Approved: 3/25/96
Date

MINUTES OF THE HOUSE COMMITTEE ON EDUCATION.

The meeting was called to order by Chairman Bill Mason at 3:30 p.m. on March 13, 1996 in Room 519-S of the Capitol.

All members were present except:

Committee staff present: Ben Barrett, Legislative Research Department
Avis Swartzman, Revisor of Statutes
Dale Dennis, Department of Education
Beverly Renner, Committee Secretary

Conferees appearing before the committee: Tom Powell, Attorney-USD 259, Wichita
Mark Tallman-KS Association of School Boards
Representative Brenda Landwehr
Mari Pat Brooks, Associate Director of Education-Kansas Catholic Conference
Jay Fowler
Wayne Mnich, Executive Director-KS Commission for the Deaf & Hard of Hearing
Shirley Armentrout
Sheryl Stanley
Sherry Diel-Kansas Advocacy & Protective Service
Charles Jedele-KS Association of Non-government Schools
Greg Evans, written testimony

Others attending: See attached list

Chairman Mason opened the hearing on **SB 636**-concerning private school pupils, provision of auxiliary school services by school districts.

Tom Powell, Attorney for Wichita Public Schools appeared as a proponent for **SB 636** (Attachment 1). This legislation clarifies what USD 259 and most school districts in Kansas assumed in the past, that school districts are not required to provide auxiliary school serviced on the premise of a private school. School districts would have the authority and discretion to provide or not provide auxiliary school services on the premises of a private school; but available on an equal basis at the public school.

Mark Tallman-Kansas Association of School Boards spoke in support of **SB 636** as a representation of one way the State can help to contain the exploding costs of special education to school districts (Attachment 2). These costs are mandated by federal and state laws, but the funding is not provided to comply.

Chairman Mason closed the proponent hearing and opened the hearing for opponents on **SB 636**.

Representative Brenda Landwehr testified as an opponent to **SB 636** with the concerns that this bill is not constitutional and an attempt to supersede the courts (Attachment 3).

Mari Pat Brooks, Associate Director for Education, Kansas Catholic Conference appeared in opposition to **SB 636** (Attachment 4). This bill would take away the capability of private school students to receive services ranging from speech therapy to learning disabilities diagnosis. This legislation is contrary to the language in the Individuals with Disabilities Act (IDEA) which states "if the parent chooses to place their child in a private school, the school system must still provide special education and related services designed to meet the needs of private school children with disabilities".

Jay Fowler, Parent of a Special Education Child spoke in opposition to **SB 636,** a bill filed in direct response to an educational due process proceeding involving his son (Attachment 5). Michael is a fourth grade student at Wichita Collegiate School and requires an interpreter in order to be successful in his education because he is

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

profoundly deaf. The major cost evidence used by the district was that public school deaf children could be "clustered" so that one interpreted could interpret for multiple children but in Michael Fowler's case, the district's IEP and his unique circumstances would require him to receive one-on-one interpreting for most of the day even in a public school setting. Mr. Fowler introduced the decisions of the due process hearing officer and the District Court with his testimony and read a letter from Greg Evans, President of USD 259's Special Education Advisory Council (Attachment 6).

Wayne C. Mnich, Executive Director of the Kansas Commission for the deaf and Hard of Hearing spoke with the aid of an interpreter in opposition to **SB 636** (Attachment 7). The objective of the integration of deaf children into the overall hearing society as adults is of primary importance. Fiscal distress is not a valid reason to deny any child with disabilities who need auxiliary services to succeed.

Shirley Armentrout spoke of concerns in opposition to **SB 636** (Attachment 8). These concerns include the therapists providing direct contracted service from school to school will no longer travel to private schools; relief provided under IDEA to the school district may be directed to private schools leaving less money to provide services that are federally mandated to be carried out by the public school system; and, testing in unfamiliar settings may cause inaccuracies.

Sheryl Stanley appearing in opposition to **SB 636** related experiences of her family with special education needs (Attachment 9). She voiced her fear that if children are denied access to auxiliary services in their school of choice, many of those children will be denied them completely because parents are unable to manage the amount of traveling necessary to provide them elsewhere during the school day. Attached to Ms. Armentrout's testimony are letters from other concerned parents.

Sherry Diel. Attorney with Kansas Advocacy & Protective Services, Inc., opposed **SB 636** for two reasons: 1) the proposed bill has the potential of eliminating parental choice which is available to parents of children with disabilities under current state law; and, 2) the proposed bill may potentially deprive children with disabilities who attend private schools necessary assistive technology devices and services (Attachment 10).

Charles Jedele, Chairman of the Kansas Association of Non-government Schools, appeared in opposition to **SB 636** and stated that this legislation will only insure that private schools will be prohibited from enrolling special education students in the future (Attachment 11).

Chairman Mason closed the hearing on **SB 636**.

The meeting was adjourned at 5:50 p.m.

The next meeting is scheduled for March 14, 1996.

HOUSE EDUCATION COMMITTEE GUEST LIST

DATE: March 13, 1996

NAME	REPRESENTING
Diane Gjerstad	USD 259-Wichita
Tom Powell	USD 259-Wichita
JR Stewart	USD 259-Wichita
[illegible]	USD 259-Wichita
Wayne C. [illegible]	KCDHH / KAD / NAD
Karlos R. Cruse	KCDHH
Shirley Armentrout	teacher MPH
Robbie Armentrout	student MPH
[illegible] Parnell	MPHeart School Parent
Jim & Janice Johnson	parent
[illegible] Johnson	Most Pure Heart Student
[illegible] Brooks	KS. Catholic Conf.
Rose Fry	Hayden H. S.
[illegible]	Hayden High School
Anne Spiess	KS. Speech, Language and Hearing Assoc.
Craig Grant	KNEA
Rosemary Crock	Most Pure Heart Parent
Katherine Appel	Most Pure Heart Stud+
Ken Gilmore	

HOUSE EDUCATION COMMITTEE GUEST LIST

DATE: March 13, 1996 (con't)

NAME	REPRESENTING
[illegible]	[illegible] 91
James Welch	Doug Mays 54?
Kevin Welch	Doug Mays 54?
Kathy A. Welch	Doug Mays 54?
Robin Lehman	Olathe USD 233
Bill Musick	St Bd of Ed
OB Sonny Rundell	Ks St Bd of Ed
Charles Jo[illegible]	Kansas Association [illegible]
[illegible]	[illegible]
Denise Apt	USA

Senate Bill 636
Testimony Re: SB 636

Presented by: Tom Powell
Hinkle, Eberhart & Elkouri, L.L.C.
Attorney Representing Unified School District 259

INTRODUCTION

Senate Bill No. 636 clarifies what most school districts in Kansas assumed in the pass, that is that school districts are not required to provide auxiliary school services on the premises of a private school. Under SB 636 school districts have the authority and discretion to provide or not provide auxiliary school services on the premises of a private school.

REASON FOR CLARIFICATION

The need for clarification arises from a recent decision by the federal district court of Kansas. Fowler v. Unified School District No. 259. In this case the federal district court ruled that Unified School District No. 259 must provide interpretative services at Wichita Collegiate, a private school, to a hearing-impaired child who resides within the boundaries of Unified School District 259 and who attends Wichita Collegiate. The Court in the Fowler case held that USD 259 did not meet its burden of proving that it was not practical to provide hearing impaired services on the premises of a private school. Under the Fowler decision a school district would have to provide auxiliary services on the premises of a private school if such is requested by parents unless the school can prove that it is not practical to do so. Placing this type of burden on a school district means that in most instances a school district upon request will have to provide auxiliary services on the premises of a private school.

STATUS OF PROVIDING AUXILIARY SERVICES PRIOR TO FOWLER

Prior to the decision in the Fowler case Unified School District 259 was not providing auxiliary services on the premises of private schools. It is the understanding of Unified School District 259 special education administrators that auxiliary services were prior to the Fowler case not being provided on the premises of private schools anywhere else in Kansas with very few exceptions. The general belief of administrators of school districts was that the auxiliary services statute did not require public school to provide auxiliary services on the premises of private schools.

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Attachment 1

WHAT ARE AUXILIARY SERVICES

The Fowler case involved the providing of interpretative services on the premises of private schools. It needs to be understood that auxiliary services covers a very broad category of services. A list of auxiliary services that is not completely exhaustive is attached as attachment "A".

SIGNIFICANT OF DECISION IN FOWLER CASE TO SCHOOL DISTRICTS

Prior to the Fowler case as stated above most school districts were not providing auxiliary services on the premises of private schools. Therefore, any costs associated with providing auxiliary services on the premises of a private school will be an additional cost to the school district. It is difficult to estimate the additional expense that schools districts in Kansas will incur if auxiliary services are routinely provided at private schools. For example, there are in Unified School District 259 on the average 3 hearing impaired grade school students for every interpreter at the elementary level. At a private school there would be one or more interpreters per student. It cost approximately $15,000 for each interpreter. This means that at the public school $5,000 per student is spent for interpreters and that in excess of $15,000 would be spent at the private school per student. The results is that USD 259 will spent in excess of $10,000 more for a private school student who receives interpretative services than is spent on students who attend the public school. This $10,000 is almost three times more than Unified School District 259 receives per student from the state from 3626 funds.

Unified School District 259 provides special education services to 5,578 students. The cost of providing auxiliary services to those children would be astronomical, if for example, because of the ruling in the Fowler case 5% of the 5,578 special education students (278 students) decided to attend private schools and requested that auxiliary services such as listed in attachment A be provided at the private school. The fear of USD 259 special education administrators is that without additional funding the services for special education students who attend public schools would be greatly deluded if SB 636 is not enacted or if additional funding is not provided.

Again, it is difficult to estimated the additional costs that would result from providing auxiliary services on private school premises, however, over time if such becomes a matter of

routine the cost without question will be significant. Based on testimony before the Senate Education Committee on SB 636 and based upon the interest shown in SB 636 there is little doubt that the demand for auxiliary services provided on the premises of private schools is great.

FEDERAL LAW

SB 636 will not conflict with special education law, rules and regulations at the federal level. School districts in Kansas will if SB 636 is passed still have to comply with federal requirements concerning the providing of auxiliary services. (under federal law auxiliary services are called related services) For example, federal law now requires that assistive devises be provided to students who attend private schools. This requirement will still not change with the passage of SB 636. The Fowler case is on appeal to the 10th Circuit Court of Appeals. If the 10th circuit rules that federal law requires school districts to provide related services on the premises of private schools then schools districts in Kansas will be required to provide related services on the premises of private schools. However, SB 636 will assure that state law requirements on providing auxiliary services will not exceed what is required to be provided under federal law.

CONCLUSION

Unified School District 259 request that SB 636 be passed. The passage of SB 636 will assure that state law requirements as to providing auxiliary services will not exceed what is required under federal law. Also, the passage of SB 636 will avoid the imposition of additional costs being imposed upon school districts without additional funding, i.e., school districts with few exceptions are not now providing auxiliary services on the premises of private schools. There is without question a demand for such services to be delivered on the premises of private schools. If SB 636 is not passed the additional expense of providing such services will be passed to local school boards many of who do not have the financial resources to provide such services without taking funding from existing programs.

ATTACHMENT A

Auxiliary Service List Not Exhaustive

1. Attendant Care
2. Adaptive Physical Education
3. Assistive Devices
4. Art Therapy
5. Aversive Therapy
6. Counseling Services
7. Interpretive Services
8. Mobile Assistance
9. Nursing Therapy
10. Services for Visually Impaired
11. Occupational Therapy
12. Psychological Services
13. Physical Therapy
14. School Health Services
15. Speech Language Services
16. School Social Work
17. Transportation

KANSAS ASSOCIATION OF SCHOOL BOARDS

1420 S.W. Arrowhead Rd, Topeka, Kansas 66604
913-273-3600

TO: House Committee on Education
FROM: Mark Tallman, Director of Governmental Relations
DATE: March 13, 1996

RE: Testimony on S.B. 636

Mr. Chairman, Members of the Committee:

KASB appears today in support of S.B. 636. We believe this bill represents one of the relatively few ways the State of Kansas could help contain the exploding costs of special education to school districts. We probably do not need to remind the committee that these costs are mandated by federal and state laws, yet neither the federal or state government is providing funding to cover the extra costs required to comply with them.

Passage of this legislation may limit some services desired by the families of students attending private schools. But it will not change the requirement of districts to provide a free, appropriate education under federal law. If districts are required to provide more expansive services to private school children - who have chosen a different education setting - it will be at the cost of all the other children in the district.

We urge you to support this legislation.

House Education
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Attachment 2

HOUSE OF REPRESENTATIVES
STATE OF KANSAS

BRENDA K. LANDWEHR
REPRESENTATIVE, NINETY-FIRST DISTRICT
HOME ADDRESS: 1927 N. GOW
WICHITA, KANSAS 67203-1106
316-945-0026
OFFICE: SUITE 303-N STATEHOUSE
TOPEKA KANSAS 66612-1504
(913) 296-7500

TOPEKA

COMMITTEE ASSIGNMENTS
MEMBER: FINANCIAL INSTITUTIONS AND INSURANCE
PUBLIC HEALTH & HUMAN SERVICES
SELECT COMMITTEE ON JUVENILE CRIME

TESTIMONY ON SB 636

Thank you Mr. Chairman and committee members for allowing me the opportunity to appear before you today in opposition of SB 636. I am not here today to debate the specifics of this bill but more of the concerns that I have about the constitutionality of this bill. With the research I have done to date it is my opinion that it goes against the Kansas and United States Constitution. I have reviewed Supreme Court case *Zobrest vs. Catalina Foothills School* (1993). Supreme Court case *Pierce vs. School Sisters* (1925) *Meyer vs. Nebraska* (1923). Then of course the case of *Fowler vs. Unified School District No. 259* (1995) which is currently waiting for a decision in the Tenth Circuit Court of Appeals. I have also requested an Attorney General's opinion on SB 636 and have been informed that it could take 6 to 8 weeks for a response.

Special education costs (the key word here is costs) are not mandated by the state or federal government. The special education services are required by state and federal law, there is a difference. We must be wise in how we provide and spend our funds for these services. So that we are providing the best possible assistance to our very special children. These children have the same right to the best education possible and it is our job to see that we do that for them.

It is important that we keep in mind that as parents we bring children into this world and accept our responsibilities no matter how difficult they may become and that it is our job to protect and provide for their needs, and we should be allowed to make the best possible choices for our children as long as they remain in our care. There are no books to answer all of the questions we face as we raise our children unfortunately it is done with some trial and error along with common sense and a lot of love. It is the right of all citizens to be allowed the freedom of choice. The state is charged with the well-being of its citizenry and that doesn't change because a child is in a private school. As legislators it is our job to see that we maintain that for the people of Kansas.
(THE FREEDOM OF CHOICE)

It appears that there have only been 4 special education due process cases litigated in Kansas since 1980. That is four cases in 16 years. I would have to assume that the legal fees for those cases were considerably more than the expense of the special education services their selves.

I think that it would be wise for this committee to withhold a decision on this bill until we receive the Attorney General's opinion and the response from the Court of Appeals. I must also express the concern that we are attempting to change a law that is for all Kansans for one case. To me that is somewhat self-serving and I do not believe that is our job as legislators. I have a strong objection about the possibility of this bill being viewed as **discriminating against a handicapped child**. I do not as an individual approve of discrimination nor will I participate in such an action as a legislator and I am here today to ask that you consider this when making your decision on this bill today.

I ask that you please consider as a committee to hold this bill until the court decisions and the Attorney General's opinion have been issued. There is no emergency need for this bill to be passed at this time.

Thank you for your time and consideration and I will be happy to stand for questions.

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Attachment 3

Brenda Landwehr

Senate Bill 636

House Education Committee Room 519S
March 13, 1996 - 3:30 PM

KANSAS CATHOLIC CONFERENCE
Mari Pat Brooks, Associate Director for Education

I wish to testify in opposition to Senate Bill 636. This proposal would allow the public school to take away from 30,000 private school children, the right to be enrolled in the school of their choice and to be able to continue to receive a whole range of services from speech therapy to learning disabilities diagnosis.

Senate Bill 636 attempts to establish as law a presumption that parents enroll their children in private schools "despite the availability of a free and appropriate public education." If you accept this premise established in lines 30-33 of this bill, it then follows that by rejecting a "free and appropriate" public education, private school parents give up the option to receive a whole range of auxiliary services in the best possible setting, their own school building.

That is directly contrary to the language in the Individuals with Disabilities Act (IDEA) which states "if the parents choose to place their child in a private school, the school system must still provide special education and related services designed to meet the needs of private school children with disabilities." Furthermore, the regulations require that the service for students enrolled in private schools must be "comparable in quality, scope, and opportunity for participation."

What does this language mean?

. It means that providing speech therapy after school to private school children is not equal to providing speech therapy during the school day to public school children.

. It means that making a private school child travel to a public school eight blocks away to receive remedial services for a learning disability is not equal to providing a public school child the same service in the next classroom.

. It means that if a child needs an aide, an interpreter, a test, or a wheelchair, then the substantial federal moneys that fund special education are to help that child regardless of where he or she goes to school.

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Attachment 4

SB636
House Education Committee
March 13, 1996

Senate Bill 636 asks you to dishonor the long history of cooperation between public and private education during which our common goal has been to do what is best for the children. There are many wonderful examples of cooperation between the public and private schools. Some public schools have gone out of their way to accommodate the private schools but feel hampered by the law. Why spend money on vans, transportation, etc. when the private schools have the room available for the instruction.

On behalf of our school parents and children, we pledge to do all that we can to see that the rights of these children are protected to the maximum extent. We want to continue to encourage a healthy spirit of cooperation between the public and private sectors. All such efforts should be guided by an overriding concern for the parties most affected, the children.

One thing that we need to keep in mind is that we, as humans, ought to be doing all that we can to ensure that every child receives a quality education. Many students in today's society are labeled "different" or even "special", but... aren't we all different and aren't we all special? Let us ensure that all students in Kansas have the opportunity to be educated, and this means providing the services needed to educate that child. The young man that you see in the audience today and many others, may be the ones who will be making the rules in the future. Let us be the ones to set good examples for them to follow.
I ask your support in opposition to Senate Bill 636.

Thank you for the opportunity to speak to you today.

STATEMENT OF JAY F. FOWLER

I am here today as the parent of a special education child and a person interested in special education in Kansas. I have been involved in special education issues as a parent for more than ten years. I have been involved as a lawyer on special education matters and am generally familiar with both state and federal special education laws. Finally, for six years, ending in 1995, I was a member of U.S.D. 259's Special Education Advisory Council. For the last two years on that Council, I was president. The Special Education Advisory Council consists of parents, teachers, school administrators, and representatives of agencies concerned with the education of handicapped children.

I am also the father of Michael Fowler, who is a profoundly deaf ten-year old child. Senate Bill 636 directly affects my son and was initially filed at the request of U.S.D. 259 in direct response to an educational due process proceeding involving him. Michael currently attends fourth grade at Wichita Collegiate School, which is a private school located in Wichita, Kansas. He requires an interpreter in order to be successful in his education. Interpretive service is an auxiliary or related service under the special education statute, and is the service that the school district wants to eliminate by obtaining a modification in current law, using the amendment proposed in Senate Bill 636.

Because Senate Bill 636 has been advanced by the Wichita school district as a response to Michael Fowler's educational due

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Attachment 5

process case, I think it appropriate that this Committee have an understanding of the background of that case and the decisions entered by the due process hearing officer and Judge Saffels on appeal. The decision of U.S.D. 259's hearing officer is attached to this Statement as Appendix "A." The decision of the United States District Court for the District of Kansas issued by Judge Saffels is attached to this Statement as Appendix "B."

In considering any change to existing Kansas law, it is important to know that the Wichita school district has challenged Judge Saffels' opinion and has filed an appeal with the Tenth Circuit District Court of Appeals in Denver. Because an appeal is pending, the opinion issued by Judge Saffels is not final and the courts are continuing to assess what legal obligations are imposed by both Kansas and federal law as to the availability of related and auxiliary services to students in private schools. While we believe that auxiliary and related services are required for private school students under both federal and state law, the Wichita school district disagrees; a final decision on that subject by the Tenth Circuit is at least six months away. Because the courts have not completed their review of the *Michael Fowler* case, it is appropriate for this Committee to defer consideration of Senate Bill 636 pending resolution of the court action seeking determination as to the meaning and extent of the statutory requirement imposed by K.S.A. 72-5392 and 72-5393.

The current Kansas statute on auxiliary services has been in place since 1980 without change. During the last 16 years, it

has allowed children with disabilities access to special education services without any outcry as to the existence of the obligation imposed by the statute. There has been no evidence demonstrating that current law creates an unusual or expensive burden on school districts. To understand and acknowledge the scope of the obligation imposed by current law, it is important to recognize that the statute does not require school districts to pay the cost of private school education for children with special needs. Rather, the statute simply requires school districts assume the obligation to provide the same assistive technologies or services to special education children in private schools that they provide to children in public schools. In the case of a parental placement of a special education child in a private school setting, the parents incur the costs of the private school education. The school district's financial obligation is limited to the auxiliary services of the same type and nature as those provided to public school students.

There is no evidence that the current auxiliary services statute imposes a significant financial burden on school districts for special education services provided to private school students. Any cost data generated to argue that providing services to students at private schools increases costs must be weighed against the fact that the same service must be provided to the student if the child was in a public school. In many instances, the cost of providing auxiliary services to a child in either a public or private school would be about the same. Perhaps the major cost

difference is that in a private school setting, the parents pay the cost of the child's education (teachers, buildings, books, etc.), while that cost is paid by the public in the public school setting.

The specter of additional cost was raised as a defense to providing interpreting services in the *Michael Fowler* case. The Wichita district argued that it would cost more money to provide services at the private school than if the service was provided at its selected site. Judge Saffels considered the cost evidence and found that it was not persuasive. Under the district's own figures, there was only a few thousand dollars difference between providing this service at a public school site and the private school. The district is currently providing interpreting services at very little additional cost and within the budget it has said it allocated for interpreting services within the district.

But SB 636 involves more than just Michael Fowler and the issue of interpreters. Rarely can it be said to make sense to change existing law and the public policy of this state because services must be provided to one child in one specific instance. Kansas has many school districts and if cost issues are to be addressed, this committee must address the impact of the private school auxiliary services obligation on Kansas as a whole. The number of students actually receiving such services at private school locations is believed to be very low, and I am not aware of any available cost data to indicate whether the comparative cost of providing the services at public schools versus private schools

would be more, or less, whether based on existing law, or based on the proposed SB 636.

While there is very little data to suggest that existing law imposes a significant burden on school districts in providing auxiliary services to students at private schools, there is very clear evidence that no significant financial burden is created by providing an interpreter in a private school setting under the auxiliary services statute. In evidence developed in the *Michael Fowler* case, it was disclosed that there was only one other instance in Kansas where a public school was asked to provide an interpreter in a private school setting under the Kansas statute. That placement occurred several years ago, and according to Dr. Bernhardt Jones of Johnson County Community College (who appeared as a witness in the *Michael Fowler* case) that private school placement is no longer active. A review of Kansas Department of Education data as of April of 1995 revealed that no students were being provided interpretative services at private schools under the auxiliary services statute.

The major cost evidence used by the district to advance its argument here and in the *Michael Fowler* case, is the fact that public school deaf children could be "clustered" so that one interpreter could interpret for multiple children. While such economies could occur, Judge Saffels found that the district's logic did not apply to Michael Fowler because the district's own IEP and Michael Fowler's unique circumstances would require him to

receive one-on-one interpreting for most of the day in a public school setting.

Across Kansas there is little evidence to suggest that providing interpreters at private schools would move interpreting resources away from public schools to the detriment of either public school students or school district financial resources. Setting aside the fact that there are no other known cases in Kansas where that has occurred, a study by Dr. Bernhardt Jones (again for the *Michael Fowler* case) found that 98% of the educational sign language interpreters interpret for just one deaf or hard of hearing student at some time during the school day. 62% of interpreters interpret one-on-one all school day. Another 20% of the interpreters interpret on a one-on-one basis the majority of each school day. The data reviewed by Dr. Jones suggests that for most school districts there would be little cost difference between providing interpretative services at a private school setting versus a public school.

The district's concern about future demand for private school auxiliary services fails to recognize the historic lack of demand and the fact that each school district participates in a determination of services needed under the IEP procedure. The district may be afraid that there will be demands for auxiliary services from parents who want to home school their children, or that there will be demands for auxiliary services in small private schools which are unlicensed and which may be educationally inappropriate.

First, a child receiving auxiliary services must have an IEP conducted under both Kansas and federal guidelines. Federal courts interpreting parental requests for special education services at private schools (involving statutory schemes similar to Kansas) have held that school districts are not required to pay for services when the parental placement is not educationally appropriate under an IEP. Existing state and federal education law provides a comprehensive way for the district to address questions regarding the appropriateness of educational placement of special education children. Second, there is no reason to believe that the current Kansas auxiliary services statute requires the provision of auxiliary services to a home school or to any other educational environment that a school district challenges as inappropriate.

In considering Senate Bill 636, I ask this committee to remember the historic commitment of this state to special education and the desire of its citizens to meet the needs of children with disabilities. Any legislation seeking to modify Kansas' long-standing commitment should be scrutinized and enacted only after great deliberation. Please do not rush to enact legislation in response to claims of fiscal distress which are not well-founded in fact, and which are not applicable to the state as a whole. I want for Michael what every parent wants for his child: the best opportunity for him to succeed through his own hard work. Please do not rush to take away his opportunity, or the opportunities of other children with disabilities who need auxiliary services to succeed.

LEGISLATIVE INFORMATION SHEET
SENATE BILL 636

1. **What is Senate Bill 636?**

Senate Bill 636 is a legislative proposal to change existing Kansas law on the availability of auxiliary services to special education children attending private schools. Current Kansas law requires that school districts provide auxiliary services to private school children with disabilities if it is "practical" for the district to provide those services. The current statute is K.S.A. 72-5392 and 72-5393. The proposed change in law eliminates the right of a disabled child to those services at a private school site.

2. **What are auxiliary services?**

Auxiliary school services include speech and hearing diagnostic services; diagnostic and psychological services; therapeutic psychological, speech and hearing services; and, other related services designed to assist a child in obtaining an education. Common examples are those services provided by an audiologist, speech pathologist, occupational and physical therapist, and sign language interpreter. Auxiliary services also include assistive devices designed to help a child participate in an academic environment. Those items can include assistive listening devices designed to help a child with a hearing impairment to understand what is being said in a classroom and devices designed to help a visually impaired student read.

3. **Why are auxiliary services important?**

Many children with disabilities do not meaningfully participate in an education setting without assistance. A deaf child would have little chance of classroom success if no interpreter was available. A child with a visual impairment may be able to read with appropriate assistive devices. A child with spina bifida may not be able to attend school without the availability of clean intermittent catheterization. With the availability of auxiliary services, many of these children can fully participate in regular academic environments. Auxiliary services allow those children to participate in education and grow to become productive members of society.

4. **Why is it important that auxiliary services be made available to private school children?**

Educational choice is important to many parents and their children. Some parents want their children to have the benefit of a Christian education. Others may want a more intense academic environment than that offered by the public schools. Some families may have their other children in private school and want their disabled child to have the same experience. Without the availability of auxiliary services for private school students, that choice is removed for most parents and the disabled child is denied the educational options that may be available to his or her brothers and sisters.

5. **Does current Kansas law require that all auxiliary services be made available at the private school?**

No. Many auxiliary services can be provided by the public schools to private school students at a public school site, or some other location. For example, speech therapy, occupational therapy, physical therapy, audiology services, and various diagnostic services are usually performed at public school sites and can be provided at those locations to private school students without meaningfully restricting the access of the private school student to the services. Current Kansas law requires a "practical" approach to the provision of auxiliary services and it makes sense for the private school student to go to the public school to receive those services when they are needed.

On the other hand, some auxiliary services are directly tied to the instructional process and require the presence of the auxiliary service at the private school. For example, assistive reading or listening devices have no value to a student attempting to learn at a private school setting if they are only available in a public school classroom. Similarly, a deaf child's interpreter or the instructional aide for the multiply handicapped child needs to go with the child if the service is to be meaningfully provided. Current Kansas law uses a common-sense approach as to the location of the service by requiring the decision on the location of the service be decided based on "practicality."

6. **Does the availability of auxiliary services at private schools mean that the taxpayer is paying for a disabled child's private school education?**

No. Current Kansas law does not require school districts to pay the cost of private school education for children with special needs. Current law simply requires school districts assume the obligation to provide the same assistive technologies or services to special education children in private schools that they provide to children in public schools. Where parents voluntarily place a special education child in a private school setting, the parents incur the costs of the private school education. The school district's financial obligation is limited to the auxiliary services of the same type and nature as those provided to public school students.

7. **Will Senate Bill 636 save money?**

Probably not. In most instances, the cost of auxiliary services will be about the same if provided at either the public or private school site. When the special education student attends private school, the educational cost of that placement is paid by the parents or absorbed by the private school. Those costs include the buildings, operations and materials, teacher's salaries, and all program costs except for the auxiliary service. When those costs are transferred to the parents and private schools, the cost incurred by school districts associated with the private school placement may be less than the cost incurred by the school district if the child remained in public school.

8. **Why was Senate Bill 636 introduced?**

Senate Bill 636 was introduced at the request of the Wichita Public School District after it lost a court case over whether it had an obligation to provide a sign language interpreter at a private school. The case is *Michael Fowler v. Unified School District No. 259*, 900 F.Supp. 1540 (Dist. Kan. 1995). Having lost the lawsuit, U.S.D. 259 now wants to change the law so that it would not be required to provide any auxiliary services at a private school site.

9. **What is the status of Senate Bill 636?**

Senate Bill 636 has passed the Senate and is now pending in the Kansas House of Representatives. It has been assigned to the House Education Committee for consideration.

BEFORE THE SPECIAL EDUCATION
DUE PROCESS HEARING OFFICER

IN THE MATTER OF THE SPECIAL)
EDUCATION DUE PROCESS HEARING OF)
MICHAEL J. FOWLER AND)
UNIFIED SCHOOL DISTRICT NO. 259)

DECISION

This matter comes on for decision following a due process hearing that was held August 4, 1994. The matter was submitted for decision when post hearings briefs were presented as scheduled by 5:00 p.m. August 10, 1994. The parents are contesting the district's refusal to provide an interpreter for Michael Fowler at Wichita Collegiate, a private nonsectarian school. Prior to the hearing, the issues were:

a. Whether federal law as well as state special education law and/or state plan require the provision of interpreting services at Collegiate. The issue here is the meaning of the term "make available" and "provide" under federal regulation. If not,

b. Whether the hearing officer has jurisdiction to interpret K.S.A. 72-5392 et seq.
and, if so,

c. Whether that statute requires the provision of interpreting services at Collegiate. The issue here is whether the services in question can or cannot be "practically provided."

d. Which party has the burden of proof.

During the hearing, the parents essentially abandoned any claim they may have had that federal law alone mandates what they are seeking. They rely instead upon state and local law in its appropriate relationship to federal law.

The district abandoned its contention that the hearing officer lacks jurisdiction to interpret K.S.A. 72-5392 et seq.

We are left, therefore, with the following issues:

1. Do applicable state and local statutes, regulations, and special education plans, in their appropriate legal context that includes the federal legislation and regulation, require the district to provide an interpreter for Michael at Collegiate; and

2. Which party has the burden of proof.

During the hearing, the district removed any doubt that it would provide Michael's assistive devices for his use at Collegiate. Other issues were settled before the hearing as described in my letter of July 30, 1994.

STIPULATIONS

The parties entered into the following stipulations:

a. Michael needs an interpreter.

b. Collegiate is a private, nonprofit elementary and secondary school within the meaning of K.S.A. § 72-5392 *et seq*.

c. U.S.D. 259 provides special education and related services to exceptional children who are residents of the district, but who attend private, nonprofit elementary and secondary schools. Such services are not provided at those schools.

d. Speech/language services, audiological services, interpreting services, and assistive devices are special education services and/or related services provided to students attending schools in U.S.D. 259.

FINDINGS OF FACT

1. Michael Fowler, who turned nine years old August 5, 1994, has completed the third grade in U.S.D. No. 259's special education program for the hearing impaired at Caldwell Elementary School. He became prelingually profoundly deaf at the age of six months as a result of meningitis. Prelingual deafness presents special

problems with learning language because of the loss of hearing before receiving any language input. Michael has consistently needed an interpreter. Testimony of Don Oltean. He could not benefit from a mainstream classroom education without an interpreter either at his present school, Caldwell, or at the private school he plans to attend this year. Testimony of Terry Bachus.

2. Michael has a very high intellectual capacity. His parents urged the district to classify him as gifted. Their concerns about him not being sufficiently challenged led them to voluntarily place Michael at Wichita Collegiate, a private nonsectarian school for the 1994-1995 school year. Subsequently, pursuant to the child study team restaffing agreed to by the parties, which is described in my July 30, 1994 letter, the district agreed with the Fowler's contention that Michael is gifted. Parent Exhibit 10.

3. Although Michael does well in school, he requires several related services that are specified on his IEP as necessary related services: an interpreter, an assistive device (mechanical hearing device), audiological services, and speech and language services. Parents' Exhibit 10. The district has agreed to provide the assistive devices, which will be used by Michael at Collegiate. The audiological services, which involve sophisticated equipment, will be provided to Michael at Caldwell.

4. The district has chosen to concentrate special education and related services for all deaf elementary age children at

Caldwell in what it refers to as a "cluster" concept. The district normally employs nine exact sign language interpreters to provide interpreting principally in mainstream classes because the regular education teachers do not sign. Of the thirty hearing impaired students who depend on signing, about ten or twelve students are mainstreamed to some extent. About ten are in core classes, where interpreters are not needed. Students also spend varying amounts of time in resource rooms, where interpreters are also not needed. Testimony of Don Oltean.

5. The district has chosen to "cluster" the hearing impaired students because it is more cost effective, easier to supervise interpreters, and for a number of educational reasons including to provide an environment where more people, including regular education students, are capable of signing even outside the classroom. Even within this Caldwell cluster, it is not unusual for there to be only one child in a Caldwell class who, therefore, has exclusive use of an interpreter. Testimony of Don Oltean, Terry Bachus, and Barb Fowler. At least six students were in this category for some or all of their school day. Testimony of Don Oltean. Programming for individual needs has resulted in placing students outside the Caldwell cluster program where they received one to one interpreting twice in the past five years. Testimony of Don Oltean. The district tries to limit the number of students requiring an interpreter to two or three per class to maintain the quality of the interpreting and make it easier for the class. Testimony of Don Oltean. There is controversy in the education

community about the efficacy of the cluster concept. Testimony of Terry Bachus.

6. There would have been two profoundly deaf students in the classroom that Michael would have attended at Caldwell. The other fourth grade would have one profoundly deaf and another deaf student that require an interpreter as well as a hard of hearing student who does not use the interpreter. As of the time of the hearing, the district had not decided if it would consolidate the remaining student, left alone by Michael's departure, with the other fourth grade hearing impaired students.

CONCLUSIONS OF LAW

The parents correctly argue, and the district has not disagreed, that federal law establishes a minimum standard for special education that states can exceed if they choose. The "interstitial detail [of the IDEA] is reserved to the states, who have the right to exceed federal standards to provide greater protection and services to handicapped children." B.G. v Cranford Board of Education, 702 F. Supp. 1140, 1148, supplemented, 702 F. Supp. 1158 (D.N.J. 1988), aff'd, 882 F.2d 510 (3d Cir. 1989). When states have enhanced special education programs, the IDEA is considered to have incorporated the state standards. In re Conklin, 946 F.2d 306 (4th Cir. 1991); Norton School Committee v. Massachusetts Dept. of Education, 768 F. Supp. 900, 902-903 (D. Mass. 1991); Pink v. Mt. Diablo Unified School District, 738 F. Supp. 345, 346-347 (N.D. Cal. 1990).

Interpreting is a related service if the student's IEP indicates that the child cannot continue in regular education without the service and would instead have to be educated in a more restrictive environment. K.A.R. 91-12-60(e); State Plan at 59. The local education agency (LEA) must provide related services on an equal basis. State Plan at 59. With respect to the "provision of related services to private schools", such services must be provided on an equal basis except that, "The LEA shall not, however, provide direct services on the premises of a parochial school." State Plan at 61. Private schools and parochial schools are both defined at page 92 of the State Plan. The services provided to private school students must be comparable in quality, scope, and opportunity for participation in the services provided for public school students. Public school personnel may be assigned to serve in private schools that are not parochial, and only certain services may be provided on the premises of parochial schools. State Plan at 92. The USD 259 local plan entitled Comprehensive Plan for Education of Handicapped Children, makes similar provisions. Comprehensive Plan for Education of Handicapped Children §23.0.1, Procedures for Related Services No. 8. K.A.R. 91-12-61(b)(5) contemplates paraprofessionals working away from school district property.

The district has not argued that the provision of an interpreter at Collegiate does not fall under the provisions of K.S.A. 72-5393. That statute provides:

> Any school district which provides auxiliary school services to pupils attending its schools <u>shall provide on</u>

> <u>an equal basis</u> the same auxiliary school services to every pupil, whose parent or guardian makes a request therefore, residing in the school district and attending a private, nonprofit elementary or secondary school. ... Speech and hearing diagnostic services and diagnostic psychological services, if provided in the public schools of the school district, <u>shall be provided in any private, nonprofit elementary or secondary school</u> which is located in the school district. Therapeutic psychological and speech and hearing services and programs and services for exceptional children, <u>which cannot be practically provided in any private, nonprofit elementary or secondary school</u> which is located in the school district, shall be provided in the public schools of the school district, in a public center, or in mobile units located off the private, nonprofit elementary or secondary school premises as determined by the school district; ... (Emphasis added)

Attorney General's Opinion No. 81-27 (February 2, 1981) interprets this statute to provide for the services in the private schools except when that would not be practical.

The district argues, however, that an interpreter for Michael at Collegiate cannot be "practically provided" within the meaning of that term in K.S.A. 72-5393. The district begins its argument by citing <u>Johnson v. Ind. Schl. Dist. No. 4</u>, 921 F.2d 1022, 1026 (10th Cir. 1990) for the proposition that the burden of proof is on the party attacking the child's individual education plan.

That court recognized the expertise of the local education authorities in establishing the appropriate "educational setting" (<u>Id</u>.), and stated that the party attacking the educational setting established by the IEP bears the burden of showing why it is not appropriate.

The parents here, however, do not challenge the need for the related service of an interpreter specified in Michael's IEP. Parent Exhibit 10. The district responds that the IEP provides for

that service at Caldwell. Yet the district does not contest the parents' right to place Michael in a private school as long as they pay for it, and everyone agrees that he needs an interpreter wherever he goes to school.

Thus, appropriateness of the IEP is not at issue. The IEP simply makes appropriate provisions for Michael's special education in the event he were to be educated in a USD 259 school. This is not a controversy over whether Collegiate or Caldwell would provide Michael a more appropriate education. The issue is instead the legal question of whether the district must pay for an interpreter at Michael's private school. The IEP does not make a finding about whether providing an interpreter at Collegiate is practical. That would not be a matter of the team's expertise in determining the appropriate educational setting in any event. Once the educational question of Michael's need for an interpreter as a special education related service is established, the question of the district's obligation to pay for it at a private school must be found in federal, state, and local law.

K.S.A. 72-5393 does, in effect, create a presumption that the related services to which it refers will be provided by the district at the private school premises. The parents would have the burden of showing the appropriateness of the related service if it were in dispute, but it has been stipulated. That law also provides an exception where the related service cannot be practically provided at the private school. Therefore, given the nature of the issue presented, the district has the burden of

proving that it falls within this practicality exception of the statute that it urges as the reason it is not required to provide the interpreter.

The district supports its position that an interpreter cannot be practically provided by invoking the guidance of federal decisions that have interpreted similar federal regulations. In this connection, the district cites Goodall v. Stafford County Schl. Bd., 930 F. 2d 363 (4th Cir.), cert. denied, 112 S. Ct. 188 (1991) and similarly reasoned cases. The court in Goodall refused to imply from the federal regulations the obligation to provide an interpreter on the premises of a private school. Nowhere in the federal regulations are related services explicitly required to be provided on private school premises. Nor did Virginia law adopt this requirement for the sectarian school placement of the Goodall case.

By contrast, Kansas law does explicitly require related services to be provided in private schools if it can be done practically. Therefore, the considerations appropriate to the federal cases are not applicable to this case. For this reason, federal court interpretation of federal regulation terms such as "shall provide" (34 C.F.R. § 300.452) cannot, as the district urges, be substituted for the practicality standard of K.S.A. 72-5393.

The district argues that added cost and undermining of the cluster concept make providing Michael with an interpreter impractical.

The parents cite authority for the definition of "practical" as that which is possible of reasonable performance. Parents' Reply Brief at 10. With respect to the district's cost argument, the parents argue that practicality is not synonymous with cost. The needs of the disabled child come first regardless of administrative and financial burdens to the district. Id. at 13-14. The cases relied upon are not cases involving related services at a private school voluntarily attended by the student. In Kruelle v. New Castle County Sch. Dist., 642 F.2d 687 (3d Cir. 1981), for example, residential placement was at issue because of the student's inability to progress without full time care. If the district lacked residential facilities, there would be a private placement, but it would be a placement by the district rather than a voluntary placement by the parents.

Where the parents have voluntarily placed their child in a private school, Kansas law imposes a practicality standard that is not otherwise imposed on special education programming. There are some exceptions that are not relevant here. The definition of practical urged by the parents, "that which is possible of reasonable performance", is probably as reasonable as any other definition, and the district does not offer an alternative definition. Nevertheless, what may be reasonably performed must bear some relationship to the cost of performance. Any related service could be provided in a private school if cost is no object. Eliminating cost from the equation would read the practicality requirement out of the statute.

At the same time, that there is some cost does not render providing the service impractical. The drafters of the requirement that services be provided in private schools surely knew that there was likely to be a cost that would be greater than providing the services only in the public schools. Therefore, added cost by itself does not make the provision of a related service impractical. The added cost would have to be so great as to be unreasonable under the circumstances. Hypothetical examples are easy to contemplate, but there is one example that is not so hypothetical. Michael is to receive audiological services. The parents have agreed to have Michael come to Caldwell for such testing. This service is performed infrequently. If such a service involved the time consuming moving of sensitive, heavy equipment to the private school to be set up, perhaps readjusted, for a ten-minute test for one child and then moved back to Caldwell and set up again for the audiologist to resume his or her regular full schedule of ten minute evaluations, common sense and reasonableness would dictate that the student make the infrequent trip instead of the audiologist and all the machinery.

The provision of an interpreter stands on different footing. Because the interpreter is needed continuously rather than infrequently, the interpreter's time is not wasted as would be the case with the hypothetical audiologist. There is no way for Michael to travel to Caldwell to make use of an interpreter for his education at Collegiate. Although he would be receiving one on one services of the interpreter, this is not an unusual occurrence at

Caldwell where mainstream placements can result in only one student who needs an interpreter being placed in a class. This was the case with at least six of the ten or twelve mainstreamed students at Caldwell who share the nine interpreters. Thus, Michael would not be receiving a particularly disproportionate share of the interpreting services compared to the other students.

Michael would increase the size of the pool and make such single placements mathematically less likely. On the other hand, as might in fact occur this year, Michael's absence could also permit consolidation of solitary deaf students into the same classroom. Such an incremental statistical difference based on Michael's impact on the size of the pool does not rise to the level of unreasonableness or make providing an interpreter at Collegiate impractical.

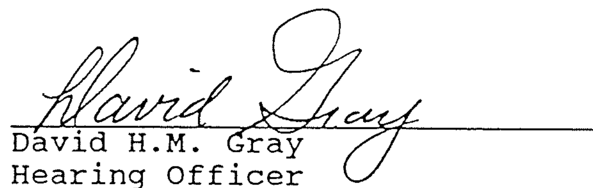
The district has argued that providing an interpreter would require filling one and one-half positions because interpreters need breaks. Staffing patterns at Caldwell permit interpreter coverage during recesses and lunch time without adding additional interpreters. Having to provide fifty per cent more interpreting services because a student is in a private school may approach if not exceed the line of impracticality, but the parents have cried "red herring" since Michael does not need or expect interpreting services during recesses and lunch time. Testimony of Mrs. Fowler. Whether or not this was a "red herring", the parents' stipulation renders the argument moot. They are not arguing for one and one-

half interpreters. They request only one full time interpreter, who may take recess and lunch breaks.

The district's final argument is that, if providing an interpreter for Michael creates a trend, the cluster concept and the ability to maintain the level and quality of services available to students at Caldwell could be seriously impacted. District's Reply Brief at 3. The district's attorney acknowledged in oral argument that this fear may be speculation. The district presented no evidence that such a trend would be created. Nor was there any evidence that the hypothetical migration from Caldwell to private schools of students requiring interpreters would be great enough to affect the functioning of the cluster concept at Caldwell. The district has not fulfilled its burden of proof to support this argument.

For the reasons described above, it is the decision of this hearing officer that the district is required to provide one full time interpreter for Michael at Collegiate.

Attached to this decision as Exhibit A is a summary of the right of the parties to appeal this decision.



David H.M. Gray
Hearing Officer

Date decided: August 22, 1994
Sent by registered mailed to
counsel: August 23, 1994

PROCEDURES FOR APPEAL OF DECISION

An appeal for review of the decision of the Hearing Officer to the State Board of Education may be initiated by the child, his/her parent(s), or by the local Board of Education. The appeal shall be made by filing a written notice of appeal with the State Commissioner of Education* not later than thirty (30) days after receiving the written decision of the local due process hearing. The local education agency shall immediately submit the following to the State Board of Education:

1. A complete and certified transcript or record of the local hearing;
2. All affidavits, documents, and other evidence produced at the hearing.

Not later than twenty days after the notice of appeal is filed, the State Board of Education or a review officer(s) appointed by the State Board of Education shall complete the following:

1. Examine the transcript of the hearing, including all affidavits, documents and other evidence;
2. Determine whether the procedures at the hearing were in accordance with the requirements of due process;

* Kansas State Department of Education
120 East 10th Street
Topeka, Kansas 66612

EXHIBIT "A"

3. Seek additional evidence, if necessary. If a hearing is held to receive additional evidence, the hearing shall be conducted in accordance with the requirements of K.S.A. 72-973;

4. Afford the parties an opportunity for oral or written argument, or both, at the discretion of the Reviewing Officer. If applicable, the parties shall be notified of their opportunity to present oral or written argument not later than ten (10) days prior to the date on which such argument will be heard. All notices shall be sent by restricted mail.

The Reviewing Officer shall render a decision not later than five (5) days after the completion of the review. A written report shall be prepared thereon to the State Board of Education. The Reviewing Officer shall decide the matter by affirming, reversing, or modifying the decision from which the appeal was taken.

The decision shall:

1. Include reasons for the findings;
2. Be based solely on evidence and oral argument presented during the review;
3. Be accompanied by a statement that the decision may be appealed to the District Court as provided by K.S.A. 60-2101.

The decision of the Review Officer shall be sent to the parties by restricted mail.

2ND CASE of Level 1 printed in FULL format.

MICHAEL FOWLER, by his parents and next friends, JAY and BARBARA FOWLER, Plaintiffs, v. UNIFIED SCHOOL DISTRICT NO. 259, Defendant.

CIVIL ACTION Case No. 94-1521-DES

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

900 F. Supp. 1540; 1995 U.S. Dist. LEXIS 15666

October 16, 1995, Decided

October 16, 1995, FILED, ENTERED

COUNSEL: [*1] For JAY FOWLER, parent and next friend of - Michael Fowler, BARBARA FOWLER, parent and next friend of - Michael Fowler, plaintiffs: Mary K. Babcock, Martha Aaron Ross, Foulston & Siefkin, Wichita, KS.

For UNIFIED SCHOOL DISTRICT NO. 259, SEDGWICK COUNTY, KANSAS, defendant: Thomas R. Powell, Roger M. Theis, Hinkle, Eberhart & Elkouri, Wichita, KS.

JUDGES: DALE E. SAFFELS, United States District Judge

OPINIONBY: DALE E. SAFFELS

OPINION: MEMORANDUM AND ORDER

I. INTRODUCTION

This matter is before the court following trial without a jury. Plaintiff, Michael Fowler, a profoundly deaf ten-year old gifted student, challenges the denial by defendant, Unified School District No. 259 ("District"), of interpretative services at Wichita Collegiate School, a private nonsectarian school. Plaintiff brought this action pursuant to the Individuals With Disabilities Education Act ("IDEA"), *20 U.S.C.* §§ *1410,* et seq. In addition, plaintiff asserts a violation of state law pursuant to K.S.A. 72-5393.

Defendant school district, does not dispute that K.S.A. 72-5393 is applicable to this case, but argues the services "cannot be practically provided."

Plaintiff must prevail in this case. After carefully [*2] and thoroughly reviewing the administrative record on appeal, considering the testimony at trial, the exhibits, the oral and written arguments of the parties, the court makes the following findings of fact and conclusions of law.

II. FINDINGS OF FACT

1. Michael Fowler ("Michael") was afflicted with meningitis as an infant and as a result is perlingually and profoundly deaf.

2. Michael successfully participated in the parent-infant and preschool programs offered by USD No. 259.

3. From kindergarten through the third grade, Michael attended Caldwell Elementary School ("Caldwell") where he was mainstreamed with only minimal resource room support.

4. Michael was able to function well in the mainstream environment, in part, because he had access to sign language interpreters utilizing Signed Exact English II ("SEE II").

5. In addition to interpretive services, Michael received: (1) speech/language services; (2) audiological services; and (3) assistive services from the District.

6. The services were provided, at public expense, pursuant to Michael's individualized education plan ("IEP").

7. In November, 1993, Michael was tested by the District and determined to be of very [*3] superior intellectual capacity. The District provided no special program to address Michael's intellectual ability.

8. On May 23, 1994, Jay and Barbara Fowler ("the Fowlers"), Michael's parents, requested a review of Michael's IEP. The Fowlers notified the District of their objection to the placement and educational plan for Michael.

9. The Fowlers had obtained an independent educational evaluation of Michael. Following this evaluation, the District designated Michael as gifted.

10. Because of their objection to Michael's placement and educational plan, the Fowlers enrolled Michael in Wichita Collegiate ("Collegiate"), a private nonsectarian school.

11. Michael attended Collegiate during the 1994-95 school year and is enrolled and attending Collegiate this fall.

12. The Fowlers requested that the District provide Michael interpretive services on-site at Collegiate at public expense pursuant to the IDEA and K.S.A. 72-5393.

13. The District denied the request.

14. The District, for reasons of administrative practicality and educational philosophy, has clustered deaf special education services for all elementary school children at Caldwell.

15. Of the 400 children at Caldwell, [*4] approximately 30 are profoundly hearing impaired and require some degree of interpretive assistance.

16. The cluster approach promotes an environment which is designed to maximize language skills by providing hearing impaired children the opportunity to communicate with similarly disabled children and with hearing children who also learn to sign and communicate with the hearing impaired children.

17. The cluster approach also allows staff interpreters to be centrally located which in turn allows a flexible schedule for the interpreters and an efficient use of scarce resources.

18. The District has made a commitment to insuring that interpreters are given sufficient breaks throughout the day. This reduces the likelihood of injury and burnout from this highly intensive and stressful activity.

19. The cluster approach also seeks to insure sufficient preparation time for interpreters.

20. During the 1994-95 school year, the District employed eight interpreters at Caldwell, although there were appropriations for nine positions.

21. The District was unable to fill the ninth position.

22. There appears to be a shortage of SEE II interpreters in the District and in other areas.

23. [*5] The SEE II method is generally more difficult to learn than the more common American Sign Language ("ASL"). In addition, signing and interpreting by SEE II is a more taxing endeavor than signing and interpreting by ASL.

24. The District has a policy that interpreters will be with the children throughout the entire school day, including recess and lunch periods. This policy ensures that the hearing impaired child always has the ability to communicate and to receive communication.

25. Because of the above stated policy, the District determined that it would be required to provide more than one interpreter st Collegiate to serve Michael.

26. The District asserts, therefore, that one-on-one interpretive services could not be "practically provided" at private schools throughout the District.

27. Barbara Fowler served as Michael's interpreter at Collegiate for the 1994-95 school year.

28. Collegiate officials structured Michael's daily schedule to allow Barbara Fowler sufficient down time, break time and preparation time during the course of the day. Such scheduling greatly reduces the need for a back-up interpreter.

29. Michael will continue to need interpretive services during the [*6] course of his school career.

30. Michael's need for gifted services were met this past year at Collegiate when the District provided a gifted consultant who met monthly with Michael's teacher at Collegiate.

31. On May 30, 1995, an IEP meeting was conducted to discuss Michael's intellectual and academic potential and to determine the appropriate services to meet Michael's special educational needs.

32. The team developed an IEP which requires full-time interpretive services, assistive devices, speech/language services and audiologist services. In addition, the team determined that Michael should have 180 minutes of gifted services per day in a gifted resource room.

33. Caldwell does not have a gifted resource room. During the IEP meeting, the team discussed transporting Michael to Minneha Elementary School to receive the services in a gifted resource room.

34. During the trial to the court, the District indicated it would consider establishing a new gifted resource room at Caldwell and transfer some students currently receiving such services at other schools to Caldwell.

35. There is currently no gifted resource room program at Caldwell. Michael, at this point, would be the only [*7] hearing impaired student in the gifted room, which would result in him receiving one-on-one interpretation during the hours he was in the room.

36. There are at least two other hearing impaired students within the District who are not placed at the cluster schools and who receive one-on-one interpretive services.

37. There was no evidence that the interpreters in these special situations had regularly scheduled back-up interpreters.

38. The cost of providing interpretive services for Michael at Collegiate may be higher than the cost of those services at Caldwell. However, some increase in cost is not necessarily financially burdensome to the District.

39. Because the District has provided individual interpreters in other special settings, there is no indication that doing so in this instance will be administratively burdensome to the District.

40. The District's argument that supervision of an interpreter at Collegiate would present an overwhelming burden to the District is not supported by the evidence that other individual interpreters work without on-site supervision at Starkey Developmental Center and the Vo-Tech School.

41. The Fowlers requested a Level I due process hearing [*8] on May 23, 1994. That hearing was held on August 4, 1994.

42. The hearing officer issued his decision on August 25, 1994, concluding that the District was obligated under IDEA to provide interpretive services for Michael at Wichita Collegiate pursuant to K.S.A. 72-5393.

43. On September 12, 1994, the District appealed the decision to the State Board of Education.

44. A state Review Officer was assigned and on October 5, 1994, the record of review was opened to permit submission of additional evidence by the District. Plaintiff objected to the taking of additional evidence.

45. The Review Officer conducted a hearing on October 13, 1994. At that hearing, the Review Officer ruled that the District could submit affidavits by October 24, 1994, to rebut affidavits offered by the Fowlers at the hearing. The Fowlers objected to the ruling.

46. On November 4, 1994, the Review Officer reversed the decision of the Hearing Officer, ruling that the District was not required to provide one-on-one interpretive services for Michael at Collegiate. The officer noted that the statute requires the District to provide services to students in private schools on a "equal basis" and found that one-on-one [*9] interpretive services for Michael were greater services than what the District was providing students in the public schools.

47. The Fowlers commenced this action seeking judicial review of an administrative order in this court on November 29, 1994.

III. CONCLUSIONS OF LAW

1. The decision of the Review Officer is properly reviewed by this court pursuant to *20 U.S.C. §§ 1400,* et seq. Jurisdiction and venue properly lie in this court.

2. *20 U.S.C. §§ 1400,* et seq., requires a school district to provide a "free appropriate public education" (FAPE) to special education students within its jurisdiction.

3. Plaintiffs have exhausted their administrative remedies in accordance with *20 U.S.C. § 1415*(c).

4. The burden of proof in this matter rests with the plaintiffs who are challenging the ruling of the state Review Officer. Although there is a split of authority on this issue, the court finds that the plaintiffs, as the challenger, are required to carry the burden of proof. *Johnson v. Ind. Schl. Dist. No. 4, 921 F.2d 1022, 1026 (10th Cir. 1990),* cert. denied, *500 U.S. 905, 114 L. Ed. 2d 79, 111 S. Ct. 1685 (1991).*

5. The Fowlers assert that the school district [*10] must "provide special education and related services designed to meet the needs of private school children with disabilities residing in the district." 34 C.F.R. § 300.452.

6. A district court reviews an administrative decision under IDEA by a modified de novo standard of review. *Murray v. Montrose County School Dist., 51 F.3d 921, 927* (10th Cir.) cert. denied *U.S. , 116 S. Ct. 278, 133 L. Ed. 2d 19864* U.S.L.W. 3249 (1995).

The IDEA specifically requires a district court reviewing a challenge under the IDEA to "receive the records of the administrative proceedings, . . . hear additional evidence at the request of any party, and basing its decision on the preponderance of the evidence," grant any appropriate relief. *20 U.S.C. § 1415*(e)(2). Thus, the court does not use the substantial evidence standard typically applied in the review of administrative decisions, "but instead must decide independently whether the requirements of the IDEA are met." *Board of Educ. v. Illinois State Bd, 41 F.3d 1162, 1167 (7th Cir. 1994).*

However, "the fact that § 1415(e) requires that the reviewing court 'receive the records of the [state] administrative proceedings' carries with it the implied [*11] requirement that due weight shall be given to these proceedings." *Rowley, 458 U.S. 176, 206, 102 S. Ct. 3034, 73 L. Ed. 2d 690* (quoting *20 U.S.C. § 1415*(e)(2)).

The district court must therefore independently review the evidence contained in the administrative record, accept and review additional evidence, if necessary, and make a decision based on the preponderance of the evidence, while giving "due weight" to the administrative proceedings below. This has been described as "modified de novo review," or as "involved oversight." Id.

7. K.S.A. 72-5393 is applicable to this case and provides in relevant part:

Any school district which provides auxiliary school services to pupils attending its schools shall provide on an equal basis the same auxiliary school services to every pupil, whose parent or guardian makes a request therefor, residing in the school district and attending a private, nonprofit elementary or secondary school . . . . Speech and hearing diagnostic services and diagnostic psychological services, if provided in the public schools of the school district, shall be provided in any private, nonprofit elementary or secondary school which is located in the school district. Therapeutic psychological [*12] and speech and hearing services and programs and services for exceptional children, which cannot be practically provided in any private, nonprofit elementary or secondary school which is located in the school district, shall be provided in the public schools of the school district, in a public center, or in mobile units located off the private, nonprofit elementary or secondary school premises as determined by the school district.

IV. DISCUSSION

At the outset, the court wishes to note its appreciation for the manner in which this matter was presented to the court. Counsel for both parties were exemplary in preparing for, trying, and arguing the case.

When stripped of all the rhetoric, specialized language and emotion, the issue before this court is really quite simple: Must the District provide interpretive services for Michael Fowler at Wichita Collegiate? After careful consideration, the court answers the question in the affirmative, thereby reversing the decision of the state Review Officer. While sympathetic to the plight of educational administrators who are asked to spread limited resources ever more thinly, the court is convinced the law requires this result. [*13]

First, there is no disagreement that the IDEA extends benefits to private school students. *20 U.S.C. § 1413*(a)(4). The regulations provide that if a student's special needs can be provided in the public schools and if the parents choose to place the child in a private school, the public school system is not required to pay the cost of the child's attendance at the private school. 34 C.F.R. § 300.403(a). However, in such a situation, the school system must still provide special education and related services designed to meet the needs of private school children with disabilities. 34 C.F.R. § 300.452. *K.R. by M.R. v. Anderson Community School Corp., 887 F. Supp. 1217 (S.D. Ind. 1995).*

Those services "for students enrolled in private schools must be comparable in quality, scope and opportunity for participation." C.F.R. § 76.654. Furthermore, the regulations require that the same average amount of program funds shall be spent on a student enrolled in a private school and a student enrolled in a public school except that a different average amount shall be spent

"on program benefits for students enrolled in private schools if the average cost of meeting the needs of those [*14] students is different from the average cost of meeting the needs of students enrolled in public schools." 34 C.F.R. § 76.665.

The plain language of the regulation shows that the primary factor in determining what services to provide students in either public or private schools is the need of each student, not the cost of the service. *Kruelle v. New Castle Co. School District, 642 F.2d 687, 695 (3d Cir. 1981)*

The different average, different need language in § 76.665 is nearly identical to language in the Kansas State Plan For Special Education ("Plan") at Article XII, § Polices, Paragraph 2. The Plan provides: "However, if the needs of students enrolled in private schools are different from the needs of students enrolled in public schools, the local education agency must provide different services appropriate to individual needs." The mandatory language, shall and must, of both the federal regulation and the state plan leaves no doubt that school systems must first look to the needs of its students, not to program costs or potential problems in program delivery.

The court also finds that the above cited requirements are not inconsistent with the words of the [*15] K.S.A. 79-5393 which provides that a "school district which provides auxiliary school services to pupils attending its schools shall provide on an equal basis the same auxiliary school services to every pupil, whose parent or guardian makes a request therefor, residing in the school district and attending a private, nonprofit elementary or secondary school." Additionally, the court is not convinced that the words of the statute which call for services for exceptional children "which cannot be practically provided in any private, nonprofit elementary or secondary

school . . . shall be provided in the public schools," mandate the denial of Michael's claim.

The key words of the statute, and the ones on which this case hangs are "equal basis" and "practically provided." The District would have the court conclude that the provision of interpretive services to Michael at Collegiate is "more than equal" and that those services cannot be "practically provided." The court disagrees.

In K.R. by M.R., plaintiff was confined to a wheelchair as the result of several serious conditions: myelomeningocele, spina bifida, and hydrocephalus with a shunt. *887 F. Supp. at 1219*. K.R. initially attended [*16] the public schools and was provided with related educational services including the services of a full-time instructional assistant. When K.R.'s parents decided to place her in a private parochial school, they requested that the school corporation ("Corporation") provide an instructional assistant. The Corporation refused. *Id. at 1220.*

The Corporation acknowledged that K.R. could not function without an instructional assistant, but refused to provide an assistant claiming that federal regulations did not require it to do so and further claiming that providing an instructional assistant would violate the general goal of safety included in K.R.'s IEP. In addition, the school claimed that providing such services would violate the Indiana Constitution which prohibits expending public funds for the benefit of religious institutions. *Id. at 1221.*

While K.R. by M.R. is distinguishable from the case before this court because here there is no religious issue and no real safety issue, the court finds the case strikingly similar, well-reasoned and applicable to the case at hand. n1 The crux of the court's holding in K.R. by M.R. is that a flat refusal to provide services that are requested [*17] and designated by all in the IEP as necessary to the individual's special needs can only be justified by showing that there is no reasonable way to provide the services.

n1 One could argue that there is a safety issue if Michael does not have an interpreter with him at all times during the day at Collegiate or that there are safety issues relating to the interpreter's need for relief from his/her duties. Neither of those concerns is truly germane to the issue before the court, because the District has stated that if the court finds that it must provide interpretive services for Michael it will assign interpretive staff to cover the entire day and to provide appropriate relief.

Showing there is no reasonable way to provide services is akin to showing services cannot be practically provided as required in the K.S.A. 72-5393. practical has been defined as "that which is possible of reasonable performance." *Greene v. Valdese, 306 N.C. 79, 291 S.E.2d 630, 634 (N.C. 1981).* Practical and reasonable are closely [*18] associated terms, and the court finds that the District cannot deny interpretive services to Michael at Collegiate unless it can prove there is no reasonable way to provide those services.

The District has not done so. In fact, by providing interpreters for individual students in some Caldwell classrooms, by sending individual interpreters for hearing impaired students at the Vo-Tech and at Starkey, the District has shown that there is a reasonable way to provide interpretive services to individual hearing impaired students away from the cluster site. It is incongruent to now claim that such services cannot be reasonably provided in Michael's case.

The District's argument that cost of providing the services is too high is inconsistent with the language of the federal regulations, the state statute, or the Plan. Michael is a prime example of what the language in both the federal regulations and the Plan specifically means: where there are different needs in students in public and private schools, those differences must be met even if the cost of meeting those needs is higher in the case of private school students. 34 C.F.R. § 76.655(b); Kansas State Plan for Special Education Article [*19] XII, Policies, § 2. K.S.A. 76-5393.

All parties agree that Michael cannot function without an interpreter. All parties agree that this service is indisputably tied to Michael's special needs. All parties agree that if Michael were attending Caldwell, he would be provided with full-day interpretive services. n2 All parties acknowledge that there are hearing impaired public school students who sometimes receive interpretive services on a one-to-one basis and that if Michael were to attend Caldwell, it is possible that he would at times during the day be receiving such one-on-one services. The fact that he would certainly be receiving such services at Collegiate does not violate the equal basis language of the § 72-5393. Equal basis must be read in light of the federal regulations and the Plan.

n2 Although the District would argue that the services would be available based on the cluster approach rather than a one-on-one approach, the testimony showed that because Michael is also gifted there would be hours during the day when he would

be the only student in a given room utilizing an interpreter. One-on-one services would, therefore, be provided by the District.

[*20]

A proper reading of all the regulatory and statutory provisions and the applicable case law leads to the inescapable conclusion that the District must provide interpretive services for Michael at Collegiate. The court has carefully and thoroughly reviewed the record including the Hearing Officer's Decision and the Review Officer's Report, has taken additional evidence through testimony before this court, and has received both the oral and written arguments of the parties. The court finds that the plaintiff has shown by a preponderance of the evidence that the District must provide interpretive services to Michael at Collegiate in accordance with his IEP.

Plaintiff's request for declaratory and injunctive relief is granted.

IT IS THEREFORE BY THE COURT ORDERED that the plaintiffs' motion for injunctive relief is granted and the defendant is required to provide interpretive services to Michael Fowler at Wichita Collegiate.

IT IS FURTHER ORDERED that plaintiffs are awarded reimbursement in the amount of $ 15,550.43 for the cost of interpretive services for the 1994-95 school year and an additional amount for the cost of services to date in the 1995-96 school year.

IT IS FURTHER [*21] ORDERED that plaintiffs submit a petition for attorneys fees and costs pursuant to *20 U.S.C. § 1415*(e)(4) and *42 U.S.C. § 1988.*

Dated this 16 day of October, 1995, at Topeka, Kansas.

DALE E. SAFFELS

United States District Judge

GREG EVANS
2307 S. DELROSE
WICHITA, KANSAS 67218

March 13, 1996

Representative Bill Mason
State Capitol
300 S.W. 10th Ave.
Topeka, Kansas 66612-1504

Re: **Senate Bill 636 - Written Testimony**

Dear Representative Mason:

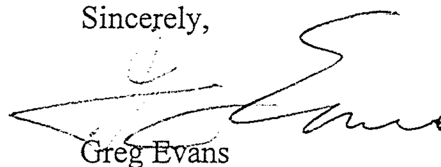
I am the President of U.S.D. 259's Special Education Advisory Council. The Special Education Advisory Council is an organization of parents, educators and other persons interested in special education services. The Council's function is to advise the school board on matters relating to special education.

I am also the parent of a special need's child. I am writing this letter to oppose Senate Bill 636. All special education children in Kansas deserve access to special education auxiliary services. Federal and state law have long recognized that auxiliary services are important to the education of special needs children and that private school children ought to have the same access to those services as children in public school.

Senate Bill 636 changes the law to deny private school children access to services. It denies educational choice to all our children with special needs. It represents a significant change in Kansas law. It is a change in law that should not occur without a detailed understanding of its consequences and some deliberation by those making the decision that the public policy of the state should be changed.

I believe, and I know that my Advisory Council concurs, that the special education opportunities of our children should be preserved and that no steps should be taken to deny or restrict the rights of our children. Please vote no on Senate Bill 636 .

Sincerely,



Greg Evans

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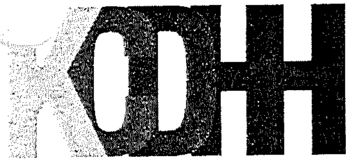

KANSAS
Commission for the
Deaf & Hard of Hearing

300 S.W. Oakley, Biddle Bldg.
Topeka, Kansas 66606-1861
913-296-2874 V/TTY
800-432-0698 V/TTY
913-296-6842 FAX

The mission of the Kansas Commission for the Deaf and Hard of Hearing is to advocate for and facilitate equal access to quality, coordinated and comprehensive services that enhance the quality of life for Kansans who are deaf and hard of hearing.

March 13, 1996

SENATE BILL 636

My name is Wayne C. Mnich and I am the Executive Director of the Kansas Commission for the Deaf and Hard of Hearing. I am also a member of the Council of Executives of American Schools for the Deaf and a life member of the the Council on Education of the Deaf. My background experience is in education - my field of specialization is in deafness and the hard of hearing. I have taught in residential programs, private programs, on the community college level, the university level for 34 years. I continue to teach - presently teaching two classes a week at Washburn University so that people will understand the unique socioeducational needs of deaf students and to develop standards for a full range of educational programs to meet these needs.

One of the most important rights of our American heritage is that every child in the United States shall have an opportunity for an education. With the passage and implementation of the Education for All Handicapped Children Act (Pl. 94-142), signed by President Gerald Ford November 29, 1975, the United States took the legislative step necessary which ensured that all handicapped children, including the hearing impaired, would receive an appropriate education.

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Deaf children should be taught by teachers who are properly prepared to help them overcome their handicap. These teachers need guidance from supervisors who are professionally qualified in the area of the education of the deaf in order to provide appropriate programs. Under PL. 94-142 a sensory-impaired child is entitled to an appropriate education. In all cases the child must receive meaningful benefit from his/her instruction in the least restrictive environment. For some sensory-impaired children this means placement in a state school for the deaf or blind on a residential basis seven days a week. For others this means receiving instruction within the local school system, whether public or private, in a separate class, in the regular class, or a combination.

Usually when deaf children are ready to enter school, their use of language is limited. Unlike their hearing counterparts, they do not have a knowledge of the meaning of very many words. They frequently do not know their own names and do not know simple words such as chair, table, mother, milk, and words describing their immediate environment. Not only do they not know the vocabulary, but they usually do not know how to use these words in structured sequences which transmit meaning to others. This is because they have never heard them. Not only do these children not know the meaning of words, but they do not know how to say the words.

It is quite logical and natural that parents want to keep their children at home and have their deaf children educated in the neighborhood school - may it be public or private, just as is true with the other children in the family. Parents want their deaf child to attend the neighborhood school and do sometimes realize the fundamental differences of the educational program needs because

of his/her basic communication handicap.

The objective of the integration of deaf children into the overall hearing society as adults is of primary importance. The degree to which this integration can take place in the school situation, either in terms of total mainstreaming or partial mainstreaming is important for all educators and for parents. The Council of Executives of American Schools for the Deaf has developed a 12-point criteria in determining in whether a deaf or severely hard of hearing pupil should be assigned to a regular class for instruction.

Parents of young deaf children are frequently the ones who are most insistent that their child be integrated into classes of typical hearing children. They are seeking normality or the appearance of normality. Actually, it is the young deaf child with his or her lack of language and communication who is most in need of the special education of the deaf. Time lost from this special education during the early years can never be regained.

In addition to the lack of learning and lack of development of language, the psychological impact on the child being placed in a situation of maximum frustration and continuing failure may have long-term traumatic effects. This frequently results in producing educational cripples who can never accept or overcome their handicap.

In considering Senate Bill 636, I ask this committee to not rush to enact legislation in response to claims of fiscal distress which to me is not a valid reason to deny any child with disabilities who need auxiliary services to succeed.

NAME - Shirley Ann (Kaufman) Armentrout
and William Robert "Robbie" Armentrout

ADDRESS - 6934 SW 33rd
Topeka, KS 66614

PHONE - (913) 478-4090

CONCERN: PASSING OF BILL NO. 636 - REQUEST THAT THE BILL NOT BE PASSED ON BEHALF OF THE CHILDREN THAT WILL BE AFFECTED.

ISSUES THAT CONCERN ME ARE:

1. The therapists that will be providing the direct services are contracted for those services and will need to be moving from school to school. Students of all services of special services need to be looked at and this would mean that my son and others would need to be moved for the therapy session at the public school providing it. At this date there are not services at all schools for all therapies. Would it make that much difference to have the service come to the student with the understanding that a paraprofessional would need to be paid and present on the bus of some students and bus transportation would need to be paid for in addition to the therapy cost. Loss of school time and the stamina that it takes out of the student to be moved cannot be given back.

2. Students of special needs are entitled to relief under the IDEA. That money is given to the school district. If the school corporation violates state law that could be passed by this one then the U.S. Secretary of Education can implement a "by-pass"to waive the troublesome requirement for the state. The federally-required services provided to the students would then go to the students in the private school. This would then begin to leave the public schools with less money to provide services that are federally mandated to be carried out by the public school system.

3. Testing that would need to be done for the student in need of special services under this bill would require them to be tested elsewhere. How could an accurate testing be done in an unfamiliar setting? How could consultation of services be accurately done in another setting? For example, if a consultant would need to come in to be sure the desk and surroundings would fit properly for a student they would not be able to do this under the new law. These are special needs that we take for granted for a student without a physical disability.

In conclusion, I will be available for further conversation or input into this critical issue. I urge you to vote against this bill as it is taking away the right of the student to be educated as a whole person.

My name is Sheryl Stanley and I would like to speak to you today in opposition to Senate Bill 636. I am the mother of five young children ages 11 1/2 years to almost 12 months. We live in rural Sedgwick County, Goddard School District and three of my children attend St. Peter Catholic School.

My oldest daughter received speech assistance for two years and it made a tremendous impact on her self confidence. My son suffered with ear infections for over a year as a baby resulting in speech delays and some hearing loss. He is currently receiving assistance at his school for speech. In addition Chris has a condition with bone spurs that have resulted in a loss of rotation in his right arm. Occupational therapy last year assisted him in developing better skills for daily living, cutting and writing. These services only amounted to a few minutes a couple times a week, but they have made a big impact on his life.

After learning about Senate Bill 636 in an early March article, I decided I needed more information. Pursuing this, I learned that this bill had been hurried through the Senate and was already at your hand for a hearing, so I wanted to carry a voice of concern for the effect this bill could have on my children, friends children and the children of the future potentially needing assistance. I have spoken to friends about this bill in the last couple days and about the services that are currently be provided but are at risk of being lost, and how this could affect our freedom of choice, how our choices for education may be taken away from parents trying so hard to help their children succeed. Some of those friends previously or currently being provided services have sent letters of opposition with me today. All of them are concerned about the impact this bill could have for other children.

Teaching children to read is the act of bringing their experiences to the written page, for example, a child can be taught to read the word rain but it will have little meaning or impact to the child has never seen or felt rain. If supportive services are denied to a child simply because the parents want their children to be taught with references to Christianity, with reinforcement to the parents morals, then those children have only begun a long road of discrimination. A child being made fun of because they are different in some way has the saddest eyes you can imagine, there is no weight as heavy as the one those parents must carry when they are unable to give the child help they need.

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If a process as simple as speech assistance or occupational therapy can assist a young child on the road to learning, as opposed to simply being a number in the system then we would surely want those children to become active citizens. Similarly if a child can not read because the letters look funny, wouldn't we want to do all we could to help? If a child can not hear, do we put them in a closet on the shelf because they are different? As a mother of five, as a Girl Scout Leader, as a Parent volunteer with computer classes, I assure you, every child is different! Sometimes it is the smallest thing that can make the longest impact on a childs life. At other times it takes longer to set a child on the right path but it is very rewarding to see our future become brighter with smiling happy children. These well adjusted children are being taught to read, to speak properly, to respect authority, to appreciate the special needs and feelings of others.

Parents want to raise children with active imaginations, progressive ideas and to be culturally aware. Parents want their children to become active, self supporting adults. Clearly, this is not an easy process. Parents time is just as important as anyone else, we have the future in our hands. I am greatly concerned that If all parents being provided services in their school of choice are forced to drive one of their children in another direction for auxiliary services it creates a hardship on the entire family. If I was to pull my son from classes and drive the 15 minutes to a Goddard School to attend 20 minutes of speech and then drive back to his school to either get his sisters or to return him to classes he would most definitely have a problem keeping up in school and soon would be needing additional services such a tutoring. My next option might be to pull all of my children from classes early so that one child can receive assistance, this then causes problems for all three teachers and surely would cause havoc if all the children needing services and their siblings are coming and going early or late from school. If you could imagine attending these hearings, some of you late, some leaving early, you would greatly limit the amount of time true accomplishment was possible. If you add to this the problem of time for homework, volunteer positions such as crossing guards that encourage good citizenship, sports practice encouraging sportsmanship, chores and scouting, reinforcing parents values and beliefs, children barely have time to play and be imaginative.

I am afraid that if children are denied access to auxiliary services in their school of choice, many of those children will be denied them completely because parents are unable to manage the amount of traveling necessary to provide them elsewhere during the school day. I am also concerned for those children needing a substantial

amount of assistance that are being denied access to a school that is in all other ways able to meet the value needs of student, siblings and parents.

When my oldest daughter was 6 she showed an amazing interest in her own future and the democratic process while using the voting machine at the Childrens Museum. She voted that she would like to see more exhibits for the 7-14 are group because "She enjoys learning about things and doesn't want to stop." Let's take a cue from our youth and move forward to preserve a sound and definitive future for our youth. Don't pass this bill and wait to see what precedent is set, to see how many parents are no longer able to get help to set their children on a firmer foundation, how many are forced to live with anothers choice of schools despite the fact that they are willing to pay both taxes and tuition for a school of choice.

There is a poem called Excuse This House and it talks about a house boasting of children everywhere. Smears on windows, smudges on the doors and toys strewn on the floor. For this the Mother says "I should apologize" but she sat down with the children and played and laughed and read, and if the doorbell doesn't shine, their eyes will shine instead. I am calling on your support for the benefit of our future young and old. Help us make their eyes shine. Thank you!

Oppose Bill 636

I strongly oppose Senate Bill 636. I feel all children should be provided auxiliary services no matter what educational institution they choose to attend. As taxpaying citizens, I feel we are paying for these services and are entitled to these services. Since the tax dollars are all currently being given to the public school systems it is the public school systems responsibility to distribute these services to all those in need whether at the public school facilities or at the private school facilities. It is discriminatory that these students should have to attend only public schools to receive services. I feel as a parent and taxpayer that we should not be forced to attend a public school where they are not able to teach or enforce the morals that I want my children to live by.

I personally have a son who has completed the speech program and another son currently going through the speech program. I know how important it has been to their self esteem as they have mastered each sound to enable them to speak more understandably. They go to a private school and I transport

them to a public school for these services. It would be a shame to take this opportunity away from them just because they do not attend a public school.

Sincerely
Kevin G. Denning
Diane Denning
Wichita Ks

March 12, 1996

Dan & Sharon Rutherford
15420 High View Dr.
Goddard, Ks 67052

Dear Elected Official;

You are considering canceling a very important step in education. Every child is entitled to Special Education. It has already been paid for by our taxes and private school children should be entitled to receive benefits.

We have a child who is EMH. He goes to a public school now. We would always want to have the opportunity to change to a private school if we so desired. Public school doesn't always provide the necessary climate needed for every child. There are many things we don't like about public school, such as riding the bus for 2 ½ hrs every day (which will change next year to approximately 3 ½ hrs a day).

When a school system is requesting changing a law that would be clearly beneficial to itself we think it needs to be looked at with greater understanding. These children need help just as much as public school children.

Dan & Sharon Rutherford

KAPS *KANSAS ADVOCACY & PROTECTIVE SERVICES, INC.*

2601 Anderson Ave. Suite 200
Manhattan, Kansas 66502-2876

Voice/TDD (913) 776-1541
Voice/TDD (800) 432-8276
Fax (913) 776-5783

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MEMO TO: Members of the House Education Committee
FROM: Kansas Advocacy & Protective Services, Inc.
RE: Staff Report on SB 636--Auxiliary School Services
DATE: March 13, 1996

My name is Sherry Diel. I am an attorney with Kansas Advocacy & Protective Services, Inc. (KAPS). KAPS is a federally funded non-profit corporation which advocates for the rights of Kansans with disabilities. KAPS administers four programs: (1) Protection & Advocacy for Individuals with Developmental Disabilities (PADD); (2) Protection & Advocacy for Individuals with Mental Illness (PAIMI); (3) Protection & Advocacy for Individual Rights; and we perform the legal advocacy for (4) the Protection & Advocacy for Assistive Technology (PAAT).

KAPS has two attorneys on staff who devote their time to special education matters. KAPS staff has grave concerns about the impact SB 636 will have on children with disabilities who are educated in the private schools.

KAPS staff does not support SB 636 for two reasons:

1) the proposed bill has the potential of eliminating parental choice which is available to parents of children with disabilities under current state law; and

2) the proposed bill may potentially deprive children with disabilities who attend private schools necessary assistive technology devices and services.

This bill was introduced as a reaction to Judge Saffel's opinion rendered in the Fowler case, which required, pursuant to state law, that the Wichita public schools provide an interpreter for the Fowler's son who transferred to Wichita Collegiate, a private school. The effect of the proposed bill would be to eliminate parental choice for parents of deaf students and parents of children with other types of disabilities who require special education services when the public school provides those services either on-site or off-site.

Without special education services, many children with disabilities will be denied the opportunity to attend private schools, unless their parents can afford the cost of the auxiliary school services their child needs. Under current law, children who attend private schools are transported to public schools or to an off-site location to receive most of their special education services. However, for those students who require one-to-one services, such as an interpreter, it is necessary to provide the special

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education services in the private school setting in order for the child to benefit from the curricula. If SB 636 becomes law, these children will, for all practical purposes, be denied the opportunity to be educated in private schools.

Parents who decide that private schooling is the best option for their child, pay property taxes. Therefore, the family does financially support public schools even though their child may not attend public schools. In addition, categorical aid, or special education funding, is allocated to the district where the student with disabilities resides based upon the number of professional staffing requirements rather the number of students with disabilities. The Wichita School District clusters deaf students in groups for educational purposes. Under federal and state law, the Wichita school system would have had to provide interpreter services in the home school of any deaf student who requested interpreter services be provided in their home school rather than in cluster settings on the basis that the child was not being taught in least restrictive environment available. If the categorical aid is tied to the interpreter, rather than the student, why would it be different if a child attends public or private school?

Second, KAPS staff is concerned that children with disabilities who attend private schools will be denied assistive technology devices, such as augmentative communication devices or assistive listening devices, if SB 636 becomes law. Although the proposed bill states that school districts are not exempted from compliance with federal and state laws with respect to the provision of special education services, KAPS staff is concerned that the proposed language could be interpreted by school districts to deprive students with disabilities necessary assistive technology devices and services.

"Assistive technology devices and services" are not incorporated within the listing of "related services" under the Individuals with Disabilities Education Act (IDEA). Rather, "assistive technology devices and services" are separately defined under IDEA to broaden the scope of services required to be provided to meet the special education needs of children with disabilities. The Kansas statutes do utilize the term "auxiliary school services". However, the State Board of Education rules and regulations follow federal terminology and include "assistive technology devices and services" as "related services". With the inconsistent terminology which exists between federal and state law and the Department of Education regulations, we are concerned that if SB 636 is passed that children with disabilities who attend private schools will be denied assistive technology devices and services necessary to further their education.

Based upon the above reasons, KAPS staff respectfully requests the Committee not recommend SB 636 for passage.

We appreciate your willingness to hear our concerns. If you have any questions, I will be happy to address them.

March 13, 1996

Testimony to oppose Senate Bill 636

To: Members of the House Education Committee

I'm Charles Jedele, Chairman of the Kansas Associations of Non-government Schools. I represent 172 schools, which enroll 36,563 students in the state of Kansas. We estimate that our schools save the taxpayers of Kansas an amount in excess of $150 million dollars.

Non-government schools have been accused for a long time of only enrolling the best students. Our schools in fact are trying very hard to enroll students with disabilities.

Present law doesn't prohibit the delivery of auxiliary services on the private school campus. It is critical to some disabled students that this is continued. For example, the hearing or sight disabled student must be given interpreters on the private school campus, if they are to attend there. The private school doesn't have the funds to provide these interpreters. If you recommend Senate Bill 636, for passage, you would in fact be denying the opportunity for these disabled students to choose private education.

Although the denial of delivery of some auxiliary services on the private school campus would not be critical to enrollment, it is certainly not in the best interest of the disabled student to require this student be transported to a neutral site for services. The student needing psychological evaluation or speech and language help is much better served in the private school building. Our parents repeatedly prefer this, and sometimes deny auxiliary services for their child because they don't want their child to leave the private school campus.

Senate Bill 636 will only insure that private schools are limited or prohibited from enrolling students with disabilities. I ask that you do not recommend this bill to the House for passage.

House Education
3/13/96
Attachment 11