Marcia Behr had extensive input during those discussions. (Tr. 988, 1257-59). At the meeting, Mrs. was allowed to read the entire Carron and Jesberg mediation report, including the recommendations, and copies of the report were provided to all participants. (Ex. R-77 at 380; Tr. 265, 268, 1239). The report was available to the team as the IEP was written. (Tr. 1257, 1303). At the conclusion of the meeting, the team decided to continue music therapy in the consultative, rather than direct service delivery model, even though the s requested direct music therapy. (Ex. R-77 at 380). In addition, after the meeting concluded and the IEP was being passed around for signature, Mr. asked to once again discuss the mediation report and asked specific staff members to comment with respect to the consultants' recommendations. Because the meeting had been concluded and the issue of direct music therapy was in litigation, Dr. Moore asked staff not to respond. (Tr. 1239-40; 1307-08).

64. The IEP developed on October 19, 1997 (Ex. R-80) indicates 's primary educational diagnosis to be mental retardation. (Ex. R-80 at 385). Significantly, at that time, the s were not expressing any disagreement with 's diagnosis. (Ex. R-78, 80). The present level of performance of the IEP notes that was attending United Services three half-days per week in an inclusive four-year old class of 17 children (with four adults) and one half-day per week in a self-contained class of six children. The IEP also notes that continues to make some progress in speech and language. The IEP contains goals and objectives in the areas of cognition, preacademics, attention, social-emotional, behavior, self-help, language, mobility, gross motor, fine motor, visual motor, and sensory stimulation. New goals and objectives were added to the IEP. The IEP proposes a placement of 510 minutes per week in the classroom with 90 minutes of speech/language therapy and 60 minutes per week each of occupational and physical therapy and 15 minutes per week of music therapy consultation. (Ex. R-80). The s expressed in writing their disagreement with the IEP. (Ex. R-78).

65. On or about October 30, 1997, Dr. Moore corresponded with the s and enclosed the October 29, 1997 IEP. In that correspondence, Dr. Moore requested the s' permission to implement the new IEP in light of the stay-put provision. (Ex. R-81; Tr. 1241, 1261). Because the s' written consent to implement the IEP was never forthcoming (Tr. 1241-42), Dr. Moore did not provide United Services with a copy of the IEP. (Tr. 989, 1087-88, 1243-44).

66. On or about October 29, 1997, the District issued a notice of action refused denying the s' request for direct music therapy. The basis for the denial was that music already was being

utilized as an integral part of the early childhood special education program and that the District was utilizing a consultative music therapist. (Ex. R-83; Tr. 1242).

67. On or about October 30, 1997, Dr. Moore prepared a memorandum for Superintendent Bernard DuBray regarding the mediation review report. (Ex. R-82). In that memorandum, Dr. Moore informed Dr. DuBray that the IEP team had denied the s' request for direct music therapy and declined to follow the consultants' recommendations with respect to music therapy because of flaws in the therapists report (i.e., incorrect information, lack of discussion with key evaluators, lack of understanding of the IEP process, and disagreement regarding documentation of expressive language regression). (Ex. R-82; Tr. 1243-44).

68. On or about November 24, 1997, Dr. Moore again corresponded with the s to request written permission to implement the October 29, 1997 IEP. (Ex. R-85). Dr. Moore did not receive a response to that request. (Tr. 1088, 1099, 1242).

69. On or about November 25, 1997, Billy Collier, the Executive Director of United Services corresponded with the s. (Ex. R-86). In that correspondence, Ms. Collier indicates that she discussed the District's decision to deny direct music therapy with United Services staff and that her staff was comfortable with the team's decision. In addition, Ms. Collier notes that she had viewed a videotape of a music therapy session with Marcia Behr and that she saw nothing during that session, that all of our staff here do not do with on a regular basis (Ex. R-86). Finally, Ms. Collier states that each of the staff that works with recognizes that she responds positively to music, which is why it is implemented in so many of her programs. No one has ever disagreed with that fact, or in any way tried to disregard it in working with . We do however, believe that the additional speech therapy units, and all of the occupational and physical therapy units that we have been providing have been as much a positive benefit to 's development as the home therapy she has also been receiving. . . . . [Y]ou and your advocates seem to disregard all of the gains that have occurred during 's attendance at United Services over the past five years (Ex. R-86 at 420; Tr. 960-62).

70. On or about December 8, 1997, Respondent's counsel corresponded with Chairperson Fowler to acknowledge that the hearing in the matter was scheduled for January 28-30, 1998. (Ex. R-90).

71. During December 1997, attorney indicated for the first time that he would be representing the s in the June 1997 due process request. (R-94, 99). On or about December 24, 1997, Respondent's counsel requested that parents counsel provide a statement of the issues that his clients intended to present at hearing. (Ex. R-94).

72. On or about January 13, 1998, the Judevine Center for Autism in St. Louis prepared a CARS/GARS summary report. (Ex. Pet. IV:12). As noted in the report, the CARS (Childhood Autism Rating Scale) is a 15-item behavioral rating scale developed to identify children with autism In addition, the GARS (Gilliam Autism Rating Scale) is used for the assessment of individuals aged 3 through 22 who have severe behavioral problems and is used to help professionals diagnose autism That report shows that Mrs. had completed a CARS with respect to and that did not score within the autistic range. (Id.)

73. On or about January 15, 1998, parents counsel dismissed without prejudice the June 1997 due process request filed by the s. (Ex. R-99).

74. On or about January 16, 1998, parents counsel instituted a new due process request on the s behalf against the District. (Ex. R-100). In his correspondence to DESE, parents counsel indicated that the new due process request was intended to cover the October 29, 1997 IEP as well as the music therapy matter previously at issue. Moreover, in that correspondence, counsel

for the parents specifically requested not to have Chairperson Fowler reassigned to the Panel and instead requested Robert Hawkins III be named attorney chairperson. (Ex. R-100).

75. On or about January 23, 1998, the District was informed for the first time by DESE that the s had withdrawn their June 4, 1997 request for a hearing. (Ex. R-103; Tr. 1284-85).

76. On or about January 23, 1998, DESE informed parents counsel that he would not receive his specific request for attorney chair because that position was appointed on a rotation basis. (Ex. R-104).

77. On or about January 29, 1998, Dorothy Nix corresponded with the s and once again requested the s' permission to implement the October 29, 1997 IEP pursuant to the stay-put provision. (Ex. R-105). Ms. Nix did not receive a written response to her request. (Tr. 1119-20).

78. On or about February 2, 1998, Charles Rendlen, III was appointed Attorney Chairperson of the three-member panel with respect to the s' January 23, 1998 due process request. (Ex. R-106). Mary Matthews and Christine Montgomery were named as the other two hearing officers. (Ex. R-106).

79. On or about February 5, 1998, Respondent's counsel corresponded with parents counsel to express dissatisfaction with the s' withdrawal of the June 1997 due process request and with what appeared to be parents counsel's attempt to forum shop for the attorney chairperson. (Ex. R-108).

80. On or about February 19, 1998, parents counsel corresponded with Respondent's counsel and informed her that the issues with respect to the new due process request were alleged procedural violations of the District at the October 1997 IEP meeting and the placement and program of , including music therapy. (Ex. R-111). Notably, in that correspondence, counsel for Petitioner does not raise an issue as to 's educational diagnosis. (Ex. R-111).

81. On or about March 1998, Chairperson Rendlen scheduled the due process hearing for June 9-11, 1998. (Ex. R-112).

82. On or about March 2-20, 1998, Mrs. and attended a three-week parent training program at the Judevine Center. (Ex. Pet. I:44). The Judevine report that summarizes the training states that is an affectionate child who shows affection even to unfamiliar people. (Id. at 4). An assessment that was conducted as a routine part of the training program showed to be in the non-autistic range (Ex. Pet. II:79; Tr. 279, 376, 875-76).

83. Lesa Johnson observed one of the Judevine sessions. At the end of the parent training session, Ms. Johnson began to observe an increase in 's attention span. Notably, Judevine did not use music or music therapy with during the parent training program. (Tr. 998-99, 1007).

84. Ann Neuner, 's United Services teacher during the 1997-98 school year, also noted a difference in after the three-week parent training program. (Tr. 1192, 1201). More specifically, Ms. Neuner testified that, after attendance at this program and after participation in similar sessions at United Services, displayed more eye contact and focus. (Tr. 1201).

85. At hearing, Ms. Neuner, who has a masters degree in early childhood special education, testified that is a visual learner who is affectionate with adults and enjoys her peers. (Tr. 1203). Indeed, one of 's strengths is her ability to model her peers. (Tr. 1202). enjoys music and movement and especially enjoyed the motor room at United Services. (Tr. 1203). In addition, Ms. Neuner testified that, in her opinion, received educational benefit during the 1997-98 school year. (Tr. 1206). She further testified that, in her opinion, did not required one-to-one music therapy services and could receive an appropriate education without that related service. (Tr. 1208).

86. On or about April 10, 1998, Respondent filed a motion for a more definite statement of issues with the Panel. (Ex. R-114).
87. On or about April 17, 1998, counsel for the parents requested a continuation of the due process hearing scheduled for June 1998. (Ex. R-116).
88. In May 1998, the District attempted to schedule an IEP meeting with the s to prepare for 's transition to kindergarten. (Ex. R-117). Dorothy Nix was informed by the s that, upon Mr. Morganstern's advice, they would not attend such a meeting. (Ex. R-117; Tr. 1090-91).
89. On or about May 12, 1998, Chairperson Rendlen corresponded with parents counsel with respect to his request for a continuance. In that correspondence, Chairperson Rendlen notes that counsel for the parents had represented that music therapy was the only issue for hearing. (Ex. R-118)
90. On or about May 14, 1998, counsel for the parents corresponded with Respondent's counsel to inform her of the issues that the s intended to present at hearing. (Ex. R-119). In that correspondence counsel for the parents states only the following issues: (1) the District's alleged exclusion of the parents from participation in the October 1997 IEP meeting; and (2) The District's alleged failure to provide an explanation for its refusal to provide music therapy. (Ex. R-119).
91. On or about May 14, 1998, counsel for parents corresponded with Mr. Rendlen to request a continuance of the June 1998 hearing dates. In that correspondence, parents counsel specifically states that the continuance will not affect the educational abilities [of] at all. is merely 5 years old and is just beginning her educational career counsel for parents further notes that he would be available for a July hearing. (Ex. R-120).
92. On or about May 15, 1998, Respondent's counsel objected to a continuance of the hearing date. (Ex. R-121).
93. On or about May 19, 1998, Mr. Rendlen granted counsel for parents request for a continuance and scheduled the hearing for July 28-29, 1998. (Ex. R-123).
94. On or about May 21, 1998, the District provided the s with written notice of an IEP conference for May 26, 1998. (Ex. R-128).
95. On or about May 26, 1998, the District convened 's IEP team to discuss her transition from the ECSE program at United Services to the Hawthorn Elementary School. (Ex. R-133; Tr. 1092, 1488). The staffing report for that meeting notes that the s were first informed of the meeting by telephone on May 13, 1998 and subsequently were provided with a second, written notice on May 21. Mr. and Mrs. did not attend the meeting. At the meeting, the 1996-97 IEP was reviewed and the team noted improvement. The October 1997 IEP was discussed, although it was never implemented due to stay-put. Finally, the staffing report indicates that the team would reconvene following the due process hearing to develop an IEP for the 1998-99 school year. (Ex. R-133; Tr. 1488-90).
96. On or about June 1997, Chairperson Rendlen corresponded with counsel for parents to reschedule the hearing for August 13-14, 1998. In his correspondence, Mr. Rendlen states that ì[I]f your clients are not sincere in prosecuting this matter, why don't you just dismiss. This is at least the fourth time that I have delayed this matter based on the parents attorneys request. The last time you requested the continuance, and begged for the continuance, you stated that you would allow it to be set anytime in August. I did so at your request. I did set it and now you have asked for another continuance (Ex. R-135).
97. On or about June 18, 1998, Mr. Rendlen scheduled the due process hearing for August 4-5, 1998. (Ex. R-137)

98. On or about July 15, 1998, Betsey Brunk, a music therapist retained by the s ñ conducted a music therapy assessment of . (Ex. Pet. IV:2). Ms. Brunk was one of a number of expert witnesses called by Petitioners in the area of music therapy. Ms. Brunk was Petitioners' first witness. (Tr. 14). Ms. Brunk testified that she has a masters degree in music therapy and defined a music therapist as someone who provides a prescribed program of music or music activities for the purpose of addressing nonmusical goals (Tr. 14, 17). Thus, a music therapist works as part of the special education team and addresses the IEP goals for a student. (Tr. 24). The music therapist may either provide direct or consultative services. (Tr. 24). Significantly, in the Texas districts where Ms. Brunk primarily works, she is employed only as a consultant to their early childhood special education programs. In those districts, early childhood students are not individually assessed for purposes of music therapy and, therefore, music therapy is not provided pursuant to an IEP for them. (Tr. 24). Rather, the early childhood teachers receive consultative services. (Tr. 24).

99. Ms. Brunk testified that students typically receive a music therapy assessment in the public school system when an IEP team requests one. Such requests usually are requested for students who are severely to profoundly disabled. When Ms. Brunk conducts her routine assessment for music therapy, she follows a specific procedure. First, she explains the process to school administrators and parents. Second, she reviews the child's written records and, more specifically, the current IEP. During that review, she identifies particular IEP goals and objectives that likely would be addressed through music therapy. Next and most significantly, Ms. Brunk observes the student in a nonmusical setting and works on targeted IEP goals. At the same time, she interviews members of the IEP team, parents, classroom teachers and relevant therapists for background information and their opinions regarding music therapy. After Ms. Brunk has completed the foregoing, she designs a music therapy assessment session. That session is designed so that the strategies she employs parallel the activities the child worked on in the nonmusical setting and addresses the same IEP goals. This allows her to make a direct comparison between the child's performance in a musical and nonmusical setting. In this manner, she can determine if music therapy is necessary for the child to benefit from special education. (Tr. 25-29).

100. Ms. Brunk met in July 1998 when she was retained by the s to conduct an independent music therapy evaluation for purposes of the due process hearing. (Tr. 18). Ms. Brunk reviewed 's most two recent IEPs and targeted goals from the IEPs where she believed music therapy might be effective. (Tr. 30-31). She also interviewed Mrs. by telephone and interviewed 's therapist from Judevine after she observed there. She also briefly interviewed Marcia Behr. (Tr. 32).

101. However, Ms. Brunk was told that it was not possible for her to do her usual observation in a public school classroom or to speak to 's teachers at United Services. This was a significant deviation from her regular procedure. (Tr. 33). Ms. Brunk's assessment of lasted only 33 minutes and was conducted in a hotel room. (Tr. 34, 47). Ms. Brunk's report indicates that 's overall attention was not significantly better within the music therapy assessment and her off-task behaviors occurred with more frequency in the music therapy session. (Tr. 48).

102. Although Ms. Brunk recommended direct music therapy for (Tr. 39-40, 45), she acknowledged that, because she did not complete her general assessment procedure with , she could not say that required direct music therapy as a related services pursuant to the IDEA. (Tr. 79, 102). Indeed, she testified that it was possible that an observation or assessment of in the school setting could completely invalidate the recommendations contained in her report. (Tr. 54). Moreover, Ms. Brunk testified that she was comfortable with the District's decision to use

only consultative music therapy with because music is a part of most early childhood classrooms (Tr. 55).
103. On or about July 28, 1998, counsel for parents filed a motion for continuance with respect to the August 4-5, 1998 hearing dates. (Ex. R-145).
104. On or about July 29, 1998, Chairperson Rendlen denied the motion for continuance. (Ex. R-146).
105. On or about July 29, 1998, counsel for parents withdrew Petitioners' January 23, 1998 request for due process without prejudice. (Ex. R-147).
106. On or about July 29, 1998, DESE informed Respondent's counsel that the request had been withdrawn. (Ex. R-148).
107. On or about July 29, 1998, counsel for parents refiled the prior due process request. (Ex. R-149).
108. On or about July 30, 1998, DESE informed the District that counsel for parents had refilled the prior due process request. (Ex. R-151).
109. On or about August 4, 1998, Joyce Hainen Crandon was appointed to serve as Attorney Chairperson and Mary Matthews and Christine Montgomery were renamed to serve as hearing officers. (Ex. R-153).
110. On or about August 11, 1998, Chairperson Hainen scheduled the matter for hearing in October 19-20, 1998. (Ex. R-159, 162).
111. At the beginning of the 1998-99 school year, the s enrolled at the Patterson School, even though they were aware that had the right to attend public school. (Tr. 227, 364). Patterson is a private daycare facility with an accredited kindergarten program. Patterson does not offer speech-language, occupational, physical or music therapies and has no special education certified staff. (Tr. 365, 791, 840, 882). The s hired an aide (who has no college degree) to work with at Patterson. (Tr. 883).
112. During the January 1999 hearing dates, Mr. testified that I don't think she's [] doing really very well at Patterson. (Tr. 787). However, when the Panel reconvened in September 1999, Mr. testified that was making a great deal of progress at Patterson even though she was not receiving any therapies as listed in her IEP. (Tr. 884-85). Significantly, the s never requested reimbursement for Patterson tuition in any statement of issues filed with any of the three Panels. Such reimbursement would not be proper because Patterson is not an appropriate placement for and the s failed to give the requisite advance notice required by the IDEA. See 20 U.S.C. ß†1412(i).
113. On or about September 11, 1998, counsel for parents provided Chairperson Hainen with a list of issues for hearing. (Ex. R-166). In that correspondence, counsel for parents raised only the following four issues: (1) the District's alleged failure to allow the parents to have participation in the October 29, 1997 IEP meeting; (2) the District's alleged failure to provide the parents with a written notice of denial of the parent's request for music therapy; (3) the District's alleged failure to provide appropriate programming in preparation for kindergarten; and (4) the District's alleged failure to provide adequate evaluations of . (Ex. R-166). Ironically, in that letter, counsel for parents writes that petitioner's seek as prompt a hearing as is possible. cannot receive an appropriate education until this matter is resolved (Ex. R-166).
114. On or about September 21, 1998, Respondent's counsel corresponded with Mr. Morganstern to arrange for an IEP meeting to address the 1998-99 school year. (Ex. R-171). counsel for parents never responded to that letter.
115. On or about September 25, 1998, counsel for parents provided a list of amended issues with respect to the scheduled October 1998 due process hearing. (Ex. R-174). The issues as

articulated by Mr. Morganstern in that letter are as follows: (1) the District's alleged failure to allow parent participation in the October 1997 IEP meeting; (2) the District's alleged failure to provide the parents with a written notice denying the parents October 1996 request for music therapy; (3) the District's alleged failure to forward the October 1997 IEP to United Services for implementation; and (4) the District's alleged failure to provide programming and related services, including music therapy, to allow to receive reasonable educational benefit. In that letter, counsel for parents notes that petitioner's seek as prompt a hearing as possible (Ex. R-174at 622).

116. On or about October 19, 1998, the three-member Panel convened for a due process hearing to consider the issues raised by Petitioners as delineated in counsel for parents September 25, 1998 letter. During counsel for parents direct examination, Mrs. testified as though had been educationally diagnosed as autistic. Respondent's counsel objected to that line of inquiry on the grounds that the s had never presented any information to the IEP team suggesting that was autistic nor had the s requested the IEP team to diagnose as autistic. The Panel sustained the objection and gave the s the option of continuing with the hearing with no mention of autism or postponing the hearing until such time as the District could conduct a reevaluation for autism. (October 19, 1998 transcript at 36-37). At the time, the s chose to request a continuance and the Panel decided to adjourn. The District then requested that the s immediately provide it with copies of any and all evaluations the s purportedly had that supported an autism diagnosis with the intent of quickly convening the IEP team to discuss whether additional evaluation by the District was necessary and to prepare a new IEP. (Ex. R-196). However, the s did not immediately present additional evaluations and Mr. Morganstern delayed the IEP meetings by filing a motion with the Panel to stay the IEP process. (Ex. R-196).

117. On or about October 19, 1998, Respondent's counsel ñ as a result of the Petitioners' decision to postpone the hearing ñ corresponded with Chairperson Hainen and requested a continuance of the hearing to January 25, 1999 as agreed by the parties. (Ex. R-181).

118. On or about October 29, 1998, the s re enrolled in the District and, more specifically, enrolled her in a kindergarten class at Hawthorn Elementary School in the District. (Tr. 365; Ex. R-184). At the s' request, was placed in a regular kindergarten class and began receiving occupational, physical and speech/language therapies and consultative music therapy. (Tr. 365).

119. Michelle Anderson was 's special education teacher at Hawthorn. Ms. Anderson has taught special education for ten years. She is certified in learning disabilities, behavioral disorders, and mental retardation. (Tr. 1310-12). In addition, Ms. Anderson has been trained by the State to serve as an in-district autism consultant and was selected by DESE to serve as a Missouri Autism Consultant. (Tr. 1312-13). Ms. Anderson also has received training in the use of music for educational purposes. (Tr. 1313-14).

120. Ms. Anderson teaches in a self-contained special education classroom. However, did not spend any time in that classroom during the 33 days she attended Hawthorn in the Fall of 1998. (Tr. 1317-18). Rather, she attended an inclusionary kindergarten classroom at the s' request and was removed from that setting only to receive her individual therapies. (Tr. 1318-19, 1333-34). Ms. Anderson testified that enjoyed being at schooling and responded well to praise and clapping. She also responded to music and movement which Ms. Anderson utilized with her. (Tr. 1344). In addition, during the short time attended Hawthorn, Ms. Anderson worked with her in the regular kindergarten classroom and worked on enumeration and matching. During the short time attended Hawthorn, she began to adjust to the classroom routine and began to make progress on her IEP goals and objectives. (Ex. R-199).

121. At that time, used primarily sign language and her verbal language skills were mostly in imitation. She demonstrated only a few verbal words and those words were not used spontaneously. (Tr. 1346-48). At hearing, Ms. Anderson testified that she had reviewed previously videotaped sessions of Marcia Behr working with . As a result of watching those tapes, Ms. Anderson testified that she did not observe anything that she was unable to do in the school setting. (Tr. 1349). Ms. Anderson also viewed an additional videotaped music therapy session from May 1999 at the September 1999 hearing. (Tr. 1351; Ex. Pet. VI:13). Ms. Anderson testified that the language skills demonstrated by in that videotape were similar to what she observed at Hawthorn. She noted that Marcia Behr used little music in her therapy session, but instead concentrated on academic tutoring. (Tr. 1354-55). In addition, she noted that exhibited more behavioral problems during the videotaped music therapy session with Marcia Behr than she did while attending Hawthorn. (Tr. 1383-85). Finally, Ms. Anderson testified that she did not observe any autistic characteristics of at Hawthorn or in the videotapes. (Tr. 1387).

122. On or about December 3, 1998, counsel for parents provided Respondent's counsel with copies of medical reports from Drs. Garrett Burris and John Mantovani dated October 24, 1997 and February 6, 1998 respectively. (Ex. R-191). Neither of those reports had previously been provided to the District and/or the IEP team. Significantly, in his October 24, 1997 letter, Dr. Burris states that it is my impression that this is a child with Down syndrome who has had some changes in language and behavior that I would regard as an accompanying pervasive developmental disorder (Ex. R-191 at 676). Dr. Burris does not mention an autism diagnosis and his correspondence demonstrates that he solicited no input from United Services or District personnel in his assessment of . (See Id.; Tr. 583-84). Similarly, in his February 6, 1998 correspondence, Dr. Mantovanií's letter demonstrates no input whatsoever from United Services or District personnel. (Ex. R-191 at 679-80). In his conclusion, Dr. Mantovani writes that is a five year old girl with trisomy-21 [Downs syndrome], moderate mental retardation and apparent pervasive developmental disorder. Mother and I discussed the pervasive developmental disorder as an associated or added feature to 's Down Syndrome (Ex. R-191 at 682; Tr. 410-11).

123. On or about December 9, 1998, Respondent's counsel wrote to counsel for parents to inform him that Dr. Burris and Dr. Mantovanií's reports had been forwarded to the District for consideration by the IEP team. (Ex. R-192).

124. On or about December 16, 1998, 's IEP team convened. During that meeting, counsel for parents referenced an updated report from Dr. Burris. (Ex. R-194). That report was not provided to the IEP team on December 16. Moreover, another member of the team invited by Petitioners, Julie Bier, indicated that she had an updated speech/language evaluation of . That report also was not provided to the team on December 16. At the meeting, Mr. mentioned that the family had obtained several additional music therapy assessments subsequent to the October 1998 hearing date. Although the s wanted the team to consider the recommendations of those reports, the s did not provide the team with copies of those assessments nor did they share the full reports with the team. Accordingly, Respondent's counsel requested those from counsel for parents. (Ex. R-194; Tr. 1490-91).

125. The December IEP meeting lasted from 6-8 hours. (Tr. 388, 897, 1326). At that meeting, an evaluation plan was developed to address the need for additional information in the areas of adaptive behavior, social/emotional/behavioral and speech/language. (Ex. R-202; Tr. 1320, 1490, 1492). The s were members of the team that prepared the evaluation plan. No member of the team requested that be reevaluated in the cognitive area. (Ex. R-202 at 726; Tr. 320-22, 1493). Mrs. provided written consent to the reevaluation on December 16, 1998. (Ex. R-203).

126. The IEP team also began preparation of a new IEP for on December 16, 1998. (Ex. R-205; Tr. 1491). The s and their advocates had input into the IEP goals and objectives and present level of performance. (Tr. 388-92, 897, 906-08, 1324; 1490-91). No draft IEP was presented. Rather, Michelle Anderson and others completed the IEP in handwritten form as the team developed it. (Tr. 379-81; Tr. 1323). The s expressed no disagreement with the IEP after the present level and goals and objectives were developed. (Tr. 1325). Marcia Behr, 's private music therapist reviewed her goals and objectives and progress reports for the in-home music therapy program and made recommendations for direct music therapy. At the meeting, the parents shared a list of characteristics of and needs that they had identified. Those were incorporated into the present level of performance of the IEP. Although the team concluded that 100 minutes per week of speech/language therapy and 60 minutes per week each of occupational and physical therapy should be provided, the team did not reach a decision with respect to music therapy. (Tr. 1325-28). Rather the team agreed to reconvene in January. (Tr. 1325-26; Ex. R-204).

127. Subsequent to the December 16. 1998 IEP meeting, the s removed from Hawthorn Elementary and placed her at Patterson. (Ex. R-194).

128. On or about January 4, 1999, Mr. Morganstern informed Respondent's counsel that he had provided all medical evaluations and music therapy assessments that the s had received to that time. (Ex. R-195). However, Respondent's counsel informed counsel for parentsthat additional music therapy assessments had not been provided, but rather that Mr. merely had read selected portions of those at the December 16 IEP meeting. (Ex. R-195). As of January 11, 1999, Petitioners also had failed to provide the IEP team with the updated speech language testing conducted by Ms. Bier. (Ex. R-195).

129. In an additional letter dated January 4, 1999, counsel for parentsinformed Respondent's counsel that he was providing an updated report of Dr. Burris. Significantly, that report ñ in question and answer format ñ indicates a diagnosis of Downs syndrome and pervasive development disorder. (Ex. R-206 at 763). counsel for parents' letter also indicates that all to date music therapy assessments had been provided. However, on January 14, 1999, counsel for parents indicated that he had not yet received all music therapy assessments. (Ex. R-212).

130. On or about mid-January 1999, Chairperson Hainen ordered Petitioners to provide a statement of hearing issues on or before January 18, 199. (Ex. R-214).

131. On or about January 20, 1999, the IEP team convened to complete the IEP that was begun on December 16, 1998 and to complete a diagnostic summary report to reflect the results of 's reevaluation. (Ex. J-1, 2, 3). That meeting lasted approximately three hours. (Tr. 374-75). The s participated in the meeting. (Tr. 374-75). A draft diagnostic summary was presented to the team which was revised at the s' request to include the results of the parents' CARS and GARS assessments. (Cf. J-1; J-2; Tr. 1494-98). At the conclusion of the discussion, the IEP team concluded that the results of the reevaluation were consistent with DESE's criteria for identifying as a student with mild mental retardation. (Ex. J-2 at 832). The team further concluded that was not autistic. (Ex. J-2). The s and their advocates disagreed with the diagnosis. (Ex. J-2 at 839).

132. At hearing, Michelle Anderson, the District's in-house autism consultant, testified that she did not believe that met the criteria to be educationally diagnosed as autistic. (Tr. 1333). She noted that, in determining a diagnosis, the team must look at all available information and not just the information presented by one test instrument. (Tr. 1334-35). Ms. Anderson testified that autistic children typically do not model peers or exhibit affection. However, did both. (Tr. 1336-37). Dorothy Nix also agreed with the team's diagnosis. She testified that the symptoms of autism that exhibited were explained primarily by her mental retardation. (Tr. 1066-68). Because the Missouri State Plan specifically requires the team to determine if those symptoms

are primarily caused by mental retardation, Ms. Nix did not find to be autistic. (Tr. 1066-680; Ex. R-216).

133. The IEP team also completed 's IEP on January 20, 1999. (Ex. J-4). That IEP indicates that 's primary diagnosis for special education purposes is mental retardation. (Ex. J-4). The IEP contains goals and objectives in the areas of reading, letter recognition, enumeration, expressive and receptive language, independent work habits, self-care, fine and gross motor and sensory needs. The IEP calls for 465 minutes per week in a self-contained special education classroom for reading and math, 300 minutes per week of speech/language therapy, 15 minutes per week of occupational therapy consultation, 60 minutes per week of music therapy consultation and 60 minutes per week of direct occupational and physical therapy. (Ex. J-4). The IEP also proposes a full-day placement with 900 minutes per week in a regular education classroom with support from the special education staff. (Ex. J-5; Tr. 1338-42). The IEP was never implemented because the s did not return to Hawthorn. (Tr. 1342).

134. Richard Craven testified at the due process hearing as follows:

> I have a Bachelor of Arts degree in Education. I'm in elementary education. I have a Master's degree in Special Education, a special degree in Secondary School Administration and a Doctorate in Education. . . I have an elementary lifetime certification. I have a secondary certification in Social Studies. I have a certification as a Secondary School Principal, NK approved. . . . I oversee Special Education programs, Title1 grant programs, the Goals 2,000 grant programs, the Health Related Services and the ESL programs. . . . . My first contact really was when we all gathered last year for due process.. . . .In October of 1998. And I had set it as my personal goal to get this resolved. With no disrespect for anyone in here, I did not want to have to go through anymore of what we went through in October in the due process hearing. I felt it was a very non-productive process. So I looked at, first of all, a child who has severe disabilities, God bless her, and she needed an education. I first wanted to focus on her. I saw two parents that loved their child very much and wanted what's best for them. While I was new to the school district, and I even gained more respect I think for the people that I worked with in the school district, I saw loving, caring individuals that worked diligently every day to provide an education for the children that we're responsible for. So I was sure that we could get this resolved. So it was a personal goal of mine going into the IEP meeting that we would have it done. . . . Q. What happened in that December IEP meeting? . . . A. Well, you know, I think my general recollection is that it was a very hostile environment. It was argumentive. I believe that the 's and the people that they brought into the IEP meeting were convinced that the only way that this was going to get resolved was to have direct music therapy. I believe that it wouldn't have mattered what was said, that that's how it had to go. . . . . Q. What did the District offer, either in that meeting or the subsequent meeting in January of 1999, in the way of music therapy? . . . Well, just in the way of music therapy, or in general? . . . Q. Well, in general and more specifically as to music therapy? . . . A. If I could just maybe expand a little bit. As I gathered information and listened to the due process hearing and talked about this and listened to people talk in our IEP meetings, it seemed to me that the professional staff could have gone and been very successful with the goals of the IEP without any music therapy at all. . . . . Q. Did anyone ever express that to you? . . . A. Yes, they did. My reaction to that was let's not go in that direction. What I don't want to do is make this dispute greater and say

no music therapy at all, because number one, we've already been offering it. So my thought was what can with we do with music therapy to provide an even greater service to to help get this resolved? So what was proposed was, number one, we would extend her day and double her day from a half a day kindergarten to full day services; that we would extend the music therapy from what we were doing in the old IEP from 15 minutes to 60 minutes a week. So that's four times the amount of music therapy. What I wanted to try to do is stay away from the terms direct and consultative, because those were hot terms. What we tried to use was the word integrate music therapy with the other therapies, or use the word collaborate between the music therapist and other therapists and provide the service in that way. In my mind, that was providing a much greater service than just 60 minutes direct music therapy, and it was much more beneficial to . What we constantly wanted to try to do is take away all the hostility and take away the anger, the frustration, and just focus in on what we can do for . She's the one missing out on this whole thing. . . . Q. Were the 's and the members of the team that they brought receptive to your suggestions? . . . A. No, they were not. . . . . Q. Dick, there has been some testimony or questioning in this hearing about your cutting off the January meeting and shortening the discussion by saying we're only going to meet until such and such a time. Could you please respond to that? . . . . . A. Yes. That is absolutely incorrect. . . . . Q. What happened? . . . . . A. The conversation began with [counsel for the parents]. . . . . asking that the meeting be concluded by 3:30 because that's when they needed to leave by. We agreed with that. We had already met eight hours. We werestarting at 1:00. We felt that we could conclude by that time, so we agreed. . . . . Q. Have you reviewed the IEP that was developed in December of 1998 and January of 1999? . . . . .. A. Yes. . . . . Q. Did you attend the entire meetings that were held on those two days? . . . . A. Yes, I did. . . . . Do you believe that that IEP offers a free appropriate public education? Oh, definitely I do. . . . . Has that IEP ever been implemented in this District? . . . .

A. No, unfortunately not.

MR. MORGANSTERN: CROSS-EXAMINATION

Dr. Craven. . . . . Well, based on what the professional staff was saying, that was their recommendation that it would be more beneficial. I think it would be least restrictive, which is what we always try to shoot for. We wouldn't be taking out of 60 minutes of something else that she could be doing and just putting her in a room with one person. So I thought it would be least restrictive too. . . . . Q. Did you assign Karen Jerkins to handle, if this program were accepted, to handle the, I had to use the term after you said it, to handle the consultative music therapy for ? . . . . A. What I understood was that she was already receiving music therapy from the District, so it wasn't a question should she get music therapy or not. It was a question of what extent of music therapy? . . . . Q. Would the District have been able to conduct a music therapy assessment of between the December and the January IEP meetings based on their description? . . . . A. Well, we couldn't have because was not in school. Did the parents ever request at the December or the January meetings that the District do a music therapy assessment of ? . . . A. Not to my knowledge. . . . And I'll ask you once again. Do you believe that that January IEP offers an appropriate education? . . . . A. Well, you know, I definitely do. I guess what the tragedy of the situation is, and I still have a very

hard time understanding why we have gotten to this point. We had a total of 1,800 minutes of service that was being offered to this youngster. I believe if you look at the IEP we agreed on all the goals; we agreed on all the related services; we agreed on everything but 60 minutes of that 1,800 minutes of service. I just do not understand why was not allowed to continue with us so that we could give her the 1,800 minutes. We could continue our dispute over the 60 minutes if we had to, but why deny her that? That is something that I continue to really not understand.

RECROSS-EXAMINATION QUESTIONS BY MR. MORGANSTERN:

Q. If the parents were objecting to what you described as 60 minutes, does that indicate to you their desire and their belief that those 60 minutes may be entirely more important than just lumping together 1,740 minutes that are immaterial? . . . . A. I couldn't answer that. I don't know what their thought is on that. . . . Q. But the 60 minutes that were involved were 60 minutes of music therapy, were they not? . . . . A. They were 60 minutes of music therapy on a a collaborative basis versus 60 minutes of music therapy as direct one-on-one. . . . . Q. So they were the crux really of the dispute? . . . . A. To me if you take it all away, take everything, the volumes and volumes of stuff that we've had to go through, that's the bottom line. What we tried to do is provide a program that was more than just 60 minutes of direct music therapy, something that would be more beneficial.

135. The IEP team agreed that the District's music therapist, Karen Jerkins, would consult and collaborate with the occupational, physical and speech/language therapists for 60 minutes per week. (Ex. J-5; Tr. 1340). The team agreed that did not require direct music therapy to meet her educational needs. (Tr. 1339). At hearing, Dr. Richard Craven, the District's Assistant Superintendent in charge of special education since July 1998, testified with regard to 's need for music therapy. At hearing, Dr. Craven noted that District staff had informed him that could have been successful on her IEP goals and objectives without any music therapy at all. (Tr. 1556). However, Dr. Craven did not want to see music therapy eliminated from 's IEP. Thus, he proposed that 's January 1999 IEP extend her day to a full day of services and further extend music therapy consultation to 60 minutes per week. He also proposed that music therapy be integrated with her other therapies in a collaborative model. In Dr. Craven's opinion, that proposal offered more benefit than the 60 minutes per week of direct music therapy that the s had been seeking. (Tr. 1557).

136. Significantly, as Dr. Craven noted at the conclusion of the September 1999 hearing, the District has offered 1800 minutes per week of educational services to and the IEP team, including the s, has agreed on all goals and objectives and all related services with the exception of 60 minutes per week of music therapy. In spite of that agreement, however, the s removed from the District thus she was deprived of the 1740 minutes per week of services that were not in dispute. (Tr. 1571).

137. At the present time, is not attending school. (Tr. 841). Rather, the s are providing an in-home program of Applied Behavioral Analysis for and are providing her with occupational, speech and music therapy at Judevine. (Tr. 841). The s no longer employ Marcia Behr as a music therapist in the home. (Tr. 831). Much of the current programming is being funded through other agencies. (Tr. 931).

138. The school district was providing with music therapy. The school district provided sufficient evaluation of the needs of the student.

CONCLUSIONS OF LAW

1. The Fort Zumwalt School District provided with a free appropriate public education at all relevant times.

2. Under the IDEA, all children with disabilities are entitled to a free appropriate public education (FAPE) designed to meet their unique needs. Significantly, the IDEA does not prescribe any substantive standard regarding the level of education to be accorded to disabled children, ***Board of Education of the Hendrick Hudson Central School Dist. v. Rowley***, 458 U.S. 176, 189, 195 (1982), and does not require strict equality of opportunity or services Id. at 198. Rather, a local educational agency fulfills the requirement of FAPE by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction Id. at 203.

3. The primary vehicle for carrying out the IDEA's goals is the individualized education program (IEP). 34 C.F.R. ß 300.13(d). The IEP is a written statement that is developed to meet the unique needs of each disabled child, and is prepared at a meeting that includes representatives of the local educational agency, the child's current teacher(s), the parents or guardian of the child, and, whenever appropriate, the child. 34 C.F.R. ßß 300.340-347. Each IEP must contain a statement of the child's present level of performance, annual goals, short-term instructional objectives, a description of the placement and the reason for its selection, dates for the duration of the program, and objective criteria by which achievement of the objectives can be evaluated. 34 C.F.R. ß 300.347. A child's IEP may also include related services, such as physical and occupational therapy, that are required for the child to benefit from the special education services included in the IEP. 34 C.F.R. ß 300.13 (FAPE means special education and related services). Further, the IDEA requires that each IEP must be reviewed at least annually and, where appropriate, revised. 34 C.F.R. ß 300.343(c)(1).

4. Under Missouri law, the IEP is not required to maximize the educational benefit to the child or to provide each and every service and accommodation that could conceivably be of some educational benefit. ***Rowley***, 458 U.S. at 199. Although an educational benefit must be more than de minimis to be appropriate, ***Doe v. Bd. of Educ. of Tullahoma City Schls.***, 9 F.3d 455, 459 (6th Cir. 1993), cert. denied, 128 L.Ed.2d 665 (1994), as stated by the Rowley Court, an appropriate educational program is one which is reasonably calculated to enable the child to receive educational benefits ***Rowley***, 458 U.S. at 207. In articulating the standard for FAPE, the Rowley Court concluded that Congress did not impose any greater substantive educational standard than would be necessary to make such access meaningful Id. at 192. The Court found that Congress intent was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside Id.

5. Although states are free to adopt a higher FAPE standard than what is required by the IDEA, Missouri has not done so. Courts uniformly have held that the FAPE standard in Missouri is that stated in Rowley, and have specifically rejected the notion advanced by some that Missouri has adopted a maximization standard. See, e.g., ***Fort Zumwalt v. Clynes***, 119 F.3d 607, 612 (8th Cir. 1997) (IDEA does not require that a school either maximize a student's potential or provide the best possible education at public expense); ***Gill v. Columbia 93 Sch. Dist.***, No. 98-4192, (W.D. Mo. June 1999) (IDEA does not require that a school either maximize a student's potential or provide the best possible education at public expense); ***Carl D. v. Special Sch. Dist.***, 21 F. Supp. 1042, 1047 (E.D. Mo. 1998) (rejecting maximization standard and holding that the law in this Circuit is clear. A school district meets the statutory obligation to

provide a free appropriate public education by providing educational benefit. The [IDEA] does not require the school district to provide the best possible education).

6. To achieve its goals, the IDEA establishes a comprehensive system of procedural safeguards designed to ensure parental participation in decisions concerning the education of their disabled children and to provide administrative and judicial review of any decisions with which those parents disagree ***Honig v. Doe***, 484 U.S. 305, 308 (1988). In recognition that a consensus regarding a child's proper placement and IEP would not always be possible, Congress provided for administrative review of an IEP determination at the request of either the parents or guardian or the local educational agency and, after exhaustion of the administrative review process, judicial review in a state or federal court. If the parents disagree with the IEP, or proposed changes to the IEP, the state must provide them with an impartial due process hearing. 20 U.S.C. 1415(b)(6). After an impartial due process hearing, either the parents or the local educational agency may file a civil action in state or federal court. 20 U.S.C. ß 1415(i)(2). Based on the above-referenced law and the facts of this case, it is clear that Respondent has provided with FAPE.

7. does not require music therapy as a related service to benefit from her educational program.

8. Somewhat obscured by the extensive proceedings in this matter is that fact that the parties agree on far more than what they disagree. Richard Craven brought that point back into focus during his testimony. As Mr. Craven pointed out, Petitioners have not disputed the special education program that has been developed for . Instead, this matter is about Petitioners' desire to have something more than they want the District to provide direct music therapy as a related service for sixty minutes per week.

9. The IDEA defines related services as transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education 20 U.S.C. ß 1401(a)(22) (emphasis added). As noted by the Supreme Court in ***Irving Independent Sch. Dist. v. Tatro***, only those services necessary to aid a handicapped child to benefit from special education must be provided at 468 U.S. 884, 894 (1984) (emphasis added). In general, related services are not included in IDEA's definition of special education See 34 C.F.R. ß 300.26(a)(2). No evidence was presented at hearing that showed required music therapy to benefit from her educational program. Indeed, all expert witnesses presented by Petitioners stated that they were unable to draw that conclusion.

10. Several past cases decided at various levels of review are particularly instructive with regard to Petitioners' request for direct music therapy services. For example, in ***East Windsor Bd. of Educ.***, the hearing officer held that a district was not required to provide a disabled student with horseback riding as a necessary related service. 20 IDELR 1478, 1481 (SEA Connecticut 1994). The parents of the child an eleven year old boy with spastic quadriplegia, severe visual impairment and speech problems had provided the boy with horseback riding experience for several years. At hearing, the parents and the school's physical therapist noted that the student benefited from the horseback riding in the following ways: (1) improved stability and balance, (b) more erect sitting posture, and (c) relaxed muscle tone. Id. at 1480. The parents, therefore, requested that the IEP team include horseback riding as a related service, but the request was denied. Id. The hearing officer agreed with the team that the student did not require horseback riding as a related service and, in so doing, reasoned as follows: [the student] benefits from his horseback riding experience. However, the benefits he derives from horseback riding, i.e. balance, sitting posture and muscle relaxation, are addressed in A.ís IEP in other activities under the direct and indirect supervision of the physical therapist. It is generally agreed

that A. is benefiting from the physical therapy program being provided by the Board. Not unmindful of the reported benefits to A.ís self-esteem derived from horseback riding, such benefits without more are insufficient to mandate its inclusion in A.ís program. Therefore, it must be concluded that horseback riding is good for A., but not necessary . . . . [But for purposes of this hearing, the parents have failed to show that A. needs horseback riding in order to benefit from his special education program. Id. at 1481.

11. Similarly, in USD #259, the reviewing officer held that a 16-year-old student with multiple disabilities did not require direct speech/language therapy as the parents had requested. 27 IDELR 117 (SEA Kansas 1997). In that case, the parents contended that the school's proposal of indirect speech/language services denied their child FAPE and agreed that the student required direct services. Id. at 124. At hearing, the school district presented evidence regarding how the direct and indirect service delivery models differed. Id. The hearing officer summarized that testimony as follows:

12. Essentially, in direct speech therapy, the student is taken out of the classroom at specified intervals for one-on-one work with the speech-language pathologist on language skills. The theory. . . is that a skill must be developed before it can be generalized, and the pull-out sessions of the direct speech therapy model developed and refined those desired skills. . . .

13. The witnesses for the District expressed the firm conviction that mentally disabled students have great difficulty generalizing concepts and skills. Consequently, they would have difficulty in understanding that lessons taught in pull-out sessions applied to other environments. For this reason, they saw indirect speech services as the professionally preferred model of delivery of speech therapy services for such students . . . In the indirect model, speech services are actually provided by the classroom teacher, in consultation with the speech/language pathologist. The indirect speech theory is that language is best learned as it is needed, in the environment where it will be used, and as it is used instant contextual application. Id. at 124

14. In examining this testimony and holding that indirect services, rather than the direct service the parent preferred, was appropriate, the hearing officer concluded that ì[i]t is obvious from all the testimony and reports that this issue is a dispute over methodology, and equally obvious that a student could conceivably receive an educational benefit from either approach. Since parents cannot force their preferred methodology of education onto a District, and since the law requires only that an IEP be calculated to confer some educational benefit, the . . . IEP's requirement of indirect services is appropriate Id. (citing ***Rowley, 458 U.S. at 176***).

15. Likewise, in Apple Valley Unified Sch. Dist., the hearing officer concluded that a thirteen-year-old student with a visual impairment was not entitled to receive vision therapy as a related service from the district. 25 IDELR 1128 (SEA California 1997). In that case, the student's optometrist recommended that the student receive 60 hours of vision therapy. Id. at 1130. In determining that vision therapy was not required to be included in the IEP as a related service, the hearing officer noted that, without such therapy, the student was able to progress on her IEP goals and objectives. Id. at 1139. As noted by the hearing officer, although vision therapy may enable Student to improve her academic performance, there is no evidence in the record that Student requires vision therapy to derive educational benefit from her current educational program Id. (emphasis in original). See also Los Angeles Unified Sch. Dist., 26 IDELR 618 (SEA California 1997) (holding that 8-year-old student with traumatic brain injury who was unable to speak and had motor skill problems did not require physical therapy to benefit from his special education program); San Lorenzo Unified Sch. Dist., 26 IDELR 331 (SEA California 1997) (holding that student diagnosed with a serious emotional disturbance did not require a boxing and weight training program as a related service in order to benefit from his

special education program; Walker County Sch. Sys., 22 IDELR 187 (SEA Georgia 1995) (holding that 13-year-old student with a serious emotional disturbance did not require the related services of physical therapy and family therapy/counseling where the evidence showed that such related services were not necessary to allow the student to benefit from special education); ***Salinas Union High Sch. Dist.***, 22 IDELR 301 (SEA California 1995) (finding that deaf and autistic student did not require the use of SIBIS, a device that emits an electric stimulus to prevent injurious behaviors, as a related service); ***Colonial Sch. Dist.***, 26 IDELR 776 (SEA Pennsylvania 1997) (where parent rejected IEP because it did not provide a student with multiple disabilities with aquatic training as a related service, the appeals panel reasoned that the parent presented no evidence to suggest the child required such therapy to benefit from his educational program); ***Lodi Unified Sch. Dist.***, 28 IDELR 218 (SEA California 1998) (rejecting parent request for vision therapy as a related service for 6-year old student with language delays and visual impairment and noting that the district provided student with a wealth of opportunities during her school day to engage in activities remarkably similar to those provided in the vision therapy she received privately)

16. In this case, the evidence establishes that does not require direct music therapy as a related service to benefit from her special education program. The evidence showed that the in-home music therapy provided by the parents has not resulted in receiving the significant gains alleged. The evidence did show that received educational benefit without the use of music therapy.

17. Finally, the parents request for one-on-one pullout music therapy services is decidedly inconsistent with the IDEA's RE mandate. See 34 C.F.R. ß 300.550(b)(1) (to the maximum extent appropriate, children with disabilities . . . [must be] educated with children who are nondisabled). Although properly receives some one-on-one instruction with regard to speech, occupational and physical therapies, she does not require that direct service delivery model with regard to music. Rather, the evidence showed that using a music therapist on consultative/collaborative basis (as the District has proposed and implemented) will assist to generalize her language skills in the classroom context in which she will be using those skills and fosters IDEA's mainstreaming goal. As in USD #259, the essence of the dispute in this case is a methodological one and it is well-established that a school district has discretion with regard to choice of methodology. See, e.g., ***Board of Education v. Rowley***, 458 U.S. 176, 208 (1982) (once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the states courts must be careful to avoid imposing their view of preferable educational methods upon the states); ***E. S. v. Independent Sch. Dist. No. 196***, 135 F.3d 566 (8th Cir. 1998) (as long as a student is benefiting from her education, it is up to the educators to determine the appropriate method).

18. There is no dispute that the special education services provided to were appropriate and that the various IEPs provided with FAPE. Furthermore, Petitioners have failed to show that required music therapy to benefit from those services. The evidence at hearing established that the District provided a free appropriate public education in the least restrictive environment to at all times. Therefore, the District is entitled to a decision in its favor and Petitioners' request for reimbursement must be denied. See ***School Comm. of Burlington v. Depít of Educ.***, 471 U.S. 359, 370 (1985) (holding that reimbursement is proper only if the IEP is determined to be inappropriate and the parent's placement is determined to be appropriate).

19. The District's diagnosis of moderate retardation is correct.

20. When the hearing reconvened in October 1998, Petitioners for the first time raised the issue that they believed 's diagnosis should include autism. The evidence showed that the District correctly diagnosed and developed an educational program that met her unique needs.
21. This case is remarkably similar to ***In Re: Scott M***., 24 IDELR 1229 (SEA New Hampshire 1996) (attached), in which the hearing officer rejected the parents claim that their mentally retarded sons diagnosis include autism. The 17 year old student was severely retarded and had minimal speech, a seizure disorder, and cerebral palsy. Id. at 1230. It was undisputed that the student also displayed autistic-like behaviors, including a short attention span. Id. at 1231. In fact, an outside doctor eventually diagnosed the student with autism. Id. at 1238. However, a psychologist retained by the school district determined that the student was not autistic. Id. at 1241. In reviewing the extensive evidence related to the student's diagnosis, the hearing officer noted several autistic-like behaviors that also are exhibited by mentally retarded persons. Id. at 1249. The hearing officer observed that it is not unusual to see some autistic features in mentally retarded children. Id. at 1243. Indeed, the hearing officer viewed the testimony of one of the parents witnesses with skepticism because it relied heavily on input from the mother, who clearly had an interest in exaggerating her sons maladies Id. at 1259.
22. In the instant case, Petitioners' evidence regarding 's autism diagnosis must be viewed with similar skepticism. In particular, Mrs. 's changing CARS scores shows a willingness to predetermine a diagnosis of autism. Clearly, Petitioners' for some reason feel it is to their advantage to have diagnosed with autism. Just as in In Re: Scott M, the s have mischaracterized ['s] behavior, which skews the results in a way that reflects behavior characteristic of autism that is not present Id. at 1242. The Missouri State Plan for Part B of the IDEA acknowledges that mentally retarded children might exhibit autistic-like behaviors by requiring as part of the eligibility determination for autism that the characteristics noted are not primarily caused by mental retardation. The evidence showed that the District's diagnosis of mental retardation is correct and that is not autistic. In fact, the family information form completed by the s in 1995 decidedly shows a non-autistic child. In the same vein, the consistent descriptions of as social and affectionate are inconsistent with an autism diagnosis. For these reasons, the Panel must reject the s' claim on this issue.
23. However, whether or not 's diagnosis should include autism, is, in any event, of little practical consequence because a child's diagnosis does not dictate the special education services that are to be provided. As the hearing officer in ***In Re: Scott M*** noted, an appropriately drafted IEP addresses the unique needs of the student, irrespective of the label attached to him/her Id. at 1250. The important point was that the school district developed an IEP that addressed the manifestations of [the student's] conditions and addressed his needs irrespective of . . . whatever label one might attach to him Whether or not the child carried a diagnosis of autism was of little importance because ì[t]here is no evidence that if [the child] carried a secondary code of autism that his IEP would need to change any substantial way Id. at 1249. The same thing is true in this case. Just as in ***In Re: Scott M***, there are [not] any educational ramifications of the diagnosis of autism that are not already addressed within ['s] IEP. Id. at 1244.
24. Parent participation in the IEP process is considered to be an important part of the IDEA. The amount of participation is not unlimited, however. Parent participation should be meaningful. ***Honig v. Doe***, 484 U.S. 305 (1988). In the end, if the IEP team cannot reach a consensus, it is the responsibility of the school district to ensure that FAPE is provided. 34 C.F.R. ß 300 Appendix A, Question 9 (it is not appropriate to make IEP decisions based upon a majority vote). See also *Northeast Indep. Sch. Dist*, 29 IDELR 922 (SEA Texas 1998) (parent approval of a school district's proposed IEP is not required for the district to implement the IEP,

and therefore a parent cannot unilaterally veto a district-proposed IEP). Even if a procedural violation occurred, the law is well-established that procedural violations alone are not sufficient to establish a violation of IDEA. See, e.g., ***Independent Sch. Dist. v. S.D.***, 88 F.3d 556, 562 (8th Cir. 1996) (holding that an IEP should be set aside only when the procedural inadequacy compromises the child's right to an appropriate education, seriously hampers the parents opportunity to participate in formulating the IEP, or causes deprivation of educational benefits); ***Evans v. Dist. No. 17 of Douglas County***, Neb., 841 F.2d 824, 827 (8th Cir. 1998) (finding no violation of the IDEA when the alleged procedural violation did not harm [the child's] progress in any way).

25. Petitioners were able to meaningfully participate in the October 1997 and all IEP meetings. Music therapy was discussed at all meetings from October 1996 onward. Petitioners were allowed to participate in all IEP meetings in a meaningful way.

26. Because Petitioners had filed for due process in June 1997, the October 1997 IEP could not be implemented without Petitioners' consent. 34 C.F.R. ß 300.514(a). On more than one occasion, the District requested that Petitioners provide written consent if they wanted the October 1997 IEP to be implemented. The District did not receive written consent. Petitioners have suggested that a statement in the October 1997 IEP that they agreed to the IEP constituted their written consent. That statement is equivocal at best. The important point is that when Petitioners later were directly and unequivocally asked to provide written consent, they refused to do so. The District acted appropriately when it did not implement the October 1997 IEP because Petitioners did not provide written consent.

27. The hearing panel does not have authority to award attorney's fees.

28. Although the IDEA contains a provision allowing awards of attorney's fees to prevailing parents, it does not give authority to hearing panels to award those fees. Authority to award such fees is reserved for courts. 20 U.S.C. ß 1415(i)(3)(B) (the court, in its discretion, may award reasonable attorney's fees as part of the costs to the parents of a child with a disability who is the prevailing party).

DECISION

1. The Panel finds that each of 's IEPs offered a FAPE.
2. The Panel finds that does not require direct music therapy as a related service.
3. The District has correctly diagnosed .
4. The District did not commit any procedural violations.
5. The Panel denies each of the s' requests for relief.
6. The Panel has no authority to award attorney's fees and further finds that Petitioners are not prevailing parties.

The Panel orders that the school district provide music therapy to exactly as explained by Richard Craven at the due process hearing transcript pages 1554-1558.

> **So what was proposed was, number one, we would extend her day and double her day from a half a day kindergarten to full day services; that we would extend the music therapy from what we were doing in the old IEP from 15 minutes to 60 minutes a week. So that's four times the amount of**

music therapy. . . . stay away from the terms direct and consultative, ... integrate music therapy with the other therapies, ... collaborate between the music therapist and other therapists and provide the service in that way. . . . . . that was providing a much greater service than just 60 minutes direct music therapy, and it was much more beneficial to .

It is so ordered:
MAJORITY OPINION:
December 14, 1999
Joyce Hainen Crandon Chairperson
Chris Montgomery, Panel Member

SEPERATE CONCURRING OPINION

1. The petitioner's contention that they were not permitted to have meaningful participation in 's IEPs is not borne out by the IEP decisions. During the early childhood program at United Services, the school staff recommended two half days in a special education classroom and two half-days in an integrated classroom. When moved into a school-age program, the school staff sought to place in a self-contained special education classroom, but at the insistence of the parents, she was fully included in a regular education kindergarten. In addition, 's OT and Speech Language services were increased in accordance with the parents wishes. Consultative music therapy was provided inspite of the fact that school personnel believed that progress could be made on 's goals and objectives without it. In fact, consultative music therapy would not have been in several of 's IEP's had the parents not made a request for direct music therapy. And finally, IEP goals/objectives were added, revised, and quantified in accordance with the parents' requests. They had input but it seems that they were so invested in the direct music therapy that anything less meant that they were not permitted meaningful participation.

2. The proposed IEP's for met the requirements of FAPE. Any additional benefit that derived as a result of the music therapy provided by the parents may also have been achieved if the parents had agreed to the more individualized special education programs that were repeatedly recommended by the school personnel.

3. At the hearing, the claim of procedural errors was not substantiated. But even if the claims had constituted a procedural violation, the perceived infraction would only be a legal technicality because was not prevented from taking advantage of a full educational opportunity. Furthermore, the parents present themselves as very knowledgeable about their rights and responsibilities.

4. With regard to the education diagnosis of Autism, the school district followed the appropriate procedures and guidelines in determining 's eligibility. During the hearing, the petitioners failed to make a case for the relevance of this issue to their request to direct music therapy. Programming and services go to the needs of the student and not to a specific diagnostic category.

CONCURRING DECISION

The District certainly used Marcia Behr's evaluation even if it was to refuse the recommendation. The District is ordered to pay $500. fee to the Petitioner's for payment of Marcia Behr's original evaluation. The Petitioner's did not request this relief, therefore they are not the prevailing parties on this issue since it was not requested. A majority of the panel members have ordered this relief to the Petitioners.

CONCURRING Decision
BY, and Chris Montgomery, Mary Matthews

The other music therapy evaluations were really just for litigation purposes. We stay away from stating whether or not is autistic by confirming that the District conducted an appropriate evaluation and made a diagnostic determination in accordance with state guidelines.

Concurring decision
December 14, 1999
By, Chris Montgomery

DISSENTING OPINION

On January 6, 1999, Chairperson of the hearing panel for v. Fort Zumwalt R-II School District sent notice to the Parties and two members of the hearing panel. On this date, a request was made for the issues that are being appealed to the panel. On or about January 15, 1999 counsel for the Petitioners responded with four issues being appealed. On January 26, 1999 counsel for parents amended the issues by adding a fifth issue to be considered by the due process hearing panel. The Panel is deciding the following issues:

Respondent failed to comply with IDEA in the IEP of October 1997 for . Thus, the IEP was invalid. Parents and classroom teacher were willfully excluded from participation and providing input with regard to music therapy. Parents, teachers and therapists were denied the opportunity to discuss as team members, valuable and relevant information necessary to allow the IEP team to provide a free, appropriate, public education in the least restrictive environment (FAPE). There was no team decision.

Beginning with the IEP of October 1996 Parents and Advocates were deliberately mislead as to the district's ability to provide the petitioner, , with Music therapy. Advocates and parent were told: Music Therapy is not a related service; Music therapy is not allowed under regulations and state law as per DESE; No funding is available to provide Music Therapy; Only Group Music Therapy is allowed.

At the IEP of October 1997, the parents met with a stone wall refusal to even discuss Music Therapy for their child. Linda Burke announced that the District decides: and, I am the district. At the IEP of October 1997, a teacher was silenced by the district and instructed not to answer questions from the parents, and further discussion of Music Therapy for was precluded by the District summarily adjourning the meeting.

Respondent failed to provide the parents with notice in writing of their decision upon the initial IEP (October 1996) request for music therapy and the appropriate explanation for said denial pursuant to the provisions of IDEA (Individuals with Disabilities Education Act). Petitioner seeks programs and placement for including reasonable provisions therein of music therapy.

The district failed to provide petitioners with a copy of the Mediation report of September 1997 in a timely fashion.
The district failed to provide the Petitioners with a written copy of their decision with regard to the mediation report.

Respondent failed to forward the October í97 IEP to United Services, notwithstanding written parental consent, therefore, excluding goals and objectives adequate to prepare for Kindergarten

Special education programming and related services provided by Respondent, specifically excluding music therapy, did not allow to receive reasonable educational benefit from her special education, as defined, by meeting a reasonable amount of classroom and language goals and objectives

Educational autism as it is affected by the provision of services in order to provide the Petitioners, , a free appropriate public education in the least restrictive environment.

Respondents Proposed Findings of Fact, Conclusions of Law and Decision submitted to the Panel on November 10, 1999 addresses the five issues but deletes issue 1. a. b. and c.; under issue 2, and a. and b.

Panel member reads issue 1. b. and 1. c. alleging violations with the IEP of October 1997. Issue 1.a. alleges a violation in the October 1996 IEP meeting. Issue 2. a. and b. are separate issues. In the presentation of issues by the Petitioner, however numbered or lettered, each statement needs to be separately addressed by the Panel.

Respondent failed to comply with IDEA in the IEP of October 1997 for . Thus, the IEP was invalid. Parents and classroom teacher were willfully excluded from participation and providing input with regard to music therapy. Parents, teachers and therapists were denied the opportunity to discuss as team members, valuable and relevant information necessary to allow the IEP team to provide a free, appropriate, public education in the least restrictive environment (FAPE). There was no team decision.

According to the transcripts and exhibits surrounding the October 29, 1997 IEP, there was an expectation by Mr. & Mrs. that a meeting would take place to discuss a report written by two

professionals chosen by the District, and Mr. and Mrs. . [Tr. Vol. 1 @ pg 264 line 25, 265 line 1-11, 20-25]. [Tr. Vol. III pg 781 line 13-16].

The report was written on September 16, 1997 [R-66 p 358 Vol II] per the terms of the June 19th Mediation Agreement and in the job description outlining responsibilities their employment. [Vol. I R-44 p265 and R-59 p338 Vol. II]. It was reported by Jenine Jesberg, speech pathologist hired by the District to participate in the completion of the report, that it had been mailed on September 23, 1997 to Dr. Moore. [R-67 p365 Vol. II]. The last sentence of the report states, please direct any question regarding this report to Maria Carron at (314) 849-4440 or Jeanine Jesberg at (314) 542-0968. Thank you for the opportunity to provide services to your district

When Mrs. inquired about the report from Dr. Moore's secretary, the secretary reported that Dr. Moore had not yet received it. [R-67 p364 Vol. II].

On or about 9/29/97 the Mediation Review (report) regarding was faxed to Dr. Moore. (R-66 p 358 Vol. II).

Mr. and Mrs. received a letter from Dr. Patricia Moore, dated September 30, 1997. The letter enclosed a copy of the music and speech/language therapist joint report. Dr. Moore also requested dates the s could be available to discuss the report and recommendations of the therapists. [R-69 p366 Vol. II and Tr. Vol. III pg. 781 line 21-25].

Mrs. testified that Dr. Moore determined the type of meeting that would take place to discuss the report and that it would be an IEP meeting. Mr. testified that the IEP was the format Dr. Moore chose to discuss the mediation report. [Tr. Vol. III p782 line 6-8]. The IEP meeting was subsequently scheduled for October 29, 1997. [R-80 p385 Vol. I].

Dr. Moore testified that Mrs. called and asked that what kind of a meeting it was . . .. Dr. Moore replied to Mrs. , it was to discuss the report. What kind of meeting do you want? And they called for an IEP meeting. [Tr. Vol. 5 @ 1256 line 20-25 and Tr. Vol. 5 1239line 17-21].

The mediation agreement included: The team will review all data of and advise the district and the parent as to her expressive language needs. The question to be addressed is whether the services for shall be provided through speech/language therapy, music therapy, or both in the form of direct services. The consultants shall review all data, including the re-evaluation data, interview appropriate personnel, and write a single report mutually agreed upon.

Dr. Moore upon receiving the mediation review on September 29, 1997 disagreed with the report because she felt the report was flawed. [Tr. Vol. 5 @ 1237 lines 18 & 19]. She never called the therapists to discuss her concerns over the report even though in the report, the consultants asked that she call them with any questions regarding the report.

Upon receiving the mediation review, Dr. Moore testified that she shared the report with her staff and sent a copy of the report to the s in a letter. [Tr. Vol. 5 @ 11 and Tr. Vol. 5 @ 1238 line 16-20]. She is referring to the letter Mrs. testified she received, dated September 30, 1997. . [R-69 p366 Vol. II].

Dr. Moore testified the reason she felt the report was flawed was, Number one, I felt like they had not interviewed everyone equally. That was the main thing. I thought some of the information was incorrect and had concerns about that. I had also talked to them about IEP's, and they indicated that they weren't aware of that process, but, yet, I felt that there was content within the report that would support that they did. So I just felt it was a flawed, biased report [Tr. Vol. 5 @ 1237 lines 22-25 & 1238 lines 1-3].

In discussing the report with the staff, Dr. Moore asked the staff to give her their opinions about the report. [Tr. Vol. 5 @ 1238 lines 7-11].

Dr. Moore stated that the staff felt that what they seen happen or being done through the process could be done by the staff that was working with at the time [Tr. Vol. 5 @ line13-15].

Consequently, at the IEP meeting of October 29, 1997 the mediation report was not discussed at the IEP meeting although the report was copied and given out to the team by the parents. [Tr. Vol. 5 @ 1238 lines 21-25 & @1239 lines 1-5].

At the October 29, 1997 IEP, Mrs. wanted the mediation report to be followed by the District and follow the recommendation of the report. [Tr.Vol. I p267 line 25 & p268 line 1-3].

Mrs. also testified that there was no discussion of the report at the IEP meeting because Pat Moore did not allow it to be discussed. She also stated that this was the first opportunity they had to discuss the mediation report. [Tr. Vol. I p268 line 8-14 & 21 & 22, p269 lines 1&2].

Mr. also testified that no discussion on the report took place we were told by Pat Moore that there was no reason to discuss the report because she had already reached a decision. she said I have already reached my decision without any discussion and her decision was that there would be no direct music therapy. [Tr. Vol. III p781 line 17 & 18-p783 line 20-22].

Mr. also testified that he asked Dr. Moore who was denying direct music therapy as recommended by the mediation report, and she responded that she was, and that she was the District and the District decides. [Tr. Vol. III p 784 lines 13-20].

Dr. Moore testified that the mediation report was not discussed because they were in litigation over the report and she felt it should not be discussed and that the meeting was over. [Tr. Vol. V p1239 line 6-10 & 1240 line 21-23].

The job description for the mediation review dated August 20, 1997 states that this agreement is not binding to either party. [R-59 p338 Vol. II]. The signed mediation agreement dated June 19, 1997 does not contain such terms indicating that the parties are bound by the agreement.

On June 19, 1997 Ft. Zumwalt School District and Mr. and Mrs. entered into a voluntary agreement through the mediation process. According to Sec. 300.506 (20 U.S.C. 1415(e), (5) An agreement reached by the parties to the dispute in the mediation process must be set forth in a written mediation agreement. (6) Discussions that occur during the mediation process must be confidential and may not be used as evidence in any subsequent due process hearings or civil

proceedings, and the parties to the mediation process may be required to sign confidentiality pledge prior to the commencement of the process.
The parties obviously agreed that confidentiality over the agreement dated June 19, 1997 was not necessary because it is not stipulated in the Agreement. [Tr. Vol. I p257 lines 10-25 & p 258 lines 1&2, 9-21].

Regardless of the differences between the s and Dr. Moore interpretation of the chronology of events surrounding the establishment of a meeting date for discussing the mediation report, Dr. Moore knew that the District was still in due process with the s over the issue of direct music therapy. The District and the s were in due process prior to mediation and after mediation. Providing direct music therapy for had been the primary issue since October 1996. The s also knew that they were still in due process despite going through mediation. Sec 300.506 Mediation (ii) Is not used to deny or delay a parent's right to a due process hearing under Sec. 300.507, or to deny any other rights afforded under Part B of the Act; 20 U.S.C. 1415(e)

Dr. Moore could have informed Mr. and Mrs. at the time they were attempting to set up a meeting, that it was her understanding that she could not discuss the mediation report at an IEP meeting because the issue of direct music therapy was in litigation. She had the opportunity through the mediation process and resulting agreement to establish rules and guidelines as to how the report would be shared and discussed with Mr. and Mrs. and under what conditions.
In the agreement, item D., states that the team (of 2 consultants) would advise the district and the parent as to her expressive language needs It appears that the report could have also been mailed directly to the s and still would have been in compliance with the agreement.

The agreement was devoid of any other conditions, exclusions, prohibitions or guidelines regarding how, when, where and with whom the parties would discuss the contents of the mediation review.
Of the terms stipulated within the agreement, the District did comply with A & B) initiating and completing a reevaluation and diagnostic summary in a timely fashion prior to her reevaluation anniversary. C) employment of 2 professionals with appropriate credentials agreed to by both parties and E), the consultants be paid by the district .

Dr. Moore chose not to call the consultants in regards to any questions about the report. Dr. Moore could have addressed her concerns with the consultants and attempted to correct the problems with the report. She could have easily informed Mr. and Mrs. of her concerns about the report and that she was not willing or comfortable with the recommendations made by the team. Instead, she blind-sided the s at the IEP meeting on October 29, 1997 when the parents had every expectation that the report would be discussed and considered in the development of the goals and objectives for .

Dr. Moore also discussed the mediation report with her staff prior to sharing the report with Mr. and Mrs. who were parties in the mediation agreement. They had no opportunity to discuss the report unlike Dr. Moore and her staff.

No documentation or exhibit was presented to the panel showing Fort Zumwalt School District, through Dr. Patricia Moore, notified Mr. and Mrs. in regards to the purpose of the IEP meeting

and consequently allowed the s to believe the October 29, 1997 IEP meeting would allow discussion of the mediation report in order to develop 's goals and objectives.

Fort Zumwalt School District through Dr. Pat Moore prohibited Mr. and Mrs. to discuss the mediation report at the October 29, 1997 IEP. The mediation report was to address whether the services for shall be provided through speech/language therapy, music therapy, or both, in the form of direct services and/or other services. The report was not an assessment. [Tr.676]. It was a review of all data, the reevaluation data and interviews with appropriate personnel in order to address the above. The information in the report was intended to determine the services needed for . Special education and related services are prescribed through the IEP document. The information in the mediation report was information the parents wanted discussed with the IEP team and included in the staffing report and in the reevaluation because the information contained within the report was relevant information to determine (iii)Whether the child needs special education and related services, or in the case of a reevaluation of a child, whether the child continues to need special education and related services and (iv)Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate as appropriate in the general curriculum [Sec 300.533 (a)(iii)].

Dr Moore also testified that the reevaluation was not part of the report. [Tr 1248 line 14-25, 1249 line 1 and 1271 lines 1-25, 1272 1-25, 1273 1-25 and 1274 1-4]. On the contrary, the mediation agreement stipulates, the consultants shall review all data, including the re-evaluation data, interview appropriate personnel, and write a single report mutually agreed upon. [R-44 p265 Vol.1].

Ft. Zumwalt School District through Dr. Patricia Moore failed to allow parent participation in the IEP meeting in regards to the discussion of the report to determine the need for special education and related services.

Sec. 300.345 Parent participation.
(a) Public agency responsibility--general. Each public agency shall take steps to ensure that one or both of the parents of a child with a disability are present at each IEP meeting or are afforded the opportunity to participate, including
(1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and
(2) Scheduling the meeting at a mutually agreed on time and place.
(b) Information provided to parents.
(1) The notice required under paragraph (a)(1) of this section must
(i) Indicate the purpose, time, and location of the meeting and who will be in attendance; and
(ii) Inform the parents of the provisions in Sec. 300.344(a)(6) and (c) (relating to the participation of other individuals on the IEP team who have knowledge or special expertise about the child).
20 U.S.C. 1401(a)(20); 1412 (2)(B), (4); 1414(a)(5)

Ft. Zumwalt School District did not demonstrate good faith in resolving the issue of direct music therapy for . The District could have initiated and completed a music therapy assessment in order to make an objective and final determination as to whether or not required direct music therapy as a related service under IDEA. The October 15, 1996 IEP meeting was the first the

District knew of Mr. and Mrs. 's interest in direct music therapy for despite the fact the s did not make the request in writing and articulate exactly what they wanted for . The record shows that the District gave consultative music therapy and increased her speech and language services without an assessment and in response to the 's request for music therapy. [R-28 p184]. An appropriate music therapy assessment completed by the District would have clearly determined for the whole IEP team, whether or not required music therapy as a related service in order to benefit from her special education.

In regards to the District prohibiting discussion of the mediation report at the October 27, 1997 IEP meeting, there was no obligation or requirement by the District to discuss the information from the mediation agreement at the IEP meeting. However, neither was there any obligation or requirement for the parents to not discuss the report at the IEP meeting. On the contrary, federal law does allow parents to bring information and experts into the IEP process.

Sec. 300.535 Procedures for determining eligibility and placement.

(a) In interpreting evaluation data for the purpose of determining if a child is a child with a disability under Sec. 300.7, and the educational needs of the child, each public agency shall--
(1) Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, teacher recommendations, physical condition, social or cultural background, and adaptive behavior; and
(2) Ensure that information obtained from all of these sources is documented and carefully considered.
(b) If a determination is made that a child has a disability and needs special education and related services, an IEP must be developed for the child in accordance with Secs. 300.340-300.350. (Authority: 20 U.S.C. 1412(a)(6), 1414(b)(4))

Prohibiting discussion at the IEP meeting by the team including the parents, was not made clear to the s at any time and was not stated as such at the IEP meeting. When parents asked that the report be discussed at the end of the meeting, Dr. Moore then stated that she would not allow discussion. The reason Dr. Moore gave to the s at the meeting for prohibiting discussion of the report was the issue of direct music therapy was in litigation. Dr. Moore did not provide the Panel with information as to the authority of her determination prohibiting discussion because it was in litigation. [Tr.1278-21-25 and 1279 1-11 (1)(b) (c) Respondent failed to comply with IDEA in the IEP of October 1997 by prohibiting parents from participating in the development of the IEP, by allowing them to provide important and relevant information to the IEP team for discussion by all, and for the inclusion of any relevant information to be included in the IEP for . Therefore, 's 10/29/97 IEP was not valid because parents were prohibited from discussing relevant information. Dr. Patricia Moore took it upon herself to make an IEP team decision that did not require direct music therapy and denied direct music therapy as a related service. [Tr. Vol. III p781 line 17 & 18, p783 line 20-22].
[Tr. Vol. II p784 line 11-25 and p785 line 1-23].

Dissenting opinion of one Panel Member

December 14, 1999
By, Mary Matthews