

BEFORE THE THREE MEMBER DUE PROCESS HEARING PANEL
PURSUANT TO RSMo. § 162.961

STUDENT and FATHER and)
MOTHER)
)
Petitioners,)
)
v.)
)
SPECIAL SCHOOL DISTRICT)
OF ST. LOUIS COUNTY, et al.,)
)
Respondents.)

FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

The Hearing Panel, after hearing the evidence in this matter on May 6-9 and May 21, 2008, makes the following Findings of Fact and Conclusions of Law and issues the following Decision and Order:

FINDINGS OF FACT

The Hearing Panel makes the following Findings of Fact:

The Parties

1. Student was adopted by her parents shortly after her birth. [R-20 at 115; Vol.I:29]. The family, in addition to Student, consists of her mother and her father (“Parents”) and a sister, the biological child of the Parents. The sister is approximately nine and one-half months younger than Student. [Vol.I:29]. The father is an attorney. [R-60 at 636]. The mother is a preschool teacher. [Vol.III:97].
2. At all times relevant to this due process proceeding, the Parents have resided within the boundaries of the School District (“the District”). While Student has been living in out-of state private placements almost continuously since December 28, 2006, her official residency is considered with Parents.
3. The District is an “urban school district” located in St. Louis County, Missouri. The District operates more than 6 buildings and has in excess of 2500 students. *Missouri School Directory*.

4. The Special School District of St. Louis County ("SSD") is responsible for identifying and serving special education students in the District, pursuant to the directives of the Missouri Department of Elementary and Secondary Education ("DESE"), 2007 Missouri State Plan for Special Education, Reg. X ("DESE State Plan").
5. The Student and her parents were represented by Thomas E. Kennedy, III and Amy N. Sanders, Law Offices of Thomas E. Kennedy, III, L. C., 230 S. Bemiston Avenue, Suite 800, Clayton, MO 63105.
6. The District was represented by Mr. Ernest Trakas, Tueth, Kenney, Cooper, Mohan & Jackstadt, 34 N. Meramec, Suite 600, Clayton, MO 63105.
7. SSD was represented by John F. Brink, Thomeczek Law Firm, L.L.C., 1120 Olivette Executive Parkway, Suite 210, St. Louis, MO 63132.
8. The Hearing Panel for the due process proceeding was: Pamela S. Wright, Hearing Chairperson; Ms. Karen Karns and Ms. Karen Schwartz.

Time Line Information and Procedural Background

9. The Parents filed a due process hearing Complaint with DESE on July 9, 2007, which was received by DESE on the same date. SSD filed its Response to Complaint on July 27, 2008. The parties agreed to extend the resolution period from July 9, 2007 to August 7, 2007.
10. The attorneys advised the Chairperson on August 7, 2007 that the parties had waived the Resolution Meeting. The Chairperson had a Pre-Hearing Conference with the attorneys on August 10, 2007. An agreement was reached on that date to hold the hearing on December 4-6, 2007, with the time line extended to January 14, 2008 for the issuance of an opinion.
11. On September 17, 2007, SSD filed a lengthy Motion to Dismiss.
12. On November 27, 2007, the Student's attorneys requested a continuance of the hearing dates and an extension of the timeline because of recent personal problems experienced by Student and her Parents. The Chairperson held a conference call with the attorneys on that date and it was agreed that the new hearing dates would be February 19-22, 2008, with the time line extended to March 24, 2008 for the issuance of an opinion.
13. On December 14, 2007, the counsel for Student submitted a Motion to Strike the Motion

to Dismiss previously filed by SSD. SSD filed its Reply Memorandum on December 28, 2007.

14. The Chairperson entered an Order on January 15, 2008 denying the Motion to Dismiss filed by SSD and denying the Motion to Strike filed by Student.
15. On February 5, 2008, the Chairperson granted a written request for a continuance of the hearing dates and an extension of the timeline requested by SSD. The parties agreed to new hearing dates of April 1-4, 2008, with the time line extended to May 1, 2008 for the issuance of an opinion.
16. On March 12, 2008, SSD filed a Motion for Continuance seeking an extension of the hearing dates so it might take the telephone deposition of Student. On March 19, 2008, counsel for Student filed a Motion for Protective Order Directing or Modifying SSD's Notice of Deposition supported by an Affidavit from Student's mental health counselor. SSD filed its Response to Motion for Protective Order on March 20, 2008.
17. The Chairperson issued an Order on March 20, 2008 denying SSD's Motion for Continuance and granting the Student's Motion for Protective Order.
18. On March 20, 2008, SSD filed a Motion for Continuance and Order to Conduct Mental Examination of Student. Counsel for Student filed a Response to SSD's Motion for Continuance and Order to Conduct Mental Examination on the same date.
19. On March 28, 2008, the parties jointly requested a continuance of the hearing dates from April 1-4, 2008 to May 6-9, 2008 so that additional depositions might be scheduled. The Chairperson granted the request for new hearing dates as well as the request to extend the time line for filing an opinion from May 1, 2008 to June 1, 2008.
20. On April 15, 2008, the Chairperson issued an Order denying SSD's Request for Mental Examination of Student.
21. 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 (EX-P) A and 1-11 and Respondents Exhibits (R) 1-99. [Vol.I:6]
22. Witnesses for Student included: Mother; Father; Darren Friesen, MD; Marc Barney (by telephone); Shannon Morgan-Gillard, PsyD; Dr. Diana Gordick (by telephone); Steve Lancaster (by telephone). Witnesses for SSD and the District included: Lara Veon (by telephone); Dee Blassie; Melanie Jane Sturgener; Scott Schaeffer; Jennifer Ann Adams; Chris Moody.
23. The hearing took place on May 6-9, 2008 and concluded, with the record closed on May

21, 2008, in St. Louis, Missouri. At the conclusion of the hearing, the parties agreed to extend the time line for mailing the decision from June 1, 2008 to August 1, 2008. [Vol.V: 48] The opinion is issued within the current time line.

Issues Heard by the Hearing Panel

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

(a) From February 2007 to the present, did SSD and/or the District violate their Child Find obligations resulting in procedural violations to deny FAPE under IDEA to Student?

(b) If so, is Student in fact a child with a disability in need of special education and related services?

(c) Assuming the answers to (a) and (b) are affirmative, should the Parents receive reimbursement for their expenses in connection with their unilateral placement at Second Nature Wilderness and Island View Residential Treatment Center as well as expenses incurred with Odyssey Transport, Chris White d/b/a Cornerstone Educational Consulting?

(d) Were the Parents entitled to reimbursement for the independent education evaluation conducted by psychologist Dr. Shannon Morgan-Gillard?

BACKGROUND FACTS¹

Student's Educational History prior to 9th Grade

25. Student attended kindergarten and grades one and two at the Flynn Park Elementary School in the University City School District. [R-53 at 497].

26. Student was seen by Rolanda Maxim, M.D., a developmental pediatrician, at the Knights of Columbus Developmental Center at Cardinal Glennon's Children Hospital on April 9, 1999. [R-58 at 583]. Dr. Maxim stated a belief that Student's relative underachievement was due to inattention and hyperactivity and not due to an underlying learning disability, and diagnosed Student as ADHD combined type and Static encephalopathy. [R-58 at 586].

27. Student entered school in the District on August 28, 2000, as a third grader. [R-20 at 115].

¹ We are including more Background Facts than are necessary for our decision but we recognize that this opinion may very well be reviewed in the state or federal courts so a thorough Findings of Fact section may be helpful at the higher level.

28. On January 25 and 31, 2001, Student was tested using a variety of instruments by the District. [R-2 at 2]. Testing was completed due to concerns regarding academic progress, her learning profile, and excessive movement. On the Wechsler Intelligence Scale for Children, Third Edition, Student obtained scores of 123 on the Verbal Scale, 112 on the Performance Scale, and 120 on the Full Scale. Verbal subscale scores ranged from 11 to 16 and Performance subscale scores ranged from 10 to 17. On the Berry-Buktenica Developmental Test of Visual Motor Integration, Student obtained a Visual Motor Integration standard score of 95. The Kaufman Test of Educational Achievement was administered on January 31, 2001. Scores included a 104 on Math Computation, 102 on Math Applications, 110 on Reading Decoding, and 129 on Reading Comprehension. [R-20 at 134].
29. Student attended an elementary school in the District for third through fifth grades. A 504 Plan was instituted on April 3, 2003 (fifth grade) to assist with her ADHD symptoms. [R-6 at 31].
30. Student attended Middle School for grades 6 to 8. [R-8 at 33, R-9 at 36, and R-13 at 47]. Mother worked with Student at home on her homework during middle school. [Vol.III:99]. Student resented spending that time with Mother. [Vol.III:100].
31. The District staff at the Middle School developed a Section 504 plan for Student on June 10, 2005 and reviewed and revised that plan on May 24, 2006. [R-10 at 37]. The plan notes that Student needs more time to process information and notes a diagnosis of attention deficit disorder. The plan had four objectives addressing understanding verbal and written directions; providing extended time; managing and organizing time; and providing opportunities to demonstrate knowledge by providing extra time and/or small group testing. [R-10 at 37 and 38].
32. In October 2005 Student participated in testing using Explore. Explore is a test used to help students plan for high school and the ACT. Her scores, in national percentile ranks, were 82 on the Composite, 74 on English, 83 on Usage/Mechanics, 75 on Rhetorical Skills, 85 on Mathematics, 93 on Reading, and 64 on Science. [R- 11 at 39].
33. Student's grades in 7th grade were as follows.

<u>Subject</u>	<u>Q1</u>	<u>Q2</u>	<u>Q3</u>	<u>Q4</u>
Science 7	A	B	B	B
Math 7	B-	B-	B-	B
Girls PE	B+	-	B+	B+
7 th Grade Health	-	A-	-	-
Social Studies 7	A	A-	A	B
Literacy	A-	C+	B-	B+

Core Foundations	A+	A+	A+	A
Concert Band	A	A+	A	A
Spanish 7	B	C+	A-	C-

[R-13 at 47].

34. Student's 8th Grade MAP score in Math was 706, which was nearly Proficient. [R-12 at 45].

35. Student's grades in 8th grade were as follows.

Subject	Q1	Q2	S1	Q3	Q4	S2
Science 8	B	B-	B	B-	A	B
Algebra 8	B	B	B	B-	B-	B-
Girls PE 8	B	B+	-	-	B+	-
8 th Grade Health	-	-	-	B+	-	-
Social Studies 8	A	B	A-	B-	B-	B-
Literacy	B	B+	B	B+	C-	B
Academic Found.	-	A-	A-	B	B+	B
Symphonic Band	A	B	A-	A+	A+	A+
Spanish 8	B+	B	B	C	P	D

[R-13 at 47].

36. In early February 2006, the Middle School staff were alerted to a partially nude photograph of Student that had been posted on the Internet. School staff informed the Parents and recommended psychiatric help outside of the school. [R-59 at 604]; [Vol.III:66-68].

37. Student saw a psychiatrist, Dr. Darrin Friesen, on February 4, 2006. [R-63 at 891]. Student's Parents and Anne Hess, Student's school counselor, were also interviewed by Dr. Friesen on that date. [Vol. I:67; Vol. III:98]. Dr. Friesen diagnosed Student as having bipolar disorder NOS, Generalized Anxiety Disorder and ADHD. [R-63 at 893]. Dr. Friesen primarily managed medications. [Vol.I:97-99].

38. Dr. Friesen testified that he was "about as certain as one could be" that Student had a bipolar disorder. [Vol.I:89]. Student no longer has a diagnosis of bipolar disorder. [Vol.III:90].

39. Student started counseling with Sherri Harris, L.C.S.W. , on or about February 15, 2006. [R-57 at 566]. Ms. Harris's therapy notes do not identify any significant school issues during the spring of 2006. [R-57 at 566 to 569].

40. From February 2006 until December 2006, Dr. Friesen saw Student on only two occasions for formal appointments. [Vol.I:99]. He had occasion to "chat" with Student in the waiting room sometimes when Student had appointments with Ms. Harris.

[Vol.I:99].

41. Dr. Friesen never spoke with anyone from the High School about Student and never observed Student in school. [Vol.I:117]. Dr. Friesen was not aware of any of the things that were being done at the High School to address the parents' concerns. [Vol.I:117].
42. Student started seeing a boyfriend, David, during the spring of 2006. [R-59 at 604]. The relationship created significant conflict between Student and Parents. [Vol.I:129]. Student's interest in school decreased after she started seeing David. [R-59 at 606].
43. On March 27, 2006, Student participated in the Missouri Assessment Program testing in the area of Math. Her Terra Nova National Percentile score for Math was 64 and for Communication Arts was 75. Student's score for Math was nearly Proficient. [R-12 at 42 to 45].
44. On May 25, 2006, Sherri Harris reported that Student continued to do pretty well with friends. [R-57 at 569].
45. Melanie Sturgener was Student's 8th grade math teacher. [Vol.IV:78-80]. Ms. Sturgener described Student as a very pleasant child, eager to please, and an average worker. [Vol.IV:80-81]. Ms. Sturgener had a great relationship with Student. [Vol.IV:81]. Student had a lot of friends, worked well with other students, made friends pretty easily, and was a typical 8th grade student. [Vol.IV:81-82]. Student participated in class and completed in-class assignments. [Vol.IV:82-83]. During this same period, Student had some issues with not completing assignments made by a substitute Spanish teacher resulting in a D grade noted earlier. [A. Hess Depo 34].
46. An "8th to 9th Grade Transition Planning" form was completed by Student's teachers at the Middle School. The form noted average reading ability, strong to average math scores, and average social/behavioral skills. [R-14 at 48].
47. Parents would learn later (during her private placements in 2007) that Student had been raped during 8th grade and was burning and self-mutilating her body at that time. [Vol. I:218, 239].
48. During the summer between her 8th and 9th grades, Student ran away with her boyfriend on two occasions, with the second one lasting two days. She was found in Lesterville, Missouri and taken to St. John's Mercy Medical Center. The Parents' medical insurance would not cover an admission at St. John's but would have covered a north county hospital. Rather than taking her to another hospital along with Student's promise that she would behave, the Parents declined to have her admitted as a psychiatric patient. [Vol I:70-71; Vol. III:103-104].

49. The Parents communicated with Anne Hess to help plan Student's transition to high school. [Vol. I:65; Vol II: 230]. Ms. Hess also suggested that Student work with a female guidance counselor at the High School named Lara Veon. [Father's Depo 10-11].
50. In a July 25, 2006 email to Father, [R-47 at 392], Ms. Hess made suggestions to Father regarding steps that he could take with respect to special education. Father did not do the things suggested by Ms. Hess. [Vol.II:148-149]. In the same e-mail, Ms. Hess also emphasized that there is a clear distinction between a medical diagnosis and educational diagnosis -- many students have the former but few have the latter. A medical diagnosis affects the whole child while an educational diagnosis manifests itself in the educational setting. [A. Hess Depo. 21-22]. Ms. Hess did not get the forms to Father as she indicated that she would do in the July 25, 2006 email. [Vol I: 31-32].
51. On August 16, 2006, Ms. Harris discussed options with Parents with respect to Student, including residential treatment through continuing to do as they were doing. [R-57 at 571]. She also mentioned Logos. The Parents thought residential therapeutic schools or Logos sounded extreme. [S. Harris Depo at 26]. Earlier in the summer, Ms. Harris had a conversation with Student where Student expressed concern that her parents would send her to an out of town school based on her own behavior. [S. Harris Depo at 28-29].

9th Grade: 2006 Fall Semester: First Quarter

52. Student entered the 9th grade at the High School in August 2006. The first day of classes was August 21, 2006. [R-92 at 1557].
53. On August 23, 2006, Sherri Harris reported in her notes that the "beginning of school is good." [R-57 at 571]. On August 30, 2006 Ms. Harris reported in her notes that Student "is enjoying school." [R-57 at 573].
54. On September 6, 2006, Mother wrote requesting that the school staff try to keep Student and her boyfriend apart. [R-15 at 72].
55. The High School has an open campus. [Vol.III:179]. Some freshmen have a difficult time adjusting to the freedom. [Vol.III:179]. The Middle School was more structured than the High School. [Vol.III:180]. The transition from middle school to high school is difficult for some students and creates tension and anxiety for some students. [Vol.III:180; IV:209-210]. Student displayed some of the typical anxieties. [Vol.III:180].
56. Lara Veon was Student's counselor at the High School. [Vol.III:165-166, 169-171]. It was Ms. Veon's experience that quite a few freshmen would experience a drop off in grades after starting high school. [Vol.III:181]. On August 14, 2006, before the start of the 2006-2007 school year, Ms. Veon met with Student and her Parents to go over her

schedule and to adjust Student's schedule so that there was a good fit with Student and her teachers. [Vol.III:170-171]. They also told Ms. Veon of Student's diagnosis and medications that she was taking. The Parents told Ms. Veon about concerns they had starting the school year and they discussed the special education referral process. [Vol.III:172]. Ms. Veon did not understand the Parents to be requesting an evaluation at that time. [Vol.III:172-173].

57. Ms. Veon shared with the Parents her belief that it was important that Student feel successful and that it was okay not to have perfect grades initially. [Vol.III:184; R-17 at 76]. She explained her belief that, particularly with freshmen, getting good grades is a process and that you can build from things that a student is doing well. [Vol.III:184]. It had been Ms. Veon's experience that small successes, including improving a grade to a D, were the foundation for continued success. [Vol.III:196]. Things that showed improvement, even though small in some people's minds, were important because they could be the foundation for success. [Vol.III:196].
58. Ms. Veon had worked with students who had a DSM-IV diagnosis and were successful in school, but who were not receiving any special services under an IEP or Section 504 plan. [Vol.III:185-186].
59. Ms. Veon coordinated a learning support team at the High School. [Vol.III:166]. The learning support team consisted of teachers, administrators, a nurse, a SSD psychologist, and a counselor. [Vol.III:166-167]. The team met every other week to review the performance of students who had been referred to the team. [Vol.III:167; IV:16-17]. The team focused primarily on students who had Ds and Fs. [Vol.III:167].
60. The learning support team discussed Student on September 13, 2006, October 4, 2006, and October 25, 2006. [R-Supplemental at 3, 17, and 10].
61. The High School uses a pyramid of support, consisting of different layers of support that can be offered to students. [Vol.III:168]. The pyramid is based on a problem solving model, which consists of determining interventions or modifications that can assist a student. [Vol.III:168-169]. The last step (top of the pyramid) is a referral for a special education evaluation. [Vol.III:168-169]. The timeframe for trying interventions before moving to a special education evaluation is based on the individual child. [Vol.III:169].
62. Student's Section 504 plan, updated on May 24, 2006, was provided to her teachers. [Vol.III:176-177; R-15 at 55 and 58]. No one ever said that the plan was not appropriate for Student while she was at the High School. [Vol.III:177].
63. Father described Student at home in September 2006 as being verbally abusive, oppositional, lying, and manic. [Vol.I:30].

64. On September 6, 2006, Lara Veon sent an email to Father noting that Mary Pearce observed Student and had “wonderful things to say about her.” Student is “going to every class, is appropriate and respectful with her teachers, is following the school rules, and is doing her homework.” “Mary and I discussed the hazard in focusing too heavily on the grades right now.” [R-17 at 76].
65. On September 6, 2007, Father signed a Medical Authorization form for the District to obtain medical records and information from Dr. Friesen and Sherri Harris. [R-16 at 073].
66. On September 7, 2006, Father sent email to Lara Veon stating, “Student has been angry and upset about our decision to not let her be with David.” Student skipped Spanish and spent hour in bathroom crying because she saw David and got upset. [R-17 at 78].
67. On September 7, 2006, Lara Veon sent an email to Father asking whether Parents are requesting an SSD evaluation. [R-17 at 80].
68. On September 19, 2006, Lara Veon sent an email to Father referencing the September 7 email and asking again whether Parents are requesting an SSD evaluation. [R-19 at 92]. In a September 19, 2006 email, Father requested an evaluation by SSD. [R-19 at 95].
69. On September 19, 2006, the formal Referral for Evaluation was completed indicating concerns in all areas of disability, including social, emotional and behavioral issues. [R-18 at 098].
70. Ms. Veon stated that when a referral from a parent for a special education was received at the High School, the request would be considered by a Joint Review Committee consisting of the counselor and school psychologist. The Committee would meet after collecting documentation and data, review the information, and determine whether an evaluation should be done. [Vol.III:198]. With respect to the Parents’ referral, Mary Pearce was the school psychologist and Ms. Veon was the counselor. [Vol.III:198].
71. On September 26, 2006, a staffing was held to address Student. [Vol.III:191; R-20 at 140]. The meeting included Student’s teachers, Father and Sherri Harris. [Vol.III:192-193]. Ms. Veon noted all the concerns expressed by the Parents and Ms. Harris at the meeting. [Vol.III:192; R-20 at 140]. The concerns were: retention on tests, third grade testing, suggestion for retesting, auditory processing, and self-conscious. [Vol.III:192; R-20 at 140]. Ms. Harris had the uninhibited opportunity to speak with Student’s teachers during the meeting. [Vol.II:129-130]. There was no evidence that Ms. Harris made any requests that the High School did not agree to do. [Vol.III:193; Vol.IV:29-30]. There was no evidence of any specific concerns or recommendations that Ms. Harris made that the High School staff disagreed with for Student. [Vol.IV:49-50].

72. Sherri Harris confirmed with Ms. Veon that there was a lot of tension at home, that homework was a bone of contention, and that Student was resistant to doing homework. [Vol.III:187]. Student reported to Ms. Veon that there was so much tension because questioning about completion of homework was constant and that an argument would usually follow. [Vol.III:187-188].
73. The Parents were advised by Lara Veon and Sherri Harris to “back off” with respect to school work, and not to put so much focus on grades. [Vol. I:53-54, 222]. Doing so would allow Student to have some responsibility for her homework. [Vol.III:187]. A purpose of backing off was to lessen anxiety Student felt about school work. [Vol. I:54; II:253; III:143-144]. When the Parents would check on Student’s grades they would become upset and then Student would get upset. [Vol. I:54]. Some of the anxiety that Student experienced was based on expectations that the Parents had for her grades. [Vol.III:144-145].
74. Dee Blassie is the Director of the Learning Center at the High School. [Vol.IV:7]. The Learning Center is a program where students, both regular education and special education students, can get support in the areas of math, English, or social studies. [Vol.IV:8-9]. Students can participate in the Learning Center through their own request, a parent request, or the request of a counselor. [Vol.IV:9]. Students in the Learning Center are taught by certified teachers. [Vol.IV:77; IV:151-152]. The Learning Center is scheduled like other classes and students can receive credit for their work there. [Vol.IV:10]. An overriding goal for Ms. Blassie is to help set students up for success. [Vol.IV:12-13].
75. Learning Center teachers communicated with the student’s content teacher to know things such as what a student needed to work on, what projects were due, when a test was coming up. [Vol.IV:20-21, 76-77, 154]. The Learning Center teacher would then provide support to the student. [Vol.IV:21].
76. Ms. Blassie testified that based on her experience, small progress can be the start of more progress. [Vol.IV:27; 35]. Ms. Blassie believed that Student at times had the kinds of successes that she believed were significant. [Vol.IV:26-27]. Ms. Blassie had worked with students in the Learning Center who had a diagnosis of bipolar disorder, who did not have an IEP or Section 504 plan, and who were successful. [Vol.IV:66].
77. Ms. Blassie spoke with Student a great deal. [Vol.IV:22]. Student shared with her about difficulties she was having at home. [Vol.IV:23]. Student started at the Learning Center on September 13, 2006. [R-Supplemental at 3].
78. Ms. Blassie spoke with Mother on several occasions. [R-43 at 332-335; Vol.IV:25]. She stressed the importance of emphasizing Student’s successes. [Vol.IV:30-31]. Mrs. Graeber’s responses were generally negative and she talked about how stressful things

were at home. [Vol.IV:31]. Ms. Harris also cautioned Mother about the importance of acknowledging to Student about small successes. [S. Harris Depo. 62-63].

79. On October 4, 2006, Dee Blassie informed Sherri Harris that Student is trying hard and doing well. [R-57 at 574].
80. The Parents completed a Parent Contact Form, which they had been given on October 12, 2006 and told to return by October 19, 2006. [Vol.III:118; R-20 at 116]. Referral materials completed by the Parents indicated concerns in intellectual/cognitive abilities, social/emotional/behavioral skills, and academics. The Parent Contact Form in the referral noted that Student needs glasses or contacts for vision, has an auditory processing disorder, takes medications to address bipolar and ADHD, participates in weekly counseling with Sherri Harris, and has had some exposure to substance abuse with peers. Medications were identified as 100 mg Seroquel, 54 mg Concerta, 200 mg Lamictal, and 10 mg of Fluoxetine. The Parents noted that counseling/therapy started in 2005 and has continued on a weekly basis in 2006. The Parent Contact Form states Student is struggling both academically and socially. The Parents stated that Student had not been exposed to or experienced physical, sexual, emotional, or verbal abuse. [R-20 at 117].
81. The information in the Parent Contact Form and Home Adaptive Behavior Checklist ("Checklist") did not provide information to Lara Veon that she was not already aware of at the time a decision was made whether to evaluate Student. [Vol.III:200].
82. On the Checklist, 26 of 32 items were marked by the Parents as areas of concern. [R-20 at 118-119]. Parent concerns included care for personal needs without reminders, perform chores and run errands, fulfill responsibilities without reminders, have adequate memory skills, have adequate concentration skills, displays self-confidence, appears, in general, to be happy, keep her room/belongings organized, take care of her own or others belongings, generally comply with family rules, admits when she has done something wrong, respond to discipline, know right from wrong, display adequate self-control, become easily frustrated or angry, get along with her mother/father, have friends her own age with whom she plays, appears to be anxious about school, complete her homework, complete homework with minimal help, complete homework within a reasonable time, have an awareness of time, adapt to change or new environment, show signs of frustration when working on homework, and involved in no outside activities. Ms. Veon had spoken with and emailed the Parents so that she had an understanding of the issues at home. [Vol.III:201,210]. The difficult situation at home and the conflict at home was clear to Ms. Veon. [Vol.III:210, 251].
83. Written comments on the Checklist completed by her Parents indicated that Student does not retain information for tests – she complains she cannot concentrate, low self-esteem, often withdrawn, oppositional, cannot comply, impulsive, easily agitated, has alienated many former friends – has no girlfriends, rarely opens a book at home, does not address

homework, can take an unreasonable amount of time on simple task, frustration on homework to the point of not bothering with it, and very antisocial on team sports or activities. [R-20 at 118-119]. The Parents noted they were concerned that Student has other undiagnosed learning disabilities. [R-20 at 119].

84. Lara Veon completed an Existing Data form that includes information regarding various areas of school performance. [R-20 at 120-129]. Ms. Veon completed the portion of the packet regarding Social/Emotional/Behavioral issues. [R-20 at 127]. It was noted that Parents reported Student had a diagnosis of mood disorder and difficulty at home with behavior. Ms. Veon wrote "being treated" in the box with "mood disorder." [R-20 at 127].
85. Student was reported to occasionally miss class. [R-20 at 127]. It was reported that concerns were mostly manifested at home. Ms. Veon explained that to mean that when Student missed a class, there had been a difficult evening at home; if Student was upset at school it was because she had a problem at home. [Vol.III:211]. Ms. Harris also confirmed that Student had skipped classes when she was angry at Parents. [S. Harris Depo at 54].
86. Ms. Veon completed a Social/Emotional/Behavioral Checklist. [R-20 at 139-131]. Only 4 of 59 behaviors on the list were checked. Ms. Veon did not consider the things checked to be overall significant. [Vol.III:214].
87. Student's grades recorded as of October 12, 2006 were as follows.

Intergr Math I – D+	World/U.S. Hist I – C
Learn CTR Math – CR	Novice Spanish I – C-
Fr. Physics – D	Col. Prep Eng I – C-
Fit for Life – A	Learn CTR Alt. History – CR

[R-20 at 137].
88. Ms. Veon noted that the grading system for middle school was different from the system for high school; it was not comparing "apples to apples" when comparing middle school and high school grades. [Vol.III:218]. The report dated October 12, 2006, indicated that Student had missed only 5 class periods at that time. [R-20 at 137; Vol.II:257; III:216-217].
89. The Joint Review Committee, consisting of Lara Veon and Mary Pearce, met on October 13, 2006. [Vol.III:R-20 at 136]. Among the information they considered was the information in the data packet but not the Parent Contact Form and Home/Adaptive Behavior checklist -- the Parents had been led to believe that they had until October 19, 2006 to complete same. [Vol.III:199-202, 236-237]. Upon completion of a review of the data gathering packet, it was determined that an evaluation for special education services

was not warranted. A Notice of Action dated October 16, 2006, was sent to the Parents. [R-20 at 114]. The Notice of Action stated that a special education evaluation was considered but was rejected because documentation did not support the suspicion of a disability. The Notice stated that the decision was based on a review of information obtained from MAP scores, Screening, Data Gathering Packet, Cumulative Record, and Classroom Observations.

90. At the time of the joint review, Ms. Veon did not believe Student was unable to learn, she believed Student had appropriate relationships with peers and teachers, she did not have concerns about Student exhibiting inappropriate kinds of behaviors under normal circumstances, and did not think Student exhibited a pervasive mood of unhappiness or depression. [Vol.III:220-221]. Ms. Veon described Student has having up and down days and that if there was a bad day at home there was a bad day at school. [Vol.III:221].
91. Ms. Veon did not believe Student needed special education at the time of the joint review. [Vol.III:221-222].
92. On or about October 18, 2006, Student's teachers reported the following:

Mark Crowell, Learning Center Math – Pleasure in class, works hard most days, lots going on in her life (parents, boyfriend, school etc...) and that can be very distracting, does not cause problems, behavior is great. [R-21 at 143].

Chris Moody, Integrated Math I – Inconsistent in coming in to see me after school, missing once a week, enthused about being in class and does her work but her out of class preparation could improve. [R-21 at 142].

Bertha Martinez, Novice Spanish I – Doing well in Spanish following meeting with father. However, lately I've noticed a change in her behavior. Student is very quiet and will not participate unless she is called on. She does complete all in-class and homework assignments but she has isolated herself from the rest of the class. I haven't seen Student this week. [R-21 at 144].

Katie Storms, Col. Prep English I – Participates and asks questions. Skipped class one day last week and skipped today due to BIG project due. Missed her Hero essay. She has some work to catch upon and she is learning that a detention isn't that bad of a punishment for skipping class. [R-21 at 145].

Jennifer Adams, Fr. Physics – Significant positive change as of late, asking good questions in class, turning in all of her assignments. [R-21 at 146].

Janet Curry, Learning Center Alt. History – Fine worker, does good work, sometimes will fall behind on a large project and I think underestimates what she can do on her own

and then gets frightened and stuck. She is a model of politeness and respectful behavior and keeps plugging away until she finishes her assignments. She is on the verge of being able to manage her time in such a way as to do more of her best work on time more consistently. [R-21 at 147].

93. Consistent testimony from teachers showed that Student generally worked productively and appropriately on schoolwork while in class. [Vol.IV:22-23, 156, 181, 203-205, 232].² Issues regarding assignments that were not completed generally related to completion of assignments away from school. [Vol.IV:158, 181, 205-206]. Student had appropriate relationships with both peers and teachers. [Vol.IV:24, 159-160, 181-182, 204-205, 210-211, 232]. Student was not disrespectful or oppositional with teachers. [Vol.IV:24, 155-156, 183, 210-211, 232].
94. On October 18, 2006, Sherri Harris reported in her notes that Mother continued to tell Student to get off phone, do homework, and how bleak future is and that Student skipped school because she was angry and thought she'd be sent away. [R-57 at 575].
95. On October 19, 2006, Ms. Blassie met with Don Rugraff and Sam Horrell, administrators at the High School. The discussion included the possibility of Student being sent to a boarding school by her Parents. [R-43 at 337; Vol. IV:67].
96. October 20, 2006, was end of the first quarter. Student's first quarter grades were as follows.

Intergr Math I – D	World/U.S. Hist I – D+
Learn CTR Math – CR	Novice Spanish I – B
Fr. Physics – D-	Col. Prep Eng I – D
Fit for Life – A-	Learn CTR Alt. History – CR

[R-20 at 138].

9th Grade: 2006 Fall Semester: Second Quarter

97. Father acknowledged receipt of the Notice of Action refused addressing the requested evaluation in an email to Lara Veon on October 24, 2006. [R-23 at 155].
98. Father acknowledged that SSD staff are the experts when it comes to special education and that the Parents would do whatever SSD recommended. [Vol.II:123-124].
99. Father acknowledged that Student got along with virtually all other adults other than her Parents from sixth grade through high school. [Vol.II:125-127].

² In rebuttal, Father was asked how it was that Student was able to be conscientious in school and class and not at home. [Vol.V:35-36]. Father stated that he did not know. [Vol.V:36].

100. On October 25, 2006, Dr. Friesen wrote a To Whom It May Concern Letter indicating Student had diagnoses of Bipolar Disorder, Generalized Anxiety Disorder, and ADHD. [R-24 at 159]. He stated she should have an evaluation and necessary testing in order to determine what accommodations were needed and which services Student qualified to receive in the academic setting. The letter did not state any specific suggestions regarding services or accommodations that Student needed, or that Student needed placement in an alternative setting. The letter does not say anything about a need to send Student to a boarding school because of any concern about harm to Student. Although Dr. Friesen asserted a belief that Student needed special education [Vol. I:113], he did not identify any services specifically.
101. Ms. Veon testified that there was never a suggestion by Ms. Harris for a intervention for Student that she said would not be done. [Vol.III:225].
102. On October 25, 2006, a meeting was held to discuss the decision not to evaluate Student. [R-25 at 160]. The Parents, Sherri Harris, Mary Pearce, and Lara Veon, were in attendance. Dr. Friesen's letter dated October 25, 2006 was brought to the meeting. During the meeting, Ms. Pearce explained the decision not to evaluate. The information Ms. Pearce provided included a review of various test results that showed Student had learned. [R-20 at 134; Vol.III:215]. All of the testing was above average. [Vol.III:215].
103. Based on her conversations with the Parents and Ms. Harris, it was Ms. Veon's understanding that the Parents and Ms. Harris were concerned that Student had learning disabilities. [Vol.III:202, 238, 270]. During this meeting on October 25, 2006, Ms. Veon clarified with the Parents and Ms. Harris that it was the learning disabilities they wanted to have considered and that the emotional issues were being addressed outside of school. [Vol.III:202-203]. It was Ms. Veon's understanding that the Parents and Ms. Harris believed that the mood disorder was being treated appropriately and that they were not looking for the school to address it. [Vol.III:212; R-20 at 127].
104. Ms. Harris's notes do not include a reference to any suggestion or recommendation by her that Student should be evaluated for special education. [R-57 at 561 to 578].
105. There was no evidence regarding any specific special education services that Ms. Harris suggested that Student required, any specific behaviors she described, or that any of her records had been provided to the school while Student was attending the High School. [Vol.III:151, 153].
106. Dr. Friesen agreed that telling a parent that their child needs a special education evaluation would be important and that he generally included important things in his notes. [Vol. I:118]. His notes do not include any record that he suggested that to the Parents that Student be evaluated prior to his October letter. [R-63 at 881 to 893].

107. Dr. Friesen believed, erroneously, that Student ran away from home in the fall of 2006. [Vol.I:120-121].
108. On October 25, 2006, Lee Andrews, SSD Legal Compliance Liaison, provided to Father the IDEA Procedural Safeguards and noted the appeal process via email. [R-23 at 156]. Father read the email to say “sue us.” [Vol. I:78]. Father did not read the procedural safeguards provisions. [Vol.II:132; 263]. The Parents did not request mediation or a due process hearing prior to removing Student from the High School. On advice of his attorney, Father chose not to pursue due process when SSD rejected Parents’ Request for Evaluation. [Vol. II: 132-133].
109. On November 8, 2006, Sherri Harris noted that she “Cautioned [Mother] about not being able to focus on the small successes and let the rest go.” [R-57 at 575].
110. In a November 21, 2006 email, math teacher Chris Moody stated to the Parents that “Student needs to buy into the help and not see it as punishment but as an opportunity to be successful.” [R-25 at 172]. More than a year later, Student’s therapist at Island View echoed that same guidance. [Vol.III:67].
111. On November 13, 2006, Lara Veon reported to Father that Student was continuing to participate in history class and seemed interested in the material. [R-25 at 167]. The history teacher also was going to have Student take a test out of the classroom to see if her anxiety lessened. [R-25 at 167]. Ms. Wiens sent an email to Father on November 15, 2006, advising him that Student’s attitude had been very positive, she asked questions in class, participated in discussions, and even gave impromptu speeches. [R-47 at 448].
112. The learning support team discussed Student during a meeting on November 13, 2006. [Vol.III:255-256; R-47 at 446]. At the time, Student had Ds in math, history, and physics. [Vol.III:257]. Student’s English grade was higher than a D as the report shows only classes with Ds and Fs. [Vol.III:257].
113. On November 20, 2006, Sherri Harris reported the Parents confronted Student and “. . . said hurtful things. ‘You won’t get into college.’” Ms. Harris met with Mother who had only negative things to say. Ms. Harris noted regarding Mother, “She gets stuck on being told ‘I hate you’ from Student. She cannot see beyond her own point of view.” [R-57 at 576].
114. On November 22, 2006, the Parents initiated a psychological evaluation with Dr. Shannon Morgan Gillard. The evaluation report states that Student was “Referred by her parents through Peggy Tracy and an educational consultant pursuant to a recommendation for Student to attend a therapeutic boarding school.” [R-62 at 849]. The purpose of Dr. Morgan Gillard’s evaluation was to lend a current diagnostic

impression regarding Student's psychological functioning and her psycho-educational functioning, or whether she had learning disabilities. [Vol.II:17].

115. On November 22, 2006, Parents provide Dr. Morgan Gillard a release to contact Chris White at Cornerstone Educational Consulting. [R-59 at 616]. Chris White is an educational consultant. The Parents first contacted Mr. White in November 2006. [Vol.II:265]. On December 6, 2006, the Parents signed an Agreement with Mr. White. [R-68 at 900]. The services to be provided included identification of schools and programs and assistance during the admission process. Parents paid \$5000.00 to Mr. White for his educational consulting services. [R-57 at 1020].
116. As early as July 6, 2006, Student discussed not wanting to be sent away from home with Sherri Harris. [R-57 at 570].
117. Mother talked with Student about boarding school, at least by late October or early November 2006. [Vol.III:129-130, 154]. Mother described Student as getting "outrageous" at the suggestion. [Vol.III:154]. Student spoke with teachers, Ms. Blassie, and Ms. Veon about being sent to a boarding school. [Vol.III:230-231; IV:23, 67, 73-74, 165; R-43 at 336]. Student's consistent statements to those persons was that she did not want to be sent away. [Vol.IV:23-24, 67]. Student spoke with Ms. Veon about being sent away to a boarding school. [Vol.III:230-231]. Student expressed that she was scared and did not want to go. [Vol.III:231]. Ms. Veon, Ms. Blassie, and Ms. Curry testified that Student felt pressured by the idea that she had to improve in her grades and behaviors or she'd be sent away. [Vol.III:231; IV:73-74, 165; 194-195]. A teacher testified that Student told her at one point that it didn't matter anymore because she was not going to be coming back to the High School, that Student's grade dropped significantly after that, and that Student then stopped working. [Vol.IV:190-191].
118. Student understood that for her not to be sent away to a boarding, she needed to receive Bs and Cs. [Vol.III:144-145]. On December 9, 2006, Sherri Harris noted that Student reported that "Mom has been threatening boarding school if her semester grades are bad." [R-57 at 576].
119. The majority of Student's absences during the fall of 2006 came after Thanksgiving. [Vol.III:230, 254; R-42 at 330-331].
120. In a November 28, 2006 email, Lara Veon stated to Father that interventions in place to help Student would not reflect immediately and noted that Student would need to take more ownership in her future. [R-25 at 175]. Ms. Veon noted that the end of the semester might be a time to reconsider setting more limits at home. [Vol.III:196]. She was looking at the end of the semester as a time to evaluate whether interventions being used were working. [Vol.III:196-197].

121. On December 7, 2006, Student was placed in ISS for two days for skipping class. Two other students had also skipped at that time. In an email to Debra Wiens, Student's History teacher, Lara Veon indicated that Student's Parents would probably choose an alternative environment for her. Ms. Wiens reported that Student was aware that the Parents were considering another setting for her. Student told Ms. Wiens, "My parents said they might send me away if my grades don't get better." [R-25 at 198]. When asked about how she felt about going to another school Student replied, "I love this school and I don't want to go." [Vol.II:151].
122. On December 9, 2006, Sherri Harris had a message that the Parents were working with educational consultant Chris White to find a therapeutic program. [R-57 at 576]. Student reported that her Mother has been threatening boarding school if her semester grades were bad. [R-57 at 576].
123. On December 13, 2006, Sherri Harris recorded that Mother "shared that she and [Father] are proceeding with sending Student to a therapeutic program . . . will probably send Student to a wilderness program." [R-57 at 576].
124. On December 16, 2006, the Parents signed a Power of Attorney giving Second Nature Wilderness Program ("Second Nature") authority to provide treatment, academics, and residential care for Student upon her arrival and signed a Payment Agreement. [R-76 at 1074].
125. On December 18, 2006, the Parents signed a Release of Information and contract with Second Nature. [R-76 at 1075-1082].
126. Dr. Morgan Gillard had not completed her evaluation by December 18, 2007. [R- 60 at 636].
127. On December 22, 2006, the District started the holiday break. [R-92 at 1557].
128. At the end of the first semester, Student had two credits. [R-32 at 222]. It required four credits to be a sophomore. [Vol.III:260]. Ms. Veon had worked with a lot of students who had failing grades in the first semester who graduated. [Vol.III:261]. However, she had accumulated more than 50 missed classes in November and December 2006. [P-A, at 1-3]; [R-96 at 1-9]. By the end of the 1st semester, Student received Fs in her core classes of Math, Physics, History and English. [P-A at 4]; [R-96 at 1-9].
129. Ms. Veon did not believe that Student needed special education at any time during the first semester. [Vol.III:267]. Ms. Harris never told Ms. Veon that Student was so mentally ill that she couldn't learn. [Vol.III:273].
130. Ms. Harris's records do not include any statement that she told the Parents that Student

was likely to suffer physical or serious emotional harm if they did not send Student away. [R-57 at 551 to 581].

131. On Wednesday, December 20, 2006, the SSD received a letter dated December 19, 2006, from Ken Chackes, the attorney for the Parents. [R-26 at 207]. In the letter Mr. Chackes did not state that Student would likely suffer physical harm or serious emotional harm if she was not sent away. There was no evidence that the Parents ever advised the High School or SSD that Student was likely to suffer physical harm or serious emotional harm if she were not removed from the High School. [R-26 at 207].
132. The December 19, 2006 letter was the first formal notice to the SSD and the District that the Parents were actually going to send Student to a private placement. [Vol.II:267-268].
133. At the time the December 19, 2006 letter from Mr. Chackes was sent, there was nothing that SSD could have done that would have caused the Parents not to send Student to Second Nature. [Vol.II:136-137].
134. On December 21, 2006, the Parents contracted with Odyssey Transportation Services to take Student to Second Nature Wilderness Program in Georgia on December 28, 2006. Parents paid \$4971.41 to Odyssey Transportation Services [R-51 at 471-472].
135. On December 21, 2006 Jim Thomeczek sent a letter to Ken Chackes noting the absence of District and SSD personnel because of the break, stating SSD's desire to "act in a timely and cooperative manner," and requesting until January 5, 2007, to respond to the December 19 letter. [R-27 at 209]. Mr. Chackes did not object to the request.
136. The High School's Winter Break was December 22, 2006 through January 3, 2007. [R-92 at 1557].

Second Nature Wilderness Program 12/28/06-03/15/06

137. On December 28, 2006, at 5:00 in the morning Student was picked up at her home and escorted to Georgia by Odyssey Transport Service. [Vol.I:238]. Student started at Second Nature on that date. [R-79 at 1101].
138. The Parents decided to send Student at that time because it was the most convenient time for Student. They wanted Student to get as much credit as she could, it was during the holidays, and it was the least disruptive time for Student. [Vol.I:228].
139. Student was not suicidal at the time she entered Second Nature and she had not been actively cutting. [Vol.II:161]. Dr. Gordick was not concerned about Student being a suicide risk. [Vol.II:193]. Student did not harm herself while she was at Second Nature. [Vol.II:192].

140. Second Nature is a for profit company. [Vol.II:207-208]. The enrollment fee, tuition and expenses for Second Nature Wilderness Program totaled \$35,054.50 and have been paid by the Parents. [Ex. R-52 at 491-494; Ex. R-83 at 1347-1351]. The Parents' insurance paid \$2,200.00 for individual therapy provided by Dr. Gordick reducing the net costs to the Parents of \$32,854.50 . [Vol.II:143].
141. Dr. Diana Gordick was Student's therapist at Second Nature. [R-83 at 1344]. Prior to Student's entrance to Second Nature, Dr. Gordick did not see any records. [Vol.II:170, 222]. It was 4-6 weeks before she received such records. [Vol.II:170, 222]. She proceeded initially on the report of Chris White (who had never met Student). [Vol.II:234-235]. Dr. Gordick did not speak with any staff members at the High School. [Vol.II:201-202, 204].
142. A Second Nature Treatment Plan dated January 11, 2007, listed Axis I diagnoses, in order, as Oppositional Defiant Disorder, Cocaine Abuse, Marijuana Abuse, Mood Disorder NOS, and Attention Deficit Hyperactive Disorder. [R-79 at 1116].
143. Dr. Gordick described Student as being verbally aggressive and demeaning in her relationships with peers and adults at Second Nature. [Vol.II:169, 196, 224-225]. There were no reports of such behavior by Student while she was at the Middle School or the High School.
144. Dr. Gordick testified that Student was not experiencing a general pervasive mood of unhappiness or depression. [Vol.II:179]. She described Student as chaotic, impulsive, reactive and experiencing rapidly changing moods when she arrived at Second Nature. [Vol.II:163]. Dr. Gordick testified that the purpose of a wilderness program like Second Nature is to impose impersonal natural consequences that a child cannot manipulate; to illustrate to the child that her own actions are directly correlated to her outcome; to allow the therapist to quickly assess the child's coping skills and behavior patterns and to formulate a recommendation for the next course of treatment with high likelihood of success for the child. [Vol II: 173-176].
145. Second Nature was not educationally accredited at the time Student attended and could not award credits. [Vol.II:188-189, 220]. Student did not receive any special education while at Second Nature. [Vol.II:141-142]. Dr. Gordick estimated the ratio of therapy time to education at Second Nature to be 15:1. [Vol.II:226]. Second Nature does not prepare educational goals for residents. [Vol.II:225-226]. It does prepare therapeutic goals for its residents. [R-52 at 474-478].
146. According to Dr. Gordick, Second Nature's discharge plans are fairly weak as far as communicating what actually happens with kids and often do not communicate effectively. [Vol.II:212, 214]. Student's discharge summary contained erroneous

- information regarding Student's diagnosis, including cocaine abuse. [Vol.II:215].
147. On December 29, 2006, results of drug testing completed at Second Nature indicated Student was positive for marijuana. [R-76 at 1058 and R-68 at 908].
 148. On January 4, 2007, Jim Thomeczek sent a letter (by U.S. Mail and email) to Mr. Chackes advising him that SSD would conduct an evaluation of Student. [R-29 at 214-216].
 149. On January 4, 2007, Ken Chackes sent an email to Jim Thomeczek advising that he would contact the Parents and let him know about Student's availability. [R-30 at 217]. In a later email on that date, Mr. Chackes advised he had learned from his clients that evening that Student was away for 6-8 weeks in Georgia, that he believed she had left the previous Thursday, and that "we will work with the District in completing her evaluation as soon as possible." [R-30 at 219].
 150. On January 5, 2007, the District's Superintendent advised Mr. Chackes that the District "will support and assist in the evaluation, once {Parents} provide the necessary permission and make Student available for assessment." [R-44 at 342].
 151. A January 12, 2007, letter from Jim Thomeczek (sent by U.S. mail and email) to Mr. Chackes described how SSD planned to proceed with the evaluation process. [R-44 at 343-344].
 152. A January 18, 2007, email from John Brink to Ken Chackes asked if he knew when Student would be available for an evaluation. [R-44 at 345]. Mr. Chackes stated by email on January 18, 2007, that he was waiting to hear from the Parents. [R-44 at 345].
 153. On January 18, 2007, Dr. Shannon Morgan Gillard completed her evaluation of Student. [R-53 at 495]. The Parents paid \$2000.00 to Dr. Morgan-Gillard's employer, Counseling & Assessment for Behavioral Health, Inc. [Ex. 53 at 528-529].
 154. Dr. Morgan Gillard did not speak with anyone at the High School in depth about Student and did not speak with Student's teachers at all. [Vol.II:56-57]. Dr. Morgan Gillard did not speak with Sherri Harris. [Vol.II:67].
 155. Dr. Morgan Gillard concluded that Student had a learning disability in reading comprehension, math reasoning, and listening comprehension. [R-60 at 648 and 657]. Although it is not clear what criteria the conclusion was based on, it was not based on criteria stated in the Missouri State Plan. [R-60 at 647; Vol.IV:12-13]. Dr. Morgan Gillard stated that the diagnostic criteria for determining a learning disability are based on a comparison of scores. [Vol.II:108]. Dr. Morgan Gillard's statement was not correct. [Missouri State Plan for Special Education at Regulation III, 25-26]. She also

acknowledged that she is not qualified to make an educational diagnosis. [Vol.V:30].

156. As part of her evaluation, Dr. Morgan Gillard saw Student on December 6 and 12, 2006. [Vol.II:52]. Student reported to Dr. Gillard that she did not take her prescribed medications when she used nonprescribed drugs. [Vol.II: 112-113; R-60 at 655; Vol.II:50-51]. Dr. Morgan Gillard believed that Student's substance abuse prevented the opportunity to determine the effectiveness of Student's prescribed medication. [Vol.II:58].
157. The Parents reported to Dr. Morgan Gillard that Student had struggled with completing her homework and motivation for several years. [Vol.II:60]. They also reported that Student was hostile, angry, and defiant with them most of the time. [Vol.II:65].
158. Dr. Morgan Gillard's perception from the teacher inventories was that Student would not follow directives of teachers. [Vol.II:63]. There was no evidence to support a conclusion that Student engaged in such oppositional behavior at school. [e.g., Vol.II:97-99; R-21 at 141-147].³
159. Dr. Morgan Gillard described Student as having a "pervasive lack of motivation" and being "far from gauging school as being something important." [Vol.II:114-115].
160. Dr. Morgan Gillard did not believe that Student presented the level of dangerousness to herself or others that would have qualified her for an inpatient admission. [Vol.II:116].
161. As part of her evaluation, Dr. Morgan Gillard made 16 recommendations. [Vol.II:85; R-60 at 660 to 664]. The sixteen (16) recommendations were listed in a priority of what would need to happen more immediately or less immediately. [Vol.I:85]. The first two recommendations that Dr. Morgan Gillard made addressed working with a child psychiatrist to discuss appropriate medication treatment and consulting with treatment providers regarding the therapeutic benefit of a substance use treatment program. [R-60 at 660].
162. Dr. Morgan Gillard made the latter recommendation in part because she was concerned about Student's substance abuse and because she believed that it would help Student regain compliance with her prescribed medications. [Vol.II:49-50].
163. Global Assessment Functioning ("GAF") looks at component symptoms and degree of impairment that the symptoms present to a person. [Vol.II:111]. Basically, the higher the GAF, the better the individual is doing. Dr. Morgan Gillard assigned a "current"

³ It should be noted that while all of the teacher inventories completed by three of Student's teachers at the High School were not dated, those that were dated were completed on or after December 15, 2006, a period of time that Student was already aware that her parents were going to send her away to another school. [R-25 at 198, R-25 at 201, R-62 at 782, 790, 798, 802, 806, 810, 812, and 814].

- GAF of 50 for Student. [Vol.II:111; R-60 at 660]. That score covered a time period from at least two weeks prior to November 22, 2006 until January 18, 2007. [Vol.II:117-119].
164. Dr. Morgan Gillard's DSM-IV-TR diagnoses did not include depression. [R-60 at 660]. The Bipolar I Disorder diagnosis she gave was further characterized as "Most Recent Episode Unspecified." [R-60 at 660].
 165. The third recommendation by Dr. Morgan-Gillard was that the Parents consider placing Student in a residential care facility for her academic, emotional and behavioral needs. [R-60 at 660-664]. She was particularly concerned regarding Student's drug use and medication noncompliance. [Vol.Ii:49-50].
 166. Dr. Morgan-Gillard met with the Parents on January 18, 2006 to discuss her completed evaluation but there was no discussion regarding whether an evaluation by SSD would be harmful to the Student. [Vol. V:31].
 167. Dr. Scott Schaeffer is employed by SSD as an area coordinator of related services for diagnostics. [Vol.IV:111-112]. Dr. Schaeffer has an undergraduate degree in psychology, a master's degree in counseling, an Ed.S. degree in school psychology, and a Ph.D. in counseling psychology and school psychology. [Vol.IV:112]. He is a licensed psychologist and certified school psychologist. [Vol.IV:112]. As a licensed psychologist, Dr. Schaeffer provides counseling and psychotherapy, diagnoses and assesses, and conducts psychological evaluations and DSM diagnoses. [Vol.IV:112-113].
 168. As an area coordinator, Dr. Schaeffer supervises school psychologists and works with SSD effective practice specialists on diagnostic issues. [Vol.IV:113]. Dr. Schaeffer was a school psychologist for SSD for ten years. [Vol.IV:114]. In that role, he conducted evaluations to determine whether children qualified for special education services under the IDEA. [Vol.IV:114-115]. Dr. Schaeffer has conducted over 500 evaluations for SSD, concerning all of the IDEA disability categories, and also generally was on the diagnostic team that determined whether the student he evaluated was eligible for services under the IDEA. [Vol.IV:115].
 169. Dr. Schaeffer teaches at Washington University and also has a private practice. [Vol.IV:116-118]. In his private practice, Dr. Schaeffer specializes in treatment of mood disorders, anxiety disorders, and ADHD. [Vol.IV:116-117]. Dr. Schaeffer works with adolescents. [Vol.IV:117-118]. Most of the adolescents that Dr. Schaeffer works with have a DSM-IV diagnosis, but less than 20% of the students with a DSM-IV diagnosis also have an IEP. [Vol.IV:118].
 170. Dr. Schaeffer reviewed Dr. Morgan Gillard's conclusion that Student has learning disabilities. [Vol.IV:120-121]. Dr. Schaeffer is familiar with the Missouri criteria for a

learning disability. [Vol.IV:120-121]. Student did not meet the Missouri criteria for a learning disability in any area. [Vol.IV:121-123].

171. Dr. Schaeffer was familiar with all of the tests that Dr. Morgan Gillard conducted or administered. [Vol.IV:119]. He explained that all behavioral rating scales use the same measurement scale, T scores, so that you can compare apples to apples. [Vol.IV:125]. For purposes of those scales, it is Dr. Schaeffer's opinion that only T-scores above 70 are clinically significant and scores above 65 are borderline significant. [Vol.IV:126].⁴ Dr. Morgan Gillard appeared to agree with Dr. Schaeffer's opinion in her testimony regarding the Achenbach. She indicated the manual indicates that a score between 60 and 69 on any of the Achenbach forms is considered borderline significant, and a score of 70 or above is clinically significant. [Vol.V:15].
172. The internalizing problems portion of the Achenbach Teacher's Report Form assesses anxiety, somatization, and depression. [Vol.IV:124]. Dr. Morgan Gillard did not report any clinically significant scores in the area of internalizing problems on the Teacher's Report Forms. [R-60 at 666]. The Syndrome Scales for the Achenbach Teacher Report Forms did not report any clinically significant or borderline significant scores for Anxious/Depressed or Withdrawn/Depressed. [R-60 at 666]. In the section of the form completed by the teachers that asked the teacher to note concerns they listed only class attendance, participation in class, possible drug use, internal and external challenges, and family relationships. [R-62 at 775, 783, and 791]. In the section of the form completed by the teachers that asked the teacher to note the best things about this pupil comments noted: Student is a kind and respectful young lady, she always has a smile with her friends in the halls, I like the way she seems to be determined and excited when she enjoys a book or paper, thoughtful, sensitive, determined to do well – often under difficult circumstances, we have a good relationship and so I enjoy talking with Student about school and social life, and she is so joyful when accomplishing a task or learning a new concept. [R-62 at 775, 783, and 791].
173. The Conner's Teacher Rating Scale primarily looks at concerns in the area of attention deficit/hyperactivity. [Vol.IV:128]. The Conner's Teacher Rating Scale scores from Dr. Morgan Gillard's report did not provide any information about depression. [Vol.IV:129].
174. The Children's Depression Inventory Teacher Version reflects the teachers' observations

⁴ Dr. Schaeffer's opinion is not inconsistent with Dr. Morgan Gillard's testimony regarding the characterizations given by publishers to various test scores. [Vol.V:14-15]. There was no evidence regarding how any of the publishers arrived at their characterizations or how the characterizations may relate to making an eligibility determination under the IDEA. Dr. Morgan Gillard agreed with Dr. Schaeffer that the behavioral scales are all scored on the same scale. [Vol.V:14]. Dr. Morgan Gillard implicitly acknowledged the limited significance of the publishers' characterizations (as opposed to the actual T-score) when she noted that the manuals and known practice dictate that a psychologist use judgment in interpreting scores and that a psychologist cannot go blindly by the characterizations. [Vol.V:16, 29].

- only in the past two weeks. [Vol.II:43-45; R-62 at 812]. Dr. Schaeffer testified that the CDI is not a bad instrument for monitoring purposes, but he does not use the instrument for diagnostic purposes and its use is discouraged by SSD. [Vol.IV:130-131]. The teachers' CDI forms were completed on December 15, 2006. [R-62 at 810, 812].
175. The Achenbach Youth Self-Report does not have clinically significant or borderline significant scores for internalizing problems or the Anxious/Depressed and Withdrawn/Depressed Syndrome Scales. [R-60 at 667; Vol. IV:131-132]. The emotional problem scale on the Conner's-Wells Adolescent Self-Report Scales were in the average range. [R-60 at 667; Vol. IV:132]. Student reported Family Problems in the severe range. [R-60 at 667; Vol. IV:133]. The Beck Youth Inventory looks at a child's self-concept, anxiety, depression, anger, and disruptive behaviors. [Vol.IV:133]. The scores for self-concept, anxiety, and depression scales were all in the average to lower than average range. [R-60 at 667]. Although Dr. Schaeffer does not use the Children's Depression Inventory for diagnostic purposes, the total scores for Student were in the average range. [R-60 at 667; Vol. IV:135].
 176. Student's scores on the MMPI did not indicate depression. [R-60 at 668; Vol.IV:136-141]. Student's scores on the MMPI were more indicative of rule breaking behavior. [R-60 at 668; Vol.IV:140].
 177. The area of consistency between the Conner's Parent Rating Scale and the teachers' scales was in the area of ADHD kinds of scores. [R-60 at 667; Vol.IV:142-143].
 178. Dr. Schaeffer testified that the BASC is a behavioral test scale that has validity indicators. [Vol.IV:136].
 179. On January 23 and 26, 2007, John Brink sent an email asking Ken Chackes as to how SSD should proceed with respect to contacting the Parents about the evaluation and for releases to obtain information. [R-34 at 240-244]. On January 27, 2007, Ken Chackes sent an email attaching a private evaluation, namely Dr. Morgan-Gillard's evaluation and asking Mr. Brink to let him know what additional information or testing, if any, SSD needed. [R-34 at 245].
 180. On January 30, 2007, John Brink sent an email to Ken Chackes referring to Jim Thomeczek's January 12, 2007 letter and asking whether SSD could contact the Parents directly. [R-34 at 248-251]. On January 31, 2007, Ken Chackes advised John Brink that SSD could contact the Parents directly regarding the evaluation. [R-34 at 252].

181. In none of the letters or emails sent by Ken Chackes on behalf of Student and Parents in early 2006 did he express concern for harm to Student's health if she had an evaluation by SSD.⁵

Island View Residential Treatment Center: 03/16/07 to Present

182. On February 6, 2007, Student was accepted for placement at Island View Residential Treatment Center ("Island View") in Syracuse, Utah. [R-68 at 907].
183. On February 7, 2007, the Joint Review Committee met again. Based on their review they determined that a referral would be made to the SSD and a letter was sent to Parents confirming same. [R-35 at 262]. On February 9, 2007, Father signed the consent to evaluate notice provided by SSD. [R-36 at 287]. Mary Pearce told Father that an evaluation would be conducted if Student were in St. Louis. [Vol.III:234, 278]. Father stated that Student was out of town and he didn't know when she'd return. [Vol.III:278]. During this February 9, 2007 meeting, Father did not express to Mary Pearce and Lara Veon any concern about potential harm to Student if SSD evaluated her. [Vol.V:39].⁶
184. On March 15, 2007, Student was dismissed from Second Nature. [R-83 at 1338, 1340, 1341]. The Discharge Plan identified Axis I diagnoses as Oppositional Defiant Disorder, Cocaine Abuse, Marijuana Abuse, Mood Disorder, NOS, and Attention Deficit Hyperactivity Disorder. [R-83 at 1341].
185. The Parents consulted only with Dr. Gordick and Chris White about the decision to send Student to Island View. [Vol.I:244-245]. Dr. Gordick said that she would be frightened to see Student leave Second Nature and go to a less structured therapeutic boarding facility than Island View. [Vol. II:199]. Dr. Gordick never spoke with anyone at the High School about Student. [Vol.II:201-202, 204].
186. On March 16, 2007, Student entered the Island View in Syracuse, Utah near Salt Lake City. [R-54 at 530]. Student was not suicidal at the time. [Vol.I:137;R-71 at 965].
187. Island View is owned by a for profit corporation. [Vol.I:182]. Island View is a locked down facility. [Vol.I:210]. While at Island View, students are generally allowed to communicate only with their parents. [Vol.I:198-202].
188. Students at Island View are placed on same-gender teams. [Vol.I:141]. There are six

⁵ The first time that Parents raised the issue of potential harm to Student as a result of an SSD evaluation was on December 14, 2007 on page 5 in a Motion to Strike the Motion to Dismiss previously filed by SSD.

⁶ According to P-8 at 70, in an e-mail generated by Mary Pearce in early June 2007, Ms. Pearce states that she had prepared a "bogus eval plan and locked the planning event down. I didn't write up the RED {Review of Existing Data} because I am pretty sure this is going nowhere." She also states in the memo that she told the father "as soon as {Student} was available to us, I would proceed with testing."

teams, with each team having approximately 20 residents. [Vol.I:141]. All the residents at Island View have a DSM-IV diagnosis and most have more than one. [Vol.I:189]. Most residents at Island View come from at least an upper middle class background. [Vol.I:190]. Students at Island View attended school from approximately noon until 4:20. [Vol.I:144].

189. Mr. Barney described the campus at Island View as follows: “There are locked doors on all the dormitories, and the school area, there are alarm doors in the back, and then there are staff down the hall towards the front, so it would be difficult for a kid to get past them, should that be an indication. They aren’t allowed in the front lobby unaccompanied, so if a kid was wandering out there a staff would go with them. They are not allowed to travel across campus or even be outside without staff presence. Typically two staff if there’s more than, more than, I can’t remember what exact number is, but, you know, say a handful of kids, if there’s more than three or four kids, there is going to be need to be two staff there.” [Vol.I:210] There are also restrictions on the use of the telephone, internet, and so forth. [Vol.I:208] There are no telephone calls to parents by the clients during the first two week. [Vol.1:199] After the first two weeks telephone calls are generally limited to just parents. [Vol.1:200] Any phone calls to anyone other than parents have to be approved by parents. [Vol.1:201] Mr. Barney also discussed the school disciplinary procedures. At Island View girls are not to be talking to boys unless they are in school, and only then it is supposed to be about school-related things. [Vol.1:194] Mr. Barney testified that there was a point at which Student was placed on communications restrictions where she was not allowed to talk to any resident. She was only allowed to talk to staff for at least a little while. [Vol.I:165]. Island View records also indicated that when Student left the Island View Campus with her parents she was required to go through a “Change of Clothes Procedure” to search for contraband upon her return. These searches are documented on July, 14, 15, and 16, 2007, September 2, 2007, and October 8, 2007. [R-85 at 1396, 1397, 1398, 1408, and 1417]
190. An Island View Resident Treatment Review dated May 22, 2007, under Problem 6, “ADHD Symptoms” stated “it appears that some of her ADHD symptoms may instead be lack of commitment, investment and caring about tasks, especially in academics. Student has allowed herself to get behind in school and much of that seems to be just a lack of interest or commitment.” [R-72 at 978].
191. Other than organizational training, Student did not receive individualized services at Island View. [Vol.I:185-186].
192. Student had a one-hour session of individual therapy each week. [Vol.I: 158-159]. With some exceptions, there was a family therapy session every other week conducted by telephone. [Vol.I:159-160]. Student participated in a substance abuse group. [Vol.I:148]. Although Student saw a psychiatrist or nurse practitioner generally once a month, that was mostly for medication monitoring. [Vol.I:190].

193. Mr. Marc Barney described Student as “not [doing] very well” academically while he was her therapist. [Vol.I:184-185]. During the time he was Student’s therapist, Mr. Barney was not able to determine a reason why Student did not do very well academically. [Vol.I:185]. One reason could have been that Student simply didn’t care. [Vol.I:185].
194. A fourth quarter grade report from Island View for the 06-07 term dated June 7, 2007, reported the following grades: PE – C+; Art – D-; Conceptual Physics – D-; World History – F; Pre-Algebra – C; American Literature – C-. Comments from teachers included “did not submit/complete log(s)”; “didn’t turn in her final project and playing catch up is the reason for her final grade”; “inconsistent effort”; and “Student rushes through some assignments and some assignments are late.” The quarter GPA was 1.28. [R-87 at 1500].
195. A Monthly Education Progress Note dated June 20, 2007 – July 17, 2007 notes that “Rt. struggles to complete the assigned work in a timely manner. Rt. Is required to attend after school tutoring, but still does not manage time well.” [R-87 at 1505].
196. On July 9, 2007, DESE received a due process complaint filed on behalf of the Student and the Parents. [R-38 at 292].
197. A grade report from Island View for the Summer 07 term dated September 1, 2007, reported the following grades: PE – B+; World History – B-; Astronomy – B+; English – D. The quarter GPA was 2.59. [R-87 at 1509].
198. [Redacted]
199. After Student ran away, Mr. Barney discovered Student had been engaging in inappropriate behavior at Island View that he was not aware of. [Vol.I:189]. After Student ran away, Mr. Barney didn’t think she had made the progress he thought she had made. [Vol.I:206].
200. Mr. Barney was Student’s primary therapist until December 2007. According to him, Student had been placed on precautions on several occasions for cutting and sexually acting out during the time that he was her primary therapist. [Vol. I:156-157].
201. In monthly resident reviews, Student’s treatment team, comprised of her therapists, psychiatrist, recreational specialist, milieu manager, C. D. counselor and teacher, review her therapeutic progress and goals to ensure that they are being consistently applied in all areas of Student’s treatment at Island view. [R-91 at 1535-1549].
202. A grade report from Island View dated November 8, 2007 reported the following grades:

202. A grade report from Island View dated November 8, 2007 reported the following grades: Reading and Composition – C+; World History/Civilizations – B; Biology – NG; Algebra I – F; Spanish I – F. [R-87 at 1510].
203. On November 15, 2007, Student was brought back to her Parents in St. Louis. [R-64 at 894].
204. Shortly after Student was returned to St. Louis, Island View notified the Parents that Student could return and the Parents would not have to pay. [Vol.I:203, 256]. An addendum to the Enrollment Agreement for Island View stated that “Island View will provide charity care for the tuition costs only until Student graduates from the program or Island View’s clinical team deems further treatment is contraindicated for Student’s continued progress of care.” [R-90 at 1532]. From March 15, 2007 to October 29, 2007, the Parents incurred tuition, room and board expenses at Island View in the amount of \$75,238.00.[R-75 at 1022-1024].
205. Since being removed from the District, Student’s GAF has declined. Student’s GAF as determined by Ms. Morgan Gillard in her report dated January 18, 2007, was 50. [R-60 at 660]. Her GAF as stated the Second Nature March 15, 2007 exit report was 40. [R-83 at 1341]. On March 16, 2007, Student’s GAF as determined by Island View staff was 40. [R-71 at 968]. On November 24, 2007, the date that Student was readmitted to Island View, her GAF as determined by Island View staff was 35. [R-74 at 1018; Vol.III:16].
206. A change in Student’s primary therapist was made in December 2007. [Vol.I:180]. Although Mr. Barney had believed that Student had shown signs of progress and a genuine investment in wanting to do better, he “could no longer trust that those things were real.” [Vol.I:180]. Mr. Barney acknowledged that “something clearly wasn’t working right” and that he didn’t feel like he could trust Student. [Vol.I:180].⁷
207. Steve Lancaster became Student’s primary therapist on December 12, 2007. [R- 86 at 1484]. Mr. Lancaster agreed that Mr. Barney did not have a good therapeutic rapport with Student and that a therapist could have only limited success if that is the case. [Vol.III:61-62]. Mr. Lancaster did not have an understanding of any school issues Student may have had at the time she was sent to Second Nature. [Vol.III:60]. He was not familiar with Dr. Morgan Gillard’s evaluation or Dr. Morgan Gillard’s conclusion that Student had learning disabilities. [Vol.III:87]. Mr. Lancaster has tried to educate the parents on Student’s issues and provide skills to them in responding to her because some of the ways they responded to her hurt their relationship. [Vol.III:95-96].
208. Mr. Lancaster has diagnosed Student with borderline personality disorder. [Vol.III:20].

⁷ Diana Gordick noted in her March 6, 2007, Treatment Plan Update, addressing the transition to Island View, “ – not a male therapist.” [R-80 at 1134]. There is no indication that Island View was aware of this suggestion or any explanation why a female therapist was not provided at Island View starting in March of 2007.

Student's current diagnoses include polysubstance abuse and she currently is in specialized treatment for dependence. [R-74 at 1018; Vol.III:84]. Island View has not diagnosed Student with bipolar disorder. [Vol.III:90; R-74 at 1017-1018].⁸

209. At Island View, Student admitted to her therapist that she had fabricated about her use of substances in the past. Mr. Barney testified that he believed "she did abuse alcohol, and she did abuse marijuana and tobacco, but that was probably the extent of it." [Barney, Vol. I, p. 148]. Mr. Lancaster testified that he did not believe Student was addicted to drugs or alcohol and that she tended to exaggerate her history for peer acceptance. [Lancaster, Vol. III, p. 13-14].
210. Mr. Lancaster testified Student's running away intensified her feelings of being a black sheep in her family and caused significant issues for the family relationship. [Vol.III:62-63]. Mother at times triggers or worsens a lot of Student's distortions or beliefs about herself. [Vol.III:63]. Mr. Lancaster saw as a problem right away that the Parents were not holding Student accountable for some of her decisions and worked with them to shift their parenting approach with Student. [Vol.III:62-68].
211. Mr. Barney testified that the Parents had not been an obstacle to Student's growth or treatment. [Vol.I:177]. Mr. Barney's testimony was not consistent with Mr. Lancaster's. Mr. Lancaster reinforced to the Parents that they needed to avoid undermining the treatment process. [R-86 at 1486; Vol.III:64-65]. In the past Mother had acted in ways that undermined Student's therapy. [Vol.III:64-65]. Mr. Lancaster testified that some of the ways that the Parents responded to Student in the past probably hurt the situation more than helped. [Vol.III:95-96].
212. Mr. Lancaster reviewed with the Parents some of the parenting dynamics that were causing problems. [Vol.III:66]. Mr. Lancaster addressed with the Parents their "obsession" with Student's grades. [Vol.III:66-67]. They would constantly ask questions about school work and whether Student was caught up. [Vol.III:66]. This was problematic because it caused Student to see her academic performance as not her own, but that she was doing it for everybody else. [Vol.III:66-67]. That pressure on Student created problems for her and increased her anxiety. [Vol.III:66]. Mr. Lancaster advised the Parents that they needed to let Student succeed or fail in academics on her own. [Vol.III:67].
213. Mr. Lancaster and Mr. Barney addressed with Mother issues related to Student's weight

⁸ The Second Nature Discharge Plan also does not include a DSM-IV diagnosis of Bipolar. [R-83 at 1341].

- that affected Student's self-esteem. [Vol.III:68-69; R-86 at 1470, 1471]. They noted Mother "brings up the 'weight' issue way too often" and "resident and Mother will resolve issues stemming from the Mother's repeated critical feedback about the resident's appearance and body image". [R-91 at 1544]. Mr. Lancaster testified that Mother tended to be "emotionally reactive" and "critical or judgmental" in comments to Student and that a result would be to intensify Student's doubts about herself and her self-esteem issues. [Vol.III:74].
214. Student's relationship with her Father has tended to be emotionally distant. [Vol.III:74-75].
215. Mr. Lancaster testified that the "family issue was just huge." [Vol.III:22]. Student's ability to feel connected to her family is key to her overall emotional stability. [Vol.III:22]. Family therapy is a "huge cornerstone" for Student's overall treatment. [Vol.III:30]. There is a "huge issue" involving Student and her sister, but the sister has not been too willing to engage in the family therapy process. [Vol.III:29-30].
216. Mr. Lancaster described Student as different than many students because she had "so many peer-based difficulties," anxiety based self-mutilating, and "a difficult time just functioning within the day-to-day milieu...based on her personality disorder problems." [Lancaster, Vol. III, p. 12]. Student's cognitive distortions and irrational thoughts caused her to have a self defeatist attitude about her academic abilities. [Lancaster, Vol. III, p. 21]. "Student has a very negative core belief system...[A]ll of her day-to-day experiences are ...filtered through that belief system, and so many of her thoughts tend to be very irrational, very self-defeating, self-attacking in nature." [Lancaster, Vol. III, p. 22-23]
217. Mr. Lancaster also testified that, during the time he had been working with Student up to and including the time of the hearing, she could not function appropriately in a less structured environment because, while making the best progress he had seen, he believes that Student "needs time to internalize the gains" she has made [Lancaster, Vol. III, p. 49]. He further testified that Student may be able to look forward to transitioning within two to three months, but concluded that she would need a structured setting, with predictable routine, clear boundaries, and a controlled environment. He opined that a less structured environment would compromise Student's decision-making capabilities and risk overall decompensation. [Lancaster, Vol. III, p. 50-52].
218. Mr. Lancaster recommended eventual transition to boarding school with therapeutic

component and structure in daily student life, an “academic-based setting, but it has to have a therapeutic component to it, otherwise I don’t think she’ll be able to hang in there, or I don’t think the school will hang in there with her.” [Lancaster, Vol. III, p. 52-53, 55]. In an environment with any less structure than boarding school with therapeutic component, Student will encounter unstable populations and environments that she is not yet able to manage. Then the likely outcome will be anxiety and decompensation. [Lancaster, Vol. III, p. 55-57].

219. A second quarter grade report from Island View for the 07-08 term dated January 10, 2008, reported the following grades: Reading and Composition – F; Lit & Comp – F; World History – A-; Algebra I – F; PE – B-; Biology – D. Comments from teachers included “Lack of motivation”; “needs improvement in work and/or study habits.” The quarter GPA was 1.00. [R-87 at 1501].
220. Mother did not know whether Student was receiving any special education at Island View. [Vol.III:150]. She did receive educational instruction of five (5) hours per day. [Vol. I:144]. Island View teachers are certified for the subject areas in which they teach, faculty includes two certified special education instructors and the school is accredited by the Northwest Association of Accredited Schools and the State of Utah. [Vol. III: 38-39; Ex-P-1 at 1-5].
221. Mr. Barney testified that Student now looks good, is more confident, and that she is a team player. [Vol.I:181]. Those things were also said to be true at the time Student ran away to California. [Vol.I:204]. In a monthly summary report dated October 9, 2007, just before Student ran away, it was reported that Student seemed to be quite stable with her mood. [R-72 at 1006-1011]. As late as October 16, 2007 Mr. Barney’s Therapist Progress Notes indicated Student was overall very positive and seemed to have a good perspective on them. She seems committed to doing well and to making a positive impact on her team. [R-86 at 1476].
222. Mr. Lancaster testified that generally there was no way to know whether any of the progress he perceived Student to have made at Island View was long-term benefits until after she left Island View. [Vol.III:69-70]. Mr. Lancaster testified that the best indicator of Student’s progress is that she had not been on the emotional roller coaster that she had been on. [Vol.III:24].
223. Mr. Lancaster testified that the Parents are not to the point where they able to manage Student in their home and the family dynamics are not to the point where Student could return. [Vol.III:56].

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. She has never received special education and related services from SSD or the District.
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 or if no program is provided for their child whom the parents contend is eligible for special education, 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 (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 Student and Parents filed the due process complaint that initiated this matter on July 9, 2007. Their complaint alleges that the District failed to identify and evaluate the Student as a "child with a disability" beginning in February 2006 and continuing to the time of the filing of the Complaint. They seek a finding that Student is a child with a disability and in need of special education services. They also seek reimbursement for certain expenses incurred as a result of their unilateral private placement. The Student's Parents bear the burden of proof in this case. *Schaffer ex rel. Schaffer v. Weast*, 546 U. S.49, 62 (2005). The U. S. Supreme Court's reference is to the burden of persuasion, which means that the Student and her Parents lose at the conclusion of the case if the evidence on both sides is evenly balanced. The standard of proof in this administrative proceeding, as in most civil cases, is proof by a preponderance of the evidence. *Tate v. Department of Social Services*, 18 S. W. 3d 3, 8. (Mo. App. E. D. 2000).

10. If a school district fails in its obligation to provide a free appropriate public education to a disabled child, the parents may enroll the child in a private school and seek retroactive reimbursement for the cost of the private school from the school district. *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U. S. 359, 370 (1985). In determining whether parents are entitled to reimbursement, the Supreme Court has established a two part test: (1) was the IEP

proposed by the school district appropriate and (2) was the private placement appropriate to the child's needs. See *Burlington*, 471 U. S. at 370; see also *Florence County Sch. Dist. Four v. Carter ex rel. Carter*, 510 U. S. 7, 12-13 (1993). The Supreme Court has also stated, because the authority to grant reimbursement is discretionary, "equitable considerations [relating to the reasonableness of the action taken by the parents] are relevant in fashioning relief." *Burlington*, 471 U. S. at 374; 20 U. S. C. Section 1412(a)(10)(C)(iii)(III).

11. The U. S. Court of Appeals, 8th Circuit has not decided the issue of whether a child who has never received special education and related services from a school district nevertheless is eligible for reimbursement for private school expenses despite the language of Section 1412(a)(10)(C) of IDEA. The Circuits that have decided are split: e.g., *Forest Grove School District v. T. A.*, 523 F. 3d 1078(9th Cir. 2008)(Student is not barred from receiving reimbursement); *Frank G. v. Board of Education*, 459 F. 3d 356 (2nd Cir. 2006), cert. denied, 128 S. Ct. 436, 169 L. Ed 2d 325 (2007)(Student is eligible for reimbursement); *Greenland Sch. Dist. v. Amy N.*, 358 F. 3d 150(1st Cir. 2004)(Students cannot recover if they have not previously received special education and related services).⁹

12. 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." This duty is triggered when a school has reason to suspect a child has a disability, and has reason to suspect that special education services may be needed to address the disability. *Id.*; 34 C. F. R. Section 300.15; *W. B. v. Matula*, 67 F. 3d 484, 501 (3rd Cir. 1995). 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.¹⁰

13. The Missouri State Plan defines "students with a disabilities" as " those children, ages three (3) to twenty-one (21), who have been properly evaluated as having Mental Retardation, Hearing Impairments and Deafness, Speech or Language Impairments, Visual Impairments including Blindness, Emotional Disturbance, Orthopedic Impairments, Autism, Traumatic Brain Injury, Other Health Impaired, a Specific Learning Disability, Deaf Blindness, or Multiple Disabilities and, who because of that disability, require special education and related services. [R-89 at 1522].

⁹ 20 U.S.C. Section 1412(a)(10)((C)(ii) provides: If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private. . . school without the consent. . . by the public agency, a court or hearing officer may require the agency to reimburse the parents for the cost if. . . the agency had not made a free appropriate public education available to the child. . .

¹⁰ The 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).

“Criteria for the disability of Emotional Disturbance are:

A child displays an emotional disturbance when:

- A. through evaluation procedures that must include observation of behavior in different environments and an in-depth social history, the child displays one of the following characteristics:
 - 1) an inability to learn that cannot be explained by intellectual, sensory, or health factors;
 - 2) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
 - 3) inappropriate types of behavior or feelings under normal circumstances;
 - 4) a general pervasive mood of unhappiness or depression; and,
 - 5) a tendency to develop physical symptoms or fears associated with personal or social problems.
- B. the characteristic(s) must have existed to a marked degree and over an extended period of time. In most cases, an extended period of time would be a range from two (2) through nine (9) months depending upon the age of the child and the type of behavior occurring. For example, a shorter duration of disturbance that interrupts the learning process in a younger student might constitute an extended period of time. Difficulties may have occurred prior to the referral for evaluation; and,
- C. the emotional disturbance adversely affects the child’s educational performance.

NOTE: Manifestations of an emotional disturbance can be observed along a continuum ranging from normal behavior to severely disordered behavior. Children who experience and demonstrate problems of everyday living and/or those who develop transient symptoms due to a specific crisis or stressful experience are not considered to have an emotional disturbance.” [R-89 at 1524].

14. The Child Find duty is an affirmative duty. It extends to all children suspected of having a disability, not merely those children who are ultimately determined to be disabled. *N. G. v. District of Columbia*, 2008 U. S. Dist. Lexis 25302,*32-*33 (D. D. C. Mar. 31, 2008). Failure to locate and evaluate a potentially disabled child is a violation of FAPE. *Id.*, at 84; *see also Hawkins v. District of Columbia*, 539 F. Supp. 2d 108, 116 (D. D. C. 2008). Once a school district has “found” a student, the district must proceed with the evaluation process even if the student has been placed in an out-of-district private school but maintains residency in the district. *District of Columbia v. Abramson*, 493 F. Supp.2d 80, 85 (D.D.D. 2007).

15. During school year 2006-07, the Student's Parents requested that the Student be evaluated pursuant to the IDEA on September 19, 2006. [FF#68] The District collected data regarding the Student. On October 13, 2006, the Joint Review Committee reviewed the Student's existing data and determined not to initiate an evaluation. [FF#89]. The Committee provided the Parents with a Notice of Action dated October 16, 2007

explaining the decision not to evaluate. The 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 SSD and 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 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 decision not to evaluate considered the following factors on October 13, 2006: only 5 missed classes; her grades were not as good as she had earned in 8th grade but the teachers reported that she was still cooperating and capable of doing the work; she got along well with peers and teachers; there were no disciplinary referrals; her problems seemed to be situational with family issues, including a boyfriend whom the Parents did not approve.

d. 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.

16. SSD and the District were on notice of a potential disability and the need for an evaluation by December 2006 when Student's grades plummeted to failing all courses; accumulated more than 50 missed classes. [FF #128]. SSD notified Parents and their counsel on January 4, 2007 that an evaluation would be done, which satisfied the time frame for its Child Find duty under IDEA. *See e.g., W.B. v. Matula*, 67 F.3d 484, 501 (3rd Cir. 1995).

17. SSD and the District did not fail to evaluate Student because the Parents failed to make Student available as requested and SSD and the District were not required to conduct the evaluation in Utah. *See e.g., J.S. & J. S. on behalf of R. S. v. South Orange/Maplewood Board of Education*, 2008 U.S. Dist. LEXIS 24031 (D.N.J. 2008); *C.G. and B.S. v. Five Town Community School District*, 2007 U.S. Dist. LEXIS 10310 at *96-*105 (D. Me. 2007), *aff'd* 2007 WL 1051650 (D.Me.); *Patricia P. v. Board of Educ. of Oak Park*, 203 F.3d 462, 469 (7th Cir. 2000).

18. There was no denial of FAPE because the Student and Parents did not show by a preponderance of evidence that that SSD and/or the District violated its Child Find duty,

including the duty to evaluate. Therefore, we decline to rule on the issue of whether Student is a child with a disability in need of special education and related services. Similarly, we decline to address the second part of the *Burlington* test regarding whether the private placements at Second Nature and Island View were appropriate and if reimbursement is warranted for the tuition expenses as well as the expenses with Chris White and Odyssey Transport Services.

19. The Student and Parents are not entitled to reimbursement for the independent educational evaluation performed by Dr. Morgan-Gillard because it was obtained unilaterally outside of the collaborative IEP development process. *M. S. v. Mullica Tp. Bd. of Educ.*, 485 F. Supp.2d 555 (D.N.J. 2007); C.F. R. Section 300.502.

DECISION

In their due process complaint, Student and Parents alleged that the District and SSD denied Student a free appropriate public education (“FAPE”) by failing to meet their Child Find obligations, including a failure to evaluate Student. According to Student and Parents, Student demonstrated behaviors and suffered from conditions since at least February 2006 consistent with the eligibility criteria for an Emotional Disturbance as defined by the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400 *et seq.* Other than their claim that the districts failed to meet their Child Find obligations, Petitioners did not allege any procedural violations.¹¹

For their relief, Petitioners requested that the hearing panel (1) maintain Student’s current residential placement, (2) find that SSD failed to find and evaluate Student, (3) reimburse them for a private evaluation they obtained, (4) find that Student is a child with a disability and in need of special education and related services, (5) find that SSD failed to provide FAPE, and (6) reimburse them for costs and tuition of a private placement and for all losses and expenses.

¹¹ Thus, the only issue with respect to the decision in October 2006 not to evaluate Student is whether the decision was substantively correct. As stated in the October 16, 2006 Notice of Action, the decision was that there was not a reason to suspect that Student had an IDEA disability.

As noted in our Conclusions of Law, a two part test has evolved for recovery of unilateral private placement expenses: (1) show a denial of FAPE and (2) prove that the private school was the appropriate placement for the child.¹² See *Burlington*, 471 U. S. at 370. Some courts have skipped addressing the first step and denied reimbursement for a failure to prove the second part. See e.g., *Gagliardo v. Arlington Central Sch. Dist.*, 489 F. 3d 105 (2nd Cir. 2007) (Court concluded that deciding whether the IEP provided FAPE was a close one so they decided not to answer it and opted to base their holding on the appropriateness (or lack thereof) of the private school. *Id.*, at 112. The better approach is to provide an analysis of the first prong and if the conclusion is that FAPE has not been denied, the second prong is left unaddressed. See e.g., *M.C. ex rel. Mrs. C. v. Voluntown Bd. of Educ.*, 122 F. Supp. 2d 289 (D. Conn. 2000); *C.G. and B.S. v. Five Town Community School District*, 2007 U.S. Dist. LEXIS 10310 at *109 (D. Me. 2007), *aff'd* 2007 WL 1051650 (D.Me.).¹³

Student and Parents Failed To Prove a Child Find Violation

Under the 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. § 412(a)(3)(A); *Missouri State Plan for Special Education ("State Plan")* at 18. The process of identifying, locating, and evaluating children with disabilities is frequently referred to as "Child Find." *State Plan* at 18. "Children with disabilities" as defined by the IDEA and Missouri state law have a

¹² The 11th Circuit in *Loren F. ex rel. Fisher v. Atlanta Independent Sch. System*, 349 F. 3d 1309, 1319 (11th Cir. 2003) expands the two step analysis set out in *Burlington* to reflect subsequent case law and amendments to IDEA.

¹³ SSD and the District have urged us to skip any *Burlington* analysis and conclude that she is not eligible because she has not previously received special education and related services. See cases cited in Conclusion of Law #11. We decline to do so.

right to FAPE. *State Plan* at 40. To be a child with a disability as defined by the IDEA, a child must be evaluated in accordance with IDEA procedures, found to have one of the IDEA's enumerated disabilities, and by reason of the disability, need special education and related services. 34 C.F.R. § 300.8(a); *State Plan* at 19-20.

The Child Find duty is an affirmative duty. It extends to all children suspected of having a disability, not merely those children who are ultimately determined to be disabled. *N. G. v. District of Columbia*, 2008 U. S. Dist. Lexis 25302,*32-*33 (D. D. C. Mar. 31, 2008). Failure to locate and evaluate a potentially disabled child is a violation of FAPE. *Id.*, at 84; *see also Hawkins v. District of Columbia*, 539 F. Supp. 2d 108, 116 (D. D. C. 2008).

Addressing a Child Find claim, the Sixth Circuit recently adopted a standard requiring that the claimant "must show that school officials overlooked clear signs of disability and were negligent in failing to order testing, or that there was no rational justification for not deciding to evaluate." *Board of Educ. of Fayette County v. L.M.*, 478 F.3d 307, 312 (6th Cir. 2007). Stated another way, one court held that Child Find requires identification and evaluation within a reasonable time after school officials are put on notice of behavior that is likely to indicate disability. *See W.B. v. Matula*, 67 F.3d 484, 501 (3rd Cir. 1995). Delays that were found to constitute a Child Find violation, or at least raise an issue of a Child Find violation, generally exceeded the relatively short period of time that reasonably can be considered to be at issue in this case. *See e.g., Matula*, 67 F.3d at 501 (triable issue whether 6-month delay resulted in Child Find violation); *New Paltz Cent. Sch. Dist. v. St. Pierre*, 307 F. Supp. 2d 394, 401 (N.D. N.Y. 2003) (ten-month delay); *O.F. v. Chester Upland Sch. Dist.*, 246 F. Supp. 2d 409, 417-418

(triable issue over 12-month delay); *Department of Educ. v. Cari Rae* , 158 F. Supp. 2d 1190, 1195-1197 (D. Haw.) (at least 6-month delay).

These standards are consistent with the high level of deference that is to be given by courts and hearing officers to the difficult decisions made by professional educators with respect to special education needs. *See e.g., Johnson v. Metro Davidson County School System*, 108 F. Supp. 2d 906 (M. D. Tenn 2000).

October 2006 Decision Not to Evaluate

When addressing the Child Find claims, we must consider only the information that was available to school officials at the time and the context in which information about Student was considered by the officials in October 2006 when they decided not to evaluate. Student was a freshman at the High School in the fall of 2006. Although Parents reported significant problems at home, available information showed that Student had successfully completed 8th grade.

[FF#34;35] As school officials testified, the transition to high school is difficult for many children. *See C.G. and B.S. v. Five Town Community School District*, 2007 U.S. Dist. LEXIS 10310 at *14 (D. Me. 2007), *aff'd* 2007 WL 1051650 (D.Me.) (“... did not always complete her assignments, which was not unusual for a freshman”); *Sylvie M. v. Bd. of Educ. of Dripping Springs*, 48 F. Supp.2d 681, 690, 697-698 (W.D. Texas 1999) (noting undisputed evidence that it is very common for ninth graders to have trouble adjusting to high school, that students' grades and adjustment generally improve noticeably as they advance grades during their high school years, that ninth grade is a traumatic, transitional year for many students, and that students receive failing grades during their ninth grade year but few do by their senior year). While school officials were aware that Student had been diagnosed to have a “mood disorder,” they

also had experience with students with such a diagnosis who were successful in school without receiving special education. [FF# 50;58;76] School officials also were aware of a significant level of conflict in the home related to Student's relationship with her boyfriend of whom the Parents clearly did not approve, completion of school work, and other family matters. [FF#36-37;54;56;65-66;69;71-73;77-78;84-85;89;93] *See Torrance Unified Sch. Dist.* (SEA California) (noting that behaviors student exhibited at school "generally coincided with the severe stressors and upheavals in Student's home and living situations, and the District reasonably could have assumed that they were related to those events").

School officials had experience working with students like Student who had made significant gains academically over time. The school officials knew, based on their experience, that such gains could come slowly and in small increments. [FF#57;76;78] School officials also were aware that prior to initiating a special education evaluation, it was the practice at the High School to engage in a process of trying other non-special education interventions that were available.¹⁴ [FF#61] *See Bd. of Educ. of Fayette County*, 478 F.3d at 313 (noting the district court's finding that educational experts had all indicated that a hasty referral for special education can be damaging to a child). Although school officials were aware that Student had been diagnosed with a "mood disorder," neither her psychiatrist nor her therapist ever provided any information to SSD and the District stating with specificity how the mood disorder may have been affecting Student educationally. For example, Dr. Friesen's barebones letter of October 25,

¹⁴ The evidence demonstrated that school officials continued to work throughout the semester with the parents and Ms. Harris in developing interventions to address issues related to the concerns that had been raised at the time.

2006,¹⁵ does not offer any educational recommendations.

Parents' own evidence and testimony showed that completing schoolwork at home had long been a struggle for Student. [FF#30] Like many parents, the Parents spent time at home helping Student with schoolwork and trying to ensure that homework was completed. In the words of Mother, Student resented this time. [Vol.III:100] Given this history and the growing conflict at home with respect to Student's boyfriend and schoolwork, it was hardly a surprise that Student did not quickly become a diligent student at home after the Parents (as they had been advised) began to no longer check with her to see if schoolwork was completed.¹⁶

[FF#72;73;85;94;109;117]

Parents testified that Student had a smaller circle of friends outside of school as time passed through 8th grade and in the early part of her 1st semester at the High School. They also presented evidence that the friends she had outside of school time may have presented negative influences. However, the credible testimony of Student's teachers (both at the Middle School and the High School) and other evidence demonstrated that Student had friends at school, had appropriate relationships with peers at school, participated with peers appropriately at school, and was able to work with other students in class appropriately.¹⁷ [FF#90;92;94] There was no

¹⁵ See *School Dist. of Springfield, R-12*, 49 IDELR 177 (SEA Missouri 2007) (noting that a letter from a doctor to the school contained little useful information other than diagnoses and a very brief summary of credentials); *C.G. and B.S. v. Five Town Community School District*, 2007 U.S. Dist. LEXIS 10310 at *97 (D. Me. 2007), aff'd 2007 WL 1051650 (D.Me.)(noting that neither letter from doctors contained evaluative data or educational recommendations of the sort the IDEA contemplates).

¹⁶ Although the Parents may not have checked with Student on her homework as they had in the past, the evidence was clear that Student understood that she would be sent away if she did not receive Bs and Cs. Reports by Student as recorded by Ms. Harris suggest that the Parents did not completely back off.

¹⁷ The evidence regarding Student's strained and confrontational relationships with peers and adults while at Second Nature and Island View stands in stark contrast to the evidence of Student's relationships while attending Clayton schools.

significant evidence to the contrary. Student was uniformly described to have had good relationships with her teachers and other adults, a fact that the parents acknowledged. [FF#99]

While her grades as of October 12, 2006 were C's and D's much lower than Student's grades at the end of 8th grade, we are reluctant to hold that this decline in grades for a freshman in the very first quarter at a very competitive high school should have caused the school officials to suspect an educational disability triggering the need for an evaluation for special education. We have a similar reluctance to criticize school personnel for not evaluating her based on the evidence that Student had unexcused absences for only 5 class periods. [FF#88] School personnel discussed the difficulties with transitioning to high school in general and to the High School's open campus that is not uncommon for freshman to exhibit. [FF#55]

Student and Parents had the burden of showing that school officials overlooked clear signs of disability and were negligent in failing to order testing, or that there was no rational justification for not deciding to evaluate in October 2006. They did not meet their burden.

By December 2006, Student's performance at school deteriorated significantly as reflected in both her grades and attendance (FF#119;128). While SSD argues that this decline resulted from her concern about attending boarding school and that position is supported in the record, we conclude that her behavior at that time prompted a need for a special education evaluation. As we noted (FF#148), on January 4, 2007 SSD's counsel advised counsel for Parents that SSD would evaluate Student. We conclude that this decision to evaluate occurred within the acceptable time frames noted in the earlier cited "Child Find" cases.

Student and Parents Did Not Prove a Failure to Evaluate

As noted in our Findings of Fact #131;132;135;148;152;181-183, the parties through their respective counsels exchanged letters after December 19, 2006 regarding Student's removal from the District by the Parents and a future evaluation by SSD.¹⁸ SSD's counsel made clear that it wanted to evaluate Student in its letter of January 5, 2007 to Mr. Ken Chackes, counsel for Student and Parents – even stating that SSD would contact the Parents to get consent and to schedule the evaluation. [R-29 at 214]. A letter of the same date to Mr. Chackes by the Superintendent for the School District specifically states that Student needs to be made available for assessment. [R-44 at 342]. The e-mails subsequently exchanged by the attorneys also make clear that the parties are working together to get parental consent and for Student to be assessed. In none of the letters or e-mails does Mr. Chackes raise the issue of potential harm to Student's emotional or physical health if she is evaluated at that time by SSD.

Concern about potential harm to Student was also not raised by Father when he met with Lara Veon and Mary Pearce on February 9, 2007 to sign the Consent for the Evaluation. [Vol. V:39].¹⁹ Lara Veon credibly testified that Mary Pearce made clear to Father at the February 9, 2007 meeting that the assessment of Student would take place once she was made available to

¹⁸ SSD and the District have argued that the Student and Parents did not comply with the notice provisions of 20 U. S. C. Section 1412 but those provisions go to the issue of reimbursement which is not addressed by the Hearing Panel because there was no denial of FAPE, a prerequisite to reimbursement.

¹⁹ When the Parents met with Dr. Morgan-Gillard on January 18, 2007 to discuss her completed evaluation, there was no discussion regarding whether an evaluation by SSD would be harmful to the Student. [Vol.V:31].

SD. [FF#185] Ms. Pearce's email of June 5, 2007,²⁰ written 4 months after the meeting with Father, confirms Ms. Veon's testimony on that point.²¹

Unfortunately, Father's testimony on the crucial February 9th meeting is not persuasive.

His deposition testimony at page 51:

I did have a conversation with [Mary Pearce] and Lara in February. . . and the school district decided they would evaluate her and we had the meeting in February, and I said to her, I looked at her, I said, well she's gone, what do you want, what do you do now, what do we do now, and she looked at me and says, "Well, I don't know, this is new territory," and she sort of threw up her hands.

A few pages later at 57-58, there is the following exchange regarding the February 9th meeting:

Q: You mentioned the meeting in February, 2007 that you attended and Mary Pearce Was there. Do you recall who else was there?

A: I think that it was Lara Veon and Mary Pearce.

Q: And was it your understanding that the purpose was to talk about an evaluation of [Student]?

A. I don't know what the understanding was. They just said that they wanted to meet with me. I showed up.

Q. Did you have any understanding of the purpose of the meeting?

A. No.

Q. Was there a discussion about the evaluation that morning?

²⁰ This email message also alleges "Parents employed manipulative ploys to put the onus of the solution on someone other than themselves. We totally reject that allegation as without any foundation in the record before us.

²¹ Student and Parents have asked us to apply the missing witness rule because neither SSD nor the District called Ms. Pearce, a retired employee [Vol III;246], or the recipients of the email to testify. We decline to apply the rule. The adverse interest rule does not apply to former employees. *Farley v. Johnny Londoff Chevrolet, Inc.*, 673 S.W.2d 800 (Mo. App. E. D. 1984). As to the recipients, we heard no testimony if they are current or former employees. Even if employee-employer relationship is present, the employee is not necessarily more available for purposes of the adverse inference rule. *See Simpson v. Johnson's Amoco Food Shop, Inc.*, 36 S.W.3d 775 (Mo. App. E. D. 2001).

A. Yes. As I testified earlier I asked Mary Pearce when and how you were going to do this evaluation, and her response was to the effect, she says: "I don't know. We are in new territory."

Q. What did you tell her about [Student] and where she was at that time?

A. I don't recall.

Q: Do you recall if you told her anything about when [Student] might be back in the St. Louis area?

A. If she asked me I would have said I don't know, because I didn't know.

Q. Did Mary Pearce tell you anything about whether an evaluation would be done if [Student] were available in St. Louis County.

A: I don't recall.

In sum, we conclude from the testimony of Lara Veon and Father as well as the June 5, 2007 email written by Ms. Pearce, Mary Pearce told Father on February 9, 2007 that SSD would proceed with an evaluation when Student was made available and Father responded that she was gone and he did not know when she would be back. Ms. Pearce stated "this was new territory" -- meaning how could SSD test someone who is not available. Again, nothing was said by Father then regarding potential harm to Student if she were to submit to an SSD evaluation.²² [Vol V:39]. Remarkably, Student and Parents produced testimony from five (5) mental health experts, three of whom had familiarity with Student in the January-May 2007 period but no testimony was elicited in support of any claim of harm to Student if an SSD evaluation took place during that time frame.

²² Potential harm to Student as a result of an SSD evaluation was raised for the first time by Student and Parents on December 15, 2007 in a Motion to Strike and Petitioners' Response to Respondent's "Motion to Dismiss" on page 5. SSD has continually insisted on Student be made available for assessment. *See e.g.*, Response To Complaint ; Motion to Dismiss, Motion to Conduct Mental Examination of Student.

Student completed the Second Nature program in Georgia around March 15, 2007 and started with Island View in Utah the next day. Student and Parents have offered no reason that she could not have returned to St. Louis in between these two placements for an evaluation. To justify their failure to cooperate, Student and Parents seize on the June 2007 email sent by Mary Pearce in early June 2007 as indicative that SSD never planned to do an evaluation because in this email, Ms. Pearce refers to the preparation of a “bogus eval[uation] plan.” We think that taken in context, this phrase does not necessarily mean the whole process was a “sham” as suggested by Father at the hearing. [Vol. II:138]. Ms. Pearce developed the plan subsequent to the February 9th meeting when Father indicated that Student was gone and he did not know when she would be coming back. [Vol. III:267-268]. Faced with conducting an evaluation of an out of state student was a first for Lara Veon [Vol. III: 234] and “new territory” for Mary Pearce according to Father’s testimony. Thus, it is easy to infer that Ms. Pearce felt that she had put together an evaluation plan that would not have been followed or developed because it was totally uncertain when or if Student would become available. In *C.G. ex rel. A.S. v. Five Town Community School Dist.*, 513 F.3d 279 (1st Cir. 2008), the parents were urging the Court to give the word “final” used by a special education director its literal meaning when referring to an IEP. The Court declined and said:

Conversation is not trigonometry, and in informal settings [such as emails] spoken language is rarely used in mathematically precise ways. In that connection, we have acknowledged that ‘words are like chameleons; they frequently have different shades of meaning depending upon the circumstances.’ (citation omitted)

Id., at 286-287.

The First Circuit also chastised the parents “for their unilateral choice to abandon the collaborative IEP process without allowing that process to run its course. *Id.*, 289. We submit the same conclusion applies to Parents who now use this email to justify retroactively their lack of cooperation in getting Student evaluated in 2007.

IDEA has a long case history mandating parental cooperation in making a student available for an evaluation by a school district. *J.S. & J. S. on behalf of R. S. v. South Orange/Maplewood Board of Education*, 2008 U.S. Dist. LEXIS 24031(D.N.J 2008) (No violation of Child Find duty for one school year because parents unilaterally placed student in private school and did not make child available for an evaluation); *C.G. and B.S. v. Five Town Community School District*, 2007 U.S. Dist. LEXIS 10310 at *96-*105 (D. Me. 2007), *aff'd* 2007 WL 1051650 (D.Me.)(No violation of Child Find duty when parents had not made student available for evaluation. The school district did not have to send its evaluators to Utah (where student attended a private therapeutic residential school after being unilaterally placed there by her parents) to do the testing or to contract with 3rd parties to conduct the assessments.); *Patricia P. v. Board of Educ. of Oak Park*, 203 F.3d 462, 469 (7th Cir. 2000)(finding no clear error in the district court’s determination that mother’s “lack of cooperation” in unilaterally placing child in Maine, not sending him back to Illinois for evaluation and offering only to permit school staff to travel to Maine to evaluate him “deprived the school district of a reasonable opportunity to conduct an evaluation of [the child] and fulfill its obligations under IDEA”); *Great Valley Sch. Dist. v. Douglas*, 807 A.2d 315;321-322, appeal denied, 815 A.2d 1043 (Pa. 2003)(“We hold that among the burdens initially assumed by those unilaterally enrolling a child in a remote educational institution are burdens associated with the location of that institution. Where a school

district has not participated in a placement decision, no burden associated with the location can be assigned to it. Thus, a school district cannot be compelled to assume any responsibility for evaluating a child while he remains outside [the state] in a unilateral placement).²³

In sum, the Student and Parents have failed to show that SSD and the District violated their Child Find duty by not evaluating Student in that the Parents did not make Student available locally for the evaluation as required under IDEA. Thus, without a denial of FAPE, there is no need to address issues (b) and (c).

Students and Parents Are Not Entitled To Reimbursement For Dr. Morgan Gillard's Evaluation.

In their Due Process Complaint Student and Parents cite Section V(3) of the Missouri State Plan as the basis for their request for reimbursement of the costs of an independent educational evaluation (“IEE”) that they obtained – namely, the \$2000.00 costs for the evaluation conducted by Dr. Morgan-Gillard. Since Section V(3) deals with Written Notice and Section V(2) addresses “Independent Educational Evaluation,” we assume that it is the latter provision on which Student and Parents rely for their claim of reimbursement. But Section V(2) by its clear language does not permit the requested relief.

The right to an IEE is limited to “[t]he parents of a child with a disability.” *State Plan* at 58. We have declined to address the issue of whether Student is a child with a disability because there has been no denial of FAPE. The right to an IEE is further limited to “any agency evaluation, with which the parents disagree. *Id.* There was no agency evaluation with which the

²³ This Court also held that a school district has a right to use its own staff to perform the evaluation even over objections that the student might experience medical or psychological harm from the testing. *Id.*, at 322. *See also, Andress v. Cleveland Independent School District*, 64 F.3d 176, 178(5th Cir. 1995) for the same holding. We need not decide if there is an exception because Parents failed to show any potential harm to Student.

Parents could have disagreed at the time they obtained their own evaluation. *See also M. S. v. Mullica Tp Bd. of Educ.*, 485 F. Supp.2d 555, 574-575 (D.N.J. 2007) (Parents were denied reimbursement for the expenses of IEES unilaterally obtained outside the collaborative IEP development process.)

ORDER

The Due Process Complaint filed by the Student and Parents is dismissed and judgment is entered against Student and the Parents and judgment is entered in favor of Special School District of St. Louis County and the School District. .

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 1st day of August, 2008.

Pamela S. Wright
Pamela S. Wright, Chairperson of the Hearing Panel

Karen J. Karns
Karen Karns, Member of the Hearing Panel

Karen A. Schwartz
Karen Schwartz, Member of the Hearing Panel

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing was served by email and by certified mail on this 1ST day of August, 2008 upon the attorneys for the parties and by regular US Mail to the other individuals listed below:

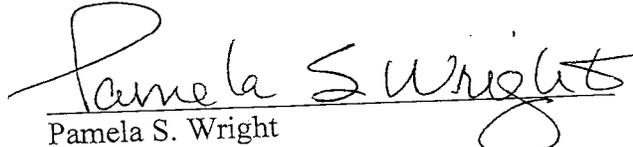
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