

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

IN THE MATTER OF :)
)
CAPE GIRARDEAU 63 SCHOOL DISTRICT,)
)
Student/Petitioner)
v.)
)
,)
)
Respondent)
)

COVER SHEET

1. (“Student”) is the son of and (“Parents”). Student was born on .
2. At all times material to this due process proceeding, Student resided with his Parents within the boundaries of the Cape Girardeau 63 School District (“District”).
3. The Student and Parents were not represented at the hearing. Prior to the hearing, Student’s Parents indicated in writing to the Hearing Chairperson that they would not attend the hearing. (HP Exh 22). Subsequently, neither the Parents nor anyone else attended the hearing on behalf of the Student.
4. The District represented at the hearing by:

Teri Goldman
Teri Goldman, LLC
36 Four Seasons Center, #136
Chesterfield, MO 63017
5. The District requested due process by letter to the Department of Elementary and Secondary Education (“DESE”) dated May 27, 2004 which was received by DESE on May 28, 2004. (HP Exh 1) The original deadline for mailing the decision in this matter was July 12, 2004. (HP Exh 3).

6. On June 14, 2004, the Hearing Chairperson sent the Parents a copy of the *Procedural Safeguards for Children and Parents*. (HP Exh 5).
7. On June 18, 2004, the District requested an extension of the time lines through September 1, 2004. (HP Exh 7). The Hearing Chairperson extended the time lines to September 1, 2004 by letter dated June 18, 2004. (HP Exh 8).
8. On June 21, 2004, the Hearing Chairperson issued a Notice of Hearing, setting the hearing for August 5 - 6, 2004. (HP Exh 9).
9. On July 9, 2004, Attorney Dayna Deck entered an appearance on behalf of the Parents. (HP Exh 10).
10. On July 14, 2004, the Parents requested that the hearing scheduled for August 5 - 6, 2004 be continued and that the time lines be extended through October 31, 2004. (HP Exh 13). The Hearing Chairperson extended the time lines through October 31, 2004 by letter dated July 20, 2004. (HP Exh 15).
11. On August 25, 2004, the District requested that the time lines be extended through December 6, 2004. (HP Exh 17). The Hearing Chairperson extended the time lines through December 6, 2004 by letter dated August 27, 2004. (HP Exh 18).
12. On September 13, 2004, Attorney Dayna Deck withdrew as counsel for the Student and Parents. (HP Exh 19).
13. On September 17, 2004, the Hearing Chairperson issued an Amended Notice of Hearing which set the due process hearing for October 19 - 21, 2004. (HP Exh 20).
14. On October 11, 2004, the Hearing Chairperson sent a letter to the parties reminding them that the matter was set for hearing on October 19, 2004 and reminding the parties that all exhibits for the hearing must be exchanged five business days in advance of the hearing. (HP Exh 21).
15. The hearing in this matter began and was concluded on October 19, 2004, in Cape Girardeau, Missouri.
16. The Hearing Panel for the hearing was Ransom Ellis, III (Hearing Chairperson); Dr. Kim Ratcliffe (Panel Member); and, Sandra Harrison (Panel Member).
17. On November 26, 2004, the District requested that the time lines be extended through December 31, 2004. The Hearing Chairperson extended the time lines through December 31, 2004 by letter dated November 29, 2004.

with *The Procedural Safeguards for Children and Parents* by the Hearing Chairperson. (HP Exh 5).

4. The District was represented by Teri Goldman, Teri Goldman, LLC, 36 Four Seasons Center, #337, Chesterfield, MO 63017.

5. The Hearing Panel for the due process proceeding was:

Ransom A Ellis, III, Hearing Chairperson
Dr. Kim Ratcliffe, Panel Member
Ms. Sandra Harrison, Panel Member

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

Dr. Dan Steska	Superintendent
Mark A. Bowles	Superintendent
Dr. Betty H. Chong	Assistant Superintendent
Danyne Ring	Director of Special Services
Sydney Herbst	Principal
Ruth Ann Orr	Special Education Process Coordinator
Kathy Wynn	Special Education Process Coordinator
Tim Ward	Psychological Examiner
Dr. Debra Rau	School Counselor
Monica Rapp	Special Education Teacher
Cheryl Crouch	Special Education Teacher
Jill Janet	Classroom Teacher (Kindergarten)
Melissa Ashby	Classroom Teacher (First Grade)
Teresa Williams	Classroom Teacher (Second Grade)
Toni Dement	Classroom Teacher (Third Grade)
Angie Kester	OHI
David Shaffer	Occupational Therapist
Barbara McClanahan	Speech Language Pathologist
Diana Rhodes	Speech Language Pathologist
Elaine Beussink	Speech Language Pathologist
Angie Reinhart	Speech Language Pathologist
Tammy Lynn	School Nurse

B. Procedural Background

7. The District requested due process by letter to the Department of Elementary and Secondary Education (“DESE”) dated May 27, 2004 which was received by DESE on May 28, 2004. (HP Exh 1) The original deadline for mailing the decision in this matter was July 12, 2004. (HP Exh 3).

8. On or about June 14, 2004 Ms. Williams notified the Hearing Chairperson (HP Exh 3) and the Hearing Panel Members (HP Exh 4) that they had been selected to serve on the hearing panel for the request for due process filed by the District.
9. On or about June 14, 2004 the Hearing Chairperson provided the Parents with a copy of the *Procedural Safeguards for Parents and Children* (HP Exh 5). The Hearing Chairperson also notified the parties that the due process hearing had to be held, and a written decision rendered by July 12, 2004. (HP Exh 6).
10. On June 18, 2004, the District requested an extension of the time lines through September 1, 2004. (HP Exh 7). The Hearing Chairperson extended the time lines to September 1, 2004 by letter dated June 18, 2004. (HP Exh 8).
11. On June 21, 2004, the Hearing Chairperson issued a Notice of Hearing, setting the hearing for August 5 - 6, 2004. (HP Exh 9).
12. On July 9, 2004, Attorney Dayna Deck entered an appearance on behalf of the Parents and Student. (HP Exh 10).
13. On July 9, 2004, the Parents filed a Motion to Dismiss the due process request. (HP Exh 11). On July 15, 2004, the District filed Petitioner's Memorandum in Opposition To Respondents' Motion to Dismiss. (HP Exh 14). On August 9, 2004, the Hearing Chairperson issued a decision denying the Parents' Motion to Dismiss. (HP Exh 16).
14. On July 14, 2004, the Parents requested that the hearing scheduled for August 5 - 6, 2004 be continued and that the time lines be extended through October 31, 2004. (HP Exh 13). The Hearing Chairperson extended the time lines through October 31, 2004 by letter dated July 20, 2004. (HP Exh 15).
15. On August 25, 2004, the District requested that the time lines be extended through December 6, 2004. (HP Exh 17). The Hearing Chairperson extended the time lines through December 6, 2004 by letter dated August 27, 2004. (HP Exh 18).
16. On September 13, 2004, Attorney Dayna Deck withdrew as counsel for the Student and Parents at the request of the Parents. (HP Exh 19).
17. On September 17, 2004, the Hearing Chairperson issued an Amended Notice of Hearing which set the due process hearing for October 19 - 21, 2004. (HP Exh 20).
18. On October 11, 2004, the Hearing Chairperson sent a letter to the parties reminding them that the matter was set for hearing on October 19, 2004 and reminding the parties that all exhibits for the hearing must be exchanged five business days in advance of the hearing. (HP Exh 21).
19. The hearing in this matter began and was concluded on October 19, 2004, in Cape Girardeau, Missouri.

20. Exhibits were introduced and received into evidence at the hearing. The following documents were admitted and made a part of the record in this case: Hearing Panel Exhibits (“HP Exh”) 1 through 23; Petitioner’s Exhibits (“P Exh”) 1 through 55, pp. 1-655. (Tr p. 6; pp. 16-17). The Petitioner’s Exhibits were admitted as business records of the District. (Tr pp. 16-17).

21. The District was given an opportunity to provide the Hearing Panel with a brief or written statement of position following the hearing. The District declined to provide a written brief or written statement of position.

C. Time Line Information

22. The District requested due process by letter to the Department of Elementary and Secondary Education (“DESE”) dated May 27, 2004 which was received by DESE on May 28, 2004. (HP Exh 1) The original deadline for mailing the decision in this matter was July 12, 2004. (HP Exh 3).

23. On June 18, 2004, the District requested an extension of the time lines through September 1, 2004. (HP Exh 7). The Hearing Chairperson extended the time lines to September 1, 2004 by letter dated June 18, 2004. (HP Exh 8).

24. On July 14, 2004, the Parents requested that the time lines be extended through October 31, 2004. (HP Exh 13). The Hearing Chairperson extended the time lines through October 31, 2004 by letter dated July 20, 2004. (HP Exh 15).

25. On August 25, 2004, the District requested that the time lines be extended through December 6, 2004. (HP Exh 17). The Hearing Chairperson extended the time lines through December 6, 2004 by letter dated August 27, 2004. (HP Exh 18).

26. The hearing in this matter began and was concluded on October 19, 2004, in Cape Girardeau, Missouri.

27. On November 26, 2004, the District requested that the time lines be extended through December 31, 2004. The Hearing Chairperson extended the time lines through December 31, 2004 by letter dated November 29, 2004.

D. The Issue

28. The following issue was presented to the Hearing Panel:

“Whether the re-evaluation of the Student dated April 30, 2004 is appropriate and whether the conclusion of that re-evaluation is correct.”

(Tr pp. 5-6).

E. Background Facts

29. Prior to moving to the District, the Student and Parents lived in Arkansas. In early 2001, when the Student was four years, nine months old, Parents had him evaluated by Dr. Eldon G. Schulz (“Dr. Schulz”), a medical doctor in the Department of Pediatric Physical Medicine & Rehabilitation Department at the Arkansas Children’s Hospital. In a report dated March 8, 2001, Dr. Schulz gave the following “impressions”:

- A. The Student has a long standing history of “atypical behavior” characterized by preservation/over fascinations with themes, the need for sameness/routine (cognitive rigidity), if interrupted he has significant disruptive behaviors and tantrums, atypical and challenging social skills with (by clinical history) advanced basic language skills. His presentation puts him on the spectrum of Pervasive Developmental Disorders.
- B. The Student has significant sleep onset problems, requiring high levels of paternal intervention.
- C. The Student exhibits high levels of non-compliant, oppositional and aggressive behaviors are consistent with the diagnosis of Oppositional Defiant Disorder.
- D. The Student has significant Sensory Processing/Integration problems affecting the tactile, vestibular, olfactory and auditory domains.
- E. The Student does not meet the diagnosis for more specific PDD He does meet the diagnosis criteria for ADHD (combined type) as substantiated by a sufficient number of symptoms and developmentally age/gender inappropriate levels (greater than the 95th percentile) of primary symptoms with impairments in the social and behavioral domains.

Dr. Schulz recommended that the Student continue taking Zoloft and re-try Concerta. (P. Exh 1, pp. 1-4).

1. Between March and June, 2001, the Parents and Student relocated to the Cape Girardeau, Missouri area. In June, 2001, the Student received a psychiatric evaluation from Dr. Brad Robison (“Dr. Robison”). Dr. Robison made the following diagnosis of the Student:

- | | |
|----------|---|
| Axis I | 1. Pervasive Developmental Disorder – Not otherwise specified |
| | 2. Attention Deficit Hyperactivity Disorder |
| | 3. Oppositional Defiant Disorder |
| Axis II | No Diagnosis |
| Axis III | Sensory integration problems |
| Axis IV | Mild to moderate stressors in social settings |
| Axis V | Current CGAF – 60 |

Dr. Robison recommended that the Student continue to take Zoloft and a stimulant medication for his ADHD. (P. Exh 2, pp. 6-8).

2. In August, 2001, the Parents had the Student examined by Dr. Stephen M. Kanne (“Dr. Kanne”), a Pediatric Neuropsychologist, in the Department of Psychology at St. Louis Children’s Hospital. At the time of the examination, the Student was taking Luvox, Risperdal and Adderall. (P. Exh 3, p. 13). Dr. Kanne administered the Wechsler Preschool and Primary Scale of Intelligence – Revised (WPPSI-R); Bracken Basic Concept Scale – Revised; Expressive One-Word Picture Vocabulary Test (EOWPVT-R; Peabody Picture Vocabulary Test – Third Edition (PPVT-III); Developmental Test of Visual Motor Integration (VMI); Child Behavior Checklist; Conner’s Parent Rating Scale – Revised: Long; and Childhood Autism Rating Scale (CARS). It was Dr. Kanne’s “impression” that the neuropsychological evaluation he preformed was “consistent with previous evaluations that found elements of his functioning and presentation that are suggestive of PDD-NOS without adhering to a specific disorder.” (P. Exh 1, pp. 12-21).

3. On or around August 21, 2001, the Student’s Mother met with Tim Ward (“Ward”) at the District. At that time, the Mother informed Ward about the Student’s behaviors and requested that the District perform an evaluation on the Student. (Tr pp. 14-15; P. Exh 2, p. 26). Ward testified that the oral information received from the Student’s Mother caused him to believe that the District should expect “quite a bit of abhorrent behavior” and “that we would be seeing him in the office a great deal of the time.” (Tr p. 18, lns. 4-8).

4. On or around August 21, 2001, the Student’s Mother provided Ward with copies of the evaluations performed by Dr. Schultz, Dr. Robison and Dr. Kanne. (Tr pp. 14-15; P. Exh 1, pp. 1-25). The Parents also had Dr. Suha Alkadry, the Student’s Primary Care Physician write the District concerning medical treatment provided to the Student. (P. Exh 3, p. 34).

5. On September 19, 2001, prior to the initiation of the evaluation, the Parents consented to the evaluation (Tr p. 19; P. Exh 2, pp. 31-33), an initial screening was conducted by the District and the Parents and representatives of the District met on September 19, 2001, to review the Summary of Screening Results form (P. Exh 2, pp. 27-28). It was the conclusion of the Student’s Team that the Student needed to be evaluated in the areas of Health, Motor, Adaptive Behavior, Language and Social/Emotional/Behavioral and an Individual Evaluation Plan was prepared (Tr p. 19; P. Exh 2, pp. 29-30).

6. During the evaluation process, the Student was observed in the Kindergarten classroom. Mr. Ward testified that his classroom observations of the Student revealed “very good behavior” and that the Student had “some distractibility, but certainly nothing far from the norm.” (Tr p. 18, lns. 16-20).

7. During the evaluation process, the Parents unilaterally elected to continue to have the Student evaluated for other medical issues. In October, 2001, the Student was evaluated by Dr. Kevin Squibb (“Dr. Squibb”), a Clinical Audiologist at the University Speech & Hearing Clinic at Southeast Missouri State University. Dr. Squibb’s report was forwarded to the District on October 23, 2001. (P. Exh 3, pp. 35-42). Dr. Squibb’s “impression” was as follows:

“[The Student] exhibits deficits in both selective attention (separating speech from background noise) and in phonemic synthesis (ability to fuse isolated phonemes

into words). These deficits are representative of a child who has, or is at least at-risk, for auditory processing deficits. This impression must be viewed with caution in light of the limited ability to test [the Student] due to his age as well as the complicating factors in his history.”

(P. Exh 3, p. 36).

8. On November 1, 2001, the Parents met with District personnel to discuss the Evaluation Report for the Student’s initial evaluation, which incorporated the results of the Student’s initial evaluation and the various evaluations conducted by other healthcare professionals at the request of the Parents. Several meetings were required to cover the information that had been provided by the Parents and generated by District personnel during the course of the Student’s initial evaluation. During the course of these meetings, Dr. Robison wrote a letter to Tim Ward dated November 13, 2001, which further explained aspects of the Student’s medical diagnosis. (P. Exh 5, pp. 61-62).

9. The final draft of the Evaluation Report for the Student’s initial evaluation was provided to the Parents on November 20, 2001. (P. Exh 4, pp. 43-60). In preparing the Evaluation Report, the District considered the medical evaluations of Dr. Schulz, Dr. Robison, Dr. Kanne, Dr. Wayne Herbert and Dr. Squibb. The Evaluation specifically notes that:

“[The Student] has been diagnosed with Pervasive Developmental Disorder-Not Otherwise Specified, possible Asperger’s Disorder, Attention Deficit-Hyperactivity Disorder (severe), Oppositional Defiant Disorder, and Obsessive Compulsive Disorder by several doctors, Dr. Eldon Schulz, Dr. Steven Kanne, and Dr. Brad Robinson [sic].” (P. Exh 4, p. 44).

The conclusion reached by the Student’s Evaluation team, during the Student’s initial evaluation was as follows:

“Having reviewed the test data, observations and reports, the multi-disciplinary team concludes that [the Student] meets State eligibility criteria as a student who is Other Health Impaired (OHI) and is in need of special educational and related services. The team noted that [the Student] displays the health impairment of Attention Deficit Hyperactivity Disorder (ADHD) which has been diagnosed as a result of comprehensive health evaluations by licensed physicians (Eldon Schulz, M.D., 3/01 and Brad Robison, M.D., 6/01). As seen in the current comprehensive educational evaluation, the health impairment results in limited alertness to environmental stimuli, causing an adverse impact in his academic performance through such things as waxing and waning attention to task in the classroom, a high degree of distractibility, tendencies to occupy himself with objects around him, difficulties with task focus, inability to follow through on requests and respond to redirection. The team also notes both fine and gross motor deficiencies, based on results of the occupational therapy evaluation which showed awkward pencil grasp, difficulties using writing utensils, difficulties with paper manipulation and cutting, difficulties catching a ball, significant amounts of

“overflow” movements when involved in fine motor tasks, irregular gait, slow running speed and some coordination difficulties. The team also reviewed results of an Auditory Processing Assessment presented by the parents, noting that impressions from it suggested that [the Student] exhibits deficits in both selective attention (separating speech from background noise) and in phonemic synthesis (ability to fuse isolated phonemes into words).

The team discussed other data from various diagnosticians citing behaviors suggestive of Asperger’s Syndrome, and diagnoses of such things as Pervasive Developmental Disorder-NOS, OCD and Oppositional Defiant Disorder. Also considered were results from various rating scales from a recent evaluation by Dr. Stephen Kanne which indicated decreased adaptive behavior (thought to be due to socialization and motor skills difficulties reported by parent during Vineland interview) and significant amounts of oppositional and noncompliant behavior. However, the team concluded that, in light of the parents’ proactive medical treatment and a successful adjustment to entry to school in which little problematic behavior has been noted, these factors were not seen to be adversely affecting educational performance at this time. The team should continue to remain cognizant that behaviors related to these conditions may surface at a later time.”

(P. Exh 4, p. 59). In making this conclusion, the Student’s Team considered all of the medical information provided by the Parents.

10. On November 14, 2001, even before the final draft of the Evaluation Report for the Student’s initial evaluation was provided to the Parents by the District, the Parents wrote the District, (P. Exh 6, pp. 63-64), indicating that they “disagreed with the evaluation committee’s findings, at least in part, and wish[ed] to request an independent evaluation” for the Student. (Tr pp. 28-29; P. Exh 6, p. 63, ¶ 1). The Parents’ letter states that they disagree with the educational diagnosis of Other Health Impaired - ADHD because the Student’s ADHD is “coexistent” with a “wider spectrum of problems better explained by his existing diagnosis of PDD-NOS.” (P. Exh 6, p. 63, ¶ 4).

11. On November 16, 2001, Ruth Ann Orr, Special Education Process Coordinator for the District responded to the Parents’ November 14, 2001 letter which requested an independent educational evaluation of the Student. (P. Exh 6, pp. 65-66). Ms. Orr enclosed a copy of the District’s Independent Educational Evaluation policy and a copy of the Missouri Compliance Standards and Indicators eligibility criteria for the applicable areas.

12. After November 14, 2001, Tim Ward and the Parents discussed the Parents’ concerns and Mr. Ward proposed changes to the diagnostic findings on the Evaluation Report of the Student’s initial evaluation. (Tr pp. 26-27; P. Exh 6, pp. 66A, 66B and 66C). The Parents continued to disagree with the diagnostic determination in the Student’s Evaluation Report, but agreed to move forward with the development of an Individualized Education Program (“IEP”) for the Student. (P. Exh 6, pp. 66D-66F).

13. On November 27, 2001, the Student's IEP Team met to prepare an IEP for him. The Team was composed of the Parents, Dr. Betty Chong, Barbara McClanahan, Jill Janet, Tim Ward, Ruth Ann Orr, David Shaffer and Sydney Herbst. (P. Exh 7, p. 67). The Team agreed upon an IEP (P. Exh 7, pp. 67-83) that included one hundred twenty-five (125) minutes a week of communication work (either pull-out or push-in) and sixty (60) minutes a week of occupational therapy for a total of one hundred eighty-five minutes of special education or related services each week. The placement of the Student was determined to be "outside the regular class less than 21% of the time." (Tr pp. 32-33; P. Exh 7, p. 80-83). The Team also agreed to further accommodate the Student by providing him preferential seating and reduced manipulatives within his proximity. (P. Exh 7, p. 80). The Parents signed the Consent for Initial Placement. (P. Exh 7, pp. 93-94). The IEP was initiated on November 28, 2001. (P. Exh 7, p. 67).

14. The Student made progress under the November 27, 2001 IEP. (Tr pp. 33-34).

15. On November 27, 2001, the Parents provided the District with consent to initiate a re-evaluation (first re-evaluation, second evaluation) of the Student. On November 27, 2001, the District prepared a Summary of Screening Results (P. Exh 7, pp. 84-86) and presented it to the Parents. Present at this meeting were the Parents, Dr. Betty Chong, Barbara McClanahan, Jill Janet, Tim Ward, Ruth Ann Orr, David Shaffer, Angie Kester and Sydney Herbst. (P. Exh 7, p. 86). The Summary of Screening Results indicated concerns in the areas of Health/Motor (as a result of the Student's previous educational diagnosis of "Other Health Impaired"); Language ("Concerns with peer interactive communication."); and Social/Emotional/Behavioral (Child Behavior Checklist results were "clinically significant, Connors Parent Rating Scale "markedly atypical")(P. Exh 7, pp. 84-87), based on the concerns presented by the Parents. (Tr p. 34, lns. 13-20). The Student's Team thereafter prepared an Individual Evaluation Plan (P. Exh 7, pp. 87-88) to address each of the areas of concern noted on the Summary of Screening Results. The District provided the Parents with Notice of Intent to Re-evaluate the Student and the Parents provided written consent for the re-evaluation. (P. Exh 7, pp. 89-91).

16. On November 28, 2001, Dr. Betty Chong wrote a letter to the Parents which indicated that, consistent with the re-evaluation plan developed the previous day, the District had engaged Dr. Julie Donnelly ("Dr. Donnelly"), as a consultant in the area of autism. (P. Exh 8, pp. 95-97).

17. On November 30, 2001, the Parents had the Student evaluated by Dr. Marcia Brown ("Dr. Brown"), a speech language pathologist at the University Speech & Hearing Clinic of Southeast Missouri State University. (P. Exh 9, pp 98-105). The purpose of the evaluation was to determine whether the Student "exhibits pragmatic or social language deficits that have not been recognized in formal testing situations." (P. Exh 9, p. 98). Dr. Brown gave the following statement of the diagnosis:

“[The Student] presents with pragmatic language deficits that are not apparent during standardized testing; however, during one-on-one interaction and narrative activities, severe difficulty with presuppositional skills was evident. He is also reported to have a great deal of difficulty in the area of conversational skills, specifically appropriate topic selection in conversations with peers. [The Student]

also presents with severe difficulty in narrative productions of any type. He also demonstrates extraneous, atypical body movements that may be self-stimulatory in nature, or possibly an artifact of ADHD.”

(P. Exh 9, p. 101). Dr. Brown recommended that the Student’s IEP Goals be revised to address pragmatic language deficits that are evident in unstructured situations and to include narration skills. Dr. Brown further suggested that the Student’s atypical body movements be addressed to minimize the impact they may have on his effectiveness as a communication partner. (P. Exh 9, p. 101).

18. On December 4, 2001, Dr. Chong had a telephone conversation with the Parents concerning their request that Dr. Kanne preform an Independent Educational Evaluation on the Student by administering the Autism Diagnostic Observation Schedule to the Student when he was not on medication. Dr. Chong confirmed this conversation in writing with the Parents in a letter dated December 5, 2001. (P. Exh 10, p. 106). During her telephone conversation, and then in her letter, Dr. Chong informed the Parents that:

A. It was the understanding of the IEP Team that the Parents had delayed any request for an Independent Educational Evaluation of the Student until the District completed the scheduled re-evaluation of the Student;

B. The Parents did not waive any right they might have to have an Independent Educational Evaluation by delaying their request until the completion of the Student’s re-evaluation;

C. Dr. Chong would review the Parents request that Dr. Donnelly administer the ADOS to the Student when he was not on his medication. Dr. Chong indicated that she would leave that test methodology up to Dr. Donnelly.

19. On December 5, 2001, Tim Ward had a telephone conversation with Dr. Kanne concerning his evaluation of the Student. The following information was received by the District during the conversation:

A. Dr. Kanne indicated that he felt the case was “confusing;”

B. Dr. Kanne indicated that he felt the Student showed some behaviors which were consistent with autism and many behaviors which were not consistent with that diagnosis. Dr. Kanne stated that if the Student was truly autistic, “it would show up whether or not he was on meds;”

C. Mr. Ward reviewed the Student’s IEP with Dr. Kanne who indicated that he was less concerned about the educational diagnosis than he was about the services that were offered to address the Student’s disabilities. Mr. Ward testified that it was his understanding that Dr. Kanne was “not ready to apply [the autism] label” to the Student.

(Tr pp. 38-39; P. Exh 9A, p. 105A).

20. On December 5, 2001, Betty McClanahan met with Dr. Squibb to review the results of the evaluations he performed on the Student. Ms. McClanahan shared the results of the District's testing of the Student with Dr. Squibb. Dr. Squibb's statements during this meeting are summarized as follows:

A. Dr. Squibb was not sure whether the Student had CAP-D. The results of his tests of the Student and the District's tests were from two standard deviations below the mean to within expectancy. Dr. Squibb could not determine if the results of the tests were being affected by the Student's ADHD;

B. Dr. Squibb confirmed that he did not diagnose the Student as CAP-D, but suggested that the Student be re-evaluated at or after age seven because there were additional testing instruments available for making a diagnosis of children in that age group;

C. The Student's scores on tests administered by Dr. Squibb for "selective attention" and "phonemic synthesis" were two standard deviations below the mean on one test. Dr. Squibb again noted that the Student was very young and his ADHD "could be getting in the way."

D. Dr. Squibb recommended that the District try a personal FM System for the Student.

(Tr pp. 39-40; P. Exh 9A, pp. 105B-105C).

21. Around January 4, 2002, the District received a letter from Phyllis L. Schnell ("Ms. Schnell"), a private counselor arranged by the Parents. (Tr pp. 41-42). Beginning on June 22, 2001, Ms. Schnell provided play therapy and family support for the Student and Parents. Ms. Schnell recommended as follows:

"I would recommend that the committee address his acute need for continued therapy services. [The Student] is clearly lacking in social skills, anger management, and communication skills. Additionally, he displays behaviors consistent with diagnostic criteria for Oppositional Defiant Disorder, Asperger's Disorder, Obsessive-Compulsive Disorder and ADHD."

(P. Exh 11, p. 108). Tim Ward testified that these observations differed from the observations he made at school and reports he had received from other District employees who regularly worked with the Student. (Tr p. 38, Ins. 2-8; p. 42).

22. Beginning in or around January 11, 2002, the District began using the FM Auditory Trainer recommended by Dr. Squibb. (Tr p. 43; P. Exh 11, p. 108A). The Student's Kindergarten teacher did not believe the auditory trainer made much difference in the Student's education. (Tr pp. 43-45; P. Exh 11, p. 108A).

23. On January 14, 2002, Dr. Squibb issued an addendum to his Report of Auditory Processing Assessment dated October 17, 2001 at the request of the Parents in order to provide clarification of the diagnosis recommendations contained in his original report. (P. Exh 13, p. 110). Dr. Squibb gave the following amended diagnosis of the Student:

“A definitive diagnosis of auditory processing disorder is not possible at this time due to: (a) limited availability of tests appropriate for [the Student’s] age, and (b) additional complicating factors such as the presence of attention-deficit disorder. However, there is strong evidence that [the Student] exhibits auditory processing deficits that are interacting with and/or contributing to his communication difficulties. On both tests that were administered (speech-in-noise and phonemic synthesis), [the Student] was more than two standard deviations below his peers. Given the data available regarding treatment effectiveness, neural plasticity, auditory development, as well as optimal periods for intervention, it is critical that children with deficits of this type and severity (as exhibited by [the Student]) receive immediate intervention even if it must be more generic in nature. Intervention may then be altered to be more deficit-specific or it may be discontinued at a later date as more diagnostic information becomes available. In addition, close monitoring of [the Student’s] auditory processing abilities is critical.”

(P. Exh 13, p. 110). Dr. Squibb further set forth two recommendations which were not contained in his original report. Specifically, Dr. Squibb recommended that the Student use an auditory trainer to optimize listening conditions and receive phonologic awareness training. (P. Exh 13, p. 110).

24. On January 15, 2002, Dr. Debra Rau, (“Dr. Rau”), a Counselor with the District, provided a written observation after observing the Student on a number of occasions within the school. Dr. Rau indicated that during those observations she did not observe significant difficulty with peer interactions or with functioning with the school setting. (Tr pp. 46-47; P. Exh 14, p. 111).

25. On January 15, 2002, the Student’s Team met to discuss the Student’s first re-evaluation (second evaluation). (P. Exh 14, pp. 112-115). Present at this meeting were the Parents, Julie Hopple (an autism technician from Judevine), Dr. Betty Chong, Sydney Herbst, David Shaffer, Diana Rhodes, Ruth Ann Orr, Barbara McClanahan, Tim Ward, Jill Janet and Angie Kester. (P. Exh 14, p. 115). As is the practice of the District, meeting minutes were prepared and circulated to the participants for signature at the end of the meeting. (Tr pp. 50-51) During the meeting the Team reviewed the independent medical information from Dr. Brown and Dr. Squibb which was provided by the Parents. The Team also reviewed the evaluations made by the various Team members. After a lengthy meeting, the Student’s Father suggested that the Team adjourn and reconvene at a later date. The parties agreed to meet again on Tuesday, January 22, 2002. (P. Exh 14, p. 115).

26. On January 16, 2002, the Parents wrote a letter to Dr. Betty Chong. (P. Exh 15, pp. 117-119) requesting that the District provide them a copy of Dr. Donnelly’s evaluation report and

tendering a bill to the District for Dr. Brown's "independent language evaluation" of the Student. (P. Exh 15, p. 115).

27. On January 18, 2002, the Student's teachers reported that the Student was making sufficient progress on each of the goals contained in his November 27, 2001 IEP and that the Student was expected to achieve each goal. (P. Exh 7, pp. 83A-83G; P. Exh 16, pp. 120-126).

28. On January 18, 2002, Dr. Betty Chong responded by letter to the Parents' letter dated January 16, 2002. (P. Exh16, pp. 127-128). In her letter, Dr. Chong enclosed a copy of Dr. Donnelly's evaluation report and indicated that the request for payment of Dr. Brown's bill for the "independent educational evaluation" would be considered when the Student's Team completed the re-evaluation of the Student. Dr. Chong also asked the Parents for consent to have a second educational consultant provide "additional information [which] will clarify some of the discrepancies in our current information." (P. Exh 16, p. 128).

29. The meeting to complete the Student's re-evaluation on January 22, 2002, was cancelled at the request of the Parents.

30. On or around January 23, 2002, the District received a letter from Dr. Elizabeth Horton ("Dr. Horton"), a physician in Cape Girardeau, Missouri. In this three sentence letter Dr. Horton states that the Student has been under her care for a "seizure disorder" and requested that the District postpone all "academic testing . . . until his seizures are under control." (P. Exh 17, p. 129).

31. On January 25, 2002, Dr. Betty Chong corresponded with the Parents (P. Exh 18, p. 130). In this letter Dr. Chong indicated that she had received a copy of Dr. Horton's January 23, 2002, letter and that no additional academic testing was scheduled for the Student. The letter further asks the Parents to meet with the Student's Team on Tuesday, February 5, 2002 to conclude the eligibility determination meeting which had been carried over from January 15, 2002. (P. Exh 18, p. 130).

32. On January 25, 2002, Dr. Betty Chong corresponded with the Parents to indicate that the District had employed Lisa Robbins as an educational consultant to review the educational programs of the District's students with special needs. (P. Exh 18, p. 134).

33. On January 31, 2002, the Parents responded to Dr. Chong's letter dated January 18, 2002 and indicated that they did not consent to an "educational evaluation by a second education consultant" because they believed that "Dr. Donnelly's evaluation and the numerous other evaluations which have already been completed are enough at this time." (P. Exh 18, p. 135). The letter also indicates that the Parents will be unavailable to meet on February 5, due to new medical testing of the Student by Dr. Horton. (P. Exh 18, p.135).

34. On February 5, 2002, the District received a letter from Julie Shofner, Missouri Protection and Advocacy Services ("MPAS") which requested a current IEP for the Student together with progress reports. On February 8, 2002, Tim Ward responded to the letter and provided the requested information. (P. Exh 18, p. 138).

35. On February 8, 2002, Dr. Betty Chong corresponded with the Parents and confirmed that the District had agreed to postpone the February 5, 2002, meeting until the Student's "physician has provided us with an updated medical report." Dr. Chong further indicated that she hoped the meeting could occur within the next three weeks. (P. Exh 18, p. 137).

36. On February 12, 2002, Dr. Betty Chong corresponded with the Parents and indicated that she would not be available on March 1, but provided three possible alternative dates (February 15, 19 or 26) for the resumed eligibility determination meeting. (P. Exh 18, p. 139).

37. On February 13, 2002, the Parents sent a letter to Dr. Chong indicating that they would be available to meet for the resumed eligibility determination meeting on March 1, 2002. The letter further raised issues associated with the Student's behavior in the classroom after he was removed from his medication and placed on a seizure medication and requested that the District purchase an auditory trainer for use in the classroom. Finally, the letter questioned the District's intentions in using Lisa Robbins as a consultant for the Student's re-evaluation. (P. Exh 18, pp. 140-141).

38. On February 15, 2002, Dr. Betty Chong corresponded with the Parents and enclosed a written notification for the resumed eligibility determination meeting for March 1, 2002, to determine continued eligibility, to review or revise the Student's IEP and to discuss extended school year programming. (P. Exh 18, pp. 143-146).

39. On February 22, 2002, Dr. Robison wrote a letter "To Whom It May Concern" concerning the Student. (P. Exh 19, pp. 147-148). Dr. Robison stated that he was in agreement with the report submitted by Dr. Donnelly and "concurred with her assessment indicating that the patient does meet criteria for Autism." Dr. Robison also stated that Dr. Horton was treating the Student for "absence seizures" and was medicating the Student with Depakote, which he indicated would also "address some of the patient's rigid inflexibility and explosiveness." (P. Exh 19, pp. 147-148).

40. On February 28, 2002, Dr. Horton wrote a letter "To Whom It May Concern" concerning the Student. (P. Exh 19, pp. 149). Dr. Horton's brief letter stated:

"[The Student] is under my care for epilepsy and is undergoing medication adjustment to treat his seizures. Academic performance is expect to be sub-optimal at this tijme until seizure control is achieved.

Stimulant medication such as Adderal, Ritalin, and Concerta can worsen his epilepsy and are not recommended. Depakote can help his seizure and attention and behavior."

(P. Exh 19, p. 149).

41. On March 1, 2002, the Student's Team met to conclude its discussion of the Student's first re-evaluation (second evaluation). Present at this meeting were the Parents, Sydney Herbst,

Jill Janet, Ruth Ann Orr, Angie Kester, Tim Ward, Diana Rhodes, Barbara McClanahan, David Shaffer and Dr. Betty Chong. (P. Exh 20, p. 165). The Report (P. Exh 20, pp. 150-168) contains the following Eligibility Determination:

“Based upon the data collected and reviewed, the multi-disciplinary team concludes that [the Student] continues to meet state eligibility criteria as a student with an Other Health Impairment (OHI) and is in need of special education and related services. The team notes various chronic or acute health and other problems (Attention Deficit Hyperactivity Disorder, Pervasive Developmental Disorder NOS, OCD, Oppositional Defiant Disorder and behaviors suggestive of Asperger’s Syndrome) diagnosed/reported as a result of comprehensive adverse educational impact in terms of difficulties attending to academic tasks and needs for assistance from others, waxing and waning attention, general inattentiveness, need for directions to be repeated and high distractibility, along with concomitant difficulties as cited and explained below.

While [the Student’s] scores on formal language tests generally fell within or above expectancy for his assessed cognitive abilities, the team concludes that sufficient data is present nonetheless to substantiate language impairment in the area of Pragmatics. For example, [the Student] displays social skills weaknesses such as how to handle social difficulties, talking at inappropriate times and making irrelevant comments, interrupting and intruding on others, concerns about and difficulties with peer interactions, resistance in following directions, and need to control play with peers. And, while language sampling completed during the initial and current evaluations revealed that [the Student] generally uses appropriate form and content of language, is able to take turns, maintain or return to topic focus with simple redirection and sequence activities with a high degree of accuracy, the team considered results of an independent evaluator along with observations at school which imply pragmatic weaknesses not apparent during standardized testing.

The team also continues to note both fine and gross motor skill weaknesses based on results of occupational therapy evaluation which showed awkward pencil grasp and difficulties using writing utensils, difficulties with paper manipulation along with significant amount of “overflow” movement, difficulties catching a ball, an irregular gait, slow running speed and some coordination difficulties.

The team discussed observations and results of various Autism scales completed by [the Student’s] teacher, his parents, and the consulting evaluator, Dr. Donnelly. While some disturbances are, indeed noted in the various areas required to determine eligibility as a student with Autism, given the broad variability in scores (scores falling in the full range from “unlikely to be autistic” to scores that “place him in the Autism category”) and the inherent difficulties of determining the impact of other diagnoses obtained by the parents and cited above, the team is unable to determine eligibility as a student with Autism at this time.

While the team considers results of a Central Auditory Processing Disorder Evaluation completed by an outside evaluator it recognizes the need to interpret results with caution since a definitive diagnosis of auditory processing disorder is not possible at this time, due to limited availability of tests appropriate for [the Student's] age and additional complicating factors such as the presence of attention-deficit disorder.”

(P. Exh 20, p. 164). Tim Ward testified that he considered the educational diagnosis reached by the Team to be “a marginal eligibility determination at best.” (Tr p. 64, Ins. 19-20). In making this determination, the Student's Team considered all of the medical information provided by the Parents.

42. On March 4, 2002, the Parents wrote a letter to Dr. Chong. (P. Exh 21, pp. 169-170). In the letter, the Parents:

- A. Requested that the District explain the Team's reasoning for their rejection of the diagnosis of Autism;
- B. Requested a response to the Parents' letter dated March 13, 2002 [sic] which requested a notice of action regarding the District's intentions for Lisa Robbins involvement with the Student's educational evaluation and programming;
- C. Requested a written notice of action relevant to the District's decision regarding the Parents' request for reimbursement of Dr. Brown's independent speech and language evaluation.

(P. Exh 21, pp. 161-170).

43. On March 4, 2002, Dr. Chong provided the Parents with a Notice of Action regarding its categorical special education diagnosis. (P. Exh 21, pp. 171-173). The Notice of Action states in pertinent part, as follows:

“Action Requested: The mother, . . . , requested that the eligibility determination designate or include autism as the categorical disability for her son, [the Student].

Specify the district's position and why the requested action was refused: The educational team concluded that [the Student] continues to meet state eligibility criteria as student with Other Health Impairment (OHI) given his difficulties attending to academic tasks and needs for assistance from others, waxing and waning attention, general inattentiveness, need for directions to be repeated and his distractibility, as well as his language impairment in pragmatics and his fine and gross motor skill weaknesses. In addition to the district's assessments, the team considered the comprehensive health and other evaluations by licensed physicians and licensed psychologists who listed diagnoses of Attention Deficit Hyperactivity Disorder, Pervasive Developmental Disorder NOS, Obsessive

Compulsive Disorder, Oppositional Defiant Disorder, and behaviors suggestive of Aspergers Syndrome.”

(P. Exh 21, p.172).

44. On March 4, 2002, Dr. Betty Chong wrote to the Parents concerning their request that the District pay Dr. Brown’s bill for the evaluation she performed at the request of the Parents. (P. Exh 21, pp. 174-177). In that letter Dr. Chong stated in pertinent part:

“The district interprets an IEE as a challenge to the administration or choice of an assessment(s) used during the evaluation/reevaluation process, not as a disagreement with the eligibility determination. Please let me know if you are disagreeing with the testing while keeping in mind that we have scheduled a meeting on March 5, 2002, to screen the current information regarding your son [the Student], whose medications have changed.

(P. Exh 21, p. 174).

45. On March 4, 2002, Dr. Betty Chong wrote the Parents concerning their letter complaining about the use of Lisa Robbins as a consultant to review the Student’s educational records and assist the District with the processing of the matter. (P. Exh 21, pp. 178-181).

46. Beginning on or around March 1, 2002, the District prepared accommodations for the Student’s medical diagnosis of Seizure Disorder. (P. Exh 21A, pp. 181A-181O), including a Tonic-Clonic Seizure Emergency Action Plan, (P. Exh 21A, p. 181C), an Individualized Healthcare Plan, (P. Exh 21A, pp. 181E-181L) and notification to District personnel regarding Safety on Playground, (P. Exh 21A, p 181M-181O). Subsequently, on April 16, 2002, the Parents wrote Sydney Herbst and indicated that it was not then necessary for the Student to be under any restrictions on playground equipment. (P. Exh 21A, p. 181P).

47. On March 5, 2002, the Student’s Team met and prepared a Summary of Screening Results. (P. Exh 22, pp. 182-184). The District considered this third evaluation of the Student to be necessary because the Parents had obtained additional medical data concerning a possible seizure disorder. (Tr pp. 59-60). Present at the meeting were the Parents, Sydney Herbst, Angie Kester, Barbara McClanahan, Jill Janet, Tim Ward, Ruth Ann Orr, John Coon (Judevine), Diana Rhodes and Dr. Betty Chong. (P. Exh 22, p. 184). Concerns were listed in the areas of Health/Motor; Fine Motor; Gross Motor; Hearing; Reading, Math, Written Language, Oral Language and Social/Emotional/Behavioral. The Student’s Team determined that the Student needed to be re-evaluated and an Individual Evaluation Plan was prepared (P. Exh 22, pp. 185-186) and the Parents were provided with an Notice of Intent to Re-evaluate the Student. (P. Exh 22, pp. 187-188). The Parents consented to the re-evaluation. (Tr p. 60; P. Exh 22).

48. On March 5, 2002, the Student’s Team met to prepare an annual IEP for the Student (P. Exh 23, pp. 189-204), which was the Student’s second IEP that school year. (Tr p. 62). Present at this meeting were the Student’s Mother, Dr. Chong, Sydney Herbst, Angie Kester, Barbara McClanahan, David Shaffer, Jill Janet and Tim Ward. (P. Exh 23, p. 189). The Present Levels of

Performance in the IEP recognize that the Student has recently been medically diagnosed with a generalized seizure disorder by Dr. Horton and had several of his medications discontinued. (P. Exh 23, p. 191). The Team added direct intervention for pragmatic language problems, including social skill weaknesses that were noted in Dr. Brown's report, but not observed at school. (Tr pp. 63-64). The Summary of Services page indicates that the Student will receive pull-out/push-in speech/language services for one hundred twenty five (125) minutes per week; occupational therapy for sixty (60) minutes per week; and paraprofessional supervision for forty (40) minutes per day. The IEP also identified several modifications and accommodation including preferred seating, reduced manipulatives that are unnecessary, visual aids when possible and home-school communications. (P. Exh 23, p. 203). The Student's Team determined that the appropriate placement for the Student was outside the regular class less than 21% of the time. (P. Exh 23, p. 203). Notes of the IEP meeting were prepared at the meeting and circulated to the participants for their signatures. (P. Exh 23, p. 205). Mr. Ward testified that the Student made progress on the goals and objectives of this IEP while he was on it. (Tr p. 65).

49. On March 8, 2002, Dr. Chong wrote a letter to the Parents (P. Exh 24, pp. 207-212) responding to their letter dated March 4, 2002. Dr. Chong indicated in her letter that the District had agreed to pay Dr. Brown's bill for the evaluation she performed on the Student at the Parent's request. The letter also notified the Parents that Lisa Robbins would be at the school on March 14 and 15, 2002.

50. On March 14, 2002, Lisa Robbins, the District's Autism Consultant, observed the Student in the educational setting. Ms. Robbins is an Assistant Professor in the Department of Education at Missouri Western State College in St. Joseph, Missouri. (P. Exh 25, p. 217). Ms. Robbins provided the following impressions concerning the Student to the District:

“[The Student] appeared to have some difficulty maintaining his attention. His teacher does a very nice job supporting him by reading his needs. She knows when and how to prompt him as well as when to allow him time to process information and when to be very specific with directions. [The Student's] placement and programming appeared to be appropriate to meet his needs at this time. With regards to his current educational diagnosis I would have to concur with the team that his most appropriate educational diagnosis at this time is Other Health Impaired. In reviewing his file [the Student] will meet the educational criteria in another category in the future, but at the present time it is my opinion that Other Health Impaired remains the most appropriate educational diagnosis.”

(P. Exh 25, p. 216). Ms. Robbins stated that she had no concerns about the appropriateness of the programming the District was providing the Student. (Tr p. 66).

51. On March 18, 2002, Dr. Chong wrote the Parents proposing dates for the Student's Team to meet to complete the re-evaluation of the Student which was begun on March 5, 2002. (P. Exh 26, p. 223-225).

52. On March 18, 2002, the Parents wrote Dr. Chong a letter (P. Exh 26, p. 226) raising several issues including:

- A. The Parents raised questions concerning the classroom observation of the Student by Lisa Robbins;
 - B. The Parents objected to the restrictions placed on the Student's use of playground equipment due to Dr. Horton's diagnosis that the Student had a seizure disorder;
 - C. The Parents requested that the re-evaluation be completed as soon as possible.
53. On March 25, 2002, Dr. Chong responded to the Parents' March 18, 2002, letter (P. Exh 26, p. 227). In that letter, Dr. Chong stated that:
- A. The observation by Lisa Robbins would be shared with the Parents at the Team meeting;
 - B. Dr. Donnelly was scheduled to visit the District on April 9, 2002 and would be reviewing the Student's functional behavior assessment, would observe the Student and make recommendations for the Student's programming;
 - C. The information provided by the Parent and Dr. Horton concerning the Student's ability to use playground equipment was referred to the Ms. Herbst, the building Principal;
 - D. The District would like to work with the Auditory Trainer equipment prior to the Dr. Donnelly's observation.
54. On March 25, 2002, the Parents wrote Dr. Chong a letter (P. Exh 26, pp. 229-233) raising several issues including:
- A. The Parents indicated they would not be available to meet on April 10, 2002 due to the Student being scheduled for a video EEG in St. Louis in connection with the evaluation of his seizure disorder by Dr. Horton. The Parents suggested an alternate date of April 12, 2002;
 - B. The Parents requested information regarding Ms. Robbins' experience and credentials, as well as her findings and recommendations;
 - C. The Parents indicate that the auditory trainer had just arrived;
 - D. The Parents asked that the District contact Dr. Brown directly regarding the information needed to complete the Student's re-evaluation.
55. On March 27, 2002, Dr. Chong responded to the Parents' March 25 letter (P. Exh 26, p. 234) which stated:

A. The meeting to discuss the Student's re-evaluation results had been changed to April 12, 2002 at the request of the Parents. (See: P. Exh 26, p. 235);

B. Dr. Chong indicates that she had not, at that time, received a copy of Ms. Robbins' report and that when it was received she would forward a copy of the report with Ms. Robbins' resume to the Parents.

56. On March 29, 2002, Dr. Alkadry, the Student's Pediatrician wrote a letter to Dr. Chong (P. Exh 27, pp.236-237) at the request of the Parents. (Tr pp. 66-67). In her letter, Dr. Alkadry indicated that the Student has been evaluated by Drs. Horton, Burris and Robison and that "[t]he evaluation and impression of all [these] subspecialists have been consistent with the likelihood of pervasive developmental disorder which actually fits into the autism spectrum disorders." (P. Exh 27, p. 236).

57. On April 10, 2002, the Student underwent an EEG evaluation conducted by Dr. Burris. The Parents provided the District with a note from Dr. Burris, dated April 11, 2002, which states: "23 hr EEG video is normal." (P. Exh 27, p. 238).

58. On April 12, 2002, the Student's Team met to prepare the Evaluation Report for the Student's second re-evaluation (third evaluation). (P. Exh 28, pp. 240-270). Present at this meeting were: the Parents, Dr. Betty Chong, Jill Janet, Debra Rhodes, Sammy Lynn, Tim Ward, David Shaffer, Sydney Herbst, Barbara McClanahan, Ruth Ann Orr and Angie Kester. The Student's Team made the following eligibility determination:

"Based upon the data collected and reviewed, the multi-disciplinary team concludes that [the Student] continues to meet state eligibility criteria as a student who is Other Health Impaired (OHI) and continues to need special education and related services. The team again notes various chronic or acute health and other problems (Attention Deficit Hyperactivity Disorder, Pervasive Developmental Disorder - NOS, OCD, Oppositional Defiant Disorder and behaviors suggestive of Asperger's Syndrome) diagnosed/reported as a result of comprehensive health/other evaluations by licensed physicians/licensed psychologists. The current comprehensive educational evaluation documents adverse educational impact in terms of difficulties attending to or maintaining attention to academic tasks, difficulties following directions, need for redirection and prodding to begin/finish work, need for directions to be repeated, high distractibility and general inattentiveness. The team also continues to recognize the concomitant difficulties cited and explained below.

While in both previous evaluations conducted, [the Student's] scores on formal language tests generally fell within or above expectancy for his assessed cognitive abilities, the team concludes that sufficient data is present nonetheless to substantiate language impairment in the area of Pragmatics. Pragmatic weaknesses primarily relating to social skills appear to remain. . .

The team also continues to note both fine and gross motor skill weaknesses, based on results of observation and both previous and current occupational therapy evaluations which have shown awkward pencil grasp and difficulties using writing utensils, difficulties with paper manipulation along with significant amounts of “overflow” movement, difficulties with ball handling skills, an irregular gait, slow running speed, some coordination difficulties, and rather slow, awkward motor movements in general.

In addition, the team notes some behavioral concerns, based upon results of behavioral scales completed by a variety of raters and a Functional Behavioral Assessment which cited difficulties following oral directions, difficulties participating in group activities, talking out behavior, and some temper outbursts.

The team again notes observations and results of various Autism scales completed by [the Student’s] teacher, his parents, and the consulting evaluator, Dr. Donnelly. While some disturbances are, indeed noted in the various areas required to determine eligibility as a student with Autism, the team continues to note broad variability in scores (scores falling in the full range from “unlikely to be autistic” to scores that “place him in the Autism category”) and the inherent difficulty of determining the impact of other diagnoses obtained by the parents and cited above, and remains unable to determine clear eligibility as a student with Autism at this time.

While the team considers results of a Central Auditory Processing Disorder Evaluation completed by an outside evaluator it recognizes the need to interpret results with caution since a definitive diagnosis of auditory processing disorder is not possible at this time, due to limited availability of tests appropriate for [the Student’s] age and additional complicating factors such as the presence of attention-deficit disorder. The team did review results of an Assistive Technology Evaluation evaluating the usefulness of an Auditory Trainer, noting that the device has allowed [the Student’s] teacher to prompt him softly and directly, as well as to allow her to repeat direction for [the Student] without disrupting the classroom flow. However, due to the limited time the device has been used, it appears premature to comment on the overall effectiveness of it at this time.”

(P. Exh 28, p. 267). The Parents were not in agreement with the Other Health Impaired diagnosis reached by the Student’s Team and indicated that they wanted the Student to be educationally diagnosed as a Student with Autism. (Tr p. 69). The Parents requested a Resolution Conference at the conclusion of the meeting. (Tr p. 69, P. Exh 28, p. 277). In making this determination, the Student’s Team considered all of the medical information provided by the Parents.

59. Mr. Ward testified that he was “confused” when he read the medical reports submitted by the Parents during the first three evaluation processes. Specifically, Mr. Ward testified that he:

“ . . . was expecting a child who displayed a great deal of abhorrent behavior, and we have never seen that. He has continually done quite well in school with minimal amounts of intervention. So I saw somewhat of a different child than was portrayed in the documents that [the Parents] gave me.”

(Tr p. 38, Ins. 2-8).

60. During the course of the April 12, 2002, meeting, the Parents presented additional medical information from Dr. Mary Beth Kapp (“Dr. Kapp”), a pediatric ophthalmologist, who evaluated the Student at the request of the Parents, as a result of their concerns that the Student had a convergence insufficiency and exotropia. (Tr pp. 69-70). Following the meeting, Tim Ward contacted Dr. Kapp to discuss her findings. (Tr pp. 69-70; P. Exh 28, p. 285B).

61. On April 16, 2002, Dr. Betty Chong wrote a letter to the Parents confirming that they had requested a Resolution Conference with the District’s Superintendent and had waived the ten day requirement for the meeting. (P. Exh 29, p. 277). The letter also set April 23, 2002 as a meeting date for the Resolution Conference. (P. Exh 29, p. 277).

62. On April 23, 2002, the District issued a Notice of Action - Refused to the Parents (P. Exh 30, pp. 286-289) in response to their request that the Student be educationally diagnosed as a Student with Autism. The Notice of Action - Refused stated that the Student’s Team rejected the autism diagnosis:

“ . . . due to the broad variability in scores (scores fell in the full range from “unlikely to be autistic” to scores that “place him in the Autism category”). Although Dr. Julie Donnelly functioned as an outside evaluator for the district, the team believed her report relied heavily on parent report, as well as the belief that [the Student] may not have been fully engaged during the administration of the Autism Diagnostic Observation Schedule (ADOS). No single procedure was used as the sole criterion for determining [the Student’s] disability and the adverse effect of the disability on his educational performance.”

(P. Exh 30, p. 287).

63. On April 23, 2002, a Resolution Conference was held with the Parents. On April 25, 2002, the Superintendent wrote the Parents with his decision. It was the conclusion of the Superintendent that the current decision of the Student’s IEP team should be upheld. (P. Exh 32, pp. 296-297).

64. On April 24, 2002, Dr. Betty Chong wrote the Parents a letter which enclosed a copy of Ms. Robbins report and resume. (P. Exh 32, p. 293). The letter also informed the Parents that Dr. Donnelly would be returning to the school on May 3, 2002.

65. On May 2, 2002, the Parents had the Student evaluated by Jaime R. Valencia (“Ms. Valencia”), an Occupational Therapist at Saint Francis Medical Center’s Center for Health and Rehabilitation. (Tr pp. 76-77; P. Exh 33, pp. 298-307). Ms. Valencia indicated in the evaluation report that:

- A. The Student displayed bilateral upper extremity and trunk weakness and instability;
- B. All areas of sensory processing were noted to have definite differences. The Student was found to have difficulty processing things heard, things seen, movement, stimuli that touches the skin, combined sensory experiences and stimuli to the mouth;
- C. The Student had a score of a definite difference in all sensory processing, modulations, and response categories with the exception of two which indicates that his life will be affected due to sensory integration deficits which will affect his performance at school, home and within the community.

66. On May 3, 2002, Dr. Donnelly observed the Student at school and provided a Functional Behavior Analysis. (Tr. P. 78; P. Exh 34, pp. 308-314). Dr. Donnelly indicated in her Functional Behavior Analysis that:

- A. The Student had some difficult personal interactions with students, but there were “far more times when [the Student] was playing amidst and with other children and doing just fine”;
- B. The Student seems to be seeking attention, usually from the teacher, but sometimes from other students. However, the Student “has progressed in his realization that he is one of a group and must follow the group schedule and rules”;
- C. The Student’s reaction to directives are delayed at times, but he often complies with the directive without any additional prompting;
- D. The Student’s current classroom behavior is not such that it required a Behavior Intervention Plan (“BIP”).

67. On May 7, 2002, the Student’s IEP Team met for a meeting to prepare the Student’s annual IEP, which would have an initiation date of September 3, 2002. (Tr pp. 79-80; P. Exh 35, pp. 315-335). Present at this meeting were the Parents, Sydney Herbst, Barbara McClanahan, Diana Rhodes, Jill Janet, Ruth Ann Orr, Tim Ward, Angie Kester and Tammy Lynn. (P. Exh 35, p. 315). The Team added additional time for Occupational Therapy to work on vision exercises and increased the Student’s Learning Center time due to the changes in the Student’s medications. (Tr p. 80). The Summary of Services page indicates that the Student will receive pull-out/push-in speech/language services for one hundred fifty (150) minutes per week; pull-out/push-in services in the communication center for sixty (60) minutes per week; occupational therapy for sixty (60) minutes per week; and vision therapy for sixty (60) minutes per week for the first semester of the school year. (Tr p. 80; P. Exh 35, p. 331). The IEP also identified several modifications and accommodation including preferred seating, reduced manipulatives that are unnecessary, visual aids when possible and home-school communications. (P. Exh 35, p. 331). The Student’s Team determined that the appropriate placement for the Student was outside the regular class less than 21% of the time. (Tr pp. 80-81; P. Exh 35, pp. 332-333). Notes of the

IEP meeting were prepared at the meeting and circulated to the participants for their signatures. (P. Exh 35, pp. 336-343). Mr. Ward testified that the Student made progress on the goals and objectives of this IEP while he was on it. (Tr pp. 81-82; P. Exh 35, pp. 335B-335I).

68. On May 22, 2002, the District issued three Notices of Action to the Parents (P. Exh 37, pp. 350-353). These Notices of Action were transmitted to the Parents in a letter from Dr. Betty Chong dated May 24, 2002. (P. Exh 37, p. 349). The Notices of Action were as follows:

A. Extended School Year – During the IEP meeting on May 7, 2002, the Parents requested that the Student receive extended school year services. This request was rejected by the District “based upon lack of evidence reflecting regression/recoupment needs and belief of the school team that [the Student] was in a period of growth and development typical of that for children of his age and grade as opposed to a period of accelerated growth.” (P. Exh 37, p. 350);

B. Behavior Support Plan – During the IEP meeting on May 7, 2002, the Parents requested that the Student be provided with a Behavior Support Plan. This request was rejected by the District based upon observations of the Student in the classroom where the Student’s teacher was able to elicit and maintain appropriate behavior utilizing strategies and techniques common to the classroom. (P. Exh 37, p. 351);

C. Counseling Services – During the IEP meeting on May 7, 2002, the Parents requested that counseling be added to the Student’s IEP as a related service. This request was rejected by the District because it was their belief that the Student did not need counseling to benefit from the educational process. (P. Exh 37, p. 352).

69. On September 19, 2002, an IEP meeting was conducted at the request of the Parents. (Tr pp. 89-90). Present at this meeting were the Parents, Sydney Herbst, Angela Kester, Melissa Ashby, Tim Ward, Barbara McClanahan, David Shaffer and Diana Hinchey. (P. Exh 38, p. 359). During this meeting:

A. The Parents again requested that counseling services be placed on the Student’s IEP as a related service and the Student be provided with a Behavior Support Plan. (Tr pp. 89-91; P. Exh 38, pp. 354-355);

B. Ms. Kester indicated that the data she was keeping on the Student revealed that he had improved by needing fewer verbal prompts and a “marked improvement in his behavior.” (P. Exh 38, p. 356);

C. Mr. Shaffer indicated that the Student was writing about 90% of his requests for activities or items in Mr. Shaffer’s room and that he (Mr. Shaffer) has seen very few letter reversals. (P. Exh 38, p. 356);

D. Ms. Herbst reported that she had observed the Student with a peer group and that he appeared to be playing in an age-appropriate manner with them. She also indicated

that the classroom teacher has a classroom management system that seemed to be working well with the Student. (P. Exh 38, pp. 357-358);

E. Ms. McClanahan reported that the Student was working well with her and that during lunchtime he was “functioning very well and has no significant problems.” (P. Exh 38, p. 357).

70. On or around January 15, 2003, one of the medical providers who the Student was seeing requested that Ms. Kester and Ms. Ashby prepare a Conners’ Teacher Rating Scale-Revised documenting their observations of the Student in the classroom. This was the first time that any of the Student’s health care providers requested information concerning the Student from the District. (Tr pp. 92-93; P. Exh 38A, pp.359A-359B).

71. On April 28, 2003, the Student’s IEP Team met to prepare his annual IEP (P. Exh 42, pp. 377-393). Present at this meeting were the Parents, Melissa Ashby, Sydney Herbst, Tim Ward, Kathy Wynn, Angie Kester, David Shaffer, Barbara McClanahan, Phyllis Schnell and Diana Hinchey. (P. Exh 40, pp. 362-366). During the meeting:

A. Ms. Kester indicated that the Student had mastered each benchmark on this current IEP. Mr. Shaffer indicated that the Student had mastered his goals of catching a ball; seated posture for writing activities; kicking a ball and cutting activities. The Student also showed improvement in decreasing overflow movements in writing and was forming all upper and lower case letters in recognizable fashion consistent with the other students in the classroom. (P. Exh 40, p. 362). Ms. McClanahan stated that the Student has met his language goals. (P. Exh 40, p. 364);

B. The Parents were informed that the Student’s academic achievement levels were at grade level and his behavior had shown great improvement. (Tr pp. 96-97; P. Exh 40, p. 369);

C. Ms. McClanahan stated that she had only two behavior incidents with the Student in the cafeteria which was “not drastically different from other students she supervised.” (P. Exh 40, p. 362);

D. Ms. Ashby indicated that the Student’s DRA post-testing showed that the Student was “right at the end-of-first-grade level, Level 16 at 99%” and that he was “performing above average in all subjects.” (P. Exh 40, p. 363);

E. The Parents indicated that they did not agree with the eligibility determination reached by the team the previous year. The Parents presented a letter from Dr. Garrett Burris of Child Neurology Associates, Inc. in Chesterfield, Missouri. The letter was dated January 2, 2002, and contained a two sentence “report” from Dr. Burris, (P. Exh 11, p. 107) which indicated that his diagnosis was that the Student “has autistic spectrum disorder accompanied by ADHD.” This was the first time the District had seen this letter. (Tr pp. 94-95). The Parents did not ask that the Student be re-evaluated. (Tr p. 95);

F. Ms. Schnell, a private counselor, reported that in her work with the Student outside of school, she has observed PDD symptoms. (P. Exh 40, pp. 363-364);

G. The Parents requested that counseling services be included on the Student's IEP as a related service and that the Student be provided with a para-professional during the school day. (P. Exh 40, pp. 364-365).

The Services Summary page of the Student's IEP (P. Exh 42, p. 391) indicated that the Student would receive push-in services for behavioral skills for one hundred fifty (150) minutes per week; pull-out/push-in services for pragmatic language sixty (60) minutes per week; and, pull-out/push-in services for occupational therapy for one hundred five (105) minutes per week. (P. Exh 42, p. 391). The IEP also identified several modifications and accommodations for the Student (P. Exh 42, p. 391). The Student's Team determined that the appropriate placement for the Student was outside the regular class less than 21% of the time. (P. Exh 42, p. 392).

72. On April 29, 2003, Kathy Wynn sent a letter to the Parents (P. Exh 40, pp. 367-370) which enclosed two Notices of Action - Refused which resulted from requests made by the Parents during the Student's IEP meeting on April 28, 2003. These Notices of Action - Refused were as follows:

A. Consulting Services – During the IEP meeting on April 28, 2003, the Parents requested that counseling be added to the Student's IEP as a related service. This request was rejected by the District because it was their belief that the Student did not need counseling to benefit from the educational process. (P. Exh 42, p. 368);

B. Para-Professional Services – During the IEP meeting on April 28, 2003, the Parents requested that the Student be provided with para-professional services in the second grade classroom. This request was rejected by the District because it was their belief that the Student did not need counseling to benefit from the educational process. (P. Exh 42, p. 369).

73. The Student performed “quite well” in his first grade classroom. (Tr p. 94). The Student's second semester grades in First Grade were: Reading (B+); Language (A); Spelling (A); Math (B); and Writing, Science and Health, Social Studies, Music, Physical Education, Art, Work Habits and Conduct were all “Satisfactory.” (P. Exh 54, p. 648).

74. During school year 2003-04, the Student's Second Grade year, the Student completed a number of the goals and objections in his IEP, (P. Exh 42, pp. 377-393), as follows:

A. Annual Goal # 1 – Behavior – “[The Student] will increase his ability to follow given directives by beginning a task within 1 minute on 4 of 5 charted incidences.” – The Student met this goal by May, 2004. (Tr p. 98; P. Exh 42, p. 394B);

B. Annual Goal – Motor – “To increase ball skills [the Student] will hit a ball off a T ball stand in 4/5 trials by therapist.” – The Student met this goal by March 12, 2004. (Tr p. 98, P. Exh 42, p. 394E);

C. Annual Goal – Motor – “To increase writing skills [the Student] will copy a five word sentence with proper sizing and spacing of letters in 4/5 trials by therapist.” – The Student met this goal by February 19, 2004. (P. Exh 42, p. 394G);

D. Annual Goal – Motor – “To increase ball skills [the Student] will demonstrate movement patterns sufficient for running and kicking a moving ball without losing balance in 4/5 trials as observed by therapist.” – The Student met this goal by March 12, 2004. (P. Exh 42, p. 394H);

E. Annual Goal – Motor – “To increase ball skills [the Student] will catch a ball that is tossed to him from 10 feet away (by another student) in 3/5 trials as observed by therapist.” The Student met this goal by March 12, 2004. (P. Exh 42, p. 394I).

75. In September, 2003, the Student was administered the MAT-7, a nationally-normed achievement test. The Student’s overall test results placed him in the “high range” on the test. (Tr pp 122-123; P. Exh 47, p. 438).

76. The Student’s education went “smoothly” through the first semester of his second grade year and the Student was primarily making A’s on his work. (Tr pp. 100-101).

77. On January 22, 2004, the Parents had the Student tested by the Autism Spectrum Disorder Clinic (“ASD Clinic”) which is a part of the Department of Psychology at St. Louis Children’s Hospital, Washington University Medical Center in St. Louis, Missouri. (P. Exh 43, pp. 400-418). The Report from the ASD Clinic was provided to the District by the Parents. (Tr pp. 101-102). No input was sought by the ASD Clinic about the Student for the Report. (Tr p. 102). The Report concludes as follows:

“[The Student] was referred for an evaluation with the ASDC due to several behaviors that he has demonstrated that prompted the past diagnoses of Pervasive Developmental Disorder – Not Otherwise Specified (PDD-NOS), which is an Autistic Spectrum Disorder (ASD). As part of the current evaluation, [the Student] was assessed by professionals in a number of disciplines, including occupational therapy, speech/language therapy, and psychology, all of which have more detailed summary of their findings attached. In summary, the team concluded that [the Student] meets the criteria for an ASD. More specifically, the diagnosis of Asperger’s Syndrome was deemed appropriate given [the Student’s] pattern of results, current presentation and symptoms, and history of behaviors consistent with an ASD.”

(P. Exh 43, p. 400). The “behavioral issues” discussed in the Report had not been observed at school. (Tr p. 102). When the Report was presented to the District in or around March, 2004, it “raised red flags” for Mr. Ward, in that the Student was doing very well in school at that time. (Tr p. 103).

78. On March 2, 2004, the Parents made a request that the District re-evaluate the Student for dysgraphia, dyscalculia and dyslexia in the home-school log (Tr p. 104; P. Exh 52, pp. 595-596) and then again on March 4, 2004. (Tr pp. 113-114). On March 4, 2004, Mr. Ward wrote a short letter to the Parents which indicated that he had received the Parents' request for re-evaluation from the Student's teacher and that he would be responding to the request shortly. Mr. Ward enclosed a copy of the Procedural Safeguards in this letter. (Tr p. 105; P. Exh 43A, p. 418A).

79. On March 12, 2004, the District convened a screening meeting to discuss the request for a re-evaluation made by the Parent. Present at this meeting were the Parents, Angie Kester, Teresa Williams, Sydney Herbst, Tim Ward, Diana Hinchey, Diana Rhodes, Elaine Beussink, Dayne Ring, David Shaffer, Cheryl Crouch and Angie Reinhart. (P. Exh 44, pp. 419-420). The Student's team agreed to re-evaluate the Student, (third re-evaluation, fourth evaluation), in the areas of gross motor, fine motor, oral language, social/emotional, behavioral and in an area of concern for the Parents – writing reversals. (P. Exh 44, pp. 419-420). The Parents requested that the District also re-evaluate the Student for visual and auditory processing concerns, including CAP-D, but the District refused to do so. (Tr pp. 107-108). The Parents consented to the re-evaluation. (Tr p. 108, P. Exh 44, pp. 425-427).

80. On March 30, 2004, Danyne Ring wrote a letter to the Parents enclosing two Notices of Action - Refused. (P. Exh 45, pp. 428-430). The Notices of Action were as follows:

A. Functional Vision Assessment – During the Screening meeting on March 12, 2004, the Parents requested that the District conduct a functional vision assessment on the Student. This request was rejected by the District because it was based upon concerns which were not observed in the classroom. (P. Exh 45, p. 429);

B. CAP-D Assessment – During the Screening meeting on March 12, 2004, the Parents requested that the District conduct an assessment for CAP-D on the Student. This request was rejected by the District because it was based upon concerns which were not observed in the classroom. (P. Exh 45, p. 430).

81. On April 30, 2004, the Student team met to discuss the Student's re-evaluation (third re-evaluation, fourth evaluation). (P. Exh 47, pp. 433-458). Present at this meeting were the Parents, Sydney Herbst, Tim Ward, David Shaffer, Elaine Beussink, Diana Rhodes, Angie Reinhart; Danyne Ring, Angie Kester, Ann Hogan. (P. Exh 47, p. 458, p. 465). After a lengthy discussion, the Student's Team made the following eligibility determination:

“In consideration of the concerns regarding specified learning disabilities which led to the request for this re-evaluation, based upon the data collected and reviewed, the team determines that [the Student] does not present clear evidence of a specific learning disability at this time. The team noted strong academic skills and no discrepancies between ability and achievement, as indicated by norm-referenced achievement testing with the Woodcock-Johnson Tests of Achievement-III where scores on all subtests and clusters fell within expectancy for his assessed cognitive abilities. Criterion-referenced testing of academic skills and observations of his reading, mathematics and written expression skills by

different observers, along with an absence of behaviors suggestive of psychological processing deficits as well, substantiated relatively strong academic skills. All of these factors, considered with grades in the “A” and “B” range, lead the team to conclude that a specific learning disability in any area is ruled out at this time.

The team also noted and discussed at length his past educational eligibility as a student with an Other Health Impairment, a language impairment in Pragmatics and concomitant fine and gross motor weaknesses. However, in considering his overall successful performance in school, evidenced by strong grades and little problematic or atypical behavior, the team is unable to determine adverse educational impact to the degree that a need for specially designed instruction (i.e. special education and related services) continues to be present. For example, though he continues to display a somewhat short attention span and slowness to complete assignments, he is easily brought back to task by gentle verbal reminders within the classroom, and it appears reasonable to approach his slowness to complete assignments with allowances for a bit of extra time or with prompts and reminders to finish in a timely fashion. Assessment of his behavior by three different raters using the Conner’s Teacher Rating Scale-Revised reveals primarily “Average” or “Typical” results which should not raise a concern (8 of 12) subscales among the three raters), with only “Slightly” or “Mildly” atypical behavior shown on the remaining subscales.

In considering his language skills, the team did note some rather subtle weaknesses identified by the language samples (brief conversations, some failure to close conversations, a tendency to sometimes use a monotone or mumble, and slight problems with structured discourse). However, in considering his scores on formal instruments which fell at or above expectancy, the team concludes that a strong language base is present and notes a variety of other language strengths from the sample including topic maintenance, situational appropriateness, maintaining eye contact and turn taking ability. And, while some motor weaknesses (primarily relating to gross motor skills) were identified by the Bruininks-Oseretsky Test of Motor Proficiency, the team notes that [the Student] displays both adequate and functional fine and gross motor skills outside of formalized testing within the school environment (displays normal range of motion in both upper extremities, bilateral reach, grasp, manipulation and release, uses functional pencil grasp, has good ability to copy from paper-to-paper and from board to paper with good letter formation and spacing, letters grounded on baseline and appropriately spaced with writing legible, functional ambulation, ability to run and climb on playground equipment, ability to walk and run over uneven surfaces without losing balance, no evidence of gravitational insecurity, ability to ascend and descend stairs, and “Satisfactory” ratings in Physical Education all three quarters of this school year). All of these factors, considered together lead the team to conclude that no substantial adverse educational impact is present which would suggest an on-going need for special education and related services.”

(P. Exh 47, p. 457). As a result, the District proposed that the placement of the Student be changed from “Outside Regular Classroom Less Than 21% of the Time” to “Full Time Regular Education.” The Parents disagreed with the placement proposal, threatened to initiate due process and left the meeting. (Tr pp. 141-141). In making this determination, the Student’s Team considered all of the medical information provided by the Parents.

82. At the time of the evaluation, the Student’s academic achievement in school was as follows:

A. Grades – The Student’s third quarter grades were: Reading (A-); Math (B+); Language (A); Spelling (A-); handwriting, science, social studies, health, art, music and PE (“Satisfactory”)(P. Exh 47, p 438);

B. Metropolitan Achievement Test - 7 (MAT - 7) – This achievement test was taken in September 2003. The Student’s scores in Total Reading, Word Recognition, Vocabulary, Reading Comprehension, Concepts and Problem Solving, Science, Social Studies, Basic and Complete Battery were in the “high” range. The Student’s scores in Total Math and Procedures were in the “mid” range. (P. Exh 47, p 438);

C. Otis Lennon School Ability Test (OLSAT) – The Student’s school ability index was 83, which suggests good cognitive skills and good performance. (Tr pp. 123-124; P. Exh 47, p 438).

83. During the evaluation, the Student was administered several achievement tests with the following results:

A. Woodcock-Johnson Tests of Achievement-III – All areas of the test fell above expectancy. (Tr pp. 124-125; P. Exh 47, pp. 438-439);

B. Brigance Comprehensive Inventory of Basic Skills – The Student exhibited mastery of 1st, 2nd 3rd grade materials in Sentence Writing and Spelling. The Student exhibited mastery of 1st, 2nd and some 3rd grade materials in Word Recognition, Reading and Math Computational Skills. (Tr p. 127; P. Exh 47, pp. 439-440).

These results indicate that the Student was performing educationally “quite well.” (Tr pp. 125-126).

84. On May 6, 2004, the District prepared a Change of Placement form for the Student which indicated a change of placement from “Outside Regular Classroom Less Than 21% of the Time” to “Full Time Regular Education.” The reason stated on the form for the change in placement was:

“Current re-evaluation revealed performance within expectancy for assessed cognitive abilities and generally strong academic performance, suggesting no

current adverse educational impact resulting from reported medical or concomitant conditions.”

(Tr pp. 140-141; P. Exh 48, p. 466).

85. The Student’s second semester grades in Second Grade were : Reading (A-); Language (B+); Spelling (B+); Math (B+); and Writing, Science and Health, Social Studies, Music, Physical Education, Art, Work Habits and Conduct were all “Satisfactory.” (P. Exh 54, p. 648).

86. The Student’s 3rd Grade teacher, Toni Dement testified that at the time of the hearing the Student was achieving “all A’s and one B” in her regular education classroom (Tr pp. 157-158) and she had observed no behavioral difficulties with the Student. (Tr p. 158).

87. Beginning in 2001 and continuing to the date of the request for due process, the Student was evaluated at the Parents’ request by the following professionals:

Dr. Suha Alkadry	Primary Care Physician, Cape Girardeau, MO
Autism Spectrum Disorder Clinic	Department of Psychology at St. Louis Children’s Hospital, Washington University Medical Center, St. Louis, MO
Dr. Marcia Brown	Speech Language Pathologist at the University Speech & Hearing Clinic of Southeast Missouri State University, Cape Girardeau, MO
Dr. Garrett Burris	Child Neurology Associates, Inc., Chesterfield, MO
Dr. Elizabeth Horton	Medical Doctor, Cape Girardeau, MO
Dr. Stephen M. Kanne	Pediatric Neuropsychologist, in the Department of Psychology at St. Louis Children’s Hospital, St. Louis, MO
Dr. Mary Beth Kapp	Pediatric Ophthalmologist, Cape Girardeau, MO
Dr. Brad Robison	Psychiatrist, Cape Girardeau, MO
Phyllis L. Schnell	private counselor, Cape Girardeau, MO
Dr. Eldon G. Schulz	Department of Pediatric Physical Medicine & Rehabilitation Department at the Arkansas Children’s Hospital, Little Rock, AR
Dr. Kevin Squibb	Clinical Audiologist at the University Speech & Hearing Clinic at Southeast Missouri State University, Cape Girardeau, MO

Jaime R. Valencia

Occupational Therapist at Saint Francis Medical
Center's Center for Health and Rehabilitation, Cape
Girardeau, MO

Beginning in 2001 and continuing to the date of the request for due process, the Student was evaluated by these professionals, at the Parents' request for: Pervasive Developmental Disorders; Oppositional Defiant Disorder; Attention Deficit Hyperactivity Disorder; Autism; Autism Spectrum Disorders; Asperger's Syndrome; Obsessive Compulsive Disorder; pragmatic or social language deficits; Central Auditory Processing Disorder including deficits in both selective attention (separating speech from background noise) and in phonemic synthesis (ability to fuse isolated phonemes into words); seizure disorders; convergence insufficiency and exotropia; dysgraphia, dyscalculia and dyslexia.

II. CONCLUSIONS OF LAW

88. The District is a Missouri Public School District which is organized pursuant to Missouri statutes. During school year 2003-2004 the District operated six (6) elementary buildings, one (1) junior high building and one (1) high school building and had an enrollment of slightly over four thousand (4,000) students. (*Missouri School Directory 2004-2005*).

89. The Student is now and has been a resident of District during all times relevant to this due process proceeding, as defined by Section 167.020 RSMo.

90. The Individuals With Disabilities Education Act, ("IDEA"), its regulations and the *State Plan for Part B of the Individuals With Disabilities Education Act* (2004), ("State Plan") set forth the rights of students with disabilities and their parents and regulate the responsibilities of educational agencies, such as the District in providing special education and related services to students with disabilities.

91. The State Plan was in effect at all material times during this proceeding. The State Plan constitutes regulations of the State of Missouri which further define the rights of students with disabilities and their parents and regulate the responsibilities of educational agencies, such as the District, in providing special education and related services to students with disabilities.

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

93. The IDEA requires that a disabled child be provided with access to a "free appropriate public education." ("FAPE") *Board of Education of the Hendrick Hudson Central School District, Board Of Education, Westchester County v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 3049, 73 L.Ed.2d 690 (1982). The term "free appropriate public education" is defined by 34 C.F.R. § 300.8 as follows:

“...the term ‘free appropriate public education’ means special education and related services that--

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

A principal component of the definition of FAPE is that the special education and related services provided to the student with a disability, “meet the standards of the SEA” (State Board of Education), and “the requirements of this part”. 34 C.F.R. Part 300.

94. If parents believe that the educational program provided for their child fails to meet this standard, they may obtain a state administrative due process hearing. 34 C.F.R. § 300.506; *Thompson v. Board of the Special School District No. 1*, 144 F.3d 574, 578 (8th Cir. 1998); *Fort Zumwalt School District v. Clynes*, 119 F.3d 607, 610 (8th Cir. 1997), *cert. denied* 523 U.S. 1137, 118 S.Ct. 1840, 140 L.Ed 2d 1090 (1998).

95. The IDEA is designed to enable children with disabilities to have access to a free appropriate public education which is designed to meet their particular needs. *O’Toole by O’Toole v. Olathe District Schools Unified School District No. 233*, 144 F.3d 692, 698 (10th Cir. 1998). The IDEA requires the District to provide a child with a disability with a “basic floor of opportunity. . . which [is] individually designed to provide educational benefit to the handicapped child.” *Rowley, supra.*, 102 S.Ct. 3034, 3047. In so doing the IDEA does not require that a school district “either maximize a student’s potential or provide the best possible education at public expense,” *Rowley, supra.*, 102 S.Ct. 3034, 3049; *Fort Zumwalt School District v. Clynes, supra.* 119 F.3d 607, 612; and *A.W. v. Northwest R-1 School District*, 813 F.2d 158, 163-164 (8th Cir. 1987). Likewise, the IDEA does not require a school district to provide a program that will, “achieve outstanding results”, *E.S. v. Independent School District No. 196*, 135 F.3d 566, 569 (8th Cir. 1998); that is “absolutely [the] best”, *Tucker v. Calloway County Board of Education*, 136 F.3d 495, 505 (6th Cir. 1998); that will provide “superior results,” *Fort Zumwalt School District v. Clynes, supra.* 119 F.3d 607, 613; or, that will provide the placement the parents prefer. *Blackmon v. School District of Springfield, R-12*, 198 F. 3d 648, (8th Cir. 1999); *E.S., supra.* 135 F.3d 566, 569. See also: *Tucker, supra.*, 136 F.3d 495, 505; and *Board of Education of Community Consolidated School District No. 21 v. Illinois State Board of Education*, 938 F. 2d 712, 716-17 (7th Cir. 1991).

96. Article IX § 2(a) of the Missouri Constitution states in pertinent part that “[t]he supervision of instruction in the public schools shall be vested in a state board of education. . . .” The State Board of Education for the State of Missouri is the “State Educational Agency” (SEA) for the State of Missouri, as that term is defined in the IDEA, 20 U.S.C. § 1401(28).

97. The IDEA, 20 U.S.C. § 1401(22) defines “related services” as follows:

“The term ‘related services’ means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.” [emphasis added]

98. The District first considered the Student to be a “Child with a Disability,” as that term is defined by the IDEA, its Regulations and the State Plan, beginning in the Student’s Kindergarten school year, on or around November 20, 2001. At that time, the Student was educationally diagnosed by the District as “Other Health Impaired”. The Student continued to be educationally diagnosed as “Other Health Impaired” until April 30, 2004, when the Student’s Team concluded that the Student was experiencing no substantial adverse educational impact in his education and, therefore, did not have an on-going need for special education and related services. At that time, the District no longer considered the Student to be a “Child with a Disability.”

99. To the extent that it is required by the facts in this case and the issue presented to the Hearing Panel, during the time that the Student was educationally diagnosed by the District as a “Child with a Disability,” from on or about November 20, 2001 through April 30, 2004, the Student was provided FAPE by the District. Additionally, the District’s actions with respect to the Student and his Parents have at all times met the substantive requirements of the IDEA and State Plan.

100. To the extent that it is required by the facts in this case and the issue presented to the Hearing Panel, from on or about November 20, 2001 through the date of the hearing in this matter, the District’s actions with respect to the Student and his Parents have at all times met the procedural requirements of the IDEA and State Plan. To the extent that a question arises with respect to any procedural due process requirement in this case, there is no competent evidence on the record that any such alleged procedural inadequacy impeded the Student’s right to FAPE; significantly impeded the Parents’ opportunity to participate in the decision making process regarding the provision of FAPE for the Student; or, caused a deprivation of educational benefits for the Student.

101. The IDEA Regulations, 34 C.F.R. § 300.532, set forth the requirements for an educational evaluation of a student. This regulation states as follows:

§ 300.532 Evaluation procedures.

Each public agency shall ensure, at a minimum, that the following requirements are met:

- (a)
 - (1) Tests and other evaluation materials used to assess a child under Part B of the Act
 - (I) Are selected and administered so as not to be discriminatory on a racial or cultural basis; and
 - (ii) Are provided and administered in the child's native language or other mode of communication, unless it is clearly not feasible to do so; and
 - (2) Materials and procedures used to assess a child with limited English proficiency are selected and administered to ensure that they measure the extent to which the child has a disability and needs special education, rather than measuring the child's English language skills.

- (b) A variety of assessment tools and strategies are used to gather relevant functional and developmental information about the child, including information provided by the parent, and information related to enabling the child to be involved in and progress in the general curriculum (or for a preschool child, to participate in appropriate activities), that may assist in determining –
 - (1) Whether the child is a child with a disability under § 300.7; and
 - (2) The content of the child's IEP.

- (c)
 - (1) Any standardized tests that are given to a child –
 - (i) Have been validated for the specific purpose for which they are used; and
 - (ii) Are administered by trained and knowledgeable personnel in accordance with any instructions provided by the producer of the tests.
 - (2) If an assessment is not conducted under standard conditions, a description of the extent to which it varied from standard conditions (e.g., the qualifications of the person administering the test, or the method of test administration) must be included in the evaluation report.

- (d) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.

- (e) Tests are selected and administered so as best to ensure that if a test is administered to a child with impaired sensory, manual, or speaking skills, the test results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure).

- (f) No single procedure is used as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child.
- (g) The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.
- (h) In evaluating each child with a disability under §§ 300.531-300.536, the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.
- (I) The public agency uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.
- (j) The public agency uses assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child.

102. The definition of “Autism” in the State Plan, for eligibility purposes, is as follows:

“Autism” means a developmental disability significantly affecting verbal or nonverbal communication and social interaction, generally evident before age 3, that adversely affects a child’s educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. . . .

Criteria for Initial Determination of Eligibility

A child displays autism when:

- A. Through evaluation that includes a review of medical records, observation of the child’s behavior across multiple environments, and an in-depth social history, the following behaviors are documented:
 - 1) Disturbances of speech, language-cognitive, and nonverbal communication; The child displays abnormalities that extend beyond speech to many aspects of the communication process. Communicative language may be absent or, if present, language may lack communicative intent. Characteristics may involve both deviance and delay. There is a deficit in the capacity to use language for social communication, both receptively and expressively.

- 2) Disturbance of the capacity to relate appropriately to people, events, or objects: The child displays abnormalities in relating to people, objects, and events. There is a deficit in the capacity to form relationships with people. The capacity to use objects in an age appropriate or functional manner may be absent, arrested, or delayed. The child may seek consistency in environmental events to the point of exhibiting rigidity in routines.
 - B. The condition adversely affects the child's educational performance.
 - C. The autism is not a result of an emotional disability as defined in this document."

(State Plan, p. 14).

103. The definition of "Other Health Impairment" in the State Plan, for eligibility purposes, is as follows:

"Other Health Impairment" means having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment that is due to chronic or acute health problems, such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, and sickle cell anemia, and adversely affects a child's educational performance."

(State Plan p. 17).

104. At the time of the Student's April 30, 2004 re-evaluation, the Student did not meet the eligibility criteria set forth in the State Plan to be diagnosed as having "Autism" or as having an "Other Health Impairment" because the Student's educational performance was not adversely affected.

105. The reevaluation conducted by the District between March 12, 2004 and April 30, 2004, was appropriate, met the procedural and substantive requirements of the IDEA and State Plan and reached a correct conclusion. More specifically, this evaluation met the requirements of 34 C.F.R. §§ 300.530 through 300.536 and the State Plan.

III. DECISION

106. Issue: Whether the reevaluation of the Student dated April 30, 2004 is appropriate and whether its conclusion of that reevaluation is correct.

The Student entered the District at the beginning of his Kindergarten year, school year 2001-02. Prior to the Student's entry into the District, while the Parents resided in Arkansas, the Student had been medically evaluated. Just before the beginning of the school year, the Parents provided the medical evaluation to the District and requested that an evaluation be performed on the Student. That evaluation was completed in November, 2001 and resulted in an educational diagnosis of "Other Health Impairment."

The Parents did not agree with the conclusion of the initial evaluation. Following the initial evaluation, the Student was re-evaluated by the District three times over two and one-half school years at the request of the Parents. The Parents have never agreed with the educational diagnosis reached by the Student's Team on any of these re-evaluations.

During this same period of time, the Parents consulted a large number of medical and psychological personnel for a variety of possible medical conditions including, but not limited to: Pervasive Developmental Disorders; Oppositional Defiant Disorder; Attention Deficit Hyperactivity Disorder; Autism; Autism Spectrum Disorders; Asperger's Syndrome; Obsessive Compulsive Disorder; pragmatic or social language deficits; Central Auditory Processing Disorder including deficits in both selective attention (separating speech from background noise) and in phonemic synthesis (ability to fuse isolated phonemes into words); seizure disorders; convergence insufficiency and exotropia; dysgraphia, dyscalculia and dyslexia.

Throughout this time period, the observations of the Student in classroom, were remarkably different from those reported by the medical professionals consulted by the Parents. Tim Ward testified that he was confused by these discrepancies because he:

“. . . was expecting a child who displayed a great deal of abhorrent behavior, and we have never seen that. He has continually done quite well in school with minimal amounts of intervention. So I saw somewhat of a different child than was portrayed in the documents that [the Parents] gave me.”

The observations made by the District continued to reveal that the Student was performing in an academically and behaviorally acceptable manner in the classroom.

During the final re-evaluation, the Student's performance was assessed within expectancy for his assessed cognitive abilities and he showed generally strong academic performance. These observations clearly indicated that the Student's educational performance was not adversely affected by the reported and medically diagnosed conditions.

In order to be diagnosed with “Autism” or with an “Other Health Impairment”, a child must have a physical, mental or behavioral condition described in the State Plan and such condition must adversely affect the child's educational performance. At the time of the April 30, 2004 re-evaluation of the Student, his performance was within expectancy for assessed cognitive abilities and he showed generally strong academic performance, which clearly demonstrated that the Student was experiencing no current adverse educational impact resulting from his reported medical or concomitant conditions. This conclusion is further exhibited by the Student's second semester grades in his second grade year which were: Reading (A-); Language (B+); Spelling (B+); Math (B+); and Writing, Science and Health, Social Studies, Music, Physical Education, Art, Work Habits and Conduct were all “Satisfactory” and his grades during the first quarter of his third grade year, “all A's and one B” in the regular education classroom with no observed behavioral difficulties.

It is the decision of a majority of the Hearing Panel (Chairperson Ellis and Panel Member Ratcliffe) that while the Student has been diagnosed with several medical conditions, he is not, at

this time, a “Child with a Disability” because the educational information obtained through the April 30, 2004 re-evaluation of the Student, clearly demonstrated that the Student was experiencing no current adverse educational impact resulting from his reported medical or concomitant conditions. Accordingly, the majority of the Hearing Panel finds that the April 30, 2004 re-evaluation of the Student was appropriate and its conclusion was correct.

Hearing Panel Member Harrison files a separate dissenting opinion which is attached.

IV. ORDER

A majority of the Hearing Panel finds that the reevaluation of the Student dated April 30, 2004 was appropriate and its conclusion is correct.

V. APPEAL PROCEDURE

PLEASE TAKE NOTICE that these Findings of Fact, Conclusions of Law, Decision and Order constitute the final decision of the Department of Elementary and Secondary Education in this matter and you have a right to request review of this decision. Specifically, you may request review as follows:

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

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

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

//ss. Ransom A Ellis, III//
Ransom A Ellis, III
Hearing Chairperson

Dated: December 30, 2004

//ss. Dr. Kim Ratcliffe//
Dr. Kim Ratcliffe
Hearing Panel Member

Dated: December 28, 2004

Dissenting Opinion of Panel Member Harrison

FINDINGS OF FACT

1. AUGUST, 2001, Dr. Stephen M. Kanne, pediatric neuropsychologist in the Department of Psychology at St. Louis Children's Hospital, Washington University Medical Center, examined the student. Dr. Kanne reported that the results are consistent with a diagnosis of PDD-NOS and suggestive of mild Asperger's Disorder and that his behaviors put him at risk for developing academic difficulties.
2. AUGUST 16, 2001 evaluated by physician, Elizabeth Horton, M.D. at Southeast Outpatient Rehabilitation, with a diagnosis of Developmental Delay, Motor Clumsiness.
3. June 13, 2001 Evaluated by physician, B. Robison, M.D. Child and Adolescent Psychiatry, and reported this student with a diagnosis of Pervasive Developmental Disorder-Not Otherwise Specified, Attention Deficit Hyperactivity Disorder, and Oppositional Defiant Disorder.
4. NOVEMBER 13, 2001 letter from Brad Robinson, M.D. stating that regardless of the diagnosis, this student clearly has an array of neuropsychiatric symptoms, motor clumsiness, a significant verbal performance split in cognitive skills, and impaired social interactions.
5. JANUARY 2, 2002 Dr. Garrett C. Burris, M.D. Child Neurology Associates, Inc. Chesterfield, Missouri reports, "It is my diagnosis that the student has autistic spectrum disorder accompanied by ADHD."
6. DECEMBER 14, 2001 Dr. Julie A. Donnelly, Ph.D an autism expert from Columbia, MO summarizes, "Although the student does not present as having many of the unusual behaviors often associated with autism, his scores on the ADOS place him in the Autism category."
7. JANUARY 22, 2004 Evaluation by Autism Spectrum Disorder Clinic, Department of Psychology, St. Louis Children's Hospital, Washington University Medical Center, St. Louis, Missouri. This evaluation concluded that the student's presentation was consistent with Attention Deficit Hyperactivity Disorder (ADHD), Oppositional Defiant Disorder and PDD-NOS, all of which he had been diagnosed with in the past. Data gathered indicate that the constellation of difficulties that the student meets diagnostic criteria for the presence of Asperger Disorder (299.8).
8. The evaluations by Dr. Schulz, Dr. Kanne, Dr. Wayne Herbert and Dr. Squibb note that: The student has been diagnosed with Pervasive Developmental Disorder-Not Otherwise Specified, possible Asperger's Disorder, Attention Deficit-Hyperactivity Disorder (severe), Oppositional Defiant Disorder, and Obsessive Compulsive Disorder by several doctors. (P.Exh 4, p.44)

Conclusion:

These evaluations clearly report a student who has multiple handicaps, Pervasive Developmental Disorders; Oppositional Defiant Disorder; Attention Deficit Hyperactivity Disorder; Autism; Autism Spectrum Disorder; Obsessive Compulsive Disorder; Central Auditory Processing Disorder.

At the time of the student's April 30, 2004 re-evaluation, the student clearly met the eligibility criteria set forth in the State Plan.

The re-evaluation, April 30, 2004 was not appropriate.

The parents observations and evaluations have validation

This student should not have been removed from Special Education. The many reports indicate he is a "Child with a Disability"

//ss. Sandra Harrison
Sandra Harrison
Hearing Panel Member

Dated: December 30, 2004

CERTIFICATE OF SERVICE

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

Parents	Teri Goldman Teri Goldman, LLC 36 Four Seasons Center, #136 Chesterfield, MO 63017
	Pam Williams Special Education Legal Services Department of Elementary and Secondary Education Post Office Box 480 Jefferson City, MO 65102-0480

by depositing same in the United States mail at Springfield, Missouri, postage prepaid, duly addressed to said parties on this 30th day of December, 2004.

//ss. Ransom A Ellis, III
Ransom A Ellis, III
Hearing Chairperson