

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

STUDENT,)
)
Student/Petitioner,)
v.)
)
THE SCHOOL DISTRICT OF SPRINGFIELD, R-12,)
)
Respondent.)

FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION & ORDER

The Hearing Panel, after hearing the evidence in this matter on October 11-12, 2007, makes the following Findings of Fact and Conclusions of Law and issues the following Decision and Order:

FINDINGS OF FACT

The Parties

1. Student attends school in the School District of Springfield, R-12 ("District"). At all times relevant to this due process proceeding, the Student has lived with his Parents who reside within the boundaries of the District. The Student is not now educationally diagnosed as being a "child with a disability" as that term is defined by the Individuals with Disability Education Act, 20 U.S.C. §1400 *et seq.* ("IDEA"). The primary mode of communication of the Student and his Parents is written and spoken English.

2. The District is an "urban school district" located within Greene County, Missouri. The District operates more than fifty (50) buildings and has in excess of eighteen thousand (18,000) students. *Missouri School Directory*.

3. The Student and his Parents were represented in this proceeding by Deborah Johnson, 9923 State Line Road, Kansas City, MO 64114.

4. The District was represented by Ransom A. Ellis, III, of the law firm of Ellis, Ellis, Hammons & Johnson, P.C., The Hammons Tower, Suite 600, 901 St. Louis Street, Springfield, MO 65806-2505.

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

Pamela S. Wright, Hearing Chairperson
Dr. Terry Allee, Panel Member
Marilyn McClure, 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 or been involved in the processing of this matter:

Dr. Norman Ridder	Superintendent
Dr. Teresa White	Associate Superintendent
Dr. Peggy Riggs	Associate Superintendent
Dr. Nancy Brake	Principal -- Westport Elementary School
Dr. Lynne Miller	Principal -- Williams Elementary School
Phyllis Wolfram	Director of Special and Compensatory Services (until 06/30/07)
Ben Franklin	Assistant Director of Special Education
Diann Barth	Compliance Coordinator-Section 504
Karen Best	Process Coordinator
Rebecca Callaway	Process Coordinator
Susie Squires	Process Coordinator
Anne Matson	Regular Education Teacher (1st Grade) --Williams
Pat Mertens	Regular Education Teacher (2nd Grade) --Williams
Gail Stone	Regular Education Teacher (3rd Grade) -- Williams

Jill Austin	Regular Education Teacher (4th Grade) --Westport
Emily Buff	Regular Education Teacher (5th Grade) -- Williams
Rosalie Willams	Special Education Teacher
Tracy Turner	Counselor -- Westport
Susan Sneegas	Bridges Teacher -- Westport
Donna Harmsworth	School Nurse
Judy Duerkop	School Psychologist
Natasha Brown	District Cultural Diversity Officer
Susan Hawkins	District's Autism Consultant

Time Line Information and Procedural Background

7. The Student's Parents filed a due process complaint with the Department of Elementary and Secondary Education ("DESE") on May 4, 2007, which was received by DESE that same day. (DEX 91 and 92, pp. 432-433).
8. On or about May 17, 2007, the District filed District's Response to the Due Process Complaint. (DEX 92, pp. 445-472).
9. The parties originally scheduled a Resolution Meeting for May 30, 2007. The Parents requested that the Resolution Meeting be postponed and the parties agreed to conduct the Resolution Meeting on June 4, 2007. That date was also postponed at the request of the Parents.
10. On or about June 14, 2007, the Parents filed their First Amended Due Process Hearing Request Notice. (DEX 93, pp. 475-482).
11. On or about July 17, 2007, the District filed District's Response To Amended Due Process Complaint. (DEX 94, pp 483-496).
12. On July 19, 2007, the parties conducted their Resolution Meeting. (DEX 95, pp 497-498).
13. On August 10, 2007, the Hearing Chairperson conducted a telephone conference with the parties to schedule the due process hearing. During that telephone conference, the parties agreed

to schedule the hearing for October 11 and 12, 2007 and to extend the time lines for issuance of the decision in this matter through November 19, 2007. On August 10, 2007, the Hearing Chairperson issued a letter to the parties confirming these arrangements.

14. 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: Petitioner's Exhibits ("PEX") 1 through 12 and District Exhibits ("DEX") 1 through 98. (Tr p. 88; pp. 292-294; pp. 456-457).

15. Witnesses for Petitioner included: parent Martha Mowery; Melisa Burns, Licensed Clinical Social worker and treating psychiatrist Barbara Houk, MD. Witnesses called by the Respondent included: District employees (previously identified in Finding of Fact #6), Phyllis Wolfram; Susie Squires; Rebecca Callaway; Diann Barth; Judy Duerkop and psychiatrist Kyle John, MD. Neither party produced testimony from Student's classroom teachers.

16. The hearing in this matter began on October 11, 2007, and concluded, with the record closed, on October 12, 2007, in Springfield, Missouri. At the conclusion of the hearing the parties agreed to extend the timeline for mailing the decision through December 21, 2007. (Tr. p. 555).

The Issues Heard by the Hearing Panel

17. The following issues were presented to the Hearing Panel:

(A): Did the District fail to identify the Student as a "child with a disability" between August 2005 and when the parents filed for due process on May 4, 2007?

(B): If the Student is a "child with a disability," what compensatory services are an appropriate remedy?

(Tr pp. 22-24).

BACKGROUND

Student's Educational History prior to August 2005

18. On September 16, 1999, the Student's Parents referred him for an evaluation pursuant to the IDEA, (DEX 3, p. 13; Tr. p. 126). The District collected the existing data regarding the Student (DEX 5, pp. 16-23) and scheduled a meeting for September 30, 1999 to review the existing data and determine whether additional data was needed. (DEX 4, p. 14).

19. The September 30, 1999, meeting was rescheduled to October 4, 1999, at the request of the Parents. On that date, District personnel and the parents reviewed the existing data regarding the Student and prepared a Summary of Screening (DEX 6, pp. 24-26). The Team determined that the Student needed to be further evaluated in the areas of Motor, Speech, Language, Cognitive/Intellectual and Academics, (DEX 6, pp. 24-26; Tr. 126) and an Evaluation Plan was developed and approved by the Team, including the Student's Parents. (DEX 6, p. 28; Tr. 127). On October 4, 1999, the Student's Parents received and signed a Notice and Consent for Evaluation of the Student. (DEX 7, p. 29; Tr. pp. 52-53) which also contained an ECSE Description of Evaluation Procedures that would be used during the evaluation of the Student. (DEX 7, p. 31).

20. On October 14, 1999, the District provided the Parents with a Notice of Conference for a meeting scheduled on November 5, 1999, to conduct a Diagnostic Staffing and plan an appropriate educational program for the Student, if needed. (DEX 8, p. 31). Between October 4, 1999, and November 5, 1999, the Student was evaluated by District personnel. (DEX 11). Though invited,

the Parents did not appear for the November 5, 1999, Diagnostic Staffing conference, so it was rescheduled by the District for November 17, 1999. (DEX 10, p. 37).

21. On November 17, 1999, the Student's Team met to discuss the results of the Student's evaluation. A Diagnostic Summary was prepared (DEX 11, pp. 38-65; Tr. pp. 128-129) which determined as follows:

“The team has determined that [the Student] was not considered and does not meet the eligibility criteria for a categorical diagnosis; however, eligibility is met for Early Childhood Special Education in the following areas: Cognitive, Adaptive, Social/Emotional, Language, Speech and Fine Motor. There appeared to be no educationally relevant medical findings. The multidisciplinary team agreed that areas of delay were not primarily caused by visual or auditory deficits, environmental, economic disadvantage, or cultural differences.”

(DEX 11, pp. 63-64).

22. On November 17, 1999, the Student's IEP Team met and developed an Individualized Education Plan (“IEP”) for the Student. (DEX 12, pp. 66-75; Tr. pp. 54-55; Tr. 129). The IEP Team determined that the Student should be placed in an ECSE Classroom in an integrated building for 660 minutes per week, receive Language therapy for 30 minutes per week and Occupational Therapy services for 30 minutes per week. (DEX 12, p. 66). On November 17, 1999, the Student's Parents received and signed a Notice of Consent for Initial Placement in a Group ECSE classroom in an integrated building. (DEX 13, p. 76; Tr. pp. 56-57; Tr. pp. 130-131).

23. On November 1, 2000, the District provided the Student's Parents with a Notice of Conference for a meeting to review and revise the Student's educational program and/or placement which was to be held on November 8, 2000. (DEX 17, p. 83). On November 8, 2000, the Student's IEP Team met to revise his IEP. During that meeting, the Student's IEP Team

determined that the Student no longer needed Occupational Therapy Services and revised his IEP to provide 690 minutes of special education and related services in a Group ECSE classroom in an integrated building and provided Language Services for 30 minutes each week. (DEX 18, pp. 84-93; Tr. p. 131). On November 8, 2000, the District provided the Student's Parents with a Notice of Action which described the discontinuance of the Occupational Therapy services. (DEX 19, p. 94; Tr. pp. 56-58; Tr. p. 131).

24. On April 26, 2001, the District provided the Student's Parents with a Notice of Conference for a meeting on May 9, 2001, to review the Student's existing data and determine whether additional data was needed, and to review and revise, if appropriate, the Student's educational program and/or placement. (DEX 21, p. 106). On May 9, 2001, the Student's Team, including his Mother, reviewed his existing data, and prepared a Summary of Screening. (DEX 22, pp. 107-109; Tr. pp. 131-132). The Student's Team determined that the Student did not meet eligibility criteria to be a "child with a disability" under the IDEA. On May 9, 2001, the District provided the Student's Parents with a Notice of Action that described the District's action as follows:

"[The Student] does not meet eligibility criteria for a categorical diagnosis; therefore, he will be placed in regular education for kindergarten. We considered having him evaluated for a categorical diagnosis; however, his academics are not being affected at this time."

(DEX 23, p. 110; Tr. pp. 57-58; Tr. pp. 132-133).

25. During school year 2001-02, the Student was in Kindergarten at Boyd Elementary School in the regular education classroom of Megan Champion. (Tr. p. 133). The Student's grade records indicate that his academic performance was good and his Second Semester grades were nearly all in the "secure" or highest range of scoring. (DEX 25, p. 115; Tr. p. 133).

26. During school year 2002-03, the Student was in the First Grade at Williams Elementary School in the regular education classroom of Anne Matson. During the early part of the school year, the Student was evaluated for participation in the District's Gifted Program. The Summary of Evaluation indicates that the Student was administered the Wechsler Intelligence Scale for Children -- Third Edition (WISC-III) on August 20, 2002 and achieved a verbal IQ score of 118, a performance IQ score of 127 and a Full Scale IQ score of 130. (DEX 26, p. 116; Tr. pp. 134-135).

27. During May, 2003, the Student was admitted by his Parents to Lakeland Regional Hospital in Springfield, Missouri. The District received very little information regarding the reason for the Student's hospitalization or any medical diagnoses he may have received during the treatment. (DEX 27, pp. 118-121). The District did receive a report from Lakeland Hospital's school that indicated the Student had achieved a "90" in language arts, a "96" in mathematics and a "pass" in physical education during the Fourth Quarter. (DEX 27, p. 119).

28. During school year 2002-03, the Student had one discipline matter which consisted of a one-half day suspension on May 14, 2003 for disorderly conduct in the classroom. (DEX 28, p. 122).

29. The Student's First Grade report card indicates that he was absent nearly 18 school days. He was rated at the end of the Second Semester as predominately being in the "mastery" or "developing" areas. (DEX 29, p. 123; Tr. p. 137). The Student's First Grade Benchmarks report indicates that he made progress throughout the school year, even with the absences he sustained. (DEX 29, p. 126; Tr. pp. 138-139). The Student's First Grade Reading report indicates that the Student was "performing above average to the point that the teacher recommended him for testing at WINGS, which is the gifted program." (DEX 29, p. 124; Tr. p. 138, lns. 5-10)

30. During school year 2003-04, the Student was in the Second Grade at Williams Elementary School in the regular education classroom of Pat Mertens.

31. On November 16, 2003, the Student's Parents requested that the District conduct an evaluation of the Student pursuant to the IDEA. (DEX 31, p. 133; Tr. p. 58). On December 4, 2003, the District invited the Student's Parents to a meeting scheduled for December 4, 2003 to review the existing data concerning the Student and determine what, if any, additional data was needed. (DEX 32, p. 134). On December 4, 2003, the Student's Team, including the Student's Father, met and reviewed the Student's existing data and prepared a Summary of Existing Data/Evaluation Plan. (DEX 34, pp. 136-138). At this meeting the Student's Team determined that no additional assessments were needed. (DEX 34, p. 138; Tr. p. 141). On December 4, 2003, the District sent a Notice of Action to the Student's Parents which described the action taken by the

District as:

“The district refuses to conduct an initial evaluation because there is no reason to suspect a disability. . . . Team determined to not proceed with an initial evaluation as requested by parent. . . . To evaluate was considered and rejected as a result of there being insufficient data which would warrant an evaluation. Parents are seeking outside assistance through counseling and a psychiatric evaluation.”

(DEX 35, p. 139; Tr. pp. 59-60; Tr. pp. 141-142).

32. During school year 2003-04, the Student had five disciplinary matters as follows:

- a. A “time out” in the office for non-compliance in the classroom on December 3, 2003 (DEX 36, p. 140);
- b. An “attempt” to contact Parent for cutting in line, non-compliance and attempting to bite the teacher's hand on February 18, 2004 (DEX 36, p. 141);

c. A one-half day suspension for Assaultive Behavior -- Class I toward another student on April 6, 2004 (DEX 36, p. 142);

d. A Student/Teacher/Principal conference and Parent notification for use of inappropriate language in the classroom on April 7, 2004 (DEX 36, p. 143); and,

e. A referral to the Office for use of inappropriate language in the classroom on May 20, 2004 (DEX 36, p. 144).

33. The Student's Second Grade report card indicates that he was absent nearly 28 school days. He was rated at the end of the Second Semester as predominately being in the "mastery" or "developing" areas. (DEX 37, p. 145). Even with the absences, the Student "progressed and mastered a number of skills by the end of second grade." (Tr. p. 142, lns. 20-25; p. 143, lns. 1-2). The Student's Second Grade Benchmarks report indicates that he made progress throughout the school year, even with the absences he sustained. (DEX 37, p. 150; Tr. pp. 142-145).

34. During school year 2004-05, the Student was in the Third Grade at Williams Elementary School in the regular education classroom of Gail Stone.

35. During school year 2004-05, the Student had two disciplinary matters as follows:

a. A conference with Dr. Lynne Miller, the Principal at Williams for "disorderly conduct in class" on April 26, 2005 (DEX 40, pp. 154-155); and,

b. A two and one-half hour out-of-school suspension for Disorderly Conduct, when he urinated on the playground at recess on May 6, 2007. (DEX 40, p. 156).

36. The Student's Third Grade report card indicates that he was absent nearly 15 school days. He was rated at the end of the Second Semester as having achieved the following grades:

Reading - B; Writing - C; Spelling - A-; Math - B; Science - B+; Social Studies - A+; Health - B. (DEX 41, p. 157). The Student's Third Grade Benchmarks report indicates that he made progress throughout the school year. (DEX 41, pp. 158-160; Tr. pp. 146-147). Phyllis Wolfram described the Student as an "average to above-average student". (Tr. p. 146, lns. 7-9).

37. At the end of the Student's Third Grade year, his Parents requested that he be allowed to transfer to Westport Elementary School. (Tr. pp. 226-227). During school year 2005-06, the Student was in the Fourth Grade at Westport Elementary School in the regular education classroom of Jill Austin.

August 2005-May 2006 School Year

38. At the beginning of the Student's Fourth Grade year, he was tested to determine if he qualified for the District's Gifted Program. On August 15, 2005, the Student was administered the Stanford-Binet Intelligence Scale: Fourth Edition and achieved a Verbal Reasoning score of 119; an Abstract/Visual Reasoning score of 140; a Quantitative Reasoning score of 128; a Short-term Memory score of 120; and, a Test Composite (IQ) of 132. (DEX 44, p. 178; Tr. pp. 148-149).

39. On December 8, 2005, the Student was hospitalized by his Parents. At that same time, the Student's Parents requested that the District provide the Student with Homebound Services. (DEX 45, p. 180). The Homebound Instruction Application indicated that the Student had a medical diagnosis of Attention Deficit Hyperactivity Disorder and Oppositional Defiant Disorder. (DEX 45, p. 180). The District approved the request for Homebound Instructional Services. After December 27, 2005, the District received a letter from Cox Health Systems (dated December 23, 2005) that indicated the following:

a. The Student was hospitalized from December 8, 2005 through December 23, 2005, "with an Axis I admitting diagnosis of Adjustment Disorder with Mixed Disturbance of Conduct and Emotions, Obsessive Compulsive Disorder, Oppositional Defiant Disorder and Attention Deficit Hyperactivity Disorder." (DEX 47, p. 182).

b. The Student had been administered an IQ test by Dr. Angela Wessel, a psychologist, who obtained "scores of Verbal 99, Performance 116, and Full Scale of 107." (DEX 47, p. 182).

c. A Speech/Language screening was completed using the Clinical Evaluation of Language Fundamentals -- Revised (CELF) screening test. The Student scored a 26 compared to an age criterion score of 19. The Student was "judged to be within normal limits" on language, voice, fluency and articulation. (DEX 47, pp. 182-183).

40. On December 18, 2005, the Student's Parents referred the Student to the District for a Section 504 Evaluation. (DEX 48, pp. 184-185; Tr. pp. 60-61; Tr. p. 332). On January 4, 2006, the District convened a Section 504 Evaluation Meeting to determine whether the Student was eligible to receive Section 504 services. Present at the meeting were the Student's Parents, Diann Barth, Dr. Nancy Brake, Jill Austin, Tracy Turner, Susan Sneegas, Donna Harmsworth and Heather Ritchie, a Care Consultant from Burrell Health Care. (Tr. p. 333). The Section 504 Evaluation Team considered the following information: (a) the Student's medical diagnoses and the data that it had received concerning those diagnoses; (b) the Student's grades in Third and Fourth Grade; (c) the Student's academic Benchmarks; (d) input from the Student's Parents; (e) input from the Student's teachers; (f) input from Heather Ritchie, the Burrell Consultant; and, (g)

the Student's performance on the Star Math, SRI and MAP tests. (DEX 48, pp. 184-185; Tr. pp. 61-63; Tr. pp. 333-334). The Team determined that the Student did not have a physical or mental disability which substantially limited one or more major life activity, did not have a record of such an impairment and was not regarded as having such an impairment. (DEX 48, p. 185; Tr. pp. 60-62).¹ Prior to the end of the meeting, a copy of the Section 504 Report was provided to the Student's Parents, with the determination marked. (Tr. pp. 336-337).

41. On January 20, 2006, the Student's Parents referred the Student to the District for an evaluation pursuant to the IDEA. (DEX 49, pp. 186-187; Tr. pp. 63-64; Tr. p. 152). Beginning on January 23, 2006, the District began collecting data to review including a Parent Input/Contact Form Screening Information; a Health Screening Form; Authorization Forms for release of medical information; Attendance Reports; Growth Reports; and, Grades and achievement reports. (DEX 49; Tr. pp. 288-289). The Student's Star Math report (DEX 49, p. 196) indicates that the Student had a grade equivalency of Fifth Grade Second Month. (Tr. pp. 291-292). The Student's Scholastic Reading Inventory (SRI) Scores (DEX 49, p.198) indicate that the Student was reading at the Fifth Grade level (Tr. pp. 292-293).

¹ Diann Barth testified as following regarding the discussion that took place at this meeting:

"Q And what do you recall telling the parents?

A Well, we had decided the student did not have a disability that would qualify him as a Section 504 student. And, as indicated on this form, the parents did sign on that. And then we gave them a copy of our notice of parent and student rights under Section 504 as well as our grievance procedures. I do recall that the parents -- after this was over, I think [the Student's Father] had indicated to me that he wondered since he didn't qualify for 504, would it be possible he might qualify for an IEP under IDEA.

Q All right. What did you tell him?

A I told him that parents always have the right to make a request for a special educational evaluation.

(Tr. p. 335, lns. 5-19).

42. On February 17, 2006, the District personnel reviewed the Student's existing data and determined not to complete an evaluation. (DEX 50, p. 205; Tr. pp. 296-298). A Notice of Action was sent to the Student's Parents that same day which provided the following description of the options considered and why they were rejected:

“Completing a special ed evaluation was considered but rejected based on the following reasons: [the Student's] attendance for this year is approximately 75%, he is making grades in the A-C range, his current SRI score was an 812 which is beginning fifth grade level (he is a 4th grader). Star Math is 5.2 grade equivalent, Math Benchmark is Progressing, Communication Arts Benchmark for Reading was Nearing Proficient, Study Skills-Nearing Proficient, Grammar-Proficient. The team attempted to review current Burrell information, but after faxing the release and repeated phone calls, the records were not available for Westport staff to review at the time of the decision.² The team did consider the parent reported diagnoses of ADHD, ODD, Obsessive Compulsive Disorder and Depression, however, he has only 2 office referrals this year and his learning does not appear to be impacted at this time.”

(DEX 50, p. 205; Tr. pp. 65-66; Tr. p. 152)

43. Around March 7, 2006, the Parents provided the District with a prescription note pad diagnosis by Dr. Barbara Houk which stated as follows:

“[Student's] DX:
I. ADHD
Obsessive/Compulsive D/O
Asperger's Syndrome

² The District's Team was required to meet by February 19, 2006, in order to be in compliance with the IDEA. (DEX 54, p. 234). Since February 19, 2006, was a Sunday, the last school day prior to that was February 17, 2006, the day chosen for the meeting. Prior to the meeting, information was requested from Burrell Behavioral Health and an Authorization To Disclose Information was signed by the Student's Father on February 1, 2006. (DEX 51, p. 209). Susie Squires testified that the District received the Burrell letter dated February 21, 2006, and the attached copy of a Clinical Assessment of the Student dated August 11, 2003 and a Treatment Plan dated January 31, 2005 on December 5, 2006. (DEX 51, pp. 208; 211-219; Tr. pp. 229-230). The Burrell Treatment Plan lists the Student's medical diagnosis (as of January 31, 2005) as: DSM IV Primary Diagnosis -- Major Depressive Disorder, Recurrent, Mild; Axis I -- ADHD, predominately inattentive Type, by hx; Axis II -- No diagnosis; Axis III -- None; Axis IV -- Problems with family, Moderate; Axis V -- Current 65, Highest 65. (DEX 51, p. 215)

Oppositional Defiant D/O
Generalized Anxiety D/O

II. None

III. None

He is severe” Aspergers is treated similar to Autism. He needs a quiet room. Occupational Therapy may help (used in Columbus, Ohio). Read OASIS on internet.”

(DEX 53, p. 226). Dr. Houk wrote this prescription pad diagnosis, at the request of the Student's Parents, on the first day that she saw the Student. (Tr. pp. 401-402). Dr. Houk testified that all of her diagnoses of the Student were “primary” (Tr. p. 416).

44. On March 13, 2006, the Student's Parents filed a Complaint with the United States Department of Education, Office for Civil Rights (“OCR”), which alleged that the Student was “in need of special education services but the District refused to evaluate [the Student], notwithstanding medical documentation that the complainant presented to the District indicating the nature of [the Student's] disabilities and his need for services.” (DEX 54, p. 227; Tr. p. 66; Tr. p. 153). The Complaint was received by the District on April 17, 2006. (DEX 54, p. 227).

45. Beginning in April, 2006, Diann Barth began trying to arrange a meeting with the Student's Parents to again review whether the Student was eligible to receive Section 504 services. The District offered to meet on April 14, 2006, which was not acceptable to the Parents who indicated they could meet on May 12, 2006, which was the first time that they could get the IMPACT representative and a babysitter. (DEX 58, p. 263). The meeting was ultimately scheduled for May 15, 2006. On May 15, 2006, the Student's Mother called the District and indicated that “somebody wrecked the IMPACT worker's car” so they could not meet with the District. (DEX 58, p. 264).

The parties were unable to get the meeting scheduled due to the end of school. (Tr. p. 299; Tr. pp. 340-341).³

46. During school year 2005-06, the Student had five disciplinary matters as follows:

- a. A bus infraction involving violation of the Bus Safety Rules, on October 19, 2005 (DEX 55, p. 238);
- b. A one day In-School Suspension for "Assaultive Behavior/Class I" for kicking a fellow student on the playground on November 17, 2005. (DEX 54, pp. 239-240);
- c. A one day In-School Suspension for "Disorderly Conduct" for hitting a fellow student with a yo-yo on the playground on January 12, 2006. (DEX 54, pp 241-242);
- d. A Conference for "Disorderly Conduct" for being disruptive in class on April 14, 2006. (DEX 54, pp. 243-244); and,
- e. A Conference for "Disorderly Conduct in Class" for being disruptive in class on May 8, 2006. (DEX 54, pp. 245-246).

47. The Student's Fourth Grade report card indicates that he was absent nearly 43 school days, including two weeks in December 2005 when he was hospitalized. He was rated at the end of the

³ Susie Squires testified that it was extremely difficult to schedule meetings with the Student's Parents. More specifically, Ms. Squires testified as follows:

"It was extremely difficult meeting their schedule. It was difficult for us. We couldn't take our teachers out of the classroom for meetings. We would give them three offers of three different choices, and they never seemed to work, and then sometimes they'd be canceled, so we'd have to reschedule, and it was just difficult for us all to get together at the same time without having to cancel or whatever, so we just kept persevering."

(Tr. p. 231, lns. 19-25; p. 232, lns. 1-2)

Second Semester as having achieved the following grades: Reading - C; Oral/Written Language - D-; Spelling - B-; Math - C-; Science - A+; Social Studies - B; Health - C-. (DEX 56, p. 247). The Student's Missouri Assessment Program (MAP) score during this Fourth Grade year was in Communication Arts - 601, Below Basic. (DEX 56, pp. 249-250; Tr. pp. 155-156).

48. On or around September 15, 2005, the Student was taking the following prescription medications: Adderall XR, Celexa and Clonidine. By April 3, 2006, near the end of the Student's Fourth Grade school year, he was taking the following prescription medications: Geodon (20 mg 1x), Luvox (25 mg 1x), Adderall (10 mg 2x), Clonidine (1mg 2x plus 2 mg 1x), Lamictal. (DEX 90, p. 428).

August 2006-May 2007 School Year

49. During school year 2006-07, the Student was in the Fifth Grade at Williams Elementary School in the regular education classroom of Emily Buff.

50. At the beginning of school year 2006-07, the District again began trying to schedule the meeting with the Student's Parents to discuss the Student's eligibility for Section 504 services. (Tr. pp. 232-233; Tr. pp. 340-342). The meeting was reconvened because the District had received additional information regarding the Student. (Tr. p. 348). After several unsuccessful attempts, Susie Squires notified the Student's Parents and the Student's Team that a meeting would be held on September 7, 2006. (DEX 58, p. 265; Tr. p. 232). The Parents indicated that they could not meet on that day and the District agreed to reschedule the meeting. (DEX 58, p. 270; Tr. pp. 234-235). On September 8, 2006, the Student's Parents were offered several morning meeting options by Ann White, the Administrative Liaison to Dr. Teresa White. (DEX 58, p. 268). On

September 12, 2006, Susie Squires offered the Student's Parents three meeting date options (September 14, 18 or 20). (DEX 58, p. 269; Tr. p. 232; p. 235, lns. 6-12). When the Student's Parents would not agree to any of the options, Rebecca Callaway sent the Student's Parents a letter notifying them that the meeting would be held on September 14, 2006. (DEX 58, p. 270; Tr. pp. 234-235).

51. On or around September 7, 2006, the District received the OCR's determination letter regarding the complaint filed by the Student's Parents. The OCR did not order the District to do anything with respect to allegations in the Complaint. (Tr. p. 155). The OCR found that "there is insufficient evidence to conclude the District violated the Section 504 and Title II regulations by failing to evaluate the complainant's son." (DEX 54, p. 235; Tr. pp. 70-72). The OCR made the following relevant Findings of Fact:

a. "At the time of the January, 2006 meeting the complainant's son had only one disciplinary referral for the 2005-06 school year. . . . During the 2004-05 school year, the complainant's son only had two disciplinary referrals." (DEX 54, p. 232).

b. "The complainant's son's classroom teacher informed the team at this meeting that he performed at or above the classroom average in the regular classroom. His classroom teacher indicated the complainant's son did have trouble staying focused, but was able to attend when she redirected him. In the gifted classroom, the complainant's son performed at or above the classroom average and his classroom behavior was manageable." (DEX 54, p. 232).

c. "The team did not consider medical records. According to the Section 504 team meeting notes, the parents did not provide any medical information and did not sign a release for the District to obtain medical records regarding the complainant's son. In a telephone conversation with the complainant on August 29, 2006, she confirmed that the District was not provided medical documentation for this meeting. The Section 504 team meeting notes indicated the case worker from Burrell verbally confirmed the complainant's son had received the diagnoses identified by the complainant." (DEX 54, pp. 232-233).

d. "On January 20, 2006, the complainant referred her son for a special education evaluation . . . under the Individuals with Disabilities Education Act (IDEA). On February 17, 2006, the District completed a review of existing data regarding the complainant's son. As part of that review the District considered parental input including

reported diagnoses of ADHD, ODD, OCD, and depression. In addition to parental input regarding the complainant's son's medical condition, the District considered the complainant's son's 75 percent attendance, his academic performance consisting of grades no lower than a C and his standardized math and reading scores that were both at or above his grade level. The District noted the complainant's son had few behavioral/disciplinary incidents at school. Based on the information available, on February 17, 2006, the District declined to conduct an evaluation of the complainant's son under IDEA because it did not find reason to suspect the complainant's son had a disability." (DEX 54, p. 233).

e. "... the District obtained a signed release for medical information on or about February 1, 2006, and forwarded it to Burrell. The complainant provided a copy of Burrell's correspondence log that indicates Burrell received the District's request for information on February 12, 2006. The District had not received any medical documentation from Burrell at the time of the February 17 meeting. Nonetheless, the evidence indicated the District did consider the medical diagnoses reported by the complainant at the February 17 meeting. . . . The team did consider the parent reported diagnoses of ADHD, ODD, Obsessive Compulsive Disorder and Depression." (DEX 54, pp. 233-234).

52. On September 14, 2006, the District conducted a meeting to review the additional data that had been provided by the Student's Parents and determine whether the Student was eligible to receive Section 504 services from the District or should be evaluated by the District pursuant to the IDEA. (DEX 59, pp. 274-275; Tr. p. 158; Tr. pp. 235-236). This second meeting was scheduled at the suggestion of the OCR. Present at this meeting were Diann Barth, Rosalie Williams, Dr. Lynne Miller, Susie Squires, Becky Callaway, Jill Austin, Natasha Brown and Emily Buff. The Student's Team re-reviewed all of the information they had reviewed during their January 4, 2006, meeting. The Student's Team also reviewed the following information: the Burrell Report dated August 11, 2003 and the Student's diagnoses listed in that report; the notes of Heather Ritchie dated January 31, 2005, and the Student's diagnoses listed in there; the "prescription pad" diagnosis from Dr. Barbara Houk dated March 7, 2006; the Student's Fourth Quarter grades from the Fourth Grade; the Student's SRI scores; Teacher input from the Student's Fourth and Fifth

Grade teachers; Star Math scores from September 14, 2006; the Student's attendance and discipline records; a Cox Health Report concerning the Student dated December 23, 2005; and input from Natasha Brown regarding her telephone conversation with the Student's Parent. (DEX 59, pp. 274-275; Tr. p. 304). At the conclusion of the meeting, the Student's Team determined that the Student did not have a physical or mental disability which substantially limits one or more major life activity, does not have a record of such an impairment, and is not regarded as having such an impairment. (DEX 59, p. 276). A copy of the decision was provided to the Student's Parents with a copy of the Procedural Safeguards. (DEX 60, p. 277).

53. At the request of Student's parent in school year 2005-2006, Student's teacher used a daily behavior chart to monitor his emotions and ability to stay on task. Starting again in mid-September 2006, his new teacher Emily Buff completed daily behavior charts at 30 minute intervals and provided copies to the parents on a regular basis. (PEX 1 and 2).

54. At the September 14, 2006, meeting, the District also determined that a special education evaluation pursuant to the IDEA was not required. (DEX 61, p. 278; Tr. p. 70). On September 15, 2006, a Notice of Action was provided to the Student's Parents. (Tr. pp. 71-72) The "Options Considered" section of the Notice of Action states as follows:

"Conducting a special education evaluation was considered but rejected. Documentation reviewed included grades from the 4th grade year, current Star Math scores, report from Burrell dated August of 2003, Cox Health report dated December, 2005, current information from classroom teachers and diagnoses given by Dr. Houk 3/7/06. The team determined that [the Student] is making academic progress and does not require a special education evaluation."

(DEX 61, p. 278). Rebecca Callaway testified that she attached a copy of her notes of the meeting (DEX 60) to the Notice of Action. (Tr. pp. 71-72; Tr. pp. 304-305).

55. After the September 14, 2006, meeting, the Student's Parents began providing medical information to the District about the Student. (Tr. pp. 72-73).

56. On September 19, 2006, the District received a letter from Melissa Burns (dated September 14, 2006), a Clinician with Burrell Behavioral Health, who indicated that she had seen the Student on three separate occasions for individual therapy and believed "that he is depressed and acts out due to his lack of success at school." (DEX 63, p. 288; Tr. p. 73).

57. On September 27, 2006, the District received a letter from Dr. Barbara Houk (dated September 21, 2006), which indicated that the Student was diagnosed by her as having "Pervasive Development Disorder, Aspersers [sic] Syndrome: Generalized Anxiety Disorder; Obsessive Compulsive Disorder, ADHD Disorder, and Oppositional Defiant Disorder." (DEX 64, p. 289; Tr. p. 73). The letter contained little useful information other than the above diagnoses and a very brief summary of Dr. Houk's credentials. (DEX 64).

58. The parents pulled Student out of Bridges, a gifted program for those students who do not qualify for the more advanced gifted program called Wings, in October 2006 where he had taken classes since at least the 4th grade. (DEX 56). In the e-mail sent by the parents to the school, they indicated that he would not return to the Bridges program until he had an IEP. (DEX 68, p. 342).

59. After November 12, 2006, the District received a copy of a letter from Lynn O'Toole, a Service Coordinator for the Missouri Department of Mental Health's Next Step program. Attached to the letter was the DMH Plan Review Committee Recommendations for the Student, dated July 25, 2006. (DEX 67, p. 292-310). The DMH Plan provided the following information:

a. “Dr. Houk is [the Student's] psychiatrist and she has provided the following diagnosis for [the Student]:

Axis I:

Asperger's Syndrome
ADHD
Oppositional Defiant Disorder Syndrome
Obsessive/Compulsive Disorder
Generalized Anxiety Disorder

Axis II and III: None.” (DEX 67, p. 299).

b. “[The Student] was originally declined for services because he did not show a delay in two or more areas of the Adaptive Behavior Scale.” (DEX 67, p. 299).

c. “[The Student's parents] recently fired their Burrell caseworker because they felt she was not adequately supporting [the Student].” (DEX 67, p. 299).

d. That on July 25, 2006, the Student was taking the following medications:

Strattera (25 mg 2x)	for ADHD
Geodon (20 mg 2x)	for Obsessive/Compulsive behaviors
Fluvoxamine (25 mg 2x)	for Obsessive Compulsive behaviors
Clonidine (2mg 3x)	to help stay calm and focused
Lamictal (100mg 2x)	for manic or depressive stages of bipolar disorder

(DEX 67, pp. 300-303).

60. On December 5, 2006, the District received a copy of a Burrell Behavioral Health Annual Assessment Update for the Student dated October 2, 2006.⁴ The Assessment was prepared by Melissa Burns. The Assessment provides the following information regarding the Student:

a. The Student had an “admitting diagnosis”⁵ as follows:

Axis I: 314.01 ADHD, Combined type
313.81 Oppositional Defiant Disorder
296.21 Major Depressive Disorder

⁴ It is noted however, that the Assessment indicates that the Student was a 4th grade student at Westport Elementary (DEX 67, p. 333) which would suggest that it was written prior to the beginning of school year 2006-07.

⁵ This “admitting diagnosis” was a CPRC diagnosis that was performed by Wendy Dawson. (Tr. pp. 112-113).

Axis II: V71.09 None
Axis III: None Reported
Axis IV: 02, Family; 82 Daily Living Skills; 92 Other
Axis V: 60 (DEX 67, p. 333).

b. The Student's "current diagnosis" was as follows:

Axis I: 299.80 Asperger's Disorder, per recent evaluation
R/O 296.90 Mood Disorder
Axis II: V71.09 No Diagnosis
Axis III: None Reported
Axis IV: 03, Family Stressors⁶; 23, Educational Problems⁷
Axis V: 40 CGAS (DEX 67, p. 334).

c. Ms. Burns made the following statement concerning her medical diagnosis of the Student:

"[The Student's] diagnosis has evolved and changed over the years. A recent diagnostic test indicated that [the Student's] significant social deficits were caused by Asperger's Disorder. However, this therapist, although new to this case, believes that there are significant underlining mood issues, specifically depression, that is creating acting-out behaviors and barriers to client's ability to function successfully at school and at home."
(DEX 67, p. 334).⁸

61. On December 6, 2007 the parents met with Lynn O'Toole, a Service Coordinator for the Missouri Department of Mental Health's Next Step program. The parents indicated to O'Toole

⁶ Melissa Burns testified that the "Family Stressors" included "a family history of significant depression in the family . . . [and] a family history of environmental upheavals, such as moving and financial stressors." (Tr. p. 115, Ins. 5-8).

⁷ Melissa Burns testified that the "Educational Problems" identified on this diagnosis included "conflicts between the parents and the educational system, includes the child's learning difficulties, the child's difficulty getting along with peers in the school environment, and also disruptive behaviors in the classroom that are creating, possibly, ISS or OSS." (Tr. p. 115, Ins. 23-25; p. 116, Ins. 1-7)

⁸ Melissa Burns testified concerning these comments as follows:

"Q [by Mr. Ellis] So even though the Axis I says that you're ruling out mood disorders, you still think there might be mood disorders?

A Right." (Tr. p. 114, Ins. 9-12)

that Student's behavior seemed to be doing better at school and at home. Student was doing well with his new teacher. He had not seen a counselor at school as yet – more than 3 months into the school year. His behaviors at school were better because (a) he sees his parents frequently at school since they had jointed the PTA and (b) he had gone off the medication Adderall and started taking Straterra. (DEX 67, p. 316).

62. On December 11, 2006, a meeting occurred that was requested by Lynn O'Toole for the Student and his Parents. (Tr. pp. 161-162). During the meeting the Student's Parents again requested that the District conduct an evaluation of the Student pursuant to the IDEA indicating that they had concerns in relation to the Student's social, motor and language skills. (DEX 69, p. 348; Tr. pp. 161-163; Tr. pp. 244-245).⁹

63. At this time, when Phyllis Wolfram reviewed the Student's file, she was concerned about the psychiatric information in the file that had been recently received by the District. Specifically, the information that had been provided by Dr. Barbara Houk (DEX 57 and DEX 64) because if the District found the Student was qualified for special education services pursuant to the IDEA, the District would be unable to properly prepare a program of special education and related services because the information provided by Dr. Houk constituted bare diagnoses with no explanation of how the Student acted. (Tr. pp. 163-165).

⁹ It was during this meeting that the Student's Mother threatened Ms. Wolfram, which resulted in the issuance of a letter asking her to refrain from such inappropriate conduct in the future. (DEX 70, Tr. pp. 165-166).

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64. Thereafter, District's staff began pulling information together regarding the Student including the following:

a. On December 12, 2006, the District provided the Procedural Safeguards to the Student's Parents and requested that they prepare and return a Parent Input/Contact Form Screening Information and a Student Health Inventory. (DEX 69, pp. 355-360; Tr. p. 245). These documents were completed and returned to the District on January 8, 2007. (DEX 69, p. 355; Tr. p. 245, 248).

b. On December 14, 2006, current classroom information was requested from the Student's Fifth Grade regular education teacher, Emily Buff. (DEX 69, p. 350). Ms. Buff completed the forms and returned them on December 20, 2006. (DEX 69, pp. 351-352).

c. On December 22, 2006, Judy Duerkop, a School Psychologist for the District, wrote to Dr. Barbara Houk seeking clarification of her letter dated September 21, 2006.¹⁰ (DEX 69, p. 353). Susie Squires testified that she and Judy Duerkop "wanted to have verification of how [Dr. Houk] diagnosed [the Student] with these different disorders because there were several on that pad" (Tr. p. 246, lns. 18-21) and, at that point in time, the District did not have anything from Dr. Houk that would help the Student's Team understand why the Student was diagnosed the way Dr. Houk diagnosed him. (Tr. p. 247, lns. 8-12). Ms. Duerkop testified as follows concerning her reasons for writing the letter: ". . . We had gotten a letter from [Dr. Houk] that basically just gave . . . six different diagnoses, and it didn't provide us with any information about those diagnoses. And then I think in that letter she also stated that he needed an IEP, and so I wanted some clarification. I wanted to know exactly what symptoms [the Student] was exhibiting that would warrant the diagnoses that she had given him and possibly why she hadn't looked at some differential diagnoses and why she was doing that."

(Tr. p. 492, lns. 24-25; p. 493, lns. 1-9).¹¹

d. On January 9, 2007, Susie Squires had a telephone conference with Michelle McCoy, the Student's outside Occupational Therapist, concerning her December 7, 2006 report.¹² (DEX 72, p. 363; Tr. pp. 248-249).

¹⁰ Dr. Houk's September 21, 2006, letter is marked as DEX 64, p. 289.

¹¹ Melissa Burns, a Burrell employee who works with the Student also indicated some confusion concerning the Student's diagnosis when she testified that his current diagnosis was "Asperger's diagnosis and a possible diagnosis of mood disorder." (Tr. p. 96, lns. 2-6).

¹² Ms. McCoy's December 7, 2006, report is marked as DEX 67, pp. 339-340.

e. On January 9, 2007, the District received an Authorization for Use and Disclosure of Protected Health Information directed to Dr. Barbara Houk, which had been signed by the Student's Mother. (DEX 74, p. 365).

f. On January 9, 2007, the District received an Authorization To Disclose Information directed to Burrell Behavioral Health, which had been signed by the Student's Mother. (DEX 74, p. 366).¹³

g. On January 9, 2007, the District received an Authorization For Use and Disclosure of Protected Health Information directed to Cox Health, which had been signed by the Student's Mother. (DEX 74, p. 367).

h. On January 11, 2007, Dr. Barbara Houk responded by letter (DEX 75, pp. 368-369) to Judy Duerkop's December 22, 2006, letter. (DEX 69, p. 353; Tr. 250-251). Ms. Duerkop testified that Dr. Houk's letter "did not give any specific criteria that warranted the diagnoses that she had given [the Student]" so she set up a telephone conference with Dr. Houk to discuss the matter. (Tr. p. 494, lns.11-19).

65. On December 22, 2006, Susie Squires wrote to the Student's Parents to confirm the conversation she had with them on December 21, 2006, and to provide them with three options for a meeting to review the information gathered by the District's staff regarding the Student. (DEX 69, p. 354; Tr. pp. 247-248). On December 28, 2006, the Student's Father called Dr. Teresa White and complained that the dates that had been provided to them for the meeting were not suitable for the schedule of the Student's Parents. (DEX 71, p. 362). The meeting to review data was subsequently scheduled for January 17, 2007, (DEX 73; Tr. p. 167) but had to be rescheduled due to "the Great Ice Storm of 2007" that crippled the Springfield, Missouri area. (Tr. pp. 76-77; Tr. p. 167, lns. 17-24; Tr. pp. 249-250).¹⁴

¹³ The District clearly still did not have access to all of the psychiatric or psychological reports prepared on the Student, including the psychiatric reports prepared by Dr. Venkatesh and Dr. Laird Jones (Tr. pp. 107-109). In addition, Phyllis Wolfram testified that the District never received medical reports prepared by Dr. Angela Wessel, Dr. Laird Jones, Dr. Alok Jain or Dr. Patrick Lord. (Tr. pp. 151-152).

¹⁴ Between the time the Student's Parents requested the evaluation and the date of the meeting to discuss the Student's Existing Data, the Springfield School system had its Winter Break, which was two full weeks long -- from December 23, 2006 through January 8, 2007, (Tr. pp. 76-77; Tr. pp. 166-167; Tr. p. 249).

66. On January 25, 2007, the District provided the Student's Parents with a Notification of Conference which notified them that a meeting had been scheduled for January 29, 2007, for the purpose of reviewing information and data collected to determine whether an evaluation of the Student was appropriate. (DEX 76, pp. 370-371).
67. On January 29, 2007, the Student's Team met to review information and data collected to determine whether an evaluation of the Student was appropriate. Present at this meeting were: the Student's Parents; Phyllis Wolfram; Susan Hawkins; and, Judy Duerkop. The Student's Team discussed and prepared a Summary of Existing Data/Evaluation Plan for the Student. The Student's Team determined that the Student did not need an additional assessment in the areas of Health, Motor, Vision, Hearing and Adaptive Behavior. The Student's Team found that the Student did need additional assessment in the areas of Speech/Language; Cognitive/Intellectual; Academic; Social/Emotional/Behavioral; and Observation. (DEX 77, pp. 372-376; Tr. pp. 75-77; Tr. pp. 167-169; Tr. pp. 250-251).
68. The Summary of Existing Data/Evaluation Plan states that the Data Collection Procedure for the evaluation of the Social/Emotional/Behavioral area would be by "record review, Informals as needed, Observations, Achenbach Child Behavior Checklist, Interviews, Aspergers Syndrome Diagnostic Scale, Projective Measures, GARS, Psychiatric Evaluation performed by an outside agency." (DEX 77, pp. 372-377). The Student's Parents were provided with a copy of the Summary of Existing Data/Evaluation Plan. (Tr. pp. 169-172).
69. On January 29, 2007, the Student's Parents were also provided with a Description of Areas to be Assessed and Known Tests to be Used. (DEX 78, pp. 380-381; Tr. pp. 169-170). The

Description of Areas to be Assessed and Known Tests to be Used states that the District will utilize the following tests to assess the area of Social/Emotional/Behavioral: “record review, Informals as needed, Observations, Achenbach Child Behavior Checklist, Interviews, Aspergers Syndrome Diagnostic Scale, Projective Measures, GARS, Psychiatric Evaluation performed by an outside agency.” (DEX 78, p. 380). Judy Duerkop explained to the Student's Parents that she was recommending that the outside psychiatrist review all of the Student's psychiatric diagnoses and medications because she had received a number of psychiatric diagnoses from the Student's providers, some that did not appear to be consistent and she felt that the medications the Student was receiving could be affecting his ability to perform in school. (Tr. p. 169, Ins. 20-25; p. 170, Ins. 1-5; Tr. p. 253, Ins. 7-19; Tr. p. 497-499). The Student's Mother signed a Notice/Consent for Additional Assessment and returned it to the District. (DEX 78, pp. 378-379; Tr. pp. 93-94; Tr. pp. 168-171).

70. On January 30, 2007, the Student's Mother called Dr. Teresa White's office questioning why the District wanted another psychiatric evaluation of the Student and calling the decision “stupid.” (DEX 80, p. 409).

71. The initial evaluation conducted by the District consisted of the following:

a. On January 29, 2007, because of its concerns about the medications the Student was taking, and how they may affect his performance in school, the District requested and received a copy of the Student's current medications from the Student's Parent. (DEX 79, p. 382; Tr. pp. 253-254).

b. On February 6, 2007, the District administered the Wechsler Intelligence Scale For Children – Fourth Edition (WISC-IV) to the Student which indicated that the Student had a Verbal Comprehension score of 89; a Perceptual Reasoning score of 106; a Working Memory of 94; Processing Speed of 100 and a Full Scale IQ of 96. (DEX 79, p. 383).¹⁵

¹⁵ On or around February 19, 2007, the Student's Father requested a copy of the WISC-IV testing results. On February 19, 2007, Susie Squires mailed the results of that test to the Student's Father.

When these results were obtained, the District members of the Student's Team were "shocked . . . that possibly the medication was affecting his ability to focus and work" (Tr. p. 255, lns. 13-20), and if the medication was not affecting the Student's ability to work, then it needed to be ruled out by the outside psychiatric evaluation. (Tr. pp. 255-256). This same conclusion was reached by Dr. John when he reviewed the Student's test results. Dr. John testified as follows:

" . . . when I saw that, I saw the 70 and I thought, Oh, we're dealing with a lower functioning child, cognitive skills. And then I saw the 130, and I said, What happened? And then later in some of the data that I looked at, it mentioned that his effort that day at the very first test was very poor. And I said, Okay. That I can buy. He didn't . . . behave well or he didn't perform well or he wasn't cooperative, so the test really isn't valid. And then there were two tests that were, I believe, in the 130s, and that supported it. The one that really struck me was the 96, the one that was lower than -- you know, you don't have a 30-plus point drop in your IQ unless you've had a head trauma or a severe illness or, again, the effort on the test wasn't there. I mean, there has to be a reason for that kind of drop. Either he wasn't into it and didn't perform or he was -- his medication could have been affecting him or, you know, maybe he had a bad cold, you know. There has to be an explanation for that. Or he got hit in the head, and, you know, he's had blunt head trauma, because you just don't fluctuate from a 130 to a 96 without some explanation."

(Tr. p. 488, lns. 21-25; p. 489, lns. 1-19)

c. On February 27, 2007, the District administered the Clinical Evaluation of Language Fundamentals--Fourth Edition (CELF-4), to the Student which resulted in the following Standard Scores: Core Language: 82; Receptive Language 83; Expressive Language 83; Language Content 86; Language Memory 80; and, Working Memory 77. (DEX 79, p. 384). While these scores were consistent with the Student's scores on the WISC-IV, the scores were also a concern for the District members of the Student's Team based on the Student's previous high IQ scores. (Tr. p. 256).

d. On February 27, 2007, the District administered the Oral and Written Language Scales (OWLS), to the Student which resulted in a Standard Score of 83; a Listening Comprehension standard score of 84; and, an Oral Expression Standard Score of 86. (DEX 79, p. 385).

e. The Asperger Syndrome Diagnostic Scale (ASDS) was prepared by Emily Buff, the Student's Fifth Grade Teacher and the Student's Mother which resulted in an Asperger Syndrome Quotient of 94 (teacher) and 99 (Mother). (DEX 79, pp. 386-387).

f. On February 27, 2007, Jeanne Carpenter, the Student's Teacher, completed a TRF/6-18 Narrative Report & Critical Items. (DEX 79, pp. 388-391).

(DEX 80, p. 410; Tr. p. 259).

- g. On March 1, 2007, Aimee Luethy, the Student's Teacher, completed a TRF/6-18 Narrative Report & Critical Items. (DEX 79, pp. 392-395).
- h. On March 1, 2007, Emily Buff, the Student's Teacher, completed a TRF/6-18 Narrative Report & Critical Items. (DEX 79, pp. 396-399).
- i. On March 6, 2007, the Student's Mother, completed a TRF/6-18 Narrative Report & Critical Items. (DEX 79, pp. 400-403).
- j. On March 7, 2007, the District administered the Wechsler Individual Achievement Test-Second Edition (WIAT-II) to the Student which resulted in the following Composite Scores: Reading 98; Mathematics 106; and, Written Language 92. (DEX 79, p. 404).
- k. The District received the Student's SRI Test which indicated a Lexile score of 736 and a Performance Standard of "Proficient." (DEX 79, p. 405).
- l. The District received the Student's Star Math Test which indicated that the Student had a Standard Score of 716, with a Grade Equivalency of 5.8. (DEX 79, p.406).
- m. The District received the Student's 3rd Quarter grades which were as follows: Reading C-; Oral/Written Language C-; Spelling B-; Math C-; Science B-; and Social Studies D. (DEX 88, p. 420).
- n. The District received the Student's Oral Reading Fluency (ORF) progress toward goal information which indicated that the Student was progressing. (DEX 88, p. 421).

72. On February 12, 2007, Judy Duerkop and Susie Squires had a telephone conference with Dr. Barbara Houk. (DEX 79, pp. 407; Tr. p. 257-258). Susie Squires described this conversation as follows:

"The conversation was pretty disjointed. When we'd ask Dr. Houk about Donald's medication, it was very difficult for her to explain why he was taking it. And she said that he had a seizure disorder, which we were unaware of, and we said we weren't aware of this, but he was being medicated for such, which was somewhat of a shock to us. She still maintained that he had all these diagnoses but could not give us how she arrived at the diagnoses that she gave him."

(Tr. p. 258, lns. 7-16). Judy Duerkop testified about the telephone conversation with Dr. Houk as follows:

"Well, it was very confusing because Dr. Houk got off on tangents and basically told me a whole lot about her personality disorders and how similar she was to [the Student]. . . . when I saw the list of medications that [the Student] was on, I was

concerned from the very beginning, but [Dr. Houk] stated . . . that one of the medications was for a seizure disorder, and she said that possibly as an infant he had seizures, but there's no record of anything in any school records or even from my history . . . that he ever had seizures. And then she also was giving him one medication for Asperger's, and I've worked with . . . several Asperger's students in my work in the district, and none of them have ever been given a specific medication for Asperger's. As far as I know, there isn't one. And also that she stated that the Lamictal could lower [the Student's] IQ.”

(Tr. p. 495, lns. 8-25; p. 496, lns. 1-11).

73. Arrangements for the outside psychiatric evaluation of the Student were made by Judy Duerkop. (Tr. pp. 499-501). Initially, Ms. Duerkop attempted to use Lynn Prince, a parent advocate to assist in finding a psychiatrist to conduct an evaluation. (Tr. p. 499). Ms. Prince indicated she would contact a psychiatrist in Joplin, Missouri. At the same time, Ms. Duerkop contacted Burrell Behavioral Health and placed the Student on Dr. Casupang's waiting list. (Tr. p. 500). Ms. Duerkop was told by Burrell that the Student would be seen for the evaluation in June, 2007. (Tr. p. 500).

74. On April 26, 2007, the Student's Mother called Susie Squires. The Student's Mother questioned why the Student had not received an IEP and Ms. Squires explained that they were waiting on the outside psychiatric evaluation. The Student's Father also spoke with Ms. Squires. The Student's Father was angry, cursed and threatened Ms. Squires. Ms. Squires tried to explain the problem with the arrangements for the outside psychiatric evaluation. The Student's Father stated the District had no right to question the Student's doctors and that “there would be no outside evaluation.” Ms. Squires asked the Student's Father “if he was refusing the outside evaluation because it was this would stop the evaluation process.” The Student's Father yelled and cursed at Ms. Squires and told her he would be contacting the District's Superintendent “catching him in

public, embarrassing him, going to the newspaper, and getting his lawyer and going to DESE.” (Tr. p. 261). Ms. Squires told the Student's Father that she “was sorry he felt that way.” (DEX 81, p. 411). Ms. Squires testified that the conversation was very “unpleasant.” (Tr. p. 260) and the Student's Father withdrew consent for the evaluation. (Tr. p. 261).¹⁶

75. On April 27, 2007, Judy Duerkop contacted Burrell Behavioral Health to determine what had occurred that caused the Student's Parents to become angry. Ms. Duerkop determined that Burrell had unilaterally changed the assignment of the Student from Dr. Casupang to Dr. Breedlove. Burrell also informed Ms. Duerkop that Dr. Casupang had refused to see the Student because of past difficulties with the Student's Parents and that she knew Dr. Breedlove and Dr. Vanketesh had previously refused to see the Student because the Student's Parents had “unloaded verbally on both” of them. Burrell confirmed that the Student in fact was on Dr. Casupang's waiting list and it would be June before he would get in to see Dr. Casupang. (DEX 82, p. 412; Tr. pp. 500-501).

76. On April 30, 2007, Judy Duerkop, called the Student's Mother. Ms. Duerkop said she understood that the Student's Parents had refused the outside psychiatric evaluation, but asked whether they would allow her to complete the interview with the Student. The Student's Mother refused to allow Ms. Duerkop to perform the interview. (DEX 83, p. 413; Tr. p. 503).

¹⁶ During this conversation, the Student's Father also said that “he was just going to have to kick everyone's ass.” (DEX 84, p. 414). There was no justification for this total lack of respect to District personnel.

77. On May 3, 2007, the District sent the Student's Parents a Notification of Action which indicated the District had determined "to discontinue the initial evaluation on [the Student]." The reason stated for this determination was as follows:

"The determination to halt the process was made as a result of a telephone conversation between Susie Squires and [the Student's Father] on April 26, 2007 in which [the Student's Father] refused to allow the district to complete the psychiatric evaluation as outlined in the Summary of Existing Data/Evaluation Plan to which both parents had previously consented. This determination is substantiated by a telephone conversation between Judy Duerkop (School Psychologist) and [the Student's Mother], on April 30, 2007. During this conversation [the Student's Mother] reiterated their refusal to allow the district to complete the psychiatric evaluation and to complete other testing by the school psychologist."

(DEX 85, p. 416).

78. The Student's Parents filed a due process complaint DESE on May 4, 2007, which was received by DESE that same day. (DEX 91 and 92, pp. 432-433).

79. At the time the Parents pulled their consent to the outside psychiatrist evaluation in late April, more than 90 days after giving it initially, the District had *not* done the following:

- a. Explored getting a psychiatrist outside of Springfield to conduct the evaluation;
- b. Conducted an interview of the Student; (Tr. 262)
- c. Compiled or analyzed the daily behavior sheets maintained by the Student's teachers for the last two years; (Tr. 510-511)
- d. Obtained the autism evaluation report from the District's outside autism expert, Susan Hawkins; (Tr. 278)
- e. Completed the Gilliam Autism Rating Scale; and (Tr. 524; 550)
- f. Completed the record review or the psychosocial report. (Tr. 512; 522-523).

Testimony from Barbara Houk, MD

80. Barbara Houk, MD treated Student from March 7, 2006 to May 2007. (Tr. 362). She graduated from University of Missouri, Columbia School of Medicine in 1991. She then completed a four year residency in psychiatry, with only 6 months devoted to child and adolescent psychiatry. She is not Board certified by the American Board of Psychiatry & Neurology. (Tr. 398-399).

81. Dr. Houk initially saw Student on a monthly basis and as he improved, she treated him every 3 months.¹⁷ (Tr. p. 364).

82. Dr. Houk advised the Student's Mother in April 2007 that an additional psychiatric evaluation would be harmful to the Student.¹⁸

83. Dr. Houk was not a credible witness for several reasons: (a) her professional credentials were weak, especially in the area of child psychiatry; (b) she prescribed an anti-seizure medication for Student who had no history of seizures (DEX, pp. 407; Tr. 257-258; 495-496); (c) she testified incorrectly that state law provides that every student medically diagnosed with ADHD must have an IEP; (d) Dr. Houk failed to consider the cumulative effect of the myriad of medications that she had prescribed for Student; (e) her testimony involved rambling answers and a failure to respond to the questions posed to her by counsels and by the Hearing Panel.

Testimony from John Kyle, MD

84. Dr. Kyle John, a pediatric and adolescent psychiatrist called as a witness by the District, testified that: (1) he was unable to identify the diagnosis that Dr. Houk considered to be "primary" from the prescription pad diagnosis; (2) he was unable to determine how Dr. Houk arrived at her

¹⁷ Student's Mother testified that her son saw Dr. Houk 2 times per month. (Tr. p. 82).

¹⁸ It is unclear if the parents relied on this advice in pulling their consent in April 2007. No mention is made in the April conversations summarized in an e-mail submitted by the District. (DEX 81).

diagnoses; and (3) he was unable to determine the extent of the Student's behaviors that led to the diagnoses. (Tr. pp. 445-446). Dr. John also described what he would provide to the District, if he was the treating psychiatrist:

“I would likely be a little bit more explicit in terms of what type of ADHD I thought [the Student] had, for example, inattentive or hyperactive-impulsive or the combined type. I would also likely include, . . . , some more data about the specific symptoms of each of the diagnoses that I was concerned about adversely affecting the patient in the school setting.”

(Tr. p. 446, lns. 5-12).

85. Dr. John used the medical diagnosis of ADHD as an example of the type of information that he felt should be provided to an educator by a treating psychiatrist, in order to develop an appropriate educational program. Dr. John testified as follows:

“If a patient has the hyperactive type or the combined type, you know, teachers and educators are going to need to be more aware of the child's tendency to move and get out of their seat and have high energy as opposed to the inattentive subtype where they may not notice that patient at all. They may be the quiet one in the back that causes no trouble but that also isn't on task and focused with what's going on in the school, so they would be two different things completely.”

(Tr. p. 447, lns. 18-25; p. 448, lns. 1-3).

86. Dr. John testified that it was also reasonable and necessary for an educator to have specific information concerning the medications a student is taking. Dr. John explained his opinion as follows:

“. . . the medications individually or combined could cause side effects that would be observed at school by teachers and educators, so whether I provided a specific letter to the school or provided literature through the family, I think it is important that the school have some understanding of what could be the common side effects and what they should do if they observe them.”

(Tr. p. 449, lns. 18-25).

87. On cross-examination by Ms. Johnson, Dr. John testified as follows concerning Naltrexone, one of the psychotropic medications that was prescribed to the Student by Dr. Houk:

“Q Now, Naltrexone, what information do you believe the school would need to know about that in order to make educational decisions regarding a child?

A Well, that's an interesting question because I've never had a child on naltrexone. It's not FDA approved for kids, neither is Lamictal or clonidine. We use them anyway. But naltrexone is most frequently used in adults with addictions. I can't really comment why it's being prescribed in this case. Again, in my nine years of child psychiatry practice, I've never prescribed it to a child. So to tell you the truth, if I were prescribing this, I would go to the PDR or to one of my references and look it up and familiarize myself with the side effects. I could do that for you right now if you wanted me to, but off the top of my head, I can't because it's not a medication I've ever prescribed to a child.”

(Tr. p. 464, lns 9-25; p. 465, ln. 1)

88. Dr. John testified that he first heard of the Student 7- 10 days before the hearing.

(Tr. 453).

CONCLUSIONS OF LAW

1. The District is an Urban Missouri Public School District which is organized pursuant to Missouri statutes.
2. 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.
3. The Individuals With Disabilities Education Act, (“IDEA”), its regulations and the *State Plan for Special Education* (2007), (“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.

4. 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.

5. The purpose of the IDEA and its regulations is: (a) "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"; (b) "to ensure that the rights of children with disabilities and their parents are protected"; and, (c) "to assess and ensure the effectiveness of efforts to educate those children." 34 C.F.R. § 300.1.

6. 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.

7. 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).

8. 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*, 119 F.3d 607, 612;

(8th Cir. 1997); 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).

9. 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, in November, 1999, after the Student's Parents requested that the District evaluate the Student. After a comprehensive evaluation, the District determined that the Student qualified for Early Childhood Special Education services in the areas of Cognitive, Adaptive, Social/Emotional, Language, Speech and Fine Motor. The Student received special education and related services from the District during school years 1999-2000 and 2000-01. Thereafter, in April, 2001, the Student's Team determined that the Student no longer met the eligibility criteria to be a “child with a disability” under the IDEA and provided the Student's Parents with a timely and appropriate Notice of Action that described the District's action. The Student has received regular education services from the District since the beginning of his Kindergarten year, school year 2001-02.

10. The Student's Parents filed the due process complaint that initiated this matter on May 4, 2007. Their complaint alleges that the District failed to identify the Student as a “child with a disability” between May 4, 2005, and May 4, 2007, which were school years 2005-06 and 2006-07. The Student's Parents bear the burden of proof in this case. *Schaffer ex rel. Schaffer v. Weast*, 546 U. S.49, 126 S. Ct. 528 (2005).

11. Under IDEA, school districts are charged with ensuring that “[a]ll children with disabilities. . . regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located and evaluated. . . 20 U. S. C. Section 1412(a)(3)(A). This process of identifying, locating and evaluating children with disabilities is frequently referred to as “child find.” IDEA further requires that for eligibility the child must be found to have one of the enumerated disabilities that affects the child 's educational performance and by reason thereof the child needs special education services. [emphasis added] ¹⁹

12. The relevant portions of the IDEA Regulations regarding Parental Consent for an initial evaluation are as follows:

§ 300.300 Parental consent.

(a) Parental consent for initial evaluation.

(1)(i) The public agency proposing to conduct an initial evaluation to determine if a child qualifies as a child with a disability under § 300.8 must, after providing notice consistent with §§ 300.503 and 300.504, obtain informed consent, consistent with § 300.9, from the parent of the child before conducting the evaluation.

(ii) Parental consent for initial evaluation must not be construed as consent for initial provision of special education and related services.

(iii) The public agency must make reasonable efforts to obtain the informed consent from the parent for an initial evaluation to determine whether the child is a child with a disability. . . .

13. The relevant portions of the IDEA Regulations regarding Initial Evaluations, 34 C.F.R. § 300.301 are as follows:

§300.301 Initial evaluations.

¹⁹The disabilities described in IDEA include mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . , orthopedic impairments, autism, traumatic brain injury, other health impairments or specific learning disabilities. 20 U. S. C. Section 1401(3)(A)(i)(2006).

- (a) General. Each public agency must conduct a full and individual initial evaluation, in accordance with §§ 300.304 through 300.306, before the initial provision of special education and related services to a child with a disability under this part.
- (b) Request for initial evaluation. Consistent with the consent requirements in § 300.300, either a parent of a child or a public agency may initiate a request for an initial evaluation to determine if the child is a child with a disability.
- (c) Procedures for initial evaluation. The initial evaluation--
 - (1) (i) Must be conducted within 60 days of receiving parental consent for the evaluation; or
 - (ii) If the State establishes a timeframe within which the evaluation must be conducted, within that timeframe; and
 - (2) Must consist of procedures--
 - (i) To determine if the child is a child with a disability under § 300.8; and
 - (ii) To determine the educational needs of the child.

14. The relevant portions of the IDEA Regulations regarding Additional Requirements For Evaluations And Reevaluations, 34 C.F.R. § 300.305 are as follows:

§ 300.305 Additional requirements for evaluations and reevaluations.

- (a) Review of existing evaluation data. As part of an initial evaluation (if appropriate) and as part of any reevaluation under this part, the IEP Team and other qualified professionals, as appropriate, must--
 - (1) Review existing evaluation data on the child, including--
 - (i) Evaluations and information provided by the parents of the child;
 - (ii) Current classroom-based, local, or State assessments, and classroom-based observations; and
 - (iii) Observations by teachers and related services providers; and
 - (2) On the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine--
 - (i)(A) Whether the child is a child with a disability, as defined in § 300.8, and the educational needs of the child; or
 - (B) In case of a reevaluation of a child, whether the child continues to have such a disability, and the educational needs of the child;
 - (ii) The present levels of academic achievement and related developmental needs of the child;
 - (iii)(A) Whether the child needs special education and related services; or

- (B) In the case of a reevaluation of a child, whether the child continues to need special education and related services; and
- (iv) Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.
- (b) Conduct of review. The group described in paragraph (a) of this section may conduct its review without a meeting. . . .

15. The relevant portions of the State Plan regarding Evaluation Timelines, Regulation III -- *Identification and Evaluation*, page 32, is as follows:

“Evaluation Timelines

The public agency shall provide the parent with a Notice of Intent to Evaluate as soon as possible, but within thirty (30) calendar days of the date of referral for evaluation. Delays beyond this time may be permitted for just cause (school breaks for summer or holidays, student illness, etc.) and documented in the student's record.

The evaluation shall be completed and a decision regarding eligibility rendered within sixty (60) calendar days following parent consent or notice, as the case may be. Delays beyond this time may be permitted for just cause and documented in the student's record” [emphasis added]

16. The relevant portions of the State Plan regarding Initial Evaluation, Regulation III -- *Identification and Evaluation*, page 32, is as follows:

“Initial Evaluation (34 C.F.R. 300.301)

. . . Either a parent of a child or a public agency may initiate a request for an initial evaluation to determine if the child is a child with a disability.

The initial evaluation must be conducted within sixty (60) days of receiving parental consent for the evaluation, may be extended for just cause, and must consist of procedures to determine if the child is a child with a disability as defined in this State Plan and to determine the educational needs of the child. . . . “[emphasis added].

17. During school year 2005-06, the Student's Parents requested that the Student be evaluated pursuant to the IDEA on January 20, 2006. (DEX 49, pp. 186-187; Tr. pp. 63-64; Tr. p. 152). The District collected data regarding the Student. On February 17, 2006, the District personnel reviewed the Student's existing data and determined not to initiate an evaluation. (DEX 50, p. 205; Tr. pp. 296-298) and provided the Parents with a Notice of Action which explained the District's decision. The District's determination not to initiate an evaluation of the Student pursuant to the IDEA was appropriate and consistent with the IDEA, its Regulations and the State Plan for the following reasons:

- a. The determination was made by an appropriate group of District employees who had knowledge of the Student;
- b. The determination was consistent with the IDEA Regulations, 34 C.F.R. § 300.305(a)(1) and (2), in that it considered data regarding the Student, including: evaluations and information provided by the parents of the child; current classroom-based, local, or State assessments, and classroom-based observations; observations by teachers and related services providers; and it received input from the child's parents and identified whether the Student was a child with a disability, as defined in 34 C.F.R. § 300.8, and the educational needs of the child.
- c. The determination not to evaluate the Student was made, and the Student's Parents were notified, within thirty (30) days following their referral of the Student for evaluation as required by the State Plan regarding Evaluation Timelines, Regulation III -- *Identification and Evaluation*, page 32.

d. There is no requirement that the Student's Parents be present for the February 17, 2006, meeting where the District staff discussed whether the Student needed to be evaluated further by the District. 34 C.F.R. § 300.305(b); State Plan Regulation III -- *Identification and Evaluation*, page 35.

e. The District had conducted a Section 504 evaluation of the Student on January 4, 2006. The Section 504 Evaluation Team considered the following information: the Student's medical diagnoses and the data that it had received concerning those diagnoses; the Student's grades in Third and Fourth Grade; the Student's academic Benchmarks; input from the Student's Parents; input from the Student's teachers; input from Heather Ritchie, the Burrell Consultant; and, the Student's performance on the Star Math, SRI and MAP tests. The Team determined that the Student did not have a physical or mental disability which substantially limited one or more major life activity, does not have a record of such an impairment and is not regarded as having such an impairment. (DEX 48, p. 185; Tr. pp. 60-62).

f. On March 13, 2006, the Student's Parents filed a Complaint with the OCR, which alleged that the Student was "in need of special education services but the District refused to evaluate [the Student], notwithstanding medical documentation that the complainant presented to the District indicating the nature of [the Student's] disabilities and his need for services." (DEX 54, p. 227; Tr. p. 66). Subsequently, on September 7, 2006, the OCR issued a determination letter that found that "there is insufficient evidence to conclude the District violated the

Section 504 and Title II regulations by failing to evaluate the complainant's son.” (DEX 54, p. 235) and made findings of fact and law that were consistent with its decision.(DEX 54, pp. 232-234).

g. The Student's Parents had not provided the District with a great deal of medical information concerning the Student, including but not limited to the psychiatric reports prepared by Dr. Venkatesh and Dr. Laird Jones (Tr. pp. 107-109) and the medical reports prepared by Dr. Angela Wessel, Dr. Laird Jones, Dr. Alok Jain and Dr. Patrick Lord. (Tr. pp. 151-152).

h. The District conducted a second thorough Section 504 Evaluation of the Student on September 14, 2006. During this evaluation, a qualified group of District employees conducted a meeting to review the additional data that had been provided by the Student's Parents and determine whether the Student was eligible to receive Section 504 services from the District or should be evaluated by the District pursuant to the IDEA. (DEX 59, pp. 274-275). The Student's Team re-reviewed all of the information they had reviewed during their January 4, 2006, meeting and reviewed additional information including: the Burrell Report dated August 11, 2003 and the Student's diagnoses listed in that report; the notes of Heather Ritchie dated January 31, 2005, and the Student's diagnoses listed in there; the prescription pad diagnosis from Dr. Barbara Houk dated March 7, 2006; The Student's Fourth Quarter grades from the Fourth Grade; the Student's SRI scores; Teacher input from the Student's Fourth and Fifth Grade teachers; Star Math scores from September 14,

2006; the Student's attendance and discipline records; a Cox Health Report concerning the Student dated December 23, 2005; and input from Natasha Brown regarding her telephone conversation with the Student's Parent. (DEX 59, pp. 274-275). The Student's Team determined that the Student did not have a physical or mental disability which substantially limits one or more major life activity, does not have a record of such an impairment, and is not regarded as having such an impairment. (DEX 59, p. 276).

18. During school year 2006-07, on December 11, 2006, the Student's Parents requested that the District conduct an evaluation of the Student pursuant to the IDEA. (DEX 69, p. 348). The meeting was subsequently held on January 29, 2007, more than thirty (30) days following the date the Student's Parents referred the Student for an evaluation pursuant to the IDEA. The meeting met the requirements of the IDEA Regulations and "just cause" existed for an extension of the thirty (30) day timeline set forth in the State Plan, Regulation III -- *Identification and Evaluation*, "Evaluation Timelines," page 32, for the following reasons:

a. The District's staff immediately pulled information together regarding the Student (DEX 69, pp. 351-355; DEX 72, pp. 248-249; DEX 74, pp. 365-367).

b. On December 22, 2006, Susie Squires wrote to the Student's Parents and provided them with three options for a meeting to review the information

gathered by the District's staff regarding the Student, which were within the thirty (30) day timeline period. (DEX 69, p. 354; Tr. pp. 247-248).

c. The District's Winter Break intervened, beginning on December 23, 2006 and lasting until January 8, 2007 (sixteen days).

d. The meeting to review data was subsequently scheduled for January 17, 2007, (DEX 73; Tr. p. 167) but had to be rescheduled until January 29, 2007, due to an ice storm that crippled the Springfield, Missouri area for a week. (Tr. pp. 76-77; Tr. p. 167, lns. 17-24; Tr. pp. 249-250).

19. On January 29, 2007, the Student's Team met to review information and data collected to determine whether an evaluation of the Student was appropriate. The Student's Team found that the Student needed additional assessment in the areas of Speech/Language; Cognitive/Intellectual; Academic; Social/Emotional/Behavioral; and Observation. (DEX 77, pp. 372-376). The District prepared a Summary of Existing Data/Evaluation Plan and provided a copy of it to the Student's Parents. On January 29, 2007, the Student's Parents were also provided with a Description of Areas to be Assessed and Known Tests to be Used. (DEX 78, pp. 380-381) which informed them of the tests and assessment methods that would be used during the Student's evaluation. The Student's Mother signed a Notice/Consent for Additional Assessment and returned it to the District. (DEX 78, pp. 378-379). The consent provided by the Student's Mother constituted "informed consent" as that term is defined by the IDEA Regulations, 34 C.F.R. §300.9 and the State Plan, Regulation I -- *General Provisions*, page 2.

20. The District began the Student's initial evaluation immediately upon receiving the consent of the Student's Parents. The decision to include an outside psychiatric examination of the Student in the Student's evaluation was justified and necessary to provide a complete evaluation of the Student for the following reasons:

(1) The March 7, 2006, "prescription pad" diagnosis by Dr. Barbara Houk (DEX 53, p. 226) failed to identify which of her diagnoses were "primary"; did not provide information which would allow the District to determine how Dr. Houk arrived at her diagnoses; and did not explain the extent of the Student's behaviors that led to the diagnoses. (Tr. pp. 445-446).

(2) Dr. Houk's September 27, 2006, indicated that the Student was diagnosed by her as having "Pervasive Development Disorder, Aspersers [sic] Syndrome: Generalized Anxiety Disorder; Obsessive Compulsive Disorder, ADHD Disorder, and Oppositional Defiant Disorder." (DEX 64, p. 289). This letter also failed to provide sufficient specificity concerning the nature and extent of the Student's diagnoses and behaviors.

(3) At some point after November 12, 2006, the District received a copy of a letter from Lynn O'Toole, which had an attached DMH Plan for the Student. (DEX 67, p. 292-310). The DMH Plan stated that Dr. Houk's Axis I diagnosis for the Student was Asperger's Syndrome, ADHD,

Oppositional Defiant Disorder Syndrome, Obsessive/Compulsive Disorder and Generalized Anxiety Disorder (DEX 67, p. 299).

(4) A Burrell Behavioral Health Annual Assessment Update for the Student dated October 2, 2006. (DEX 67). This document has an “admitting diagnosis,” Axis I of: 314.01 ADHD, Combined type, 313.81 Oppositional Defiant Disorder and 296.21 Major Depressive Disorder.

(5) The Burrell Behavioral Health Annual Assessment Update listed the Student's “current diagnosis,” Axis I of: 299.80 Asperger's Disorder, per recent evaluation, R/O 296.90 Mood Disorder. (DEX 67).

Melissa Burns, who wrote the Assessment Update, made the following statement concerning her medical diagnosis of the Student:

“[The Student's] diagnosis has evolved and changed over the years. A recent diagnostic test indicated that [the Student's] significant social deficits were caused by Asperger's Disorder. However, this therapist, although new to this case, believes that there are significant underlining mood issues, specifically depression, that is creating acting-out behaviors and barriers to client's ability to function successfully at school and at home.” (DEX 67, p. 334).

(6) The lack of sufficient information from Dr. Houk caused the District to write Dr. Houk on December 22, 2006, to seek clarification of her letter dated September 21, 2006. (DEX 69, p. 353). Susie Squires testified that she and Judy Duerkop “wanted to have verification of how [Dr. Houk] diagnosed [the Student] with these different disorders because there were several on that pad” (Tr. p. 246, Ins. 18-21) because at that point in time the District did not have anything from Dr.

Houk that would help the Student's Team understand why the Student was diagnosed the way Dr. Houk diagnosed him. (Tr. p. 247, lns. 8-12).

(7) During a telephone conference with Dr. Barbara Houk, on February 12, 2007, Judy Duerkop and Susie Squires found the conversation to be “disjointed” and “confusing” and Dr. Houk referenced medical conditions for the Student that had no basis in fact (i.e. that the Student had a seizure disorder). (DEX 79, pp. 407; Tr. p. 257-258; Tr. p. 495, lns. 8-25; p. 496, lns. 1-11).

(8) The medications prescribed by Dr. Barbara Houk, “individually or combined could cause side effects that would be observed at school by teachers and educators,” which required analysis by a child and adolescent psychiatrist.

(9) The use of the medication, Naltrexone, was questionable because it is not FDA approved, and though used with adults with addictions, it is not commonly used with children.

(10) The use of the medications prescribed by Dr. Barbara Houk may have resulted in a thirty (30) point drop in his IQ, when it was measured on the WISC-IV test administered by the District on February 6, 2007. (Tr. p. 488, lns. 21-25; p. 489, lns. 1-19).

21. For reasons set forth below, the District did not have just cause for failure to complete its evaluation within the 60 day period from the date when the Parents' consents were obtained.

DISCUSSION

The District failed to complete its evaluation in a timely fashion. "Just cause" is present if there are circumstances such as a child experiencing a lengthy illness preventing testing or if school is closed for an extended period of time for weather, health epidemic, etc. The legislative intent of IDEA contemplates that a child will be identified, evaluated and given special education services in a timely fashion. See, e. g., W. B. v. Matula, 67 F. 3d 484, 501 (3rd Cir. 1995). In this case, the District made no effort to go outside the geographical area to find a psychiatrist even though the District managed to find a (local) psychiatrist 7-10 days before the hearing to appear as an expert witness. (Finding of Fact #88) The District had not completed a number of parts of the evaluation nearly three months after the parental consents had been given. (Finding of Fact #79). Whether out of frustration from the delays and/or on advice from Dr. Houk who testified that another psychiatric evaluation would be harmful to Student, the parents pulled their consents in late April and filed a due process complaint. Their position is that no further evaluation is needed because Student's school records demonstrate that between August 2005 and May 2007, Student was a child with a disability. (Tr. 8 & 9).

We conclude that the Student has failed to meet his burden of proof that he was a child with a disability during the period in question because we are not convinced that any of his medically diagnosed disabilities affected his educational performance. Despite a number of school absences (approximately 43 days) in the 2005-2006 school year, Student was doing reasonably well in classes – A's, B's and C's; participating in a gifted program called Bridges; had only 5 discipline referrals to the principal. (DEX 55-56). His standardized test scores showed that Student as a 4th

grader was progressing at a 5th grade level. (DEX 49, p. 196-198). From August to December 2006 when the evaluation process started, there were no discipline referrals; he had not seen the counselor at school the first half of the year; Student's behaviors were better since he got new medicine and as he had started seeing his parents at school more often once they joined the PTA; he was getting along well with his new teacher, Emily Buff. (DEX 76, p. 315-316). His attendance was substantially better in that he had missed approximately 8 days in the first 3 quarters; he was getting B's and C's. (DEX 88, p. 420). In both school years, the grade cards did include areas of concern in Personal and Social Development but the teachers nevertheless graded Student as Satisfactory (as opposed to Unsatisfactory) in those categories. We accept the grade cards as evidence of his performance academically and socially because we did not receive the benefit of any testimony from Student's classroom teachers.

ORDER

The Due Process Complaint filed by the Student's Parents is dismissed.

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....

2. 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.

Dated this 20th day of December, 2007.

Pamela S. Wright
Pamela S. Wright, Chairperson

Terry Allec
Terry Allec, Panel Member

Marilyn McClure
Marilyn McClure, Panel Member *with dissent*

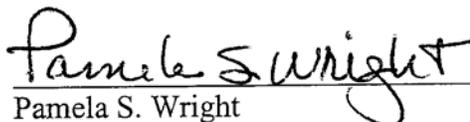
CERTIFICATE OF SERVICE

The undersigned certifies that she sent one copy to each of the following by certified mail on this ^{Tu} 20 day of December, 2007 to:

Ransom A. Ellis, III
Ellis, Ellis, Hammons & Johnson, P.C.
The Hammons Tower, Suite 600
901 St. Louis Street
Springfield, Missouri 65806-2505

And

Deborah S. Johnson
Attorney at Law
9923 State Line Road
Kansas City, Missouri 64114


Pamela S. Wright

Marilyn McClure (panel member), concurring on the first issue.

The school district delayed completing the evaluation (Finding 79). Part of this delay involved the school district attempting arrangements for the child to be evaluated by a psychiatrist . Although the parents had previously provided the district with a diagnosis by a psychiatrist (Findings 57,59), the district sought and received consent for an evaluation by a psychiatrist of the district's choosing.

The Missouri State Plan provides for thirteen categories of eligibility; one category is "other health impaired". A district-provided psychiatric evaluation was not mandatory for consideration of all the categories for which the student might be found eligible.

There is no requirement in the Missouri State Plan requiring a psychiatric diagnosis for eligibility under the category titled "Other Health Impaired", thus the school district did not adequately consider all potential categories of disability when developing the evaluation plan.

Marilyn McClure (panel member), dissenting on the second issue.

Notably, the parent(s) referred the student to the school district for evaluation of this child in 1999, 2003, December 2005, January 2006 and December 2006.

In March, 2006, the parent voluntarily provided the district a script from Dr. Houk, a psychiatrist licensed in Missouri, that indicated a diagnosis of Asperger's. Finding 43.

This panel member recognizes that children with this medical diagnosis may be found to

meet the criteria to be determined eligible for IDEA in Missouri as "other health impaired".

Dr. John, psychiatrist who testified for the school district, (Tr 51, pgs. 472 line 25, pg.473 line 1) when asked about the child's Asperger Syndrome Quotient of 94 on the *Asperger Syndrome Diagnostic Scale* administered by the school, he testified "Well, judging from my observation on this form, it means that he's likely to have Asperger's syndrome".

The daily behavioral charts kept by the teachers (at the parent's request) demonstrate significant, on-going inappropriate classroom behaviors and establishes that the student's condition adversely affects his educational performance and his behaviors interfere with his learning and that of others. These documents speak volumes. It is obvious to this panel member that due to his condition he is not benefitting from educational programming in the manner typical children do.

Entries in these behavior charts during fifth grade include: not working on task, not controlling emotions, not participating in reading and writing, easily distracted, walking around, drumming on book, not participating in group discussions, refusing to do any work, would not stay focused, reading instead of listening or working on assigned tasks, being required to work on assignments instead of recess, hyper, threw assignments away, bothered other students during writing time, touching inappropriate places, barking like a dog, touching other students, slapped a girl, spit on another student, pretended to

shoot people, burped all through school, sleeping during class, called himself a failure, yelled and argued with a student, yelling at partner, separating from group, throwing erasers, slammed book, disruptive, out of seat, yelled at everyone "I hate everyone", throwing things, hitting people in head with backpack, calling others names, used "B" word, shotting baskets in the classroom, flipped a basket of books, very defiant, hit another student during lunch,...

During his fourth grade school year the entries recorded on the behavior sheets include: Not working on task, difficulty controlling emotions, difficulty with peer relations, difficulty respecting others, would not listen, would not follow instructions, throw a fit about following instructions, loudly protested adult direction, yell while teacher talking, would not follow lunch procedure, hit behind chair and doors, crawled under table when he got mad, chewed holes in his shirts...

My fellow panel members have focused on the student's academic achievements (grades) and lack of discipline referrals to the principal's office. I contend that they are too narrowly defining educational performance by considering such.

The student's report cards indicate significant delays in personal and social skills. These areas of non-academics obviously are a priority by the district for all students since they appear on all student's report cards. These report cards reflect this student's serious lack of skills in these areas. These areas are areas where students are expected to meet developmental goals as part of the general curriculum.

This is a student who was an IDEA eligible student when younger and received early childhood services from the district. This scenario is consistent with children with asperger's who need early intervention when young and later do well during the primary grades but struggle in the mid and upper elementary grades.

This is a student that has an impairment that rises to the level of eligibility with the Missouri Department of Mental Health.

This student's condition has resulted in not only DMH eligibility, but in hospitalizations.

This student received "homebound" services from this district while hospitalized in December 2005. Student is believed to have the same, if not additional, conditions now as when he was hospitalized. Finding 39.

This panel member would order that the child is eligible for services under IDEA under the category "other health impaired" and be awarded compensatory services as sought by the parent to include social skills training. I would also order training on IDEA eligibility for the staff who has served this child as well as training on Asperger's for the staff who is/will be working with this student.

With this I respectfully dissent,

Hearing Panel Member

With this I respectfully dissent.

A handwritten signature in cursive script, appearing to read "Michael". The signature is written in black ink and is positioned above the typed name.

Hearing Panel Member