

**BEFORE THE HEARING PANEL  
EMPOWERED BY THE  
DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION**

**IN THE MATTER OF :**

,

**Petitioner**

**and**

**PARKWAY C-2 SCHOOL DISTRICT and SPECIAL SCHOOL DISTRICT OF ST.  
LOUIS COUNTY,**

**Respondents**

**DECISION AND ORDER**

This matter pends before the Hearing Panel following the due process hearing. The following Decision and Order is issued by the Hearing Panel:

**Cover Sheet Information**

1. ("Student") is the son of ("Parents"). Student was born on . Student's Special School District identification number is . Student's Social Security Number is .
2. At all times material to this due process proceeding, Student has resided with Parents in Ballwin, Missouri, which is located within the boundaries of the Parkway C-2 School District.
3. The Parents and Student were represented at the hearing by:

Thomas E. Kennedy, III  
2745 E. Broadway, Suite 101  
Alton, IL 62002

4. The Parkway C-2 School District and the Special School District for St. Louis County were represented by:

James G. Thomeczek  
Thomeczek Law Firm, L.L.C.  
1120 Olivette Executive Parkway  
Suite 210  
St. Louis, Missouri

5. Parents requested due process by letter dated October 1, 1999.

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**DECISION AND ORDER**

The Hearing Panel, after conducting the due process hearing in this matter on April 5 and 6, 2000, issues the following Decision and Order:

## **FINDINGS OF FACT**

The Hearing Panel, makes the following Findings of Fact:

### **I. The Parties**

1. The Petitioner[1] resided with his Parents within the boundaries of the Parkway C-2 School District ("Parkway") at all times relevant to this due process proceeding. (Tr Vol I, p 14)[2].

2. Parkway is a Missouri school district organized pursuant to Missouri statutes. The Special School District of St. Louis County, Missouri ("Special School District") is a special school district organized pursuant to Section 162.845 *et seq.* RSMo. Parkway and Special School District are collectively referred to herein as the "Districts".

3. The Student and Parents were represented at the hearing by Thomas E. Kennedy, III, 2745 E. Broadway, Suite 101, Alton, Illinois.

4. The Districts were represented by James G. Thomeczek, Thomeczek Law Firm, L.L.C., 1120 Olivette Executive Parkway, Suite 210, St. Louis, Missouri.

5. The three person panel for the due process proceeding was:

Ransom A Ellis, III, Hearing Chairperson

Thurma DeLoach, Panel Member

Mary Matthews, Panel Member

6. During all times relevant to this proceeding the following persons were employed by Parkway and provided educational services to the Student:

Dr. Jere Hochman, Superintendent  
Dr. Stephen Colombo, Director of Special Services  
Dr. Bonnie Maxey, North Area Superintendent  
Patricia Teich, Early Childhood Director  
Jean Manning, Preschool Coordinator  
Marty Dauer, Family & Community Liaison Coordinator  
Maureen Wikete, General Education (Pre-School) Teacher

7. During all times relevant to this proceeding the following persons were employed by the Special School District and provided educational services to the Student:

Mr. Rich Carver, Acting Administrator  
Dr. Marty Rulo, Assistant Superintendent for Special Education  
Dr. Joseph Jones, Director of Special Education - Region II  
Mary Ann Tietjens, ECSE Director[3]  
Nancy Tumbrink, ECSE Coordinator  
Leora Andrews, Administrator of Legal Services  
Kristine Penn, Special Education Teacher  
Angela Mueller, ECSE Diagnostic Area Coordinator  
Nancy Sexton, ECSE Diagnostic Teacher  
Susan Keller, Speech-Language Pathologist  
Denise Cook, Speech-Language Pathologist  
Emily Mayer, Speech-Language Pathologist

## **II. Procedural Background**

8. On or about October 1, 1999, the Parents sent a letter to Ms. Heidi Atkins-Lieberman, Legal Counsel for Special Education Services, Missouri Department of Elementary and Secondary Education ("DESE") requesting a due process hearing. (Panel Exh 1) The request for a due process hearing was received by DESE on October 4, 1999 (Panel Exh 2).

9. On or about October 14, 1999, Ms. Lieberman notified the Hearing Chairperson (Panel Exh 3) and the Panel Members (Panel Exh 4) that they had been assigned as the Chairperson and Panel Members for the three-member due process panel in this case.

10. On or about October 14, 1999, the Hearing Chairperson notified the Parent and School District that a panel had been selected in the case and that the hearing had to be held and a written decision rendered by the panel and mailed to the parties by November 18, 1999. (Panel Exh 3)

11. On or about October 19, 1999, the Hearing Chairperson provided the Parent with a copy of the *Procedural Safeguards for Children and Parents* published by DESE. (Panel Exh 5).

12. On October 25, 1999, the School Districts, through their Attorney, James Thomeczek, entered an appearance and requested that the time lines be delayed until February 15, 1999. (Panel Exhs 8 and 9) On October 26, 1999, the Hearing Chairperson extended the hearing time lines to February 15, 1999. (Panel Exh 10). The request for a continuance was appropriate.

13. On November 19, 1999, the Hearing Chairperson transmitted a *Notice of Hearing* to the Parent and School District. (Panel Exh 12) The Notice scheduled the hearing for 9:00 a.m. on January 11, 2000, at the Administrative Offices of the Special School District, St. Louis, Missouri.

14. On January 4, 2000, the School Districts and Parents transmitted their exhibit and witness lists and exhibits to the Hearing Panel and to each other.

15. On January 10, 2000, the School Districts, through their Attorney, James Thomeczek, requested that the hearing be temporarily postponed due to a family medical problem. On January 10, 2000, the Hearing Chairperson postponed the hearing. (Panel Exh 18). The request for a temporary postponement was appropriate.

16. On January 12, 2000, the Hearing Chairperson transmitted an *Amended Notice of Hearing* to the Parents and School District. (Panel Exh 19) The Notice scheduled the hearing for 9:00 a.m. on February 10 and 11, 2000, at the Administrative Offices of the Special School District in St. Louis, Missouri.

17. On February 7, 2000, the Parents requested that the due process be continued and further requested that the time lines for the proceeding be extended for an additional sixty (60) days. The stated reason for the request was that the Parents wished to obtain counsel to represent the Student at the due process hearing. (Panel Exh 20).

18. On February 8, 2000, the Hearing Chairperson postponed the hearing and extended the time lines to and until April 15, 2000. (Panel Exh 21). The request for a continuance was appropriate.

19. On February 11, 2000, Thomas E. Kennedy, III entered an appearance on behalf of the Student and Parents. (Panel Exh 22)

20. On March 3, 2000, the Hearing Chairperson issued a Second Amended Notice of Hearing (Panel Exh 31) The Notice scheduled the hearing for 8:30 a.m. on April 5 and 6, 2000, at the Administrative Offices of the Special School District in St. Louis, Missouri.

21. On March 6, 2000, Hearing Panel Member Jeffi Jessee was replaced by Dr. Thurma DeLoach as a result of Ms. Jessee's scheduling conflict for the hearing on April 5 and 6, 2000. (Panel Exh 32)

22. On April 5 and 6, 2000, the Due Process hearing was initiated in the Administrative Offices of the Special School District with all parties in attendance. The hearing was open at the request of the Parents. At the conclusion of the hearing on April 6, 2000, the parties agreed to resume the hearing on June

8, 2000 and further agreed to extend the date for mailing the decision in this case until June 30, 2000. (Tr Vol II, pp 154 - 155).

23. On April 11, 2000, the Hearing Chairperson issued a written extension of the time lines in the case which extended the date for mailing the decision to and until June 30, 2000. (Panel Exh 39).

24. On June 8, 2000, the Due Process Hearing in this case resumed and the record closed at the conclusion of that hearing day. At the conclusion of the hearing the parties jointly requested to have the opportunity to file post-hearing briefs to the Hearing Panel and jointly requested that the date for mailing the decision be extended to and until July 31, 2000. (Tr Vol III, pp 184). On June 13, 2000, the Hearing Chairperson extended the date for mailing the decision to July 31, 2000.

25. The parties stipulated to the admission of Hearing Panel Exhibits (Panel Exh) 1 through 39 (Tr Vol I, p 5; Tr Vol III, p 5); Petitioners' (Pet Exh) Exhibits 1 through 8 and A through L (Tr Vol I, p 32 - 33); and, Respondents' (Resp Exh) Exhibits 1 through 48 (Tr Vol I, pp 32 - 33).

### **III. The Issues And Relief Requested**

26. The parties agreed that the following issues should be presented to the Hearing Panel for decision:

1. Whether the Districts exceeded the time lines for holding an IEP meeting for the Student during the period of June through August, 1999 and if so, did such act result in a denial of a free appropriate public education for the Student. (Tr Vol I, pp 5 - 6).

2. Whether the Districts failed to maintain a continuum of services for the Student and if so, did such act result in a denial of a free appropriate public education for the Student. (Tr Vol I, p 6).

3. Whether the Districts offered a placement for the Student prior to the August, 1999 IEP meeting and if so, did such act result in a denial of a free appropriate public education for the Student. (Tr Vol I, p 6).

4. Whether the Student's current placement fails to provide the Student with a free appropriate public education in the least restrictive environment. (Tr Vol I, pp 6 - 7).

5. Whether the Student's IEP should contain an additional three hundred (300) minutes in a regular education setting in order to provide the Student with a free appropriate public education and to meet the goals and objectives in the Student's IEP. (Tr Vol I, p 7).

27. The Parents stated that the relief they were requesting was reimbursement for the tuition payments they have made to the Barretts Elementary School for the Student's preschool program from September, 1999 until the Student is placed in an appropriate placement. (Tr Vol I, p 7).

28. The Districts generally objected to the three procedural issues, denominated above as paragraph 26 (A) through (C), stating that the issues had not been presented to them prior to the day of the hearing. (Tr Vol I, p 8).

#### **IV. Background Facts**

29. In or around June, 1998, the Student injured his right ear when he poked an ear swab into it. The Student was examined by a pediatrician who did not note damage to the eardrum. (Tr Vol I, p 15). Subsequently, on January 28, 1999, the Student was examined by Pamela Koprowski, an audiologist at St. Louis Children's Hospital. (Resp Exh 2).[4] Ms. Koprowski found that the Student had: (1) a mild hearing loss at 500-4000 hertz; (2) a tympanogram within normal limits "suggesting normal middle ear functioning"; and, (3) a "large canal" in the right ear "consistent with perforation of eardrum." (Resp Exh 2). Ms. Koprowski recommended that the Student receive an otologic exam by a pediatric otolaryngologist and a speech-language evaluation. (Resp Exh 2).

30. On or around February 3, 1999, Dr. Clary, a pediatric otolaryngologist at St. Louis Children's Hospital, confirmed that the Student had a perforated right eardrum.

31. On February 5, 1999, the parents registered the Student and his fraternal twin brother in Parkway School District's day preschool program at Barretts School. (Resp Exh 3, p 003 - 004). The Student and his twin brother were enrolled for two one-half days per week (360 minutes per week). (Resp Exh 24, p 082, ¶ 4; Tr Vol I, pp 88 - 89). At this time, the Student was aged two years and eight months.

32. On March 3, 1999, the Student was screened for eligibility for the First Steps Program. (Resp Exh 4, pp 005 - 015). The Student was determined to be eligible for the First Steps Program due to his "50% delay in communication" and "diagnosed condition of hearing loss." (Resp Exh 4, p 014). On March 8, 1999, a meeting was held between the Student's mother and Lynette Crouch, First Steps Service Coordinator for the purpose of discussing and preparing an Individualized Family Service Plan for the Student ("IFSP"). (Resp Exh 5). An IFSP was developed during this meeting. (Resp Exh 5). The Student received sixty (60) minutes of in-home, individual speech-language therapy three (3) times a week pursuant to the IFSP prepared in the First Steps Program. (Resp Exh 6).

33. On March 19, 1999, a Speech-Language Pathology Evaluation was conducted on the Student by Raj Boodoosingh-Musgray a speech-language pathologist with the First Steps Program (Resp Exh 7). The evaluation determined the following about the Student:

1. Auditory Comprehension—The Student had "receptive language skills which are above average for his chronological age, characterized by a PLS standard score of 127" which "correlates to a percentile rank of 96."

2. Verbal Expression—The Student had “a moderate-severe expressive language deficit characterized by a PLS standard score of 94” which “correlates to a percentile rank of 34.”

3. Oral Motor/Speech Intelligibility—The Student had a “moderate-severe speech intelligibility (less than 40%).” (Resp Exh 7, pp 024 - 025).

34. On May 14, 1999, the Parkway’s Parents as Teachers program performed a health screening on the Student. (Resp Exh 8). As a result of the screening, on June 1, 1999, the Student was referred for evaluation in the areas of speech and language. (Resp Exhs 9, 10 and 11, p 035). The referral letter (Resp Exh 10) included a completed Parent Information Form for the Student (Resp Exh 10, p 29) and a screening form prepared by Parkway (Resp Exh 10, pp 31 - 33).

35. On June 3, 1999, Special School District prepared a Screening/Evaluation Plan form for the Student (Resp Exh 12). The Screening/Evaluation Plan determined that there was “no problem suspected” in the areas of vision, health, motor, intellectual/cognitive, adaptive behavior, academics/preacademics/developmental and social/emotional/behavioral. The Screening/Evaluation Plan found suspected problems in the following areas:

A. Hearing —

- 1) Screening information — accepted the audiology report done at St. Louis Children’s Hospital on January 28, 1999 — Problem suspected.
- 2) Evaluation Plan — “Review of previous testing”

B. Speech —

- 1) Screening information — accepted Speech and Language Evaluation done by Raj Boodoosingh-Musgray on March 19, 1999. — Problem suspected — “Poor intelligibility of speech and some drooling.”

2) Evaluation Plan — Review report of Raj Boodoosingh-Musgray dated March 19, 1999 and record of Speech sample/baseline, oral peripheral exam and formal speech test conducted at that time.

C. Language —

1) Screening information — accepted Speech and Language Evaluation done by Raj Boodoosingh-Musgray on March 19, 1999. — Problem suspected — “Primarily communicates through one word utterances and gestures.”

2) Evaluation Plan — Review of previous testing by Raj Boodoosingh-Musgray dated March 19, 1999.

The Screening/Evaluation Plan was reviewed with the Student’s mother during a meeting held on June 21, 1999. (Resp Exhs 13 and 14). At that time, Special School District provided the Student’s mother with a Notice of Intent to Evaluate and Consent Form (Resp Exh 14, p 40). The form indicates that in the area of Speech/Language, the Districts intended to evaluate the Student by “review[ing] previous testing.” (Resp Exh 14, p 40). The Student’s mother gave written permission to conduct the evaluation on the Student during the meeting on June 21, 1999. (Resp Exh 14, p 040). No formal testing was performed at the evaluation, but some informal assessment was done by a speech/language pathologist (Resp Exh 24, p 81, ¶ 1), apparently on June 21, 1999, in the short period of time after the Student’s mother gave consent and prior to the discussion of the Diagnostic Summary.

36. On June 21, 1999 the District discussed the Student’s Diagnostic Report with the Student’s Mother. (Resp Exh 15). Present and participating in the meeting were Susan Keller (Special School District Speech-Language Pathologist), Nancy Sexton (Special School District Diagnostic Teacher) and the Student’s Mother. (Resp Exh 15, p 048). This diagnostic team agreed that the Student was eligible for Early Childhood Special Education services due to his delay in speech and language. (Resp Exh 15, p 048; Resp Exh 16). Specifically, the diagnostic team recommended that: (1) language skills should be addressed in all areas; (2) speech

skills should be addressed; and, (3) auditory processing skills should be monitored. (Resp Exh 15, p 47). The Diagnostic Results form indicates that the Student's evaluation indicated that he was "eligible for ECSE due to delays in speech — (-2.0 SD) and language (-2.0 SD).

37. On July 13, 1999, following the evaluation of the Student and prior to the first IEP meeting, the Student's Mother received a telephone call from Lois Pickowski and Nancy Trumbrink (Tr Vol I, pp 41 - 43). According to the Mother, during the conversation Ms. Pickowski asked her:

"What I was thinking about? How many days of special education preschool I wanted for my child? And that most children with a moderate communication disorder received four days of self-contained cross [categorical] for preschool. (Tr Vol I, p 42; p 134).

When Ms. Trumbrink spoke to the Student's mother, Ms. Trumbrink asked the mother what placement options she was considering for the Student. (Tr Vol I, p 134). According to the mother, she asked Ms. Trumbrink to "write down what the options are for preschoolers." (Tr Vol I, p 43). Again, according to the Student's mother, Ms. Trumbrink said "she couldn't do that because the options were so numerous." (Tr Vol I, pp 43 - 44; p 135). Ms. Trumbrink testified that when she made these comments she was not making reference to placement options, but instead was discussing "programming options" with the Student's mother. (Tr Vol III, p 24). According to the Districts' Resolution Conference Decision:

"The discussion prior to the IEP . . . was reported by [the Student's] mother to be a phone conversation between her and an SSD administrative intern. The intent of the call was to discuss the variety of placement options available to help parents prepare for the IEP meeting."

(Resp Exh 24, p 82, ¶ 6). The only "formal offer of placement" made by the Districts was "the offer of placement made at the conclusion of the writing of the goals and objectives at the IEP meeting." (Tr Vol I, pp 135 - 136).

38. In July, 1999, Kristi Scanlon, a Speech-Language Pathologist, reported the following to the Student's pediatrician:

1. Auditory Comprehension—The Student “continues to demonstrate receptive language skills that are above average for his chronological age.”

2. Verbal Expression—The Student has a “mild expressive language deficit” and had “demonstrated significant progress since [the] start of speech therapy.” (Resp Exh 17, pp 050 - 051). This information was provided to the Districts on or before the August 17, 1999 IEP meeting.

39. In August, 1999, Kristi Scanlon followed up on her letter dated July, 1999 and reported the following regarding the Student:

“...It is recommended that [the Student] continue to receive speech and language services. Speech intelligibility is a concern. [The Student] is able to produce all age-appropriate phonemes in isolation and at syllable level. However, at CVC level intelligibility decreases significantly. Although [the Student] has made excellent progress, expressive language is not without deficits. [The Student] would likely benefit from exposure to other children without language deficits. [The Student] would benefit from these models. However, speech and language services are necessary to provide [the Student] with the opportunity to continue improving speech intelligibility and expressive language skills to age-appropriate.”

(Resp Exh 18, p 052). This information was provided to the Districts on or before the August 17, 1999 IEP meeting.

40. On August 13, 1999, Raj Boodoosingh-Musgray, the Student's speech-language pathologist from March 19, 1999 through June 10, 1999 reported that while she worked with the Student, the Student achieved his vocabulary goal, achieved his mean length of utterance goal, was able to name and identify pictures and objects with 70% to 85% accuracy and improved his speech intelligibility from 40% accuracy to about 90% accuracy. This report concluded stating:

"I believe that [the Student] may continue to further improve these skills if given the opportunity to see and hear typically developing speech and language models in a classroom consisting of his peers. An environment such as this may also help to improve social development that is expected among typically developing children his age. Working to improve these skills will not only help [the Student] to succeed in the classroom but is necessary to succeed in life as well."

(Resp Exh 19, p 053). This information was provided to the Districts on or before the August 17, 1999 IEP meeting.

41. On August 17, 1999, Districts convened a conference to discuss and prepare an individualized education program ("IEP") for the Student. Present and participating in the meeting were the Student's parents; Kristine Penn; Maureen Wikete; Nancy Tumbrink; Pat Teich; Jean Manning; Ken Eigenberg (PACCD Representative); Kathy Strong and Rebecca Borowitz (the Student's aunt). (Resp Exh 20, p 054; Tr Vol I, p 30).[5]

42. The personnel from the Districts came to the August 17 IEP meeting with a "draft" of the IEP, which the Parents understood was for discussion purposes. (Tr Vol I, p 30). Likewise, the Parents came to the meeting with written goals and objectives which they requested to be placed in the IEP. (Tr Vol I, p 31; Tr Vol II, p 22). The parties to the IEP meeting discussed the Districts' draft and the written goals and objectives provided by the parents (Tr Vol II, pp 45 - 47) and "universally agreed" to the parents' draft goals and objectives. (Tr Vol I, pp 30 - 31)[6] and added one or two additional goals and objectives which were proposed by the Districts. (Tr Vol I, pp 33 - 37). The finalized goals and objectives were as follow:

Goal Number 1 — [The Student] will use 5 - 7 word utterances to communicate with same-age, typically developing peers and adults in classroom activities on 3 out of 4 opportunities.

1. will use 5 word mean length utterance in imitation
2. will use 5 word mean length utterance w/out model
3. will use 7 word mean length utterance in imitation
4. will use 7 word mean length utterance w/out model

Goal Number 2 — [The Student] will answer simple questions across all settings with 80% accuracy.

1. will answer yes/no questions
2. will answer "what" questions
3. will answer "who" questions
4. will answer "where" questions
5. will generalize to same age, typically developing peers across all settings

Goal Number 3 — [The Student] will develop a more age-appropriate vocabulary by using object and action words and applying his vocabulary across all settings 80% of the time for 3 days.

1. will locate object in class when named
2. will point to an action picture when named in a field of 2 - 4 pictures
3. will name an action picture in a field of 2 - 4 pictures
4. will point to an object picture when named in a field of 2 - 4 pictures
5. will name an object picture in a field of 2 - 4 pictures
6. will apply action/object vocabulary in functional way to all settings

Goal Number 4 — [The Student] will produce targeted age-appropriate sounds with 80% accuracy.

1. in words
2. in spontaneous speech

3. will generalize intelligible speech sounds in class with same-age, typically developing peers

Goal Number 5 — [The Student] will increase his social skills by verbally initiating interaction with peers on 3 out of 4 opportunities.

1. will engage himself in an activity with 1 - 2 children w/adult assistance
2. will engage himself in an activity with 1 - 2 children independently
3. will verbally engage himself in an activity with 1 - 2 children with adult assistance
4. will verbally engage himself in an activity with 1 - 2 children independently
5. will initiate verbal interaction in an activity with 1 - 2 children with adult supervision
6. will initiate verbal interaction in an activity with 1 -2 children independently

(Resp Exh 20, pp 061 - 062). The Parents do not object to the goals and objectives set forth in the IEP. (Tr Vol I, p 73).

43. With respect to Goal number 2, the Parents interpreted the term "across all settings" to mean in "any home setting, any neighborhood setting, anywhere [the Student] is in a setting, across all settings." (Tr Vol I, p 74; Tr Vol II, p 23). However, the Parents do not expect the Districts to implement services in the home or in the neighborhood or pay for such services. (Tr Vol I, p 82)

44. During the August 17, 1999 IEP meeting, following agreement on the educational programming for the Student, the parties turned to the issue of the appropriate placement for the Student. At the beginning of the IEP meeting, the Parents informed the IEP team that they had registered the Student at Barretts School because they believed it was important for the Student to attend school with his twin brother. (Tr Vol I, p 80; Tr Vol III, pp 25 - 26). Districts recommended that the Student receive one hundred twenty seven and one half (127.5) minutes

of early childhood special education services in a combination of multiple settings. (Resp Exh 20, p 055). These services included sixty (60) minutes per week of speech-language services in a special education setting; sixty (60) minutes per week of speech-language services in a general education preschool setting and seven and one-half (7.5) minutes per week of consultative speech-language services.

45. The parents consented to the educational placement recommended by the Districts (Resp Exh 20, p 065), but requested an additional unspecified number of minutes in a regular educational classroom. (Tr Vol I, p 116). The parents presented the IEP team with a copy of a DESE technical bulletin which the Student's father stated appeared to be "new information that [the Districts' personnel] . . . hadn't processed." (Tr Vol I, p 150; Tr Vol II, p 25). An attempt was made to contact Teresa Tometich, a representative from DESE, to get an interpretation of the technical bulletin but it was unsuccessful. (Tr Vol 1, p 40; p 151). According to the Student's mother, the representatives of the Districts stated that they "really didn't know [the Student] very well" and "perhaps he has more needs than can be gotten in a regular education setting." (Tr Vol I, pp 41 - 42). Again, according to the Student's mother, the Districts' representatives offered to discuss a more self-contained placement for the Student. (Tr Vol I, p 41). After a lengthy discussion concerning the placement of the Student, the parties agreed to reschedule the IEP meeting for September 3, 1999 to discuss the number of general education minutes to be provided to the Student. (Tr Vol I, p 45; Resp Exh 20, p 071).

46. Prior to the September 3, 1999, IEP meeting, the parties were able to have a telephone conference with Teresa Tometich. During that conversation, Ms. Tometich indicated that "the goals and objectives didn't warrant regular education minutes . . . and she could not recommend, and would not recommend . . . that was the IEP team decision." (Tr Vol I, p 152). Ms. Tometich further stated that "if the IEP determined that minutes of regular ed were required for FAPE and to meet the goals and objectives that DESE actually would be the one that paid for those . . . but that the funding shouldn't be a part of the decision." [7] (Tr Vol I, p 152).

47. On or after August 26, 1999, the Student's first day of school, and prior to the September 3, 1999, IEP meeting, Ms. Tumbrink observed the Student while he was in Ms. Wikete's classroom. (Tr Vol I, pp 49 - 50). In a subsequent telephone conversation, Ms. Tumbrink indicated to the Student's mother that she had "made specific time to come and observe the [Student]" and was impressed with him. (Tr Vol I, p 50). The Student's mother also spoke with a speech language therapist who was working with the Student who indicated that the Student was doing very well. (Tr Vol I, p 50). The Student's mother interpreted these comments to indicate that the Districts were now questioning whether the Student was eligible for services, which she believed was "retribution" for her requests for inclusion. (Tr Vol I, p 50).

48. On September 3, 1999, the second IEP meeting was convened. Present at this meeting were the Student's parents; Jean Manning (Parkway Preschool Coordinator); Nancy Tumbrink; Kristine Penn; Maurine Wikete; Emily Mayer; Dee Dee Cooke; Kathy Strong and Ken Eigenberg. During the meeting the parents requested three hundred (300) minutes of education time, without special support, to be included on the IEP service page. (Resp Exh 22, p 081; Tr Vol I, pp 116 - 117). No agreement was reached concerning the addition of these additional minutes to the IEP. Since no agreement was reached, on the service page of the Student's IEP the Districts inserted sixty minutes of special education services delivered in the general education setting ("push in services"); sixty minutes of special education services in a special education setting ("pull out services") and seven and one-half minutes of indirect special education services. (Resp 20, p 55).

49. Between June 21, 1999 and September 3, 1999, the Student received speech and language services from the First Steps program and beginning August 26, 1999, the first day of school with the Districts, the Student received services from the Districts. (Tr Vol I, pp 72 - 73).

50. On September 7, 1999, the Student's parents requested that a Resolution Conference be convened to discuss the following issues:

- A. The School Districts' refusal to include three hundred (300) minutes in a regular education setting on the Student's IEP;
- B. The School Districts' failure to develop an IEP for the Student within thirty (30) days following the educational diagnosis of the Student;
- C. The School Districts' discussion of services and appropriate placement of the Student before the IEP team developed the appropriate goals and objectives for the Student's IEP;
- D. The School Districts' failure to consider a full continuum of educational placements for the Student;
- E. The School Districts' failure to provide written notice of the August 17, 1999 IEP meeting at least ten (10) days prior to the meeting;
- F. The School Districts' failure to have a speech-language pathologist present at the August 17, 1999 IEP meeting;
- G. The School Districts' failure to perform sufficient assessments on the Student so as to allow for development of goals and objectives during the August 17, 1999 IEP meeting;
- H. Allowing a Special School District Administrator to observe the Student on August 31, 1999 without the knowledge or consent of the Parents;
- I. The School Districts' failure to provide written notice of the September 3, 1999 IEP meeting to the Parents;
- J. Discussion of non-related topics by School District personnel during the September 3, 1999 IEP meeting;
- K. The School Districts' failure to provide written justification for placement and denial of the parents' requests to amend the Student IEP.

(Resp Exh 22, pp 076 - 077)

51. On September 10, 1999, the Districts sent the Parents a Notice of Action Refused which was official notification of the IEP committee's decision to reject the Parents' request for "an addition of 300 minutes of general education . . . to [the Student's] IEP (8-17-99)." (Resp Exh 23, p 078). The Notice of Action Refused indicates that the Parents' request was rejected because "[t]he goals and objectives of the IEP for [the Student] could be implemented without general education minutes." (Resp Exh 23, p 078).

52. On September 15, 1999, the Resolution Conference was convened by mutual agreement. Four of the issues presented at the Resolution Conference are presented in this Due Process proceeding. On September 20, 1999, the Districts transmitted their Report regarding the Resolution Conference held on September 15, 1999. (Resp Exh 25, pp 080 - 083). The Districts determined the following with respect to the four issues in this Due Process proceeding:

**Issue 1 — Whether the Districts exceeded the time lines for holding an IEP meeting for the Student during the period of June through August, 1999 and if so, did such act result in a denial of a free appropriate public education for the Student.**

"Although 56 calendar days elapsed between the June 21, 1999 diagnostic conference and the August 17, 1999 IEP, appropriate staff were not available until mid-August to hold the IEP. . . . Parents and their guests attended both August 17, 1999 and the September 3, 1999, IEP meetings. . . . [The Student's] special education services began immediately with the start of the school year and were not delayed by any IEP issues. . . . There were reasons for the delay in convening the IEP and services were begun at the start of the school year. Therefore, no harm resulted." (Resp Exh 24, p 82, ¶ 6; p 83, ¶ 3).

**Issue 2 — Whether the Districts failed to maintain a continuum of services for the Student and if so, did such act result in a denial of a free appropriate public education for the Student.**

“Opportunities for ‘inclusive’ programming are available when recommended by the IEP committee.” (Resp Exh 24, p 83, ¶ 3)

**Issue 3** — Whether the Districts offered a placement for the Student prior to the August, 1999 IEP meeting and if so, did such act result in a denial of a free appropriate public education for the Student.

“The discussion prior to the IEP . . . was reported by [the Student’s] mother to be a phone conversation between her and an SSD administrative intern. The intent of the call was to discuss the variety of placement options available to help parents prepare for the IEP meeting. . . . The conversation prior to the IEP was not intended to make placement recommendations, but was only an informal conversation to assist with IEP preparations.” (Resp Exh 24, p 82, ¶ 7; p 83, ¶ 3).

**Issue 4** — Whether the Student’s IEP should contain an additional three hundred (300) minutes in a regular education setting in order to provide the Student with a free appropriate public education and to meet the goal and objectives in the Student’s IEP.

“The 60 minutes in a general education preschool setting is sufficient to provide the opportunities for generalization identified in the goals/objectives and, according to the educational staff at the resolution conference, should ensure that the goals are met. The above program appears to be reasonably calculated to confer educational benefit at this time.” (Resp Exh 24, pp 082 - 083, ¶ 1).[8]

53. The Districts also determined that, when the Student’s IEP committee was reconvened, “the committee should determine if reevaluation is needed” which is:

“especially important due to some potential discrepancies in prior evaluations, the fact that there has never been formal standardized testing by public school staff, the significant growth in speech and language that [the Student] is apparently demonstrating and the issues that exist related to FAPE for [the Student].”

(Resp Exh 24, p 83, ¶ 2).

54. Following the Resolution Conference, on September 17, 1999, Diana Chamblin-Bevirt, Speech and Audiology Department Manager at Forest Park Hospital in St. Louis, Missouri, performed a speech and language screening on the Student. (Tr Vol II, pp 50 - 52). Ms. Chamblin-Bevirt issued a report (Pet Exh 5, p 9) which "indicates a definitive diagnosis of . . . central auditory processing disorder, can't be made until the child is at least six." (Tr Vol II, pp 52 - 53). Ms. Chamblin-Bevirt testified that it is her opinion that the Student:

". . . really needs the same-aged normally developing peers in order to have a good model for speech and language development, so that he can hear the correct sounds being produced and he can also see what normal interaction is all about, and the power of your words, how if you make an utterance . . . [if] you ask for something, then it's given to you."

(Tr Vol II, p 60). Ms. Chamblin-Bevirt stated she believes the Student "needs at a minimum, at least two times a week in a structured normal classroom, with same-aged peers and normal speech and language development" (Tr Vol II, p 63) and "needs two hours a week [of structured speech therapy, outside the normal classroom] to start and then taper off after that." (Tr Vol II, p 64).

55. By letter dated October 1, 1999, the Parents requested that a due process hearing be held. (Panel Exh 1). The Parents describe the problem giving rise to their request for due process as follows:

". . .The nature of our dispute involves the number of regular preschool education minutes as a setting that need to be included in our son's IEP – currently, the service minutes do not reflect the educational needs of [the Student] as delineated by the goals and objectives in his IEP. At the reconvening of our son's IEP meeting on Friday, September 3, 1999, we were informed of SSD's decision not to provide a free and appropriate public education (FAPE) in the least restrictive environment (LRE) per the Individuals with Disabilities Education Act (IDEA). By refusing to include the required regular

education minutes for our son to fulfill the goals and objectives on his IEP, SSD has failed to offer FAPE to our son.”

(Panel Exh 1). The Parents’ request for due process proposes to resolve the stated problem by revising the Student’s “IEP to reflect 300 minutes of regular preschool education as a setting necessary for him to be able to fulfill his IEP.” (Panel Exh 1).

56. In December, 1999, the Student was evaluated by Mary Warburton, a speech language pathologist at St. Louis Children’s Hospital. (Tr Vol II, pp 77 - 79). During the evaluation, Ms. Warburton took a history of the Student which indicated that he has a “family history of a central auditory processing disorder” which is generally not diagnosed until age six. (Tr Vol II, pp 82). As a part of the evaluation, Ms. Warburton administered two tests. The results of those tests were as follows:

A. Preschool Language Scale 3 (“PLS”) — The PLS is a peer-normed standardized test, which measured the Student’s receptive and expressive language. (Tr Vol II, pp 86 - 87). Ms. Warburton testified that the Student’s “scores on the PLS 3 placed [the Student] within the mean” . . . which means that “he scored right along with his peers, or he was in the range of where his peers would be.” (Tr Vol II, pp 86 - 87).

B. Goldman Fristoe Test of Articulation — The Goldman Fristoe Test of Articulation tests the Student’s expressive vocabulary. (Tr Vol II, pp 93 - 94). Ms. Warburton determined that the Student’s speech intelligibility was “about 50 percent in a known context.” (Tr Vol II, pp 94 - 95). Ms. Warburton admitted, however, that the Student’s acquisition of expressive language was within the “developmental range”. (Tr Vol II, pp 110 - 111).

Ms. Warburton summed up her evaluation of the Student stating that she believes the Student “doesn’t have just an articulation problem. He has an articulation problem . . . that becomes an intelligibility problem that affects his greater expressive language.” (Tr Vol II, pp 95 - 96).

57. When asked to review the goals and objectives on the Student's IEP, Ms. Warburton, indicated that they "are appropriate goals" for the Student. (Tr Vol II, p 113).

58. With respect to placement, Ms. Warburton recommended that the Student's IEP team be reconvened and that they consider placing him in a "language classroom" where the focus of the classroom is to work on language and communication or a Special School District early childhood classroom which emphasizes stimulation of language. (Tr Vol II, pp 99 - 101). Ms. Warburton testified that it would be appropriate to have typically developing same-aged peers present when the speech therapist works with the Student because they would "provide a good model" for the Student "when it comes to speech, speech articulation, intelligibility . . . to express himself, in order to get his wants and needs met." (Tr Vol II, pp 102 -103; pp 106 - 107). Ms. Warburton stated that she feels the Student should receive two to three hours per week in the language classroom. (Tr Vol II, p 104). She stated:

"He needs more language intervention in a group setting, either in a large group setting, which would be the classroom, and also, with some smaller groups to work more intensively on speech and language. . . . It would be language intervention with a speech therapist involved in the delivery model for whatever hours he gets, but he needs an environment where the persons that are responsible for him or are educating him have some knowledge of how to facilitate language with him."

(Tr Vol II, p 119).

59. On March 7, 2000, Dr. Michael J. Noetzel, a Pediatric Neurologist, provided a report to the Parents concerning his examination of the Student. (Pet Exh L). Dr. Noetzel testified that it was his "neurological diagnosis" that the Student had "expressive language difficulties resulting in deficits in socialization and behavior." (Tr Vol I, pp 105 - 106). With respect to the question of whether the Student has central auditory processing difficulties, Dr. Noetzel testified that the Student is too

young to be tested for such difficulties (Tr Vol I, p 95) and it would be speculation at this point for him to express such a diagnosis. (Tr Vol I, p 108). Dr. Noetzel further testified that it is his medical opinion that the Student needs to be in an integrated classroom with age-appropriate peers “on average three or four mornings out of a week in order to really make effective use of the opportunities.” (Tr Vol I, pp 98 - 99). Dr. Noetzel stated that while the Student was “only two months behind” in expressive language, he was concerned about its impact “on socialization more than anything else.” (Tr Vol I, pp 101).

60. Maureen Wikete, lead teacher in the Barretts Elementary Preschool classroom, testified that during the 1999 - 2000 school year she had the Student in her classroom. (Tr Vol III, pp 7 - 8). Ms. Wikete further testified that the Student exhibited typical social interaction for a three-year-old (Tr Vol III, pp 10 - 11); that she could “usually” understand the Student’s speech (Tr Vol III, pp 13 - 15); and, she believed the Student engaged in socially appropriate behavior from the beginning of the school year. (Tr Vol III, p 15). Ms. Wikete also testified that she felt the program being provided to the Student by the Districts was appropriate. (Tr Vol III, p 16).

61. Emily Mayer, the Speech Pathologist who has worked with the Student during School Year 1999-2000, testified that the allotted thirty minutes per school day was a sufficient period of time within which to work on the goals and objectives in the Student’s IEP. (Tr Vol III, p 130). Ms. Mayer further testified that during the School Year, the Student has met Objectives 1, 2, 3 and 4 of his IEP and has progressed on Objective 5. (Tr Vol III, p 131). Ms. Mayer also stated that it was her opinion that the one hour out of class and the one hour in class as proposed by the Districts was appropriate for the Student. (Tr Vol III, p 134).

## **CONCLUSIONS OF LAW**

The Hearing Panel makes the following Conclusions of Law:

### **I. Conclusions Of Law – Generally**

62. The Individuals with Disabilities Education Act, ("IDEA"), 20 U.S.C. §1400 *et seq.*, the IDEA regulations, 34 C.F.R. Parts 300-301 and the *State Plan for Part B of the Individuals With Disabilities Education Act*, (November, 1996)("State Plan") set forth the rights of students with disabilities and their parents and regulate the responsibilities of educational agencies, such as the School District in providing special education and related services to students with disabilities.

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

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

- (a) Are provided at public expense, under public supervision and direction, and without charge;
- (b) Meet the standards of the SEA, including the requirements of this part;
- (c) Include preschool, elementary school, or secondary school education in the State involved; and,
- (d) Are provided in conformity with an IEP that meets the requirements of §§300.340--300.350." (34 C.F.R. §300.8).

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

65. If parents believe that the educational program provided for their child fails to meet this standard, they may obtain a state administrative due process

hearing. 34 C.F.R. §300.506; *Thompson v. Board of the Special School District No. 1*, 144 F.3d 574, 578 (8th Cir. 1998); *Fort Zumwalt School District v. Clynes*, 119 F.3d 607, 610 (8th Cir. 1997), *cert. denied* \_\_\_ U.S. \_\_\_, 118 S.Ct. 1840 (1998); *Ojai Unified School District v. Jackson*, 4 F.3d 1467, 1469 (9th Cir. 1993), *cert. denied* 513 U.S. 825, 115 S.Ct. 90 (1994).

66. The IDEA is designed to enable children with disabilities to have access to a free appropriate public education which is designed to meet their particular needs. *O'Toole, supra.*, 144 F.3d 692, 698. The IDEA and the State Plan require the School District to provide a child with a disability with a "basic floor of opportunity...which [is] individually designed to provide educational benefit to the handicapped child." *Rowley, supra.*, 102 S.Ct. 3034, 3047. In so doing the IDEA does not require that the school district "either maximize a student's potential or provide the best possible education at public expense," *Rowley, supra.*, 102 S.Ct. 3034, 3049; *O'Toole supra.* 144 F.3d 692, 698; *Heather S., supra.* 125 F.3d 1045, 1054; *Fort Zumwalt, supra.* 119 F.3d 607, 612; *Johnson v. Independent School District No. 4 of Bixby, supra.* 921 F.2d 1022, 1026; *A.W. v. Northwest R-1 School District*, 813 F.2d 158, 163-164 (8th Cir. 1987); and, *Gregory K. v. Longview School District*, 811 F.2d 1307, 1314 (9th Cir. 1987). Likewise, a school district is not required to provide a program that will, "achieve outstanding results", *E.S. v. Independent School District No. 196*, 135 F.3d 566, 569 (8th Cir. 1998); that is "absolutely [the] best", *Tucker v. Calloway County Board of Education*, 136 F.3d 495, 505 (6th Cir. 1998); that will provide "superior results," *Fort Zumwalt, supra.* 119 F.3d 607, 613; or, that will provide the placement the parents prefer. *Blackmon v. School District of Springfield, R-12*, 198 F. 3d 648, (8th Cir. 1999); *E.S., supra.* 135 F.3d 566, 569. See also: *O'Toole supra.* 144 F.3d 692, 708; *Tucker, supra.*, 136 F.3d 495, 505; *Heather S., supra.* 125 F.3d 1045, 1057; *Board of Education of Community Consolidated School District No. 21 v. Illinois State Board of Education*, 938 F. 2d 712, 716-17 (7th Cir. 1991) and, *Lachman, supra.*, 852 F.2d 290, 297. This is true even if the "parents show that a child [will make] better progress in a different program." *O'Toole supra.* 144 F.3d 692, 708 citing *Walczak v. Florida Union Free School District*, 142 F.3d 119, 132 (2nd Cir. 1998).

67. At the Administrative hearing level, the School District has the burden of proving that it has complied with the IDEA. *Blackmon v. School District of Springfield, R-12*, 198 F. 3d 648, (8th Cir. 1999); *E.S., supra.* 135 F.3d 566, 569 citing *Clyde K. v. Puyallup School District No. 3*, 35 F.3d 1396, 1398-99 (9th Cir. 1994), and that the educational program and placement are appropriate. *Burger v The Murray County School District*, 612 F. Supp. 434 (N.D. Ga 1984).

68. In *Rowley, supra.*, the Supreme Court established a two-step test to be followed by a court when it reviews a state decision regarding the appropriateness of a school district's education program. *Rowley, supra.*, 102 S. Ct. 3034, 3051. The *Rowley* Court described the two-step test as follows:

"First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more." (footnote omitted).

*Rowley, supra.*, 102 S. Ct. 3034, 3051; *see also Tucker v. Calloway County Board of Education*, 136 F.3d 495, 501 (6th Cir. 1998); *E.S., supra.*, 135 F.3d 566, 569; *Fort Zumwalt, supra.*, 119 F.3d 607, 611; *Independent School District Number 283 v. S. D.*, 88 F.3d 556, 561 (8th Cir. 1996); *A.W., supra.*, 813 F.2d 158, 163.

69. "Procedural deficiencies in the development of a child's IEP warrant rejecting the IEP only if they compromised the pupil's right to an appropriate education, seriously hampered the parent's opportunity to participate in the formulation process, or caused a deprivation of educational benefits." *Blackmon v. School District of Springfield, R-12*, 198 F. 3d 648, (8th Cir. 1999) citing *S.D., supra*, 88 F 3d 556, 562.

## **II. Conclusions Of Law On Issues**

The Hearing Panel makes the following conclusions of law regarding the issues presented to it by the parties:

70. **Issue 1** — Whether the Districts exceeded the time lines for holding an IEP meeting for the Student during the period of June through August, 1999 and if so, did such act result in a denial of a free appropriate public education for the Student.

**Decision** — While the Districts did exceed the time lines for holding an IEP meeting by approximately twenty-seven (27) days, the Hearing Panel finds that the delay did not result in a denial of a free appropriate public education for the Student. More specifically, on March 3, 1999, the Student was screened for eligibility for the First Steps Program and on March 8, 1999, an IFSP was developed for the Student. There is no evidence in the record to reflect that the First Steps Program made any effort whatsoever to notify the Districts concerning First Steps' determination that the Student was a "child with a disability" which was contrary to First Steps' responsibility under the IDEA.

Apparently, the Districts discovered the Student's possible disability through the Parkway Parents as Teachers Program (PAT). The record indicates that the PAT program referred the Student for screening on May 14, 1999 and on June 1, 1999, the Student was referred for evaluation in the areas of speech and language. On June 3, 1999, Special School District prepared a Screening/Evaluation Plan form for the Student finding suspected problems in the areas of hearing, speech and language. The Screening/Evaluation Plan was reviewed with the Student's mother on June 21, 1999 and while some informal assessment was done by a speech/language pathologist that same day. That same day, the Districts discussed the Student's Diagnostic Report with the Student's Mother. The diagnostic team recommended that: (1) language skills should be addressed in all areas; (2) speech skills should be address; and, (3) auditory processing skills should be monitored. The Diagnostic Results form indicates that the Student's evaluation indicated that he was "eligible for ECSE due to delays in speech — (-2.0 SD) and language (-2.0 SD).

On August 17, 1999, Districts convened a conference to discuss and prepare an IEP for the Student. As noted above, this meeting exceeded the time lines by approximately twenty seven (27) days. However, the record reflects that during the Summer of 1999, the Student was still receiving services from the First Steps program so there was no gap in the programming provided for the Student. (Tr Vol III, pp 27 - 28). While the failure to hold the Student's IEP conference within the required time period may constitute a technical procedural violation of the IDEA, the Hearing Panel finds that the delay did not compromise the Student's right to an appropriate education, seriously hamper the Parent's opportunity to participate in the formulation process, cause a deprivation of educational benefits to the Student[9] or, result in a denial of a free appropriate public education to the Student.

71. **Issue 2** — Whether the Districts failed to maintain a continuum of services for the Student and if so, did such act result in a denial of a free appropriate public education for the Student.

**Decision** — The Hearing Panel finds that the Districts have not failed to maintain a continuum of services for the Student. More specifically, the record clearly shows that the Districts maintain an appropriate continuum of educational services for the Student including the option of placement and services delivered in a regular preschool setting as part of the IEP. (See: Pet Exh 7 and Resp Exh 34).

Even if the Districts did fail to maintain a continuum of services for the Student, neither the Parents nor the Districts have objected to the Student's placement during School Year 1999-2000, except with respect to whether the educational program should include regular education minutes. Accordingly, any such failure (which the Hearing Panel does not believe occurred) would only constitute a technical procedural violation of the IDEA, because the Hearing Panel finds that such a failure, if it occurred, did not compromise the Student's right to an appropriate education, seriously hamper the Parent's opportunity to participate in the formulation process, cause a deprivation of educational benefits to the Student or, result in a denial of a free appropriate public education to the Student.

72. **Issue 3** — Whether the Districts offered a placement for the Student prior to the August, 1999 IEP meeting and if so, did such act result in a denial of a free appropriate public education for the Student.

**Decision** — The Hearing Panel finds that the Districts did not offer a placement for the Student prior to the August, 1999 IEP meeting. Accordingly, there was no denial of a free appropriate public education to the Student.

More specifically, following the evaluation of the Student, the Student's Mother had a telephone conversation with Lois Pickowski and Nancy Trumbrink. Ms. Trumbrink testified that during the conversation she was not making reference to placement options, but instead was discussing "programming options" with the Student's mother. The record clearly reflects that the only "formal offer of placement" made by the Districts was "the offer of placement made at the conclusion of the writing of the goals and objectives at the IEP meeting." (Tr Vol I, pp 135 - 136). The placement offered by the IEP team at the August 17, 1999 IEP meeting was not "four days of self-contained cross categorical for preschool" which the Student's Mother testified was offered to her during the July, 1999 telephone conversation with Nancy Trumbrink. (Tr Vol I, p 42). To the extent that there is a conflict in the testimony concerning this issue, the Hearing Panel credits the testimony of Nancy Trumbrink with respect to her communications to the Student's Mother.

73. **Issue 4** — Whether the Student's current placement fails to provide the Student with a free appropriate public education in the least restrictive environment.

**Decision** — The Student's placement during School Year 1999-2000 was defined as "ECSE in a combination of multiple settings." (Resp Exh 20, p 55). The special education services were provided as "push in" and "pull out" services in the pre-school classroom at the Barretts Elementary School. Neither the Parents nor the Districts have objected to the Student's placement during School Year 1999-2000, except with respect to whether the educational program should include

regular education minutes. The Hearing Panel also believes that the Student's placement was appropriate and in the least restrictive environment. Accordingly, the Hearing Panel finds that the Student's School Year 1999-2000 placement, early childhood special education in a combination of multiple settings provided in a regular preschool classroom with small group "pull out" speech/language therapy, was an appropriate placement to address the IEP goals and objectives and to provide a free appropriate public education to the Student. \_

74. **Issue 5** — Whether the Student's IEP should contain an additional three hundred (300) minutes in a regular education setting in order to provide the Student with a free appropriate public education and to meet the goals and objectives in the Student's IEP.

**Decision** — As noted above, the Hearing Panel finds that the Student's placement during School Year 1999-2000, in a pre-school classroom at the Barretts Elementary School, was appropriate for the provision of a free appropriate public education in the least restrictive environment.

However, the Hearing Panel finds that *all* of the goals and objectives developed and agreed to by the Student's IEP team at the August 17, 1999 IEP meeting require that time in a regular preschool classroom be included as a part of the provision of special education services to the Student in order for modeling and practice of interaction with normally developing peers to occur. In particular, goal 1, [The Student will use 5 - 7 word utterances *to communicate with same-age, typically developing peers* and adults *in classroom activities* on 3 out of 4 opportunities] and goal 5, [The Student will increase his social skills by *verbally initiating interaction with peers* on 3 out of 4 opportunities] clearly require significant interaction time between the Student and typically developing peers in a classroom setting. Given that the Student did participate for a full three hundred sixty (360) minutes per week in the regular Barretts preschool, it is impossible to separate out how much of his progress is due to this experience versus the actual direct instructional time with the speech/language pathologist. The Hearing Panel does not believe that the goals in the Student's August 17, 1999 IEP can be

accomplished during the one hundred twenty-seven and one-half minutes (127 1/2) per week of early childhood special education services alone. While the Student was provided with a free appropriate public education, such would not have been the case if the placement was not in a regular education preschool classroom, a reverse mainstream classroom or a comparable placement where the Student could have frequent opportunity for interaction with typically developing peers.

Since interaction with typically developing peers in the regular education program was an essential component of the educational program developed by the Student's IEP team the Hearing Panel believes that at least three hundred (300) minutes in the regular education setting should have been set forth in the Student's IEP and the Districts (or DESE) should pay for such programming.

### **III. Conclusions Of Law – Order**

75. The Hearing Panel orders the Districts to reimburse the Parents for the cost of three hundred minutes per week of regular education preschool programming during the regular school session beginning around September, 1999 and ending around May, 2000. \_

### **OTHER OBSERVATIONS AND RECOMMENDATIONS**

76. The parties stipulated to five issues which are discussed above. The Hearing Panel came away from the hearing with concerns about the Student's screening and evaluation and the decision process used to develop the Student's educational program. Since these concerns were not "issues" presented to the Hearing Panel for decision, the Hearing Panel does not feel it has jurisdiction to decide the issues. In addition, the Hearing Panel believes that it is possible that the parties may have elected not to fully develop or present evidence that would explain the concerns. Nevertheless, the Hearing Panel offers the following, non-binding, observations and recommendations:

A. Screening and Evaluation of the Student — Substantial evidence was presented concerning the screening and "evaluation" of the Student by the

Districts. Since the Parents and Districts did not propose an issue about the appropriateness of the Student's evaluation, the Hearing Panel assumes that both parties believe it was appropriate and adequate.

However, testimony at the hearing from the various experts and educational personnel painted a "bi-polar" picture of the Student as having substantial disabilities or as having progressed significantly — as needing a self-contained placement or a regular education setting with only modest early childhood special education services. The Hearing Panel came away from the hearing believing that the "evaluation" conducted by the Districts in June, 1999 was, at best, perfunctory. Furthermore, since that "evaluation" the Student has been further observed and evaluated by medical and education personnel. Accordingly, the Hearing Panel recommends that the Student's IEP team consider having an independent evaluation conducted on the Student by qualified independent evaluators who have been agreed to by the Districts and the Parents.

B. The Student's IEP — In the event that the Student's IEP team determines that an independent educational evaluation should be conducted on the Student, the Hearing Panel recommends that the Student's IEP team meet to review the independent educational evaluation and develop an appropriate educational program for the Student. IEP participants should include at least one member of the evaluation team and a person certified in the area of speech/language with early childhood special education experience.

C. The ECSE Services Form — The Hearing Panel recommends that the Districts review their ECSE Services form (Resp Exh 20, p 55) to ensure that the personnel of the Districts understand that regular education minutes can be included on the form and to provide guidelines to IEP teams as to how to determine when regular education minutes should be included in an early childhood special education IEP.

## **APPEAL PROCEDURE**

**PLEASE TAKE NOTICE** that these Findings of Fact, Conclusions of Law, Decision and Order constitute the final decision of the Department of Elementary and Secondary Education in this matter.

**PLEASE TAKE NOTICE** that you have a right to request review of this decision pursuant to the Missouri Administrative Procedures Act, Section 536.010 *et seq.* RSMo. Specifically, Section 536.110 RSMo. provides in pertinent part as follows:

"1. Proceedings for review may be instituted by filing a petition in the circuit court of the county of proper venue within thirty days after the mailing or delivery of the notice of the agency's final decision....

3. The venue of such cases shall, at the option of the plaintiff, be in the circuit court of Cole County or in the county of the plaintiff or of one of the plaintiff's residence...

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

\_\_\_\_\_  
Ransom A Ellis, III  
Hearing Chairperson

Dated: \_\_\_\_\_

\_\_\_\_\_  
Dr. Thurma DeLoach  
Hearing Panel Member

Dated: \_\_\_\_\_

\_\_\_\_\_  
Mary Matthews  
Hearing Panel Member

Dated: \_\_\_\_\_

## CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was served upon each party to this action, to-wit:

Mr. and Mrs.

, MO 63021

James G. Thomeczek  
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Department of Elementary and Secondary  
Education  
Post Office Box 480  
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by depositing same in the United States mail at Springfield, Missouri, postage prepaid, duly addressed to said parties on this 31st day of July, 2000.

Ransom A Ellis, III  
Hearing Chairperson

- [1] Petitioner shall be referred to herein as the "Student".
- [2] The term "Tr" refers to the Transcript of the Due Process Hearing in this case.
- [3] The term "ECSE" when used herein means Early Childhood Special Education.
- [4] Respondent's Exhibits are referred to herein as " Exh".
- [5] The IEP meeting on August 17, 1999 was held more than thirty (30) days after the Student was identified as being a "child with a disability." Ms. Tumbrink testified that during the Summer of 1999, the Student was still receiving services

from the First Steps program so there was no gap in the programming provided for the Student. (Tr Vol III, pp 27 - 28).

[6] Apparently, Kristi Scanlon reviewed the goals and objectives prior to the August 17, 1999, IEP meeting in that the Student's mother testified that Ms. Scanlon thought the goals and objectives were "good". (Tr Vol I, p 31).

[7] The hearing transcript, Volume I page 152, indicates that the witness testified that Ms. Tometich stated that "the goals and objectives **didn't** warrant regular education minutes." The Hearing Panel believes the witness testified that Ms. Tometich stated that "the goals and objectives **did** warrant regular education minutes," and the hearing transcript is in error. This conclusion is buttressed by Petitioner's Exhibit 1, page 2, which indicates that "Ms. Tometich says that general education minutes seem to be warranted given the language of the IEP."

[8] The Districts further determined with respect to the additional issues presented by the Parents at the Resolution Conference, the Districts determined that the issues "do not warrant recommended action at this time." (Resp Exh 24, p 083, numbered paragraph 3).

[9] See: *Blackmon v. School District of Springfield, R-12*, 198 F. 3d 648, (8th Cir. 1999) citing *S.D.*, *supra*, 88 F 3d 556, 562.