

Division of Special Education

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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 his parents, _____, and Columbia 93 School District

FINAL DECISION

Now on this 28th day of September, 1998, after hearing the evidence and statements of the parties, and after proper deliberation, the majority of the panel members finds, that; This Three Member Panel has jurisdiction being duly appointed by the Missouri Department of Elementary and Secondary Education on March 10, 1998 pursuant to Section 162.961 RSMo. The parent's due process request was received by the Missouri Department of Elementary and Secondary Education on March 10, 1998. Pursuant to federal and state law the hearing must be held and a written decision rendered and mailed within 45 days from this date, the chairperson of the three member panel may grant extension of time at the request of either party. The panel members assigned were Ben Franklin, Trudy Fulmer, and Joyce Hainen Crandon, Attorney at Law, Chairperson of the Panel.

On March 24, 1998 a Notice of Hearing with certificate of service was issued setting the matter for due process hearing on the 10th day of April, 1998 at 9:00 a.m. at the Columbia 93 School District, 1818 Worley St., Columbia, MO. On April 1, 1998 at the request of the school district

the hearing date was extended to April 17, 1998. On April 4, 1998 the hearing date was changed to April 16, 1998 at the request of the parties. On April 14, 1998 at the request of the school district the hearing date was extended to June 4, 1998. On April 25 at the request of counsel for school district the due process hearing date was extended to June 11, 1998.

On May 16 the fifth grant of extension of time was requested by the parents. The hearing was set for June 1, 1998. The sixth grant of an extension of time was granted to the school district on May 23, 1998 to a date certain in the month of July. A seventh grant of an extension of time was requested by both parties and granted on June 1, 1998 wherein the Due Process hearing date was extended until the 22nd day of July at 8:30 a.m.

The due process hearing was commenced on the 22nd day of July, 1998 at 8:30 a.m. in Columbia, MO. This matter was heard by a three-member panel, Joyce Hainen Crandon, Chairperson, Ben Franklin and Trudy Fulmer, Members, convened in accordance with the relevant statutes of the State of Missouri and the rules and regulations of the Department of Elementary and Secondary Education. The student was not present at the hearing, but he was represented there by his mother and his stepfather. The parents were not represented by counsel. Respondent District appeared by Dr. Kim Ratcliffe, Director of Special Education and was also represented by counsel, Cathy J. Dean, Polsinelli, White, Vardeman & Shalton, Kansas City, Missouri. The matter came on for hearing. Both parties made opening statements. The parents called their first witnesses for direct questions. There was cross examination from the school district and panel members. At the request of both parties the matter was continued until August 3, 1998 for further presentation of evidence.

FINDINGS OF FACTS

After the hearing of evidence and presentation of exhibits, and a proper deliberation, the three member hearing panel makes the following finding of facts:

1. On August 13, 1997, the student enrolled in the District for the 1997-98 school year. D. Ex. Vol. 1, pp. 92-94. At that time, the District was advised that the student had an IEP at his previous school. Id., p. 94.

2. The student is a _____ grade student at Fairview. He is _____ years old. He is warm and affectionate. He attended Pemberton Elementary in the state of Virginia previous to moving to Columbia in August, 1997.

3. The parents were satisfied with the student's progress at Pemberton.

4. The parents do not want the student taken out of regular classes to have one-on-one tutoring.
5. The student and his parents attended the "Meet the Teacher" night on August 25, 1998. D. Ex. Vol. 2, p. 406.
6. School started on August 27, 1997. D. Ex. Vol. 1, p. 96.
7. The student adjusted well to his new school and made friends. Tr. Vol. 1, 513:1-2 (made friends at school) (mother); Tr. Vol. 2, 681:15-25. The student did not have any trouble fitting in with the kids in the classroom. (Ms. Snyders); Tr. Vol. 2, 785:18-786:7 (adjusted well) (Ms. Hassemer).
8. The parents received notice of the September 11, 1997, IEP meeting by telephone on September 8 and in writing on September 9. D. Ex. Vol. 1, pp. 142, 144.
9. When Ms. Snyders sent the notice of the September IEP meeting, she also sent procedural safeguards, which included information about the fact that parents can only be reimbursed for outside testing if they objected to testing done by the District and the other procedures regarding requesting reimbursement for outside testing. Tr. Vol. 1, 432:16-433:7 (Ms. Snyders).
10. On September 11, 1997, the IEP team assembled to draft an interim IEP and to obtain consent to provide special education services. D. Ex. Vol. 1, p. 144.
11. Elaine Hassemer, the Assistant Principal at Fairview Elementary School, served as the local educational agency ("LEA") at the student's September 1997 and December 1997 IEP meetings. D. Ex. Vol. A, p. 144; D. Ex. Vol. 2, p. 251.
12. The "Special Education Eligibility Summary" or diagnostic summary for the student as of September 11, 1997, that the school district utilized, was the one from his previous school. D. Ex. Vol. 1, pp. 38-40; *see also* pp. 27-37; Tr. Vol. 2, 740:8-743:25 (Ms. Snyders). That summary included the psychological testing given to the student in May and June of 1996. Id.; complaint Ex. pp. 69-71; D. Ex. Vol. 1, p. 144 ("Date of most recent evaluation 6/10/96").
13. Based on his prior IEP and input from the parents and teachers at the time of the student's interim IEP, the IEP team accepted his educational diagnosis of Emotional Disturbance and Specific Learning Disabled. D. Ex. Vol. 1, p. 145 ("His current educational diagnosis is Emotional Disturbance and Specific Learning Disabled."); Tr. Vol. 2, 747:17-24 ("We were using the diagnosis from the previous school, the learning disabled, ADHD an SED.") (Ms. Snyders).

14. The IEP team determined that the placement which best met the student's educational needs was a modified regular instruction program. D. Ex. Vol. 1, p. 144.
15. The student has been diagnosed as having Attention-Deficit/Hyperactivity Disorder (ADHD), learning disability in written expression (LD), and severe emotional disturbance (SED). All three diagnoses were made prior to the relevant times of this case and are still active.
16. The procedural safeguards provided were the procedural rights provided by the Missouri State Department of Education to all school districts in Missouri. Tr. Vol. 2, 738:14-20 (Ms. Synders). When the procedural safeguards were presented to the parents, they said they "were familiar with the process as it was discussed, and that they had seen that type of document before in their work with other schools." Tr. Vol. 2, 827:5-24 (Ms. Hassemer).
17. At the September 1997 IEP meeting, the parents did not request an independent evaluation and did not ask the School District to pay for an independent evaluation. Tr. Vol. 2, 777:17-24 (Ms. Hassemer).
18. The parents and the District are in agreement that during the September IEP meeting, the District's procedure for conducting a screening and deciding if further testing would be recommended was discussed. Tr. Vol. 1, 10:15-17 (stepfather's opening statement), 360:21-361:10 (Ms. Snyders); Tr. Vol. 2, 470:9-21 (mother). Thus, the parents knew the school was considering recommending an assessment of the student and the parents had been considering doing an assessment of the student as well. Tr. Vol. 1, 10:15-17 (stepfather's opening statement); Tr. Vol. 1, 438:9-439:8 (Ms. Snyders); Tr. Vol. 2, 471:19-472:3; 547:12-548:13 (mother).
19. At the September IEP meeting, the student's stepfather wrote on the interim IEP, "will meet within three weeks to discuss, add resources, counseling, tutoring, ect." D. Ex. Vol. 1, p. 144; Tr. Vol. 1, 417:5-9 (Ms. Snyders).
20. The student was a warm and affectionate child. [Father's opening statement.]
21. At the September 11, 1997, meeting, the student's mother signed a "Notice of intent to place and consent to place." D. Ex. Vol. 1, p. 143. The procedural safeguards were also provided with that notice. Id. When the student's mother signed the consent for initial placement, she also made a checkmark beside the statement, "I have received and read this notice. I understand the notice and the procedural safeguards attached. I understand the need for the proposed placement of my child. I give the school district permission to make the initial placement." Id.

22. The following events were to occur in the three weeks after the September 11, 1997, IEP meeting: the teachers would work with and observe the student and the teachers would conduct a screening to determine whether they agreed with the disability diagnosis that had been given at the previous school and whether additional testing would be recommended. Tr. Vol. 1, 361:4-10; 417:5-418:4 (Ms. Snyders).

23. Beginning on September 12, 1997, the day after the interim IEP meeting, the student received between 300 and 400 minutes a week of regular modified instruction, 30 minutes a week of consultation with the school counselor, and 1800 minutes a week of regular education. D. Ex. Vol. 1, p. 144.

24. The student's regular modified instruction was provided by Ms. Snyders, a learning specialist. She has an undergraduate degree in special education, learning disabilities, and mental retardation with certification in grades K through 12. She has her master's degree in literacy, the process of reading and writing. Tr. Vol. 1, 407:17-408:17 (Ms. Snyders).

25. Seven days after the September interim IEP meeting, a screening team made up of various members of the District met and acknowledged his current diagnosis of Sever Emotionally Disturbed and Specific Learning Disability. D. Ex. Vol. 1, p. 118. After examining a number of areas, the screening team determined that further evaluation should be recommended, and they developed an evaluation plan for the student. D. Ex. Vol. 1, pp. 118-130 (September 13, 1997, screening meeting).

26. The screening team met on Thursday, September 18, 1997. On Monday, September 22, 1997, the student's parents wrote on the daily assignment sheet, "the student has an assessment scheduled for 10/1 all day an 10/3 one-half day." D. Ex. Vol. 1, p. 135. This notification came before a meeting could be scheduled to discuss the District's recommendation for re-evaluation.

27. The IEP team did not meet again in three weeks, because less than three weeks later the District received notice that the student was going to be out of school for testing through an outside agency. Tr. Vol. 1, 418:5-22 (Ms. Snyders).

28. After the September 1997 IEP, the parents "decided to go ahead and take him to the University Assessment Consultation Clinic to have him go through a battery of tests looking at the ADHD, the LD, achievement, the works. So we sort of got a baseline for the beginning of the school year when we did that. And came back in and the District accepted the test results." Tr. Vol. 1, 10:17-25 (stepfather's opening statement).

29. Ms. Snyders made notes in her contact log on both September 23, 1997 (12 days after the IEP meeting), and September 29, 1997 (18 days after the IEP meeting), regarding the student's outside testing. Tr. Vol. 1, 418:18-421:2 (Ms. Snyders). On September 29, 1997, Ms. Snyders noted that the student's mother "came by to get information for the child's study clinic. The student will be tested this Wednesday and Friday. The interim IEP will be extended until testing results are available." Tr. Vol. 1, 420:22-412:2 (Ms. Snyders); D. Ex. Vol. 2, p. 406. The student's mother acknowledged that the parties agreed to wait for the test results. Tr. Vol. 2, 549:1-4 (the District "said they'd wait for the IEP, to hold the actual IEP meeting until we get the results back.") (mother).

30. Ms. Snyders, the case manager, sent a consent form to the parents requesting that they consent to release the results from the outside testing. Tr. Vol. 1, 421:4-13 (Ms. Snyders). She also wanted to talk to the person at MU who was giving the test. Tr. Vol. 2, 749:17-750:11 (Ms. Snyders). The consent was not returned to Ms. Snyders. Id.; D. Ex. Vol. 2, p. 406 (entry for 9/26/97). At the December 1997 IEP meeting, the parents advised the District in writing that they felt "pressured to hand over a release of information for the student's test results." D. Ex. Vol. 2, p. 226 ("Our Fairview Experience" by parents 12/5/97, pp. 226-229).

31. The parents did not speak to anyone at the District requesting payment for an outside evaluation. Tr. Vol. 1, 418:23-419:11 (Ms. Snyders). The parents did not write to anyone at the District requesting payment for an outside evaluation. Id. There is no evidence in the record to suggest that the parents made any request for reimbursement for the outside evaluation.

32. Starting September 12, 1997, and continuing throughout the year, the student's learning specialist and/or classroom teacher communicated in writing daily and weekly with the student's parents. D. Ex. Vol. 2, p. 406. ("September 12, 1997, began new assignment notebook. I now fill out each afternoon per parent request"); D. Ex. Vol. 1, pp. 110-112, 114, 116, 131, 133-141, 147-149, 151, 153-154, 156-166, 168-169, 186-189, 191-199, 201-207; D. Ex. Vol. 2, pp. 208-209, 221-224, 231-232, 235-240, 243-250, 264-271, 274-282; 296-312, 314-316, 319-329, 331-332, 337-342, 346-347, 353-354, 356-363, 365-374, 376, 381-189, 402-405.

33. At the interim IEP meeting in September 1997, the parents expressed an interest in having a tutor for the student. D. Ex. Vol. 1, p. 144 (father's note mentions tutoring among other things).

34. Because of the parent's interest in tutoring, on September 29, 1997, Ms. Snyders "arranged for the student's parents to contact Diane Audsley for tutoring." D. Ex. Vol. 2, p. 406. Ms. Audsley provides tutoring to students at Fairview Elementary free of charge. That tutoring is

available to all students at Fairview regardless of whether they have an IEP. Tr. Vol.2, 649:22-650:2 (Ms. Audsley).

35. Ms. Audsley has a BS in Elementary Education, as well as a master's degree and a specialist's degree in Reading Education. Tr. Vol.2, 640:7-17 (Ms. Audsley). While receiving her specialist's degree in Literacy, more of her course work was spent in areas for children with disabilities because it is an interest of hers and because her son has attention deficit hyperactivity disorder and is learning disabled. Additionally, she has many hours of college training in special education and assessment. Tr. Vol. 2, 661:3-20 (Ms. Audsley). Ms. Audsley teaches five different college courses, mostly at the graduate level, in addition to her teaching and tutoring at Fairview. Tr. Vol. 2, 6460:7-17 (Ms. Audsley). For the past two years, she has been a mentor teacher and also a tutor outside the regular school day. Id., 640:1-3; 18-21.

36. Before she began tutoring the student, she spoke with both of the parents, the student's classroom teacher, the student's learning specialist, and interviewed the student about what he would like to work on. Tr. Vol. 2, 641:20-642:5 (Ms. Audsley).

37. Ms. Audsley began tutoring the student the first week in October 1997. Tr. Vol. 2, 642:6-7 (Ms. Audsley). She and the student met every Wednesday afternoon from the first week in October through the last week in school. Tr. Vol. 2, 660:9-20 (Ms. Audsley).

38. At the beginning of the student's tutoring, Ms. Audsley worked with him on the projects necessary to earn the right to attend the Newberry field trip. "It's an extra field trip that kids get to go on if they've read 10 Newberry honor books and done projects for them. So we decided to work on the Newberry projects." Tr. Vol.2, 642:24-643:4 (Ms. Audsley).

39. After the Newberry projects were completed, Ms. Audsley began to work with the student on his homework assignments. Tr. Vol. 2, 643:5-6; 647:4-648:4. Because the student expressed an interest in having more free time at home or after school, he and Ms. Audsley spent one or two tutoring sessions working on the homework listed on his homework assignment sheet. The student's stepfather then "asked that we really not work on homework during the tutoring sessions because that was something that they enjoyed doing together at home and they felt like it was pretty manageable." Consequently, Ms. Audsley stopped working with the student on his homework. Id. Thereafter, Ms. Audsley worked with the student on his writing. Tr. Vol.2, 643:5-9; 647:6-10 (Ms. Audsley).

40. The student's stepfather wanted Ms. Audsley to work with the student on "letter formation" to improve the student's handwriting. Tr. Vol.2, 643:17-644:2 (Ms. Audsley).

41. Ms. Audsley thought that the student benefited from her tutoring. Tr. Vol. 2, 649:18-21 (Ms. Audsley). However, she explained that any child would benefit from individual instruction. Id. Ms. Audsley did not think that the student required her tutoring services in order to benefit from his special education services or his instruction in the regular classroom. Tr. Vol. 2, 650:3-7; 651:2-5 ("I don't think he needed it to be successful in school.") (Ms. Audsley).

42. The student's stepfather asked Ms. Audsley to work during the student's tutoring time on: First, to help the student work on extra credit project which allowed the student to go on a field trip. Next, Ms. Audsley was asked to help the student with his handwriting and his letter formation. Ms. Audsley was not asked to work with the student on the composition of sentences, paragraphs, or stories.

43. While the student did not need tutoring to progress at school, Ms. Audsley did think that the student's assistance from Ms. Snyders in the regular class was beneficial to him. Tr. Vol. 2, 670:20-671:10 (Ms. Audsley).

44. Ms. Snyders spent significant periods of time with the student in a one-on-one setting. She went into the student's classroom every day from 11:00 until 12:00 and spent on average over one-half that time sitting one-on-one with the student. Tr. Vol. 1, 357:11-358:3 (Ms. Snyders). In describing what she did during the 11:00-12:00 time;

"During the regular reading program there's a lot of writing involved and so I always helped the student with that. And then since the student's disability was in written expression we also made sure if there was some kind of writing project, a report, a story, creative writing, that we would do it during that time." Tr. Vol. 1, 378:5-12 (Ms. Snyders).

45. In addition, she went back into his classroom from 3:00 until 3:35 and that time was spent only with the student on a one-on-one basis. Tr. Vol. 2, 703:20-704:4 (Ms. Snyders). Tr. Vol. 2, 706:5-7 ("Q: Did you assist other students? A: Not during that time.") (Ms. Snyders). The time spent from 3:00 until 3:35 was devoted to working on the writing process with the student. Tr. Vol. 2, 704:5-705:3 (Ms. Snyders).

46. The December 1997 IEP meeting involved six hours of discussion and took place over three different days starting on December 5, 1997. D. Ex. Vol. 2, p. 241. The parents received notice of the December 1997 IEP meetings and attended each meeting. D. Ex. Vol. A, pp. 200-201 ("Other: Went on field trip today - sent home notice of IEP and procedural safeguards"); Vol. 2, p. 230, p. 407 (entries for 11/19 and 11/20), p. 408 (entries for 12/9/97 - 12/12/97).

47. When the parents went to the December 1997 IEP, they took with them a written statement, "Our Fairview Experience," which was an outline of what the parents wanted to discuss. D. Ex. Vol. 2, pp. 226-229; Tr. Vol. 2, 477:11-19 (mother).

48. The student's stepfather brought several copies of "Our Fairview Experience" to the December 1997 IEP. Tr. Vol. 2, 790:5-792:16 (Ms. Hassemer). All the members of the IEP Team spent some time reviewing the document and then the team focused on the information that they needed from the document to continue the IEP. Id. There were some issues mentioned in the document that were not relevant to the IEP process and it was explained that they would be addressed at a later date. Id.

49. After the first session of the December 1997 IEP meeting, Ms. Hassemer, the LEA, wrote a summary of the first meeting. Tr. Vol. 2, 780:19-782:8 (Ms. Hassemer); D. Ex. Vol. 2, p. 233.

50. Ms. Hassemer explained the purpose of that document: "I wanted to make sure that we recalled what we had talked about and what our discussions were involving and where we were headed. And this was an agenda for us to use as we continued that IEP meeting so we wouldn't start back at square one and rehash everything that we'd already been over." Id.

51. At the parent's request, Dr. Kim Ratcliffe attended the December 1997 IEP meetings. Dr. Ratcliffe is the Director of Special Education for the District. Tr. Vol. 2, 834:7-10 (Dr. Ratcliffe). As part of her duties she is responsible for being familiar with the rules, statutes and laws that the District must follow in order to receive funding for special education. Id., 835:20-836:12. She has received training and experience with respect to those laws from the Department of Elementary and Secondary Education for the State of Missouri provided to directors of special education. In addition, she has a specialist's degree in Special Education Administration and her doctorate is in Special Education.

52. At the beginning of the December IEP meeting, Dr. Ratcliffe explained that she wanted to add an additional item to be discussed at the meeting, to consider whether a re-evaluation was necessary. Tr. Vol. 2, 659:19-861:14 (Dr. Ratcliffe). She did that because under the amendments to IDEA, assessment or reassessment needs to be part of the IEP discussion. Id.

53. One of the items discussed was whether additional testing was needed because the screening team questioned the portion of the previous diagnostic summary which concluded that the student was seriously emotionally disturbed ("SED"). D. Ex. Vol. 2, p. 241; tr. Vol. 2, 861:1-863:10 (Dr. Ratcliffe).

54. The student's mother was adamant, at the December 1997 IEP meeting, that she did not want the District to examine whether or not the student's diagnosis of SED was accurate. Tr. Vol. 2, 513:6-11 (mother).

55. After re-evaluation was discussed, "The team determined that with due respect for the parents and their history with their son, that it was perhaps premature on our part to want to look at that diagnosis, because [the parents] felt that there might be trouble down the road and he might have some adjustment problems. And so the team decided that it would be prudent on our part to wait and to look at a re-evaluation after the student had gone through a year." Tr. Vol. 2, 862:16-25 (Dr. Ratcliffe); D. Ex. Vol. 2, p. 241.

56. After lengthy discussion, the IEP team accepted the testing done by the University of Missouri and accepted the previous educational diagnosis of seriously emotionally disturbed and specifically learning disabled. Tr. Vol. 1, 10:15-25 ("the District accepted the test results") (stepfather's opening statement); Tr. Vol. 2, 548:3-4 ("We met back, and they accepted the assessment testing that was done.") (mother); Tr. Vol. 1, 430:3-431:9 (Ms. Snyders); Tr. Vol. 2, 754:5-7 ("There was no elimination of that diagnosis.") (Ms. Snyders); D. Ex. Vol. 2, p. 252 ("His current diagnosis is Seriously Emotionally Disturbed and Specifically Learning Disabled."); Tr. Vol. 2, 825:23-826:13 ("We had agreed to continue on with the diagnosis that he had from his old school.") (Ms. Hassemer).

57. With respect to the diagnostic summary, the question was posed to Ms. Snyders, "Did you have a diagnostic summary on the student?" Tr. Vol. 2, 727:13 (Ms. Snyders). The response was no, that the Columbia District had done nothing beyond informal check lists. Tr. Vol. 2, 727:14 (Ms. Snyders). Clearly, the District did not re-evaluate the student and create a diagnostic summary. Instead, the District was using the diagnostic summary by the previous school. Tr. Vol. 2, 728:12-17 (Ms. Snyders); D. Ex. Vol. 2, p. 241.

58. The student's parents recommended that the student's IEP include the following: "Special Education Services: modified regular instruction program, 300 to 400 minutes (1:1 attention), Related and Other Services: tutor (after school), 240 minutes; school counselor, 30 minutes; psychotherapy, 45 minutes." D. Ex. Vol. 2, p. 228 ("Our Fairview Experience").

59. The student had significant problems in the past. Tr. Vol. 2, 450:16-452:21 (mother). These behavior problems were first observed when the student was 3 or 4 years old. Id., 450:16-24. When he started school, "preschool for handicaps," he had to be restrained because he was

biting, kicking, spitting at the teachers, where he endangered the other students and himself. Id., 451:7-24.

60.Eventually, the student was placed in foster care. Tr. Vol. 2, 452:2-11 (mother). When the student came home from foster care, his mother noticed improvement in his behavior. Tr. Vol. 2, 452:19-21 (mother).

61.The student's parents felt strongly that one of the reasons the student was behind his peers was "because he was pulled out so much when he was younger due to the behavioral problems which have thankfully mostly subsided." Tr. Vol. 1, p. 12:1-4 (stepfather's opening statement). Consequently, the parents did not want the student "pulled out" of class. Instead, the parents wanted the student to receive additional tutoring after school. However, there was no evidence that the student had behavior problems at Fairview which caused him to be pulled out of class. Instead, the evidence established that he was behaved in class and he demonstrated academic progress.

62.While the teachers recognized that additional tutoring or practice is helpful to any student, they testified that the student did not need the after-school or before-school tutoring in order to benefit from the special education services provided to him nor did he need them to make meaningful progress toward the goals and objectives in his IEP. Tr. Vol. 1, 310:22-311:1 (Ms. Greeson); Tr. Vol. 1, 416:2-6 (Ms. Snyders); Tr. Vol. 2, 872:14-873:10 (Dr. Ratcliffe). To the contrary, the progress reports for the student as well as the testimony of hi classroom teacher, Ms. Greeson, and his learning specialist, Ms. Snyders, establish that he did receive educational benefit from his IEP and made meaningful progress toward his goals. D. Ex. Vol. 2, pp. 390-392; Tr. Vol. 1, 299:3-311:1 (Ms. Greeson); Tr. Vol. 1, 380:11-394:19; 429:3-21 (Ms. Snyders).

63.Ultimately, the December IEP provided for special education services of a modified instruction program 400 minutes a week and for related services with the counselor 30 minutes a week, and 1800 minutes a week of regular education content in all academics, including art, music, and physical education. D. Ex. Vol. 2, p. 251. The 400 minutes of special education services included an additional 30 minutes of one-on-one instruction from Ms. Snyders in the regular classroom. This placement was agreed upon because the parents thought the student needed more one-on-one instruction in writing but they did not want the student to be taken out of his regular education classroom to the resource room. Tr. Vol. 2, 483:10-484:1 (mother).

64.The team agreed on the goals and objectives set out in the IEP. D. Ex. Vol. 1, p. 242; Tr. Vol. 1, 428:12-430:2 (Ms. Snyders). However, the parents refused to sign as team members in

attendance at the December IEP because the IEP did not include as a "related and other service" tutoring after school and did not include psychotherapy. D. Ex. Vol. 2, pp. 225 and 251; Tr. Vol. 1, 428:12-429:2 (Ms. Snyders); Tr. Vol. 2, 486:5-6 (mother).

65. "Related Services" are services which are needed for a child to benefit from other special education services. Tr. Vol. 1, 415:22-416:1 (Ms. Snyders).

66. The teachers did not think the student needed tutoring or psychotherapy to benefit from his special education services. The student obtained educational benefit from his IEP without those services. Tr. Vol. 1, 415:22-416:6 (Ms. Snyders).

67. Ms. Audsley attended the December 1997 IEP meeting. Tr. Vol. 2, 645:9-11. At that meeting, tutoring was discussed. Id., 645:12-647:3. As part of that discussion, the parents asked that additional time for tutoring be offered. Ms. Audsley responded by offering to tutor the student on Mondays as well as Wednesdays with the stipulation that she taught a class for the University of Missouri at Rolla and was required to be in Rolla one Monday a month. Id. In response, the parents "expressed concern that it wasn't consistent enough because of the one Monday a month that I couldn't do that." Id. Ms. Audsley explained, "I knew the specific dates because it was a graduate level course. So we had already determined what the dates were going to be, and I told them that I could give that to them in advance so they would know the one Monday a month I would not be able to do that." Id. Ms. Audsley was not able to stay at the meeting until the end but she did renew her offer when she left. "I just said that the additional Mondays were still an option for them. If they wanted to take me up on it to give me a call." Id.

68. The parents rejected the tutoring on three additional days a month.

69. The District provided the parents with a written "Notice of Action" in which they acknowledged that the District had refused to extend the student's school day for tutoring and refused to include psychotherapy as part of his IEP. D. Ex. Vol. 2, p. 225. The notice specifically states, "Request: to extend the student's school day by one hour four days a week in order for the student to receive one-on-one special education services. Request denied because it is progressing and it is not needed to provide educational benefit (FAPE)." Id.

70. Placement options which were considered and rejected by the IEP team were, "District offered small group/one-on-one instruction 100 minutes per week during the school day. Parents rejected offer, team agreed to increase class-within-a-class time because the student's written language goals/objectives could be addressed during that period." Id.

71. The other factors the District considered relevant to the action were the fact that the student had an equal opportunity to participate in program options that were available to all students in Fairview School. Specifically: The student had received tutoring after school from October through December for one hour and fifteen minutes (75 minutes) one day a week [Wednesday] after school provided by a reading specialist; also available to the student was after-school tutoring for an additional 75 minutes a week three times per month [on Mondays] with the reading specialist (this offer of additional tutoring was declined by the parents); and finally, math tutoring was offered one hour per week before school (again, the parents declined this offer). Id.

72. The parents filed for due process with their letter of March 6, 1998. D. Ex. Vol. 2, p. 351.

73. The parents claim that the student made no progress during the 1997-98 school year. To prove this claim, they offered testimony of the student's mother that the student was "not at a fifth grade level for reading." Tr. Vol. 2, 529: 16; 538: 16-23 (mother). There is no foundation for this evidence to explain how she determined the student's reading level or how she is qualified to determine the reading level of a book.

74. The parents also rely on a comparison of various standardized tests from which they draw an inference that the student has made no progress.

75. The parents called Dr. Roberts, who had no personal experience with the student but who testified in general about evaluating "normal children" and the limitations of standardized tests for evaluating children with disabilities. Dr. Roberts testified that standardized tests have certain limitations and he suggested that especially for children with disabilities, one must take into consideration the limitations of a standardized test. For example, emotional distress plays a part. Tr. Vol. 1, 57:23-58: 14 (Dr. Roberts). "[P]articularly children who are identified as having disabilities often have distorted idea of what their ability to achieve might be. And the standardized testing situation is very different than what they may be exposed to in a normal school day. There can be quite a bit of anxiety associated with that. Certain of the subscales that are within both achievement and aptitude tests are extremely sensitive to these factors particularly anything that requires speed and attention to detail. So in some cases you see scores with extreme, that cannot be predicted by previous testing, so in terms of limitations the tests are essentially normed on, quote, unquote, normal children." Id.

76. In addition to the "limitations" of standardized test mentioned above, Dr. Roberts testified that, in evaluating children, it is important to look at informal measures as well as standardized

tests. Tr. Vol. 1, 51:17-52:1 (Dr. Roberts). He testified that it is "the best practice" to socially validate test results with daily performance on a day-in and day-out basis within the environment. Tr. Vol. 1, 52:2-8 (Dr. Roberts). Dr. Ratcliffe agreed. Tr. Vol. 2, 838:18-839:15 (Dr. Ratcliffe).

77.The student's teachers who observed his performance on a day-in and day-out basis saw improvement in the student in all areas. D. Ex. Vol. 2, p. 390-392 (progress report for 1st, 2nd and 3rd quarters of 1997-98 school year); Tr. Vol. 1, 380:11-394:19 (Ms. Snyders); Id., 299:3-311:1 (Ms. Greeson); Id., 226:12-24 (Ms. Summers).

78.Ms. Audsley, who observed the student from October through June, testified that the student increased two grade levels in the area of reading. Tr. Vol. 2, 662:10-21. When she first saw him his reading level was "around second, end of second, beginning of third grade level. And by the time he left I would have placed him at the end of fourth grade, beginning of fifth grade." Id. In written language, she did not see as much progress. By the end of the school year he was somewhere around the beginning of fourth grade level. Tr. Vol. 2, 662:22-663:2 (Ms. Audsley).

79.The District's Exhibit 190, a writing sample of the student's work, is not consistent with the work Ms. Audsley usually saw. It is not a topic the student chose on his own. When the student was allowed to choose his own topic, he would generally write more and include more detail. However, for writing on a topic given to him by someone else, it is typical of what he does. Tr. Vol. 2, 664:8-665:2 (Ms. Audsley).

80.Ms. Audsley worked with the student for approximately 30 one-on-one sessions over the school year. During that time she witnessed only one incident which could be characterized as a behavior problem. Tr. Vol. 2, 667:5-668:3 (Ms. Audsley). That incident occurred when they were moving from working on reading to working on writing. When she told the student "Today instead of doing reading we're going to work on some writing, he became upset and said no, that he wasn't going to do that." She talked to him about it and eventually he settled down enough that they continued with their agenda for the day. That was the only incident she saw in over 30 sessions. Ms. Audsley saw no indication of emotional difficulties. Tr. Vol. 2, 668:20-24. (Ms. Audsley).

81.Ms. Snyders saw a lot of progress in the student's written expression over the school year. Tr. Vol. 2, 677:10-678:19. At the beginning of the year, the student could write one sentence about a topic, but he needed extra assistance to write multiple sentences about a topic. Id. By the end of the year, "He was writing more complete sentences about a topic. He actually was

thinking about what he was writing and had more organization. He was writing stories at the end of the year."

82.The grades seen on the student's report reflect his success in accomplishing the learning outcomes of the units. Tr. Vol. 2, 805:19-807:13. The determination of the outcomes for the curriculum is set by the district and teachers have in-service training on how to use the grade card. There would be some subjectivity in the grades, but it is predominantly an objective evaluation.Id.

83.Ms. Snyders testified that the student's report card is a true and accurate assessment of the student's work. Tr. Vol. 2, 721:23-722:11 (Ms. Snyders).

84.We find that the student made progress and received educational benefit from both the September and December IEPs.

85.The student's parents claim that the school should have provided after-school tutoring as a related service and part of his IEP. To prove that such a related service is required, the parents must show that the student needed the tutoring in order to benefit from the other services listed in the IEP to benefit from the services provided by Ms. Summers and Ms. Snyders.

86.The student's parents urged that he should have had psychological counseling in addition to the counseling he received from the school counselor. In essence, the parents claim that he should have had the additional psychological counseling because he has always had it. Tr. Vol. 2, 459:13-23 (mother); 569:4-571:5 (mother).

87.At the student's previous school, during the 1996-97 school year, the school psychologist worked with him each week using a program called "Skillstreaming." D. Ex. Vol. 1, p. 69; Tr. Vol. 2, 572:6-18 (mother).

88.At the parents' request, the District's counselor, Sharon Summers, used "Skillstreaming" with the student during the 1997-98 school year. Tr. Vol. 1, 196:16-20 (Ms. Summers). Dr. Ratcliffe was familiar with Skillstreaming, thought it was helpful, and used it in her classroom.

"Skillstreaming" is designed to deal with anxiety or frustration, relaxation, helping children to learn how to cope, back off, think through a plan, execute a plan, and can also be used to respond to depression, anger, or adjustment to disabilities. Tr. Vol. 2, 868:5-869:3 (Dr. Ratcliffe).

89. In January 1998, the student began meeting with Maria Gutierrez. Tr. Vol. 1, 149:21 (Ms. Gutierrez). Ms. Gutierrez is a post-doctorate psychology resident. Tr. Vol. 1, 161:11-18 (Ms. Gutierrez). She does not have any license or certification in the State of Missouri. Id. She worked with the student from January through May of 1998. Tr. Vol. 1, 162:1-4 (Ms. Gutierrez). After May, she was working with the family in family therapy, not just child therapy. Tr. Vol. 1, 167:3-8 (Ms. Gutierrez). Her testimony was that some of the student's issues were school related.

90. Ms. Gutierrez explained that, in her opinion, the difference between psychotherapy and school counseling is, "psychotherapy deals more with interventions specific to the child and family. Whereas school counseling may focus more on academic concerns and how they are impacting the child." Tr. Vol. 1, 154:3-9 (Ms. Gutierrez).

91. Ms. Gutierrez has no direct knowledge of the student at school and has never observed him at school. Tr. Vol. 1, 160:8-13 (Ms. Gutierrez).

92. In Ms. Gutierrez's opinion, the only diagnosis that the student currently has is ADHD. Tr. Vol. 1, 164:22-165:2 (Ms. Gutierrez).

93. The only recommendation Ms. Gutierrez made regarding the student's school was that he have a highly structured one-on-one environment. She testified as follows:

"If there was a classroom teacher who understood the student's attention deficit and learning needs and provided strategies to focus him, would that be the kind of environment that you were describing?

That would be something that I would envision for him.

When you were recommending this highly structured one-on-one, were you envisioning that in a pull-out program?

I don't know what a pull-out program is.

Okay, a program away from the regular classroom. F. No. Vol. 1, 166:5-18 (Ms. Gutierrez)."

94. The September and December IEPs provide for 30 minutes a week of counseling with the school counselor. D. Ex. Vol. 1, p. 144; Vol. 2, p. 251.

95. Ms. Sharon Summers was the student's school counselor. She has a bachelor's degree from Southwest Missouri State University with training and certification in the areas of social studies,

media services, elementary classroom and learning disabilities. She also has a master's degree in counseling and has approximately fifty graduate hours beyond her master's degree. She has been teaching for twenty-three years in the areas in which she is certified and has been a guidance counselor for the past ten years. Tr. Vol. 1, 197:16-198:3 (Ms. Summers).

96.Ms. Summers began counseling the student as part of his interim IEP. While the student benefited from the sessions they had together, she did not think that the student needed more individual time. Id., 201:2-15 (Ms. Summers).

97.Ms. Summers and the student worked on the goals and objectives in the student's IEP and she saw improvement in the student on his goals and objectives from September of 1997 until the IEP meeting in December of 1997. Tr. Vol. 1, 203:5-11 (Ms. Summers). The student met with Ms. Summers at least thirty minutes a week. Tr. Vol. 1, 235:9-15; 239:22-240:25 (Ms. Summers).

98.In developing the December 1997 IEP, the team agreed that the student should have a behavior plan. The student's behavior was not a problem in the classroom but he had occasional difficulties during unstructured times. Tr. Vol. 1, 392:21-393:23 (Ms. Snyders). The student's classroom teacher, counselor, and learning specialist worked with the student to develop a behavior plan to help him during unstructured time in the school day. Tr. Vol. 1, 175:13-25 (Ms. Summers); 246:19-247:8 (Ms. Greeson); 392:21-393:23 (Ms. Snyders). That plan was implemented and worked well throughout the school year. Id.

99.The student felt comfortable to come to the counselor or the principal if he had behavior problems or problems with peers he could not deal with on his own. Tr. Vol. 1, 206:24-207:25 (Ms. Summers).

100.Ms. Hassemer had direct knowledge of behavioral concerns within her building because she was the person in charge of discipline for her building. Tr. Vol. 2, 785:14-17 (Ms. Hassemer). In her experience, "fifth grade problems usually generate around peer relationships, playground problems, unstructured times, recess, perhaps bus if they ride a bus." Id., 786:8-14. Ms. Hassemer was aware of one problem the student had on the bus with his sister. Tr. Vol. 2, 786:15-789:22 (Ms. Hassemer). Ms. Hassemer also was aware that the student had a behavior plan. She was asked to provide information for his behavior checklist, because part of her job was to supervise students in the lunchroom and to supervise students as they get on and off the buses. Id. In her opinion, the student's behavior was about average for a fifth grader. Id. She

testified the student was "not a student that spent a great deal of time with me, not a-what I would call a regular." Tr. Vol. 2, 789:8-23 (Ms. Hassemer).

101. An IEP for the student's fifth grade year was developed at his previous school on May 23, 1997, by the teachers and other IEP team members who knew the student. Tr. Vol. 1, 363:17-364:21 (Ms. Snyders). When the District IEP team met in September of 1997 to develop the student's interim IEP, they examined the goals and objectives which were developed in May of 1997 and determined that they were appropriate for the student. Tr. Vol. 1, 359:18-360:20 (Ms. Snyders).

102. In December 1997, when the IEP team met, they again looked at the student's needs. The team looked to see if the interim goals and objectives were appropriate for the student. Tr. Vol. 1, 379:4-24 (Ms. Snyders); D. Ex. Vol. 2, pp. 226-229 ("Our Fairview Experience"); Tr. Vol. 2, 790:5-23; 816:14-821:11 (Ms. Hassemer). Some changes were made, but the goals and objectives in December 1997 were predominantly the same as those developed in May and September of 1997. *Compare* Complainant Ex., pp. 36-45, and D. Ex. Vol. 2, pp. 251-263.

103. Next, the December 1997 IEP team determined the special education services, related services, and other services to help the student meet those goals and objectives. Again, some modifications were made.

104. The parents asserted, in their request for due process, that the student's homeroom teacher breached the student's confidentiality. D. Ex. Vol. 2, p. 351. This claim was based on hearsay and speculation. There is no evidence to support this grave and serious assertion.

105. The only evidence presented was that over spring break, another student said the student had "learning problems." Tr. Vol. 2, 799:20-800:9 (Ms. Hassemer). Later, the student asked his parents how the other student knew he had learning problems. *Id.* The parents did not hear Ms. Greeson make the alleged statement. Tr. Vol. 2, 516:8-14 (mother). Apparently the parents drew the conclusion that Ms. Greeson must have told him. Tr. Vol. 2, 800:16-24 (Ms. Hassemer).

106. On the Monday after spring break was over, the accusation of a breach of confidentiality was brought to the attention of Ms. Hassemer and she investigated. Tr. Vol. 2, 797:22-801:11 (Ms. Hassemer); Tr. Vol. 2, 698:16-701:12 (Ms. Snyders). Ms. Hassemer called in the teacher who reassured the student and his parents that she would never do such a thing. Tr. Vol. 2, 797:22-801:11 (Ms. Hassemer).

107.The parents offered no evidence but for conjecture and hearsay at the hearing to support this grave and serious claim against Ms. Greeson.

108.The September 1997 IEP was implemented and the December 1997 IEP was implemented throughout the 1997-98 school year.

109.Sharon Summers, school counselor, testified that the student's behavior was not a problem in the classroom, "and that is why the formal behavior plan was not developed (Transcript page 176, lines 1-7).

110.The school district offered one-on-one instruction for one hour each day before school starts.

111.The school day begins at 9:00 a.m. until 3:45 p.m.

112.The school district offered on of tutoring after school each week.

113.The parents have rejected the one hour tutoring before 9:00 a.m. each day. The parent testified that the student was not functional at 8:00 a.m. in the morning. Also because the reading instruction is not written in the IEP. The parent testified that "additionally written expression and Math is his learning disability."

114.Mrs. Gresson evaluated the student on his first report card and found him "satisfactory" to "excellent" in all areas including following rules, managing property, etc. (District Exhibits 000390).

115.The student received approximately one hour per week of one-on-one attention in the area of reading while at Fairview (outside the school day).

116.The parents accepted the District's offer to have Diane Audsley offer the student one hour per week of reading tutoring.

117.The parents rejected additional tutoring time with Diane Audsley when they learned that neither the additional time nor the original time would be put in writing in the IEP.

118.The parents rejected an offer of Monday morning Math tutoring because 1) it was not to be put in writing in the IEP, 2) it was not in the student's area of learning disability, and 3) the parents could not get the student there at that time.

119.The parents rejected having the student taken out of the regular classroom for written language instruction because that would not be a least restrictive environment and they feared he would continue to fall further behind.

120.The parents expressed a wish for the student to receive tutoring and for him to receive a behavior plan repeatedly and in writing.

121.The parents refused to sign the IEP.

122.Dr. Gutierrez, psychotherapist, testified that the student needs a behavior plan (Transcript pages 153 line 15 through page 154 line 2).

123.The school district implemented a behavior plan as stated in testimony by Mrs. Greeson: 12/5/98 IEP Annual Goal number IV, objective C: "The counselor, teacher, and learning specialist will develop a behavior plan for the student to follow while he is at school".

124.Lisa Snyders stated that Kim Ratcliffe offered to pay for the portion of private psychotherapy that dealt with school-related issues (Transcript page 758, line 21 through page 759, line 4).

125.Mrs. Greeson claimed that the student is reading independently at the fifth grade level (Transcript page 264, lines 20-21). She stated that he is doing fine and is ready for sixth grade (Transcript page 278, lines 2-5).

BASIS OF DECISION

The federal requirements are contained in the Individuals With Disabilities Education Act ("IDEA"). Under IDEA, all children with disabilities are entitled to a free, appropriate, public education ("FAPE") designed to meet their required needs. 20 U.S.C. 1401(18). Under IDEA school districts receiving certain federal funds must provide a "free appropriate public education" to all children with disabilities. 20 U.S.C. 1400(c).

The primary vehicle for carrying out the IDEA's goals is the individualized education program ("IEP"). An IEP is "a written statement for each child with a disability developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities..." 20 U.S.C. 1401(20).

In Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982), the Court established a two-part inquiry for determining whether a school district has provided FAPE: "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? 458 U.S. at 206. The U.S. Supreme Court has ruled that a "free appropriate public education" consists of educational instruction specifically designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction. Rowley, 458 U.S. at 188. The Court explained that the Act requires "the education to which access is provided be sufficient to confer some educational benefits. Rowley, 458 U.S. at 207. That is the standard to be applied in this proceeding. Fort Zumwalt, supra; Yaris v. Special School District of St. Louis County, 927 F. Supp. 1214 (E.D. Mo. 1996).

When examining the record to determine if the District violated any procedural duties, it is important to remember that even if a procedural violation occurs, "plaintiffs would not automatically be entitled to relief." Logue v. Shawnee Mission Public School Unified School District No. 512, 25 IDELR 587 (U.S. Dist. Kan. 1997). Procedural flaws do not automatically render an IEP defective. Doe v. Defendant 1, 898 F.2d 1186, 1191 (6th Cir. 1990); Urban v. Jefferson County School District R-I, 89 F.3d 720, 726 (10th Cir. 1996). Instead, "there must be some rational basis to believe that procedural inadequacies compromise 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." Roland M. v. Concord School Committee, 910 F.2d 983, 994.

The panel finds that the services stated in the IEP were provided along with additional services comprising the educational program. The record is replete with all the steps taken to implement the student's IEP. The student's classroom teacher, learning specialist and counselor worked with the student on the goals and objectives in his IEP and the student's case manager documented his continued progress toward his goals and objectives during the school year while the range of services described in and out of the IEP continued. The panel finds that the IEP team considered available diagnostic data. The panel also finds that the school district provided written notice of Procedural Safeguards before the September IEP to the parents.

The record shows the members of the District's diagnostic screening team questioned the severe emotional disturbance (SED) portion of the student's diagnosis and recommended re-evaluation. At the December 1997 IEP meeting, the result of the evaluation secured by the parents were also discussed along with the screening team's recommendation for the re-evaluation. The

parents were adamant that reevaluation was not appropriate at that time. In deference to the parents, the December 1997 IEP team agreed to use the 1996 diagnostic summary and developed the student's present level of performance and recorded his diagnosis as both LD and SED. Although the panel finds this to be a procedural error, because it was the recommendation of the team to seek a new evaluation. The panel also reasons that this is not an action that prejudiced the provision of FAPE. The student's parents were active participants in the formulation of his IEP. Testimony of Mr. Wallace and Ms. Snyders showed their lack of clarity about whether the collection of some papers they received were the complete evaluation scores, evaluation, and diagnostic summary. They testified that they may not have read the information they did receive. No where could the panel find a school district-generated document or even a cover sheet that identified what papers they identified as the complete out-of-state evaluation, partial or otherwise, to accept it in writing as the guiding document to the Dec. 1997 IEP. Nor did the District documents show any addition to the 1996 evaluation. The District document labeled "diagnostic summary" was actually a screening instrument and a plan to evaluate. There was no evidence from the District psychological professional on the team, Mr. Wallace, that he collected any data by observation or structured interview. He testified to information through others, and he could not testify that he had handled or read any previous out-of-state information records. This is despite the disputed "severely emotional disturbed label." The parent-enlisted outside evaluation, from University of Missouri, did not match the testing evaluation suggested on the screening document. The parents did not seek any input from the school district on the type of test to be utilized by the school district in an evaluation. There was no testimony on why the parents chose the type of testing instrument that was done by the University of Missouri. The parents sought no coordination of evaluation from the school district. The 1996 evaluation and the University of Missouri evaluation did not coordinate or compliment each other, which presented difficulty for the panel members. No documentation was found as to what exact "consideration" was given to the University of Missouri evaluation, or what parts were or were not accepted, or what other decisions were made due to the presentation of this document. However, the consideration testified to as being given to the previous evaluation, the efforts in acquiescing to the parents' request to not test leave this panel with only a procedural violation that did not materially affect the student in a negative way. The student received special education services based on his unique needs, not based on his diagnostic label; and in addition, the student received educational benefit from his IEP and from the totality of services provided by the school district and the parents. The student's continued progress toward his goals and objectives during the school year while the range of services described in and out of the IEP continued.

Any procedural errors did not hamper the parents' opportunity to participate in the formulation process, nor did such procedural error cause the student to have diminished educational benefits. The student did benefit from the educational benefits as provided and delivered to him by the school district.

At the time the December 1997 IEP was written, the student had been in Ms. Greeson's regular 5th grade class since August of 1997. He was receiving special education services in that classroom for between 300-400 minutes per week from Ms. Snyders, the learning specialist. He also had individual counseling sessions with the school counselor for 30 minutes per week. In addition the team agreed that, in addition to the time from 11:00 to 12:00 each day the learning specialist spent with the student during Language Arts, she would spend 30 minutes each afternoon during social studies time, working one-on-one with the student on his writing. Tr. Vol. 1, 357:15-358:3 (Ms. Snyders). Also under the December 1997 IEP, the student continued placement in the mainstream class and continued counseling sessions with the school counselor. All these people testified at the due process hearing and at the student's regular reporting sessions, that the student was benefiting from his educational program. Additional tutoring services were also made available to the student. Important to this decision, is the fact that the student's parents provided individual outside counseling. Again, it is this totality of services that constituted the provision of FAPE.

DECISION

After consideration of the evidence and a proper deliberation, the testimony of the witnesses, the exhibits of both the petitioner and respondent, the record as a whole, the panel finds that FAPE was provided when it considers as a whole those services stated in the IEP, those made available but not stated in the IEP, and those outside counseling services provided by the parent.

Consistent with the finding that FAPE included the totality of services provided, the panel orders that the school district reconvene the IEP team and include the services that were being provided this last school year as a condition of assuring that FAPE continues to be provided with the current IEP. Those services include that portion of the outside counseling that is required to address the impact of the student's disability on his educational functioning and the tutoring that has been provided and offered by the school district. The panel determines that portion to be two thirds [2/3]; thus the panel directs the school district to pay for a 2/3 portion of the outside counseling provided for the student by his parents during the past school year for the months of

January, February, March, April, May, 1998, and to pay for 2/3 of any costs of outside counseling during the term of the current IEP.

The school district offered to pay for a portion of psychotherapy and to give math 1-1 tutoring to the student. All of this is considered in totality-FAPE and needs to be included in writing in the current IEP. If a new evaluation is effectuated and a new IEP is written, the new document will be the actual governing document. The IEP is a compliance document that assures that the services will not be withdrawn without a reconvening of the IEP. The panel finds that FAPE was delivered, because it is clear that all disputed areas were provided.

Additionally, the panel has considered the following and denies the following:

1. the issue of extended school year;
2. payment for the parents missed work;
3. parents clerical expenses; the independent evaluation from the University of Missouri requested by the parents;
4. there was no breach of confidentiality by the school district teacher.

Further, anything not specifically granted is hereby denied.

Joyce Hainen Crandon, Attorney at Law, Chairperson of the Panel

Trudy Fulmer, Panel Member

Ben Franklin, Panel Member

9-27-98

CERTIFICATE OF MAILING

This is to certify that a copy of the foregoing was served on the following persons by depositing the same in the U.S. Postal Service postage prepaid, on this 28th day of September 1998.

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