BEFORE THE THREE-PERSON DUE PROCESS HEARING PANEL EMPOWERED BY THE MISSOURI DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION PURSUANT TO SECTION 162.961 R.S.Mo.

_____, STUDENT,	**)**
by and through _____,	**)**
PARENTS,	**)**
	)
Petitioner,	**)**
v.	**)**
	)
FORT OSAGE R-I DISTRICT,	**)**
	)
Respondent.	**)**

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DECISION

PROCEDURAL HISTORY AND STATEMENT OF ISSUES

A. Procedural History

This matter comes before the three-person due process hearing panel convened by the Missouri Department of Elementary and Secondary Education ("MDESE") pursuant to Section 162.961 R.S.Mo., on the request for due process filed by the parents of Student ("Parents" or "Petitioners") on behalf of their son (hereinafter "Student"), a student who at the time the complaint was filed, was enrolled in the Fort Osage R-I School District as a regular education student ("School District" or "District" or "Respondent"). The request for due process ("Complaint") was received by MDESE on October 21, 2008. Respondent exhibit R-44 at 394 and R-85 at 788, complaint at R-85 at 816 (hereinafter R for Respondent, P for Petitioner or HP for Hearing Panel, followed by a dash and then exhibit number and then at page number if applicable). The panel convened by MDESE consists of panel members Dr. Terry Allee and Rand Hodgson, and Chairperson Janet Davis Baker. At the time of filing the Complaint, the Student and Parents were represented by Larry Wright; they are currently represented by Deborah S. Johnson. The Respondent District is represented by Teri B. Goldman and Alefia E. Mithaiwala with Mickes Goldman O'Toole, LLC. A resolution meeting was conducted on October 27, 2008. R-52 at 505. The Respondent challenged the sufficiency of the Complaint, R-85 at 799-800, and the Panel Chairperson found the Complaint sufficient on November 20, 2008. R-8 at 801-02.

The Respondent filed a Motion to Dismiss the due process Complaint for failure to state a claim on December 18, 2008, R-85 at p. 809, which was followed by new counsel Deborah Johnson filing a Motion for Leave to File First Amended Complaint with a proposed First Amended Complaint on behalf of Parents on January 21, 2009. R-85 at 860. The Chairperson

granted leave to file the Amended Complaint and denied the Respondent's Motion to Dismiss on May 19, 2009.[1] R-85 at 900. A resolution meeting was held on the Amended Complaint on June 2, 2009. R-65 at 579; Hearing Transcript at p. 1092, hereinafter "TR" followed by a colon and then page number. The Respondent then filed a challenge to the sufficiency of the Amended Complaint, R-85 at 918, which the Chairperson denied on June 16, 2009. R-85 at 921.

The hearing was conducted at the offices of the School District on September 30 through October 2, 2009, December 15-18, 2009 and March 1-2, 2010. A motion for directed verdict was made at the conclusion of the Parent's case which was denied at that time, TR:1308, and then renewed by Respondent through a Motion for Reconsideration of its Motion for Directed Verdict, or, in the Alternative, Motion for Summary Judgment, R-86, which was denied by the Chairperson in an e-mail of February 24, 2010. HP-1. The hearing was closed at Parents' request. TR:6-7.

The following exhibits were admitted:

Petitioners' Exhibit 104, pages 625-632, 784-97, 798-801.
Petitioner's Exhibit 103, pages 109-11, 114, 115-16, 142-152, 173-186, 188, 191-204, 231, 273.
Petitioner's Exhibit 104, pages 600, 764, 765-66, 802, 803, 810, 811, 812-22.
Petitioner's Exhibit 101, vol. 2, from page beginning with Lake City School Student Referral Progress Sheet through end.
Petitioner's Exhibit 103, pages 5-6, 22, 23, 24, 25, 26, 27-30, 34-37, 38-39, 43, 44-50, 51, 54-56, 57-59, 60, 62, 64, 65, 66, 67-85, 86, 87-101, 102-07, 153, 226-27, 238-45, 246-52, 269, 271-72, 276-85, 313-22, 328-41, 345-50, 406-33, 440, 442.
Petitioner's Exhibit 104, pages 824-912.
Petitioner's Exhibit 100, vol. 1, documents starting at the first page up to the preprinted calendar dated August 2007, and documents beginning at the page identified Emergency Information Data through the end.
Petitioner's Exhibit 103, pages 548, 567-69, 571, 573, 574.
Petitioner's Exhibit 104, pages 610, 615-24, 625-32, 758-61, 764-66, 804-08.

Respondent's Exhibits R-64 (pp. 555-556), R-77 (pp. 646-647)
Respondent's Exhibits R-1, R-2, R-3.
Respondent's Exhibit R-8, page 143; R-9, page 166; R-51, pages 500-03.
Respondent's Exhibits R-1 through R-85.
Respondent's Exhibit R-86, pages 943-44, 951-53, 941-42.
Respondent's Exhibit R-86, pages 945-50.

1. The delay between filing the Motion and the ruling was attributable to the agreement between counsel for the parties and the Chairperson that no action would be taken on the pending motions until an evaluation of Student had been completed (which in turn had been delayed because of Student's involvement in a serious car accident) and a decision was made by Parents on whether their current Motion for Leave to File First Amended Complaint would be filed with a different proposed Amended Complaint depending on the outcome of the evaluation and eligibility determination for Student. Parents decided to stay with the original proposed Amended Complaint although a determination was made of IDEA ineligibility. See further discussion, *infra*.

Parents called the following witnesses to testify: Dr. Steven Holeman, Student, Dr. Gary Seabaugh, Roxie Lanier, Student's Mother (hereinafter "Mother") and Dr. David Donovan. Respondent called Dr. Anissa Gastin, Stephanie (Homfeld) Shepherd, Andre Montgomery, Sandra Silver and Christine Short.

B. Time-Line Information

The initial deadline for issuance of the hearing panel's decision was January 4, 2009. The Respondent requested an extension of time for the hearing panel's decision through March 20, 2009, which the Chairperson granted. The Parents requested an extension of time for the hearing panel's decision through May 19, 2009, which the Chairperson granted. As a result of allowing Parents to file an amended complaint, the hearing panel's decision deadline was reset accordingly and a subsequent request to extend the hearing panel's decision was made by Respondent through November 15, 2009, which was granted by the Chairperson. At the conclusion of the first set of hearing dates, a joint motion was made to extend the hearing panel's decision deadline through January 31, 2010, which the Chairperson granted. At the conclusion of the second set of hearing dates another joint motion was made to extend the hearing panel's decision deadline through May 31, 2010, which the Chairperson granted. At the conclusion of the third set of hearing dates, the Respondent requested an extension of the hearing panel's decision deadline through July 2, 2010, which was granted by the Chairperson. A joint request was made to extend the hearing panel's decision deadline through August 9, 2010, which was granted by the Chairperson. The Respondent requested an extension of the hearing panel's decision deadline through September 3, 2010, which was granted by the Chairperson.

C. Statement of Issues

The issues to be determined by the panel and upon which evidence was presented at the hearing were stated by Parents in their Complaint and Amended Complaint and explained during the hearing (TR:10-18) and set forth as issues in Parents' Proposed Findings of Fact and Conclusions of Law as follows:

1. Whether the Respondent failed to evaluate Student in a timely manner thereby violating the Individuals with Disabilities Education Act (IDEA);

2. Whether the Respondent failed to identify Student as a child with a disability and thereby violated the IDEA; and if so,

3. Appropriate relief. [2]

The Amended Complaint contended that the Respondent had been provided information that Student had diagnoses of Attention Deficit Hyperactivity Disorder (ADHD) and Oppositional Defiant Disorder (ODD) and that each and every year since Student was in kindergarten the Respondent has had information indicating Student qualifies as a child with a disability under the IDEA. Further, the Respondent allegedly failed to provide parents with

2. While these are the stated issues, a review of the transcript of the hearing and relevant legal authority allows the conclusion that the real issue in the case is that of Child Find. See further discussion *infra*.

information related to Student's rights under the IDEA each and every year since kindergarten. The request relief included compensatory and remedial services and declaratory and injunctive relief to prevent future IDEA violations which may affect Student. In their proposed Findings of Fact and Conclusions of Law, Parents request reimbursement of Parents' expenses for Student's placement at Plaza Academy, a private school; mileage reimbursement for Student's transportation to Plaza Academy; and payment for costs and mileage incurred in placing Student at Plaza Academy for a minimum of one full school year including summer school.

The actual evaluation and eventual determination by the Respondent that Student was not a child with a disability under the IDEA is not an issue in this proceeding , which was repeatedly acknowledged by Petitioners in pre-hearing pleadings, statements by counsel at hearing (TR:27-28, 33-34, for example) and within the Petitioners' Proposed Findings of Fact and Conclusions of Law.[3]

There is a two year statute of limitations under the IDEA for due process complaints which runs from the time the parent or public agency (District), "knew or should have known about the alleged action that forms the basis of the due process complaint." 34 C.F.R. § 300.511(e). This deadline has exceptions, however, if the parent was prevented from filing a complaint because the public agency made specific misrepresentations that it had resolved the problem forming the basis of the complaint or that the public agency withheld information from the parent that was required to be provided to the parent. 34 C.F.R. § 300.511(f). Parents alleged in the Amended Complaint that the Respondent failed to provide them information relating to their rights which Respondent was required to provide and told Parents that they needed to have Student evaluated and obtain education related services for Student at their expense and discouraged Parents from filing complaints by falsely representing to Parents that Student would not qualify as a child with a disability under the IDEA. Because these allegations on their face could suggest an exception to the two year statute of limitations, testimony was allowed at the hearing regarding Student's complete educational history with Respondent.[4]

An allegation was initially made in the Complaint that the Respondent misrepresented Parents' ability to have legal representation at an October 23, 2008 disciplinary hearing; however, in the Order on the sufficiency of the Amended Complaint the Chairperson stated that this portion of the Complaint would be deemed abandoned as the Parents had provided no explanation of how this related to any issue that could be presented in a due process hearing under the IDEA.

There was also an issue initially raised in the Complaint regarding access to records. The Parents contended that Mother had yet to receive records regarding her son's school history which she needed before she could take part in protecting her son's right to an education. In the

3. Respondent considered Parents to have referred Student for an initial evaluation for IDEA eligibility on October 17, 2008 based upon a letter from Mother dated October 14, 2008 delivered to Respondent on October 17, 2008. R-42 at pp. 379A, R-43 at 382; TR:1441. The evaluation was completed in February 2009 due to Student's unavailability for necessary testing due to his automobile accident, and an ineligibility decision was reached on March 9, 2009. R-62.

4. The panel subsequently determined that there were no exceptions to the two year statute of limitations that should apply. See further discussion *infra*. However for appeal purposes, the findings of fact include the educational history of Student in the District.

Order of May 19, 2009, denying Respondent's Motion to Dismiss, the Chairperson stated that the threshold question before the panel was whether Student was a child with a disability under 34 C.F.R. § 300.8(a)(1), as it is the parents of a child with a disability who have the right to inspect and review records under 34 C.F.R. § 501(a). At that time, the Chairperson stated that until the issues of identification and failure to timely evaluate were determined at a hearing, it would not be possible to determine whether the issue of access to records was properly before the panel. R-85 at 900. This records issue was not raised by Parents in their Proposed Findings of Fact and Conclusions of Law. Mother acknowledged at the beginning of the hearing on September 30, 2009, that she had access to all of Student's educational records except as would be subsequently specified. TR:5-6. As there were no allegations that were subsequently raised by Parents regarding access to any additional records needed to prepare for the hearing, and based upon the evidence presented at the hearing, this issue will be deemed to be abandoned.[5]

In answering both the original Complaint and the First Amended Complaint, the Respondent contends that it had no reason to suspect that Student was a child with a disability within the meaning of the IDEA from 1999 to 2009. Further, Respondent received no information from Parents regarding their concerns about an IDEA disability until Parents delivered correspondence requesting an evaluation on October 17, 2008, followed up with certain medical information dated March 2007 and delivered by Parents on October 31, 2008. Respondent contends that information regarding a medical or psychological diagnosis standing alone, is insufficient to establish IDEA eligibility.

In response to the allegations regarding Respondent's providing information to Parents relating to their rights, the Respondent contends that it complied with all requirements regarding the IDEA's "child find" provisions and that it was not required to notify Parents of their due process rights until Parents referred Student for an IDEA evaluation, at which time they were provided information regarding their due process rights.

Respondent denies that Student has any right to a "free appropriate public education" (FAPE) as that term is defined in the IDEA because until there is a determination of IDEA eligibility, there is no right to FAPE. Finally, the Respondent states that the Parents are not entitled to any relief sought.

FINDINGS OF FACT

1. During all times material to this due process proceeding, Student resided with his Parents within the boundaries of the Fort Osage R-1 District, located in Independence, Missouri. TR:74-77, 693-94.

5. On October 27, 2008, the District held an IDEA resolution meeting with Parents to discuss Mother's due process complaint. R-52 at 505; TR:1073. During that meeting, Mr. and Mother acknowledged that the requested IDEA evaluation was in process and that the District had provided the Parents with copies of Student's education records. R-52 at 505.

2. Student's date of birth is February 11, 1994. At the time of the testimony at the due process hearing during the 2009-10 school year, Student was 15 years old and considered to be in 9th grade by the District. TR:74-75.

3. Student has attended school within the Fort Osage R-1 District since kindergarten. TR:76.

4. The Fort Osage R-I District is a public school istrict located in Independence, Missouri with approximately 4,800 students, distributed among five elementary schools, two middle schools with one for students in 5th and 6th grades and one for students in 7th and 8th grades and one high school. TR:1313-14. The District also operates a vocational school, the Career and Technology Center, and the Lewis & Clark Learning Center which contains some of what the District's Director of Student Support Services, Dr. Anissa Gastin, called "nontraditional alternative programs" which are provided on a voluntary basis by the District. TR:1278-79, 1314, 1683. The District also has an Early Childhood Center and the McCune School, a residential detention facility operated by the Jackson County, Missouri Family Court for which the District is statutorily required to provide educational services. TR:1314.

5. The District's Lewis & Clark building ("Lewis & Clark") houses a behavior management school for students in kindergarten through ninth grades. TR:1315. The approximately 35-45 students in the program are taught different ways to cope with behavior so that they can return to the District's more traditional programs. TR: 1315, 1322. Lewis & Clark also houses an alternative high school for approximately 40 students and a long-term suspension program for one to ten students suspended for more than ten days. TR:1315, 1322-23. Each of those programs is considered to be a regular education program and not a special education program. TR:1315. However, students with IEPs can attend those programs and a certified special education teacher is available. TR:1316.

6. The curriculum offered in each of the District's nontraditional alternative programs is the same as that used in each of the District's traditional programs. TR:1317. Students who participate in each of the District's nontraditional alternative programs can receive tutoring, counseling, social skills training and/or 1:1 or small group instruction. TR:1317, 1321-22, 1329. Students also have the opportunity to interact with their peers and have access to a social worker. TR:1317, 1325. The District's behavior management program also assigns regular education paraprofessionals to each of its classrooms and that program also includes a recovery room where students can process behavior. TR:1318. Students in that program have behavior management "Success Plans." TR:1319-20. The behavior management program is based on a level system. TR:1319-20. Students in the long-term suspension program also have similar types of interventions available. TR:1320-21.

7. The District also operates a Credit Recovery Program that is offered to all high school students and is housed at Lewis & Clark. TR: 1316. The Credit Recovery Program operates from 3-5 p.m. on Tuesday – Thursday. TR:1316. The Credit Recovery Program is not a special education program. TR:1316.

8. The District provides differentiated instruction for all students to meet the student's individual needs, including those in the regular education programs as well as the nontraditional alternative programs. TR:1318-19, 1323. According to Dr. Gastin, differentiated instruction is considered to be good teaching and is expected of all teachers within the District; it is not special education and does not require an Individualized Education Program (IEP) for receipt. TR:1319, 1324. As explained by Dr. Gastin, differentiated instruction allows a teacher to work with a student based on the student's level of knowledge, how the student best learns and other environmental factors. TR:1323-24.

9. The District uses a behavioral program for all ages in all buildings called "Behavior Intervention Support Team" (BIST). TR:1329-30. According to Dr. Gastin, BIST is "based on grace and accountability" allowing students to "understand their feelings but also holding them accountable for their actions." TR:1330. Further, BIST gives students "the skills necessary to take responsibility for their behavior and then to be able to process through what they have done and to understand how it's not okay. . . . then to be able to process back, apologize, if necessary, think about what they have done and get back to the classroom so they can learn." TR:1330. BIST is considered to be a positive approach to behaviors and the District has employed this approach for many years. TR:1331. Within the context of the BIST program, the District may develop "Success Plans" for positive behavior support. TR:1331-32.

10. Under the BIST program, if a teacher believes that a student's behavior is disruptive, the teacher can send the student to a "safe seat," which is a seat within the classroom set apart from other students. TR:1332-33. The student, while in the safe seat, still has access to education and instruction. TR:1336. If the student's behavior is not acceptable in the safe seat, the student can be sent to a "buddy room" which is generally in another teacher's room so that they might do what they were supposed to do in their regular classroom. TR:1333. The student is given the work that he is supposed to be working on and a teacher is available as well as an "interventionist", a position filled by regular education "paras" [para-professionals], who have received training on BIST. TR:1337-38.

11. If the issue persists in the buddy room, the student can be sent to the "recovery room." TR:1333. During a recovery room intervention, a staff member works with the student to process so that the student can be accountable and take responsibility. TR:1333. There is an nterventionist available to work with the student on schoolwork in the recovery room. TR: 1337.

12. BIST employs a continuum that the student works through and back. Once in the recovery room, the student goes back to the buddy room and then the safe seat and then the classroom. TR:1333-34. However depending on the behavior, a student may go directly to the recovery room from the classroom. TR:1334. While one of the goals of BIST is to prevent suspensions, there are circumstances where depending on student history, suspensions still occur. TR:1334. Even with out-of-school suspension situations, students may still receive educational services at Lewis & Clark, McCune or Credit Recovery. TR:1335.

13. In 1999, Student's parents enrolled him in the District's regular education kindergarten program. R-1 at 1-2; TR:695, 916. On the kindergarten enrollment form, Mother did not mark that Student was receiving special education services. R-1 at 2; TR:917. On the

kindergarten health history form, Mother indicated that she had no concerns with Student's behavior. R-1 at 7; TR:921-22.

14. Student attended kindergarten at Cler-mont Elementary School during the 1999-2000 school year and his report card for the year shows that he was mastering concepts at an age and grade appropriate level and was promoted to first grade. R-1 at 9-10; TR:707, 922-24. The report card indicated that some work habits and behaviors needed improvement. R-1 at 10; TR:706-07, 923.

15. From the fall of 2000 through the end of the 2003-04 school year, Student attended 1st through 4th grades at the Cler-mont Elementary School. R-1 at 11-25, Ex. R-2 at 26-38; TR:667. Mother described first grade as "OK", acknowledged that Student was academically achieving at expected levels, and confirmed that she did not request extra assistance for Student. TR:925-26. Student had no medical diagnoses at that time and was not on any medications. TR:926-29. With respect to 2nd and 3rd grades, Mother acknowledged that Student was able to advance without an IEP or medication. TR:937-39, 942.

16. The Parents had Student privately evaluated by psychologist Dr. Robert Haynes for a possible learning disability (LD) and he wrote a report dated April 26, 2002. Ex. R-49 at 409-11; TR: 708, 711, 757. As reflected on a school form dated October 24, 2001, R-1 at 15, the Parents informed Student's teacher that Student would be "tested for LD privately." According to Mother, she had Student privately tested because of concerns that she had about Student's school performance. Ex. R-1 at 15; TR:700-02, 892-96.

17. Mother further testified that someone from the District suggested that she have Student tested in 2002, and that might have been a counselor or someone who did special education or his second grade teacher. TR:701-02, 932. She stated that she didn't mean he needed to be tested for special education but for ADHD. TR:934. Mother testified that the District was planning to test Student but that she wanted to have an independent person conduct the testing. TR:701-03, 781. At another point in her testimony, she could not recall if the District had suggested that it conduct the testing but the District may have. TR:703.

18. Mother was aware of something called a "learning disability" and asked Dr. Haynes to look at whether Student was learning disabled. TR:896-97; R-48 at 409. Mother did not ask the District's permission to take Student to Dr. Haynes nor did she request that the District pay for the Haynes' evaluation. TR:896.

19. During her testimony and when asked if Dr. Haynes explained to her that Student did not have a learning disability, Mother stated that she did not meet with Dr. Haynes but she thought he sent the report directly over to Dr. Beck. TR:901, 894-95. Dr. Beck placed Student on ADHD medication. TR:894-95. Mother did not ask Dr. Haynes to send a copy of his report to the District but she got a copy of it. TR:902. Mother stated that she couldn't specifically recall who she gave it to at the District but thought it was the counselor at Cler-Mont Elementary. TR:704, 757-58, 892, 976. The report from Dr. Haynes, R-48 at 409-11, was contained in packet of records that Mother delivered to the District in October 2008 after

requesting an IDEA referral; according to Mother, these copies were obtained directly from Dr. Beck's office. TR:901-02, 1043-44.

20. Mother testified that Dr. Haynes' report showed that Student had ADHD. TR:696, 894. Dr. Haynes' report does not reflect a definitive diagnosis of ADHD. R-48 at 409-11.

21. Student was promoted with his class from kindergarten through 4th grade and report cards and progress reports indicate completion of grade level curriculum, although some behavioral concerns were noted. R-1 at 11-14, 17-25; TR:726-29, 738-39, 926, 928-30, 934, 936-37, 939, 941-45, 954, 1344-49.

22. During the 2003-04 school year, when Student was in 4th grade, progressive testing on the Gates MacGinitie Reading Diagnostic Test showed that he advanced from a 2.9 grade level in vocabulary in September 2003 to a 5.7 grade level in May 2004. Ex. R-2 at 30; TR:1345, 943-47. His comprehension, which began at an 18% level in September, advanced to 76% by the end of that school year. R-2 at 30, 32-33; TR:1345-49. According to Dr. Gastin, this degree of academic growth would not be generally expected to be seen in a student on an IEP. TR:1346.

23. From 5th through 6th grade, Student attended the District's Fire Prairie Middle School. TR:667, 957-58. During those years, Student's grades varied and were lower than they were in elementary school and he had several discipline referrals. R-2 at 34, 38-40; TR:744-45, 960. He also had two discipline referrals for such misconduct as touching a female peer on the buttocks, and refusing to complete assignments and follow directions. R-2 at 39-A, 39-B; TR:959-60.

24. During the 2006-07 school year, Student attended 7th grade in the District's Osage Trail Middle School. R-2 at 42, 43; TR:668, 963, 1353. On his enrollment paperwork, his parents indicated that he was on the medication Adderall and had just switched from Concerta. R-2 at 42; TR:962-63. That form also indicated that Student had never been placed in a psychiatric hospital but was seeing an outside counselor. R-2 at 42; TR:962-63. The Parents did not indicate the reason for the medication or the outside counselor. Ex. R-2 at 42. Parents made no mention on the form of any diagnosis of ADHD. TR:1350-51.

25. During the 2006-07 school year, the District provided all middle school students and parents with a student handbook planner. R-2 at 43-47; TR:964. That handbook makes reference to special education students and the discipline of such students. R-2 at 47; TR:965. On or about August 24, 2006, Student and Mother signed that they read and understood the procedures and policies of the Middle School. R-2 at 48; TR:964.

26. At hearing, Mother testified that Student and the Parents received such planners until Student's eighth grade year and that she reviewed them at the time received. TR:968. During the relevant time, she also received and read the District's newspapers and website, each of which included the District's IDEA public notice. TR:967-69. Mother did not contact anyone at the District regarding her concerns about Student because he was passing classes and the

District advised her that Student's issues were behavioral. TR:970-71. Mother testified that she asked to talk to a counselor but was advised that the counselors didn't handle behavioral issues. TR:970-71.

27. On or about August 28, 2006 and at the beginning of Student's seventh grade year, the District again administered the Gates-MacGinitie to Student. At that time, he tested at an 8.8 grade level in vocabulary, a 10.2 grade level in reading comprehension and a 9.4 grade level in overall reading. Ex. R-3 at 56; TR:978, 1359-60. Student tested above many of his peers. R-3 at 57; TR:981-84, 1360-61. According to Dr. Gastin, students with disabilities generally do not perform that well in relation to their peers. TR:1361.

28. During the first semester of his 7th grade year, Student began displaying more misconduct at school. R-2 at 49-51; R-3 at 50; TR:973-74. During orientation on August 23, 2006, and during the first four days of school, he ran in the hallway, got into a confrontation at a locker, displayed a "too cool" attitude, and failed to get his work completed. R-2 at 51; TR:1352-54. There were also reported incidents regarding Student's drawing of gang-related material. R-3 at 58; TR:986-87, 1361-62. As a result, his 7th grade team teachers prepared a Success Plan for him. R-3 at 50-51, 53-55; R-5 at 88; TR:973-74, 1351-52, 1355-59, 1364-65, 1367. J. Keeling, one of Student's 7th grade teachers, indicated on a school note of a parent contact on August 23, 2006, that Mother reported that Student had ADHD and was on medication. R-2 at 51; TR:975. According to Dr. Gastin, school records did not reflect a parent communication of ADHD prior to August 23, 2006. TR: 1352-53.

29. In September 2006, Student was disciplined for tripping another student and causing that student to fall onto the teacher's desk. R-4 at 66; TR:987, 1722-23; R-86 at 943. According to Sandra Silver, Student's teacher at the time, that behavior was not connected to any educational disability. TR:1722-23. During that same month, Student hit two students in the hall. R-4 at 85; TR:988-89. At one point during the 2006-07 school year, Student was disciplined for making inappropriate sexual comments to a female student about "giving head." R-5 at 100; TR:989, 1366. In October 2006, Student pierced his own ear lobe with a pin. R-5 at 106. In November 2006, Student received a discipline referral for cursing. R-6 at 111. In November, he was disciplined for flipping off another student on the bus ride home. R- 6 at 122; TR:990.

30. In mid-September 2006, Student was referred to the general education Student Support Team for being apathetic and "playing the game." R-4 at 70; TR:1363. That referral had no relation to a referral for special education. TR:1363. The referral form noted that Student stated that he had ADHD but didn't take his medications regularly and was using misconduct to get sent to the BIST recovery room so he could get out of class. R-4 at 70. Parents supported the referral to the Support Team. R-4 at 70. As part of the referral, Student's teachers were asked to complete checklists that showed concern with unexplained bruises, incomplete class work, tardiness, decline in the quality of work, inappropriate clothing, vandalism and destructive behavior, clothing related to drugs and gangs, and defiance of authority. R-4 at 81.

31. Sandra Silver testified on the District's behalf at hearing. TR:1693; R-86 at 943-44. During the 2006-07 school year, Ms. Silver was Student's 7th grade social studies teacher at Osage Trail Middle School. R-86 at 943. During that school year, Student exhibited inappropriate behaviors in Ms. Silver's class that she described as "opportunistic." R-86 at 943. As an example, Ms. Silver testified that, on one occasion when she permitted him to participate in a group activity, Student came up behind a female student and laid his body across the back of hers in a sexually suggestive manner and grinned at other students in the classroom while doing it. R-86 at 943; TR:1706-07; 990-91.

32. Although Ms. Silver frequently referred Student to the recovery room and he was gone frequently from her class because of behavior, she never referred him for an IDEA evaluation because she did not suspect that he had an educational disability. R-86 at 944; TR:1707-14. In Ms. Silver's opinion, Student's behavior appeared to be of his choice. TR:1709-10; R-86 at 944. Also, in her opinion, Student had the ability to control his behaviors but deliberately chose, at times, to disrupt the class when the teacher was not looking. R-6 at 944.

33. During the 2006-07 school year, Ms. Silver met with Student's parents on one occasion to discuss how to help Student. TR:1717. During that meeting, the Parents did not discuss Student's diagnosis of ADHD. TR:1717-18. Ms. Silver never perceived Student's behaviors to be the result of ADHD and the Parents never volunteered that Student was not responsible for his behaviors because of his medical diagnosis of ADHD or any other medical condition. TR:1721.

34. On or around the end of January 2007, the Middle School Principal referred Student to the District's Lake City Management School. R-9 at 161; TR:993, 1368-69. The basis for the referral was Student's defiance of authority, intimidation and lack of academic progress. R-9 at 161; TR:993-94. At that time, referrals for the Lake City program generally came from building principals. TR:1368. The program was based on "Response to Intervention" (RTI) which is a system of levels of interventions for dealing with disruptive defiant behaviors that disrupt the learning of other people. TR:1363-64, 1369.

35. The Lake City program was an alternative program the District operated in a building leased from the Lake City Ammunition Plant. TR:668, 326. At the time, the District operated its K-9 behavior management and long-term suspension programs in that facility. TR:1326. The Lake City Management School then became the Lewis & Clark behavior management program for kindergarten through 9th grade. TR:1368.

36. The Lake City (and currently the Lewis & Clark) program is a general education intervention program designed for students with consistent disruptive or defiant behaviors that disrupt the learning environment. TR:1369. Very few IEP students are placed there. TR:1374-76. After the student's referral, the director of the program reviews the packet of information submitted, speaks to the referring administrator and makes a decision regarding whether the program is the right one for that student. TR:1370-71. If the administrator so decides, the student and parents have an intake meeting with the director. TR:1372. At that meeting, the director describes the program and the parents sign an acknowledgement form stating that they

give permission for the student to attend. TR:1372. The program is described as an "at-risk" program. TR:1372. At the time that Student was referred for the Lake City program, Debbie Laemmli was the director of the program. TR:811, 1372-73. Ms. Laemmli retired at the end of the 2008-09 school year. TR:1373.

37. On or about February 12, 2007, and as part of the enrollment process for Lake City, Student and his parents were asked to read and sign the "Parent Acknowledgement Form." R-9 at 164; TR:1371-72. The Parents' signatures evidenced their agreement to assign Student to Lake City so that he could work on and improve his behavior. R-9 at 164; TR:243-44, 995-96. The Parents investigated Lake City before agreeing to place Student there. TR:792.

38. On that same date, Student began attending the Lake City School. TR:668, 696. Student attended Lake City from February 12, 2007 through the fall of 2007, when Lake City relocated and became Lewis & Clark. TR:669-71, 1385, 1402. On March 21, 2007 and while at Lake City, Student was disciplined for making inappropriate sexual comments. R-10 at 167; TR:244-45, 997. According to Student's testimony at hearing, he made that comment because he was attempting to fit in. TR:245. He testified that the comment was not caused by his ADHD. TR:245.

39. On March 27, 2007, Student received a misconduct notice for writing a drug reference on a picnic table and on his classwork. R-10 at 167; TR:246, 997. At hearing, Student admitted to the misconduct and, when asked whether it was due to his ADHD diagnosis, stated "That's just human behavior." TR:247. On April 10, 2007, Student received a bus misconduct notice for telling a peer that "he was going to his house and kick him in the nuts." R-10 at 168; TR:998. Student testified that "I was just joking around" and that this misconduct was not caused by his ADHD. TR:247.

40. On or about April 26, 2007, Student was involved in an altercation with the recovery room teacher at Lake City. R-14 at 180-87; R-15 at 196; TR:1003, 1376-78, 249-50. During that altercation, he verbally threatened to push the teacher out of a chair and pushed on the interventionist physically with his body. R-14 at 181; R-15 at 196.

41. Student testified about the altercation and disputed the District's description of the incident. TR:249-50. According to Student, charges were filed against him to which he pled guilty, received a suspended sentence and had to complete community service. TR:250, 796, 1004. He also began seeing counselor Steven Holeman. TR:252.

42. On or about April 30, 2007, Ms. Laemmli, the Lake City director, suspended Student for ten school days as a result of this incident and recommended a long-term suspension to Assistant Superintendent Jeff White. R-15 at 188; TR:1378-80.

43. On or about May 3, 2007, the District held a hearing with respect to the proposed long-term suspension. R-15 at 191-97; TR:1380-81. Rather than imposing the recommended 180-day suspension, Assistant Superintendent White suspended Student for an additional 90 school days. R-15 at 197-99; TR:1379, 1382, 822-23. After ten days of suspension were completed, Mr. White allowed Student to return to Lake City, on probation, to serve the

remainder of the suspension. R-15 at 197-99; TR:1382-84, 796, 1004-06.[6] As one of the criteria for Student to remain at Lake City, Mr. White required Mr. and Mother to sign a release of information which would allow school officials to communicate with and "partner" with Student's outside counselor. R-15 at 197-99; TR:1007, 1381-82. Mr. White informed the Parents that failure to meet the criteria he imposed would "warrant immediate referral for revoking his probation." R-15 at 198.

44. During the summer of 2007, the District held a progress hearing to see how Student was doing and to determine where he should attend school during the 2007-08 school year. R-16 at 200-04; TR:1385-86. At that time, the Parents had yet to complete and provide the release of information required by Mr. White. TR:1388. As of June 8, 2007, the Parents still had not provided the District with the required release. TR:1008-09, 1387-88; R-16 at 203. While Mother signed the release, she marked off the portions that would have allowed the District to speak to Student's doctors because according to Mother, there was nothing the District needed to know, that seeing a counselor is a "private thing." TR:999-1003; R-13 at 178.

45. On or about June 11, 2007, Mr. White corresponded with the Parents and informed them that Student would have to remain at Lake City for at least the beginning of the 2007-08 school year. R-16 at 204; TR:1387. He further informed them that, if Student consistently exhibited good behavior and academics for six weeks, he could return to the Osage Trail Middle School. R-16 at 204; TR:1387.

46. Dr. Anissa Gastin became the District's Director of Student Affairs in July 2007. TR:1309, 1376. In that position, Dr. Gastin is responsible for overseeing the District's at-risk and alternative programs. TR:1310, 1683. She also is responsible for student discipline and, as part of her employment, Dr. Gastin is the hearing officer for long-term suspensions. TR:1310, 1377. Dr. Gastin has a master's degree in counseling and a doctorate in educational leadership. TR:1310. She is certified to teach in a number of areas and has administrative experience in special education. TR:1312.

47. As Director of Student Affairs, Dr. Gastin became aware of Mr. White's decision about the need for a release of information that allowed the District to acquire information from Student's doctors. TR:1377, 1381. When Dr. Gastin became employed in July, the District still had not received the required release. TR:1385.

48. On or about August 20, 2007, Mother completed the District's Emergency Procedure card as part of the enrollment paperwork for the 2007-08 school year. R-18 at 220; TR:1009, 1388. In that paperwork, she indicated that Student had no medical problems and the form does not indicate that Student was diagnosed with ADHD or ODD or took any medication. R-18 at 220; TR:1009-10, 1388.

49. In August 2007, Student again attended Lake City. TR:1385, 1387. At that time, he remained on probation for the previously imposed 90 day suspension. R-18 at 221; TR:797-

6. Although most suspended students are not permitted to participate in extracurricular activities, the District allowed Student to continue to participate in football practices during his 90 day suspension. TR:1383.

98, 1387, 1389-90.[7] Student began the year on a "shut down" plan that required him to be segregated in a focus room with the ability to earn his way into a regular classroom. R-18 at 221; TR:1389. Student did progress up certain levels toward return to the regular classroom. TR:636-40, 1398, 1649.

50. In September 2007, Student had to complete a "think sheet" for drawing a gang sign. Ex. R-19 at 223; TR:1011, 1391-92. The District requires students, as part of the BIST positive approach, to complete a think sheet so that the student thinks about the conduct that led to the discipline. TR:1391-92. Also, in September, Student had to complete think sheets for "flipping the bird" to a girl on the bus and for having an impermissible cell phone. Ex. R-19 at 225, 227; TR:1011, 1392-93, 1396.

51. On September 14, 2007, Student and Mother met with Ms. Laemmli and Dr. Gastin to discuss his progress. R-19 at 228; TR:1397, 1515. The meeting was held, in part, to discuss Mother's concern that Student remained at Lake City on a focus plan. TR:1397, 1515. Dr. Gastin reminded Mother that Student was still on probation for the 90-day suspension and he needed to exhibit six weeks of good behavior before returning to Osage Trail Middle School. TR:1397-98, 1515. At the meeting, Mother finally provided the release that Mr. White previously had required. TR:1012, 1398-99; Ex. R-20 at 229.

52. The District received several pages of medical records from ReDiscover, notated as a child psychiatric evaluation, on or about September 19, 2007. R-20 at 230-238; TR:1399. The records were of a report of an evaluation conducted by Dr. John Wubbenhorst, D.O. and was signed March 2, 2007. R-20 at 238. Those records noted that Student was argumentative, defiant and uncooperative. R-20 at 231, 237-38; TR:1013, 1401. The medical diagnoses contained therein were ADHD and ODD. R-20 at 234, 236-37; TR:1400. Dr. Gastin testified that these records were the first medical documentation provided to the District stating that Student had a medical diagnosis of ADHD. TR:1399-1400. None of documents was dated earlier than March 2007. TR:1401; Ex. R-20. Dr. Gastin also testified that the defiant, argumentative and uncooperative attitudes described were consistent with what the District observed and were symptomatic of a social maladjustment. TR:1401.

53. In September and October 2007, Student received misconduct notices for a confrontation in which he stated "if you want to fight, fight me," for giving his cell phone to another student to hold, for lying to adults, for threatening language and profanity, for bringing a condom to school, and for stealing. Ex. R-21 at 239, 242, 243, 244, 249; TR:1402-07. Dr. Gastin testified that, in her opinion, those behaviors were not the result of Student's ADHD. TR:1402.

54. Student's grades during the first quarter of the 2007-08 school year ranged from A's to F's, but he, for the most part, received passing grades and progressed academically. TR:1406-07, 828; R-22 at 255.

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7. The District also allowed Student to participate in the after school weight lifting program. Ex. R-18 at 221; TR:1390-91. Student attended the weight lifting program for a while, but Dr. Gastin revoked that privilege when Student failed to attend. TR:1391.

55. During the fall of 2007, the Lake City program relocated to the Lewis & Clark facility and became known as Lewis & Clark. TR:669-71, 1385, 1402.

56. In November and December 2007, Student was written up and/or disciplined for threatening behavior, threatening language, saying to a student on the bus "nigger, mother fucker, shut up," and "flipping off" a teacher. Ex. R-23 at 256, 258; R-25 at 265-66, 271; TR:1408-09. Dr. Gastin testified that this behavior did not create any reason to suspect an IDEA disability on the part of the District.

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57. Stephanie Homfeld Shepherd testified on the District's behalf with respect to Student's time at Lewis & Clark. TR:1725; R-86 at 951-53. During the 2004-05 and 2005-06 school years, Ms. Shepherd was the behavior interventionist at the District's Fire Prairie Middle School. R-86 at 951; TR:1730-31, 1779-81. During the 2007-08 school year, she was the 7th and 8th grade home room teacher at Lewis & Clark. R-86 at 951; TR:1731.

58. Ms. Shepherd first met Student when he was in the 5th grade at Fire Prairie. R-86 at 951; TR:1733. She worked with him at that school in both 5th and 6th grades as the behavior interventionist employed to assist with the implementation of the BIST program. R-86 at 951; TR:1733-34, 1745-46. During those years, Student exhibited some struggles with his behavior that primarily included a lack of respect for teachers and authority figures and the school's established rules. R-86 at 951; TR:1733-34. During Student's time at Fire Prairie, the BIST approach was successfully used with Student. R-86 at 951-52. Ms. Shepherd discovered that Student wanted to and formed relationships with people. R-86 at 952. .Ms. Shepherd did not observe Student having off-task behaviors at Fire Prairie. TR:1739.

59. During the time she worked with him at Fire Prairie, Ms. Shepherd never considered referring Student for a special education evaluation because she viewed him as a regular education student who displayed opposition to authority and certain rules that he did not want to follow. R-86 at 952; TR:1739. During that same time period, the Parents never informed Ms. Shepherd that Student had a medical diagnosis of ADHD or any other medical condition and Ms. Shepherd was unaware, at that time, that Student was on any medication. R-96 at 952; TR:1748. Ms. Shepherd first learned about Student's medical diagnoses in the fall of 2007 when Student attended Lewis & Clark. R-86 at 952; TR:1756-57.

60. Ms. Shepherd was Student's homeroom teacher during the 2007-08 school year (when Student was in 8th grade) at Lake City and Lewis & Clark. R-86 at 952; TR:1731, 1749, 1765. During that year, Student had no difficulty focusing. TR:1755. When not caught up in what she characterized as "neighborhood issues", Student could focus and complete work. TR:1755. During that year, Ms. Shepherd observed that Student had changed and was more overt in his behavior, more confrontational with peers, more "predatory" and more calculated. R-86 at 952; TR:1792. Ms. Shepherd did not consider referring Student for a special education evaluation because she viewed his behavior as calculated and based on choice. R-86 at 952.

61. Academically, Ms. Shepherd observed that Student was bright and performed in an above average manner. R-86 at 952. At times, he would work for several hours and complete multiple assignments without instruction. R-86 at 952.

62. Student's 90-day suspension ended on or around January 16, 2008. TR:1410. At that time, the District held another progress meeting with Student and Dr. Gastin. TR:1409-10; R-27 at 275. Student indicated that he wanted to work his way back to the middle school and was making progress toward that goal. TR:1410-12; R-27 at 276. Although Student's suspension was over, the District decided that he should remain at Lewis & Clark and continue on the level system. TR:1413; R-27 at 276.

63. On or about January 31, 2008, Student was disciplined for being confrontational and insubordinate to a teacher and Ms. Laemmli. TR:1413-14; R-27 at 278. That behavior was not representative of an IDEA disability according to Dr. Gastin, but did impact Student's ability to work his way back to the middle school. TR:1414. According to Dr. Gastin, Student chose to act in a confrontational way and continued to choose behaviors that were inappropriate and insubordinate. TR:1416

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64. On or about March 5, 2008 when Student arrived at school, he was observed to have a strong marijuana odor about him. R-29 at 289-90; TR:640, 665, 1016, 1418-19. When questioned by Ms. Laemmli, he admitted that he had smoked marijuana that morning. R-29 at 289; TR:1017. Ms. Laemmli imposed a 10-day suspension and referred the matter to Dr. Gastin for consideration of further suspension. R-29 at 289, 290-92; R-30 at 292 -93; TR:1419, 153-54, 1017.

65. On March 14, 2008, Dr. Gastin held a suspension hearing with respect to Student's use of marijuana and Student again admitted to smoking marijuana. R- 30 at 294, 306; TR:1499-20, 1552, 1617. Dr. Gastin, Ms. Laemlli, Mother and Student were present. R-30 at 305; TR:1552. At the hearing, the District reviewed Student's prior discipline records and academic information. R-30 at 294. At the time, Student's Gates testing showed that he was performing at a post-high school level in vocabulary and at a 12^{th} grade level in overall reading. R-30 at 294. The Parents did not provide Dr. Gastin with any medical information to suggest that Student was not responsible for his behavior on that occasion. TR:1618. In Dr. Gastin's opinion, Student's diagnoses of ADHD and ODD were not relevant or related to the incident. TR:1618-19.

66. On March 17, 2008, Dr. Gastin corresponded with the Parents and informed them that she was suspending Student for 180 school days. R-30 at 309; TR:671-72, 1420, 1422. She further informed the Parents that, during that suspension, she had approved Student to attend the day program at the District's McCune School. R-30 at 309; TR:1420-21. Dr. Gastin testified that she allowed Student to attend McCune because it was Student's second offense and, because of his age, she thought he still needed to be in school. TR:1420. The Parents did not have to agree to the McCune assignment; but had they rejected that assignment, Student would have been suspended and not allowed to attend any District programs. TR:1421. Mother testified that she thought the discipline imposed was "a little extreme." TR:1017. As part of her decision, Dr. Gastin also informed the Parents of their right to appeal her decision to the District's Board of Education. R-30 at 309; TR:1422; R-30 at 310; TR:1424-25.

67. On March 28, 2008, the Parents appealed Dr. Gastin's 180-day suspension to the District's Board of Education. R-32 at 312-13; 1018, TR:1422. In the interim, Student was permitted to remain at Lewis & Clark. TR:1422. The Board on April 15, 2008, affirmed the 180-day suspension as well as Dr. Gastin's offer to allow Student to continue his education at McCune. R-32 at 312-13; R-37 at 332-35; TR:1426, 1429. The Board's decision stated: "Student has been approved to attend the day program at the McCune School so long as he maintains regular attendance, appropriate behavior, and makes academic progress." R-37 at 335; TR:1429, 1018.

68. Prior to this time, neither Parents nor Student indicated that Student's diagnoses of ADD or ODD were the reason for Student's behaviors. TR:1423. Parents had not requested an evaluation for purposes of the special education eligibility and had not requested that the District offer something more to Student. TR:1423, 907.

69. Parents agreed that Student should attend McCune. TR:671-73, 1422. Prior to making that decision, the Parents were permitted to visit the school, tour the facility, and speak to Andre Montgomery, the School's Educational Service Coordinator/Principal, about the program. TR:672, 1421-22, 1829, 1859, 1891; R-86 at 945-59. Before attending, Student signed a written agreement in which he agreed to engage in good behavior, have regular attendance and make academic progress. Ex. R-35 at 324; TR:1427-28. Student attended McCune through the remainder of his 8th grade year and for the beginning of his 9th grade year until about October 2008. TR:673-74. Parents never mentioned to Mr. Montgomery that they thought Student had a disability for which he needed special education. TR:1885-86, 1895.

70. McCune School is a residential facility operated by the Jackson County, Missouri Family Court. TR:1326; R-86 at 945. Approximately 35-40 adjudicated youths are assigned there by the Court and live and attend school there. TR:1326-27, 1623; R-86 at 945. The District operates the educational program at McCune using the same curriculum used elsewhere in the District and employs the teachers and administrators who attend the same professional development and other activities as other District staff. TR:1326-28, 1867; R-86 at 945. The District has an agreement with the Court that allows it to assign up to ten male long-term suspended students there. TR:1327-28; R-86 at 946. Those students are bused to and from McCune on a daily basis. TR:543, 1327, 1426; R-35 at 316-17.

71. Dr. Gastin had an opportunity to observe Student at McCune. TR:1435. Student did not appear to be intimidated, nervous or otherwise afraid to be around the students who were there, including those who may have been members of a gang. TR:1435. Andre Montgomery also testified that Student was not nervous or intimidated around those McCune students who were gang-affiliated. TR:1893. Rather, he actively engaged with those students and used some of the gang signs and symbols. TR:1894.

72. McCune has both regular and special education programs available to the residential and day students who attend there. R-86 at 946. In addition, McCune offers programs including a GED program and a Title I program. R-86 at 946. The District assigns both regular education and special education teachers to McCune. R-86 at 946. For those

students who have IEPs that require it, McCune has a resource classroom for pull-out services. R-86 at 946-47.

73. The McCune School is not considered a special education program, although McCune does offer special education services to IEP students. TR:1328-29, 1874, 912, 1885. All students who attend there can receive differentiated instruction, tutoring, counseling and social work services. TR:1328, 1885-86. According to Student's testimony, his classes had approximately 15-18 students, including resident and non-resident students. TR:542-43.

74. McCune uses the same curriculum, grade level expectations and state standards as the District and the academic rigor is no less than at the District. R-86 at 946. In addition, McCune attempts to follow the District's curriculum and at the same pace as in the District's traditional programs. R-86 at 946. McCune teachers also are expected to differentiate instruction to meet all students' needs. R-86 at 946.

75. McCune staff follows the BIST approach that is used throughout the District. R-86 at 947. In addition, McCune also supports the Court's behavioral program. R-86 at 947. None of those programs are considered special education programs. R-86 at 947.

76. All students who attend McCune, whether residential or day, are required to wear a uniform which consists of "scrubs" and is provided by the Court. R-86 at 947, 806; TR:1877. When the day students arrive each morning and leave each afternoon, McCune personnel conduct an external pat down to ensure campus safety and to further ensure that no dangerous materials come into the school. R-86 at 947.

77. By order of the Court, McCune has Court-employed "Youth Workers" in some classrooms to help supervise and assist with monitoring behavior. R-86 at 947; TR:158, 1495, 1881-82. They wear uniforms consisting of khaki pants and a polo shirt and do not carry weapons. R-86 at 947; TR:158, 160.

78. Student progressed academically at McCune and was promoted to 9th grade. R-38 at 338; TR:1426-27. At the end of the final quarter of the 2007-08 school year, Student had all A's and one B. R-38 at 338; TR:543, 647-48, 1426-27; 1431.

79. During the summer of 2008, Student attended summer school until that privilege was revoked due to a physical altercation in which he participated at the District's Cler-Mont Elementary School. R-40 at 348-49; TR:544-47, 1431-32. At the time, Dr. Gastin considered suspending him from school, but allowed him to return to McCune for the fall semester. TR:1432, 349, 351.

80. During the 2008-09 school year, Student attended McCune as a 9th grade student. TR:546. On or about August 18, 2008, Andre Montgomery had a telephone conversation with Father regarding Student's possible use of drugs and tobacco. R-40 at 353. During that conversation, Father expressed concerns about Student's conduct at home and wanted to know how Student could be court committed to McCune. R-40 at 353.

81. While at McCune, Student was disciplined for behavioral incidents that included writing a gang-related reference and profanity on school worksheets. R-40 at 356-A-C; TR:1432-34. On or about October 2, 2009, Student was involved in an incident involving an exchange of pornography for prescription pills. R-42 at 366-376; TR:1435-36. Student admitted to Mr. Montgomery that he had brought the pornography to McCune and traded it for pills. TR:1435-36, 1019. Mr. Montgomery suspended Student for ten school days and recommended further suspension. R-42 at 372; TR:1436.

82. On October 15, 2008 and at Mother's request, the District provided her with copies of relevant Board of Education policies regarding students with disabilities as well as the District's IDEA public notice. R-42 at 379-G-J; TR:1438-39. At hearing, the District presented an exhibit that showed that the IDEA public notice consistently has been published in District newsletters and posted on the website and in all buildings, and distributed to various public media. R-84; TR:1439.

83. On October 17, 2008, Dr. Gastin convened the hearing with respect to the proposed long-term suspension. R-42 at 376; TR:1436. On that date, the Parents came to Dr. Gastin's office for the hearing. TR:1437. Mother said she wanted Student evaluated for IDEA. TR:1437. Dr. Gastin attempted to explain that she was merely the hearing officer with respect to Student's suspension and was not the individual who could address the evaluation request. TR:1437-38, 1547. Mother became angry, started yelling and indicated that they could not do a hearing under those circumstances. TR:1438, 1547. Dr. Gastin rescheduled the hearing. R-42 at 377; TR:1438. The Parents presented Dr. Gastin with no medical information at that meeting. TR:1438.

84. At the October 17th meeting, Mother presented a letter to Dr. Gastin dated October 14, 2008, and addressed "To Whom It May Concern." R-42 at 379-A; TR:1437, 697-98, 821-22. In that letter, she requested that Student be evaluated under the IDEA and also requested copies of Student's school records. Ex. R-42 at 379A-F; TR:1437. Mother stated in her testimony that it was her understanding that had Student been covered by the IDEA or Section 504 of the Rehabilitation Act of 1973[8], that the District would not have been able to suspend Student for more than ten days at a time or place him at McCune. This meeting was the first time, according to Dr. Gastin, that Mother indicated that Student's disciplinary problems might be caused by ADHD or ODD. TR:1547. The District treated Mother's verbal and written requests as a referral for IDEA and considered the date of referral to be October 17, 2008. R-43 at 382; TR:1441.

85. On October 21, 2008, the District provided Mother with a copy of the IDEA Procedural Safeguards in response to her parent referral. R-43 at 382; TR:972, 1047. Those safeguards were provided within the requisite five days of Mother's referral. R-43 at 382.

86. On October 23, 2008, Dr. Anissa Gastin held the rescheduled disciplinary hearing regarding Student's possession of pornography. R-45 at 398; TR:1440-42, 1618, 764. Student's

8. Section 504 may be used to provide accommodations and eliminate barriers that exclude individuals with disabilities from participating in certain activities. The definition of a disability under Section 504 is much broader than the IDEA definition.

education records were copied and provided to the Parents on that date. R-45 at 398; TR:1439, 1585, 1620-21. While Student was present, he did not speak on his own behalf. TR:1436, 1443. Mother spoke on Student's behalf and stated that Student was a special education student. TR:1443. In Dr. Gastin's opinion, Student's diagnoses of ADHD and ODD were not relevant to the pornography incident. TR:1618-19.

87. On October 24, 2008, Dr. Gastin corresponded with the Parents about the disciplinary incident. R-45 at 402. Dr. Gastin noted that, at the time of the pornography incident, Student remained under a prior 180-day suspension and she was revoking his probationary status at McCune. R-45 at 399, 402. However, because of the special education evaluation request, she indicated that she would permit Student to remain at McCune during the evaluation period. R-45 at 399, 402-03. Ordinarily if a regular education student is suspended, the student has no entitlement to continue to receive special education services. TR:1443. For the pornography violation, Dr. Gastin informed the Parents that she was imposing an additional 180-day suspension to be served after the prior one concluded. R-45 at 399, 402-03. She also informed the Parents of their right to appeal the suspension to the Board of Education. R-45 at 403.

88. The Board subsequently revoked Student's privilege to attend McCune and affirmed the additional 180-day suspension. TR:1443-44. However, because of the IDEA due process request, the Board and the District allowed Student the opportunity to return to McCune. TR:1021, 1444. After the hearing on October 23, 2008, Student never returned to the McCune School because of Mother's dissatisfaction with McCune. TR:1021, 1444. Prior to the pornography incident, the Parents had never expressed any dissatisfaction with McCune. TR:1444.

89. On October 29, 2008, an IDEA multidisciplinary team conducted a review of existing data under IDEA procedures to determine whether to evaluate Student. Ex. R-47 at 403. Parents participated in that meeting. R-47 at 407. Based on the review, the team concluded that formal evaluation was needed to determine if Student had an IDEA disability. R-51 at 503-C.

90. During the October 27, 2008 resolution meeting on the initial Complaint, Mother stated that she wanted Student to attend "regular school" and he would not return to McCune. R-52 at 505; TR:1074-75. Mother also stated that, if Student had been on an IEP for the incidents for which he had been suspended, he would not have been punished. R-52 at 505.

91. On October 31, 2008, Mother hand-delivered to the District a packet of medical records relating to Student. R-48; TR:899-900, 1042-43. The packet included the report from Dr. Haynes indicating that Student was not learning disabled. R-48 at 409-11. An additional record in the October 31 packet of records stated that Student had a diagnosis of parent-child relation problems. R-48 at 408. Another record from April 2007 in the packet stated that Student's "[B]ehavior is defiant & opposition & argumentative & disrespectful & [patient does not] take responsibility for his actions." R-48 at 419.

92. On or about November 13, 2008, the District provided Student's parents with a notice of action proposing to evaluate Student to determine his eligibility under IDEA. R-51 at

503-D. On or about November 21, 2008, Mother provided written consent for the proposed evaluation. R-51 at 503-F.

93. On November 22, 2008, Student was involved in a serious car accident and was hospitalized for a period of time. R-51 at 503-H; Ex. R-53 at 506; TR:1445. During his recuperation time, the District made attempts to provide Student with homework so that he could receive credit for the first semester, but he never completed the provided work. TR:1445; R-56.

94. In January 2009, the Parents enrolled Student in the Missouri Virtual Instruction Program ("MoVIP"). R-54; TR:1023, 1076-77, 1445-46, 1023-24. If a student completes work through MoVIP, the District provides the student with credit towards graduation. TR:1446.

95. On February 6, 2009, the District received a request for Student's records from the Plaza Academy which indicated to District that Student was apparently enrolling in that school. R-56. On that date and based on Student's presumed enrollment there, the District ceased providing Student with homework. R-56. On February 17, 2009, Roxie Lanier, the District's Special Services Director, corresponded with the Parents and asked if Student had been accepted at the Plaza Academy and when he would begin attending there. R-58.

96. On February 9, 2009, the Parents sent the District a letter stating that they would be placing Student in "a private school, in ten days" but would make him available for the IDEA evaluation. R-57.

97. Student began attending Plaza Academy at the end of the 4th quarter of the 2008-09 school year and completed that school year. TR:309, 315, 321, 674, 1025.[9] Student did not attend summer school there. TR:321. He attended Plaza Academy for some of the 2009-10 school year. TR:309. In total, Student probably attended the Plaza Academy for about 8 weeks. TR:309. Dr. Gary Seabaugh, Plaza Academy's founder and a witness for the Parents, testified that he could not say how many days of attendance Student had during the two school years. TR:360. He also testified that the Parents did not make him aware that, from July to September 2009, they were asking that Student be allowed to return to the District. TR:323. With respect to the 2009-10 school year, the Parents did not apply for Plaza Academy until at least the middle of September 2009. TR:326.

98. Dr. Gary Seabaugh, an expert witness for Petitioners, founded the Plaza Academy approximately 37 years prior to his testimony. TR:297. Dr. Seabaugh is a child psychologist and research scientist. TR:275. He has a Ph.D. in developmental and child psychology. TR:297. Dr. Seabaugh has no credentials that would permit him to teach in a Missouri public school and he has never taught in any public school. TR:328-29. He has no certification to teach special education and has never taught in that capacity in Missouri. TR:329.

9. Per Mother, Student began attending in February but did not attend every day. TR:1082. In addition, Mother stated that Student attended in September and November 2009 but not October 2009 because she thought he was having surgery in October. TR:1009.

99. At the time of Dr. Seabaugh's testimony, Plaza Academy had 21 enrolled students, but had capacity for 45 students. TR:330. The students ranged in age from 14-19. Of the 21 students, 13 had IEPs. TR:331.

100. According to Dr. Seabaugh's testimony, he has training on the IDEA and a "good working knowledge" of that law and its eligibility requirements. TR:330-31. Per Dr. Seabaugh, to qualify under the IDEA, a student has "to meet certain clinical criterion." TR:332. He further testified that he understood that every deficit did not constitute a disability but did not know the Missouri criteria for eligibility. TR:332. When asked about the criteria for an emotional disturbance under IDEA, Dr. Seabaugh stated that a student had to meet the criteria for the DSM.[10] TR:332. He acknowledged that he did not know how the term social maladjustment was used in relation to IDEA eligibility. TR:335.

101. Per Dr. Seabaugh, Student appears to be ODD from a psychiatric standpoint. TR:335, 337. The DSM diagnostic criteria for that diagnosis includes noncompliance, a lack of impulse control, swearing, and profanity. TR:337. Dr. Seabaugh was aware that Student's history included the precocious use of alcohol, tobacco and illicit drugs. TR:337-38. Dr. Seabaugh was not aware that a prior therapist who worked with Student and his family had diagnosed parent-child relationship problems. TR:339.

102. Dr. Seabaugh knew that when Student first enrolled in Plaza Academy, he did not have an IEP. TR:330. Moreover, during the time Student attended there, Plaza Academy did not evaluate Student for IDEA eligibility and never implemented an IEP for him. TR:330. Dr. Seabaugh was unable to say whether Student's skills were the result of a deficit or a disability. TR:370-71.

103. According to Dr. Seabaugh, Plaza Academy's entire curriculum is special education (TR:355) event though Student testified that he thought it was a "college prep" school. TR:652. When asked to define special education, Dr. Seabaugh stated that it means services outside the normal curriculum that is conducted in a public school, but he was aware that public schools have programs and interventions that are not special education. TR:356-57. At a subsequent point in his testimony, however, Dr. Seabaugh testified that Plaza Academy has a "full range curriculum" and provides both advanced placement and remedial coursework. TR:276.

104. Dr. Seabaugh could not recall whether Plaza Academy academically tested Student upon his initial enrollment to determine his baseline skills. TR:346-47. He was aware that the District's testing showed that Student's academics were commensurate with his IQ and that, at the time of testing, Student had not been in school for several months. TR:347-48. Dr. Seabaugh also stated that Student's grades at Plaza Academy were not commensurate with his IQ (and were primarily D's and F's). TR:348. He acknowledged that at the School District's alternative programs, Student's grades were within the average range and appeared considerably better than those he received at Plaza Academy. TR:348, 350-51. The difference according to Dr. Seabaugh, was that Plaza Academy holds students to a much higher standard. TR:351, 653-

10. The Diagnostic and Statistical Manual of Mental Disorders (DSM) is published by the American Psychiatric Association and provides standard criteria for the classification of various mental disorders.

54. When asked what he knew about the District's programs, he stated that his only knowledge was what he learned from Student and his mother. TR:353.

105. Dr. Seabaugh testified that Student had a few friends at Plaza Academy and was forming relationships with his teachers there. TR:345. In his opinion, he had established a good rapport with Student and, in his further opinion, Student did not display an inability to form relationships. TR:346.

106. On February 27, 2009, Student's multidisciplinary team convened to discuss the IDEA evaluation completed by the District at the Parents' request. R-59. Mother and her advocate, Marilyn McClure, were present. R-59 at 518; TR:1033, 1188.

107. The District prepared a written report dated March 9, 2009 to reflect the results of the IDEA evaluation. R-62. The evaluation conducted by the District showed that, with respect to attention and intelligence, Student performed in the average range. R-62 at 538-39; TR:1189-91. After reviewing the evaluation information, the multidisciplinary team concluded that Student did not meet the criteria to be "emotionally disturbed" according to the rating scale required for this purpose, but instead displayed characteristics of the presence of a mild (in one rater's opinion) to serious (in two raters' opinions) conduct problems. R-62 at 547. In addition, the team concluded that, although Student had a medical diagnosis of ADHD, he did not display characteristics consistent with the IDEA criteria for "other health impaired." R-62 at 550.

108. Christine Short testified on behalf of the District regarding the IDEA evaluation. TR:1819, 1820-22; R-86 at 941-42. During the time of the evaluation, Ms. Short was a process coordinator for the District and, in that role, was responsible to coordinate the initial evaluation procedures for Student. TR:1824-26. As part of that process, she requested medical records from the Parents and Mother hand-delivered a packet of medical records to her in October 2008. TR:1823-24; R-48. During the evaluation process, the District did not receive any information from Dr. Donovan or from Plaza Academy. TR:1827-28, 1848. Based on the information the District did receive, Ms. Short was aware that Student had diagnoses of ADD, ODD and parent/child conflict. TR:1832.

109. As part of the evaluation, the District conducted an in-depth social history of Student and the evaluation report includes Student's school history dating back to kindergarten. TR:1850. Ms. Short also testified that the achievement tests the District administered for the evaluation reflected matters that Student necessarily would have learned prior to the time of testing. TR:1851.

110. On March 4, 2009, the District was notified that Student had withdrawn from the MoVIP program. R-60; TR:1079-80, 1446.

111. On March 9, 2009, the District provided the Parents with a notice of action stating that Student was not eligible for special education services pursuant to the IDEA. R-62 at 536.

112. On May 19, 2009, Mother sent Ms. Laemmli a letter and some information from the Plaza Academy. R-64. That information showed that Student's grades at the Plaza Academy ranged from 52% to 85%. R-64; TR:1080-90.

113. During the second resolution conference with Mother regarding the Amended Complaint on June 2, 2009, according to notes taken by the District, Mother stated that Father had said that he did not want Student labeled "for meds" but the School District would have to ask Father about whether he would want student labeled for special education. R-66 at 581; TR:1094-95. When asked what she wanted for Student, Mother stated that she wanted him at the high school, in "a regular school environment" and to "remove the discipline." R-66 at 582. She also stated that: "All we wanted for Student was to be allowed to be in sports and that was taken away with his suspension." R-66 at 583.

114. On June 2, 2009, Mother sent a letter to Ms. Laemmli with information from Dr. David Donovan, Student's then-treating psychologist. R-67 at 589-90. Per Mother, Dr. Donovan had diagnosed Student with depression, ADHD and ODD. R-67 at 589.

115. On August 7, 2009, Dr. Gastin met with Parents and Student to discuss the educational options for the remainder of Student's then-current out-of-school suspension. R-72 at 633; TR:1448-49, 1467. During that meeting, Student stated that he should attend the Lewis & Clark alternative program and not the District's high school. TR:1449. Student also expressed concern about returning to McCune based on his inability to fight because of the car accident and the injury to his back. TR:1625. In Dr. Gastin's opinion, Student did not appear to be nervous, intimidated or afraid of returning to McCune. TR:1625. Dr. Gastin and the Parents also discussed the District's Credit Recovery Program and Mother and Student both thought that would be a good option for Student. TR:1449. Mother informed Dr. Gastin that Student was scheduled to have surgery in August and asked if he could begin the Credit Recovery Program in October and Dr. Gastin indicated that would not be a problem if she allowed Student to participate in Credit Recovery. TR:1449. On or about August 10, 2009, Dr. Gastin wrote to Parents and informed them that, although Student was in "stay-put", the District would allow him to attend the Credit Recovery Program at Lewis and Clark. R-73; TR:1449-50, 1488-91.

116. On August 19, 2009 Mother waived Student's stay-put placement of suspension at McCune so that, at Mother's request, Student could attend the Credit Recovery Program. TR:881, 1450.

117. Student attended the Credit Recovery Program beginning in August 2009 but also attended Plaza Academy. TR:881-82, 1027. Dr. Gastin testified that her decision to allow Student to participate in the Credit Recovery Program meant that Student would not return to Plaza Academy. TR:1450, 1587-88. Had she known that Student was going to continue to attend Plaza Academy, she would not have agreed to Credit Recovery. TR:1450, 1026-27.

118. On or around November 30, 2009, Student had surgery. TR:879. Student did not attend any school after that. TR:879-82.

119. On or about March 1, 2010, Dr. Gastin revoked Student's privilege to attend Credit Recovery. TR:1656. At that time, Student remained under a long-term suspension which was scheduled to end in early April 2010 and, after which, Student would be able to attend the District as a regular education high school student. TR:1656.

120. Dr. Steven Holeman testified for the Parents. TR:34. Dr. Holeman is a licensed professional counselor who saw Student and his parents for "assessment and treatment" approximately three years prior to his testimony. TR:36, 38; P-104 at 784. Dr. Holeman has a Ph.D. and is licensed as a clinical psychologist in California and Missouri. TR:38. When treating and assessing Student, he conducted a clinical interview with Student and his parents and prepared a psychosocial history. TR:39-40

121. According to Dr. Holeman, Student's presenting problems included substance abuse. TR:41. Based on his assessment, Dr. Holeman diagnosed Student with disruptive behavior disorder and ruled out a diagnosis of ADHD, not otherwise specified. TR:42. During his direct examination, Dr. Holeman testified that it would be difficult, if not impossible, for Student to maintain meaningful relationships and he recommended that Student be assessed for a school 504 plan. TR:44-47.

122. During cross-examination, Dr. Holeman conceded that he had no credentials in the field of education or special education and was not certified to teach in a public school. TR:48. He also noted that he had never taught in a public school. TR:48.

123. During cross-examination, he also testified that he was involved with the Parents from March-May 2006. TR:48-49. At the time, he understood they sought his services because they were experiencing difficulty with Student's behaviors at home. TR:TR:49. Dr. Holeman provided counseling/therapy sessions with Student and his parents for those three months for approximately one session per week. TR:52. Dr. Holeman could provide no further detail as his files were unavailable due to an office move. TR:53-54.

124. During cross-examination, Dr. Holeman also was questioned about his knowledge of IDEA and he testified that he was "somewhat" familiar with that law. TR:56. Although he was aware that IDEA has eligibility requirements, he could not provide specifics of those and did not know if DSM diagnoses equated to IDEA eligibility. TR:57. When asked if the student has to be in need of special education to be IDEA eligibility, he testified: "No, that's not my understanding." TR:57.

125. Prior to his testimony, Dr. Holeman reviewed his curriculum vitae and the blank bio-psychosocial form that he uses but not the parties' exhibit volumes. TR:59. He also spoke to the Parents. TR:59. The Parents' attorney told him that he was being presented as an expert witness but he did not know in what area and did not know if his area of expertise was supposed to be with respect to IDEA or the DSM. TR:59-60. Dr. Holeman was never asked by the Parents to observe Student at school and was unable to recall whether he was asked to communicate with school administrators or teachers about Student. TR:61. Dr. Holeman also was not asked to look at the District's IDEA evaluation report. TR:61.

126. When questioned during cross-examination, Dr. Holeman was unable to recall whether he was aware of issues with Student taking drugs from his mother, with inconsistent parenting and discipline or with gang involvement. TR:65.

127. During cross-examination, Dr. Holeman also testified that it was accurate to say that Student has a persistent pattern of willful violation of societal norms without guilt or remorse. TR:66. He agreed that Student has knowledge of appropriate behavior but chooses to break socially defined rules and that it is most likely that his peers view him as cool, tough or delinquent. TR:66-67. He also stated that Student chooses wrong over right. TR:67. When asked about social maladjustment under the IDEA, Dr. Holeman stated that social maladjustment is only part of Student's problem. TR:68. In conclusion, he stated that he could not speak to the question of whether the mere fact that a student has behaviors means that student has a disability as defined by IDEA or 504. TR:72.

128. Dr. David Donovan testified for Parents.[11] TR:448. Dr. Donovan has a Ph.D. in counseling psychology and is licensed to practice psychology. He has no degrees in education or special education and is not certified to teach by the State of Missouri. TR:465-66. Dr. Donovan has no knowledge or training with respect to the IDEA. TR:466. When asked if he was familiar with Missouri's eligibility criteria under the IDEA, he stated that he knew what an IEP is. TR: 467. Although he has no knowledge of the IDEA, Dr. Donovan testified that, in his opinion, Student has a learning disability based on his medical diagnosis of ADHD. TR:467. In forming his opinion regarding ADHD, he did not conduct any testing but relied on Mother's report of a prior pediatrician diagnosis. TR:486. Dr. Donovan did not know if his opinion regarding a learning disability was consistent with Missouri criteria. TR:467. He also was unaware that, in 2002, Dr. Haynes had concluded that Student did not meet the criteria for a learning disability. TR:489. Dr. Donovan testified that, in his opinion, Student had a diagnosis of pervasive developmental delay, but when cross-examined as to the basis for that diagnosis, he stated that "I don't know how to answer that. I'm not an expert on that issue so I might be borrowing from different sources." TR:468.

129. Per Dr. Donovan, Student was his patient for individual and family treatment from January or February 2009 to the time of his testimony. TR:469. He was aware that one prior counselor, Paul Hendricks, had diagnosed Student with ODD, parent-child relationship problems and rule-out ADHD.[12] TR:470. He did not speak to Mr. Hendricks about the diagnosis of parent-child relationship problems. TR: 471.

130. According to Dr. Donovan, he conducted an assessment of Student when he first became his patient. TR:451. However, he never tested Student and did not complete an evaluation report. TR:478. When Student became his patient, Mother provided him with some school records and Dr. Donovan testified that he was able to form opinions about what Student was like prior to January of 2009 based on those records and interviews even though he was not treating him at the time. TR:450, 477-78, 497. Among the records that Mother provided was the

11 The District objected to Dr. Donovan's testimony as his professional relationship with Student postdated January 21, 2009, the date of the Parents' amended complaint. TR:449.

12 Per Dr. Donovan, rule-out means that the treating professional does not have sufficient information to make the diagnosis. TR:488.

District's February 2009 evaluation report. TR:497. When questioned about that report, Dr. Donovan acknowledged that he just skimmed it and did not recall seeing the results of the ADHD scales that were administered. TR:497-98. The Parents did not provide Dr. Donovan with any information from Plaza Academy. TR:479. Dr. Donovan's recommendations about Plaza Academy were based on what he was told by the Parents. TR:479. Per Mother, Student's grades at Plaza Academy were better than the grades he received at the District, but Dr. Donovan did not conduct a comparison to determine if Mother's report was accurate. TR:479-80.

131. Based on his assessment, Dr. Donovan concluded that, prior to January 2009, Student would have had the psychological diagnoses of ADHD, ODD and depression; however Dr. Donovan acknowledged that in September 2008, Dr. Wubbenhorst, Student's doctor at the time, found no signs of depression. TR:494, 451-52, 481. In Dr. Donovan's opinion, Student also was in the process of developing a conduct disorder. TR:453-54, 481. Dr. Donovan believes that, to properly address those diagnoses in a school environment, Student should be mainstreamed in the school setting with "normal kids." TR:455.

132. Dr. Donovan testified that, when Student first became his patient, he completed an in-depth social history and, based on that history, discovered that Student's father was a recovering substance abuse user. TR:471-73. Although he inquired about family drug problems as part of the social history, that question did not seem relevant to him in relation to Mother. TR:473. Dr. Donovan was not aware that Student had reported to District staff that he was using drugs and had stolen marijuana from his mother. TR:473. He also was unaware that, on one occasion when Student physically aggressed against his mother, his father took him to a cemetery and beat him with a board. TR:474-75. In response to this type of question during cross-examination, he stated, "Well, I think it's relevant but there's no way that I can know everything about Student in 20 sessions." TR:475.

133. Dr. Donovan also testified that he believed that Student was "behavior disordered" which, in his opinion, would equate to oppositional defiant disorder or conduct disordered. TR:481. In support of that opinion, he stated that Student argues with adults, refuses to comply with adult requests or rules, blames others for his mistakes or misbehavior, uses profanity, and engages in the precocious use of alcohol, tobacco or illicit drugs. TR:481-83. He also agreed that Student is capable of being charming in an effort to achieve his goals and engages in risk-taking behavior. TR:510-11. He further testified that Student generally is accepted by his peers but is viewed as cool, tough or delinquent. TR:510. During examination by the Parents' attorney, Dr. Donovan stated that Student did not have an ability to build or maintain interpersonal relationships prior to January 2009 because of his ADHD "which, you know, functions as a learning disability." TR:457-58. However, when questioned by the District's attorney, Dr. Donovan testified that, prior to January 2009, Student did have an ability to build or maintain interpersonal relations. TR:455. Indeed, he stated that "I think he can. He did with me." TR:455. During his sessions with Dr. Donovan, Student was comfortable and relaxed and they had a satisfactory relationship. TR:502. During those sessions, he talked about his friends and described typical teenage behavior. TR:502-03. Dr. Donovan was not familiar with the concept of social maladjustment as that term is used within the IDEA. TR:511-12.

134. Per Dr. Donovan, he provided counseling services to Student which related to Student's needs prior to January 2009. TR:459-60. At the time Student began seeing him, he "came in presenting very depressed and was in a new school situation. He was in private school then." TR:460. Although he was not asked during direct examination about the car accident that Student was in November 2008, TR:475-76, Dr. Donovan indicated that the depression he had diagnosed could have been because of the chronic pain resulting from that accident. TR:476.

135. In addition to the testimony from Mother referenced above, Mother testified that although Student experienced problems at school since elementary, he improved when he was given medication. TR:783-90. She stated that Student had diagnoses of ADHD and ODD and, in her opinion, the ADHD makes it difficult for Student to stay on task and complete his work. TR:890. She agrees with the ODD diagnosis and believes that it makes Student combative. TR:890, 905. She also agreed with a prior diagnosis of parent-child relationships problems. TR:905. She further testified that she had Student take his ADHD prescribed medication only when he was in school but the medication helped him stay focused. TR:888, 891. Mother also testified that, every year since Student was in second grade, she informed District personnel about his ADHD diagnosis. TR:809-10. Mother acknowledged that, prior to the fall of 2008, she had never requested that Student be evaluated for special education. TR:907. Mother testified that she was unaware that a student had to be in need of special education to qualify for an IEP and just indicated that she wanted Student to have "extra assistance." TR:912. When questioned about why she wanted Student on an IEP, Mother indicated that she wanted the District to help Student get caught up in his classes. TR:812. As she stated, "What I think of an IEP is someone just to help my son." TR:954.

136. Mother testified that in approximately October 2008, Mother received correspondence from the school district suggesting to her that Student was giving up his right to a free appropriate education, so she went out to the internet and researched Student's rights. TR:696-97. She testified that it was at this time that she learned about Section 504 and IDEA and realized Student should have been helped a long time previously and that the District had a lot of programs they had never told Mother about. TR:697-698. In October 2008, she saw that a Student could be entitled to receive services under IDEA if they have Other Health Impairment which can cover ADHD. TR:698.

137. Mother acknowledged that Student had engaged in drug abuse. TR:885. She heard Student testify that he had stolen drugs from her "stash" but denied the truthfulness of that statement. TR:907-08. She indicated that Student has a history of being untruthful. TR:907-08. Mother also testified that not all of Student's behaviors were attributable to his ADHD – for instance his ear piercing could be related to being "bored in the buddy room." TR: 989. Some of the hitting behaviors were just kids being kids. TR 989-990.

138. Student also testified during the Parents' case-in-chief and briefly on rebuttal. TR:74. At the time of his testimony, Student was 15 years old and was attending Plaza Academy and the District's Credit Recovery Program. TR:74. During the hearing and his testimony, he was not taking any ADHD or medication other than that for a cough. TR:187-88, 548, 675. During his direct examination, the Parents' attorney objected to conversation in the room that she

stated was distracting to Student. TR:178. However Student did not seem to have a problem during his testimony with focus or distractibility. TR:178,188-90.

139. Student testified at length about his elementary school years but acknowledged that he was unable to remember much of what occurred. TR:76-105, 203-219. He acknowledged that some of his behavioral problems were his own fault and he needed to take responsibility. TR:91. Student also acknowledged that his mother wanted him in special education and he, too, wanted to be in special education to be able to succeed in school. TR:191. When asked what special education meant, Student stated that it meant having the teacher give him special attention and standing next to him to keep him on task. TR:191-92.

140. Student also testified about the misconduct he displayed while at McCune and acknowledged that he used profanity. TR:548-52. With respect to the incident involving pornography, Student conceded that he admitted to Mr. Montgomery that he had brought pornography to McCune and traded it for pills. TR:561. He understood that it violated the rules and acknowledged that his ADHD had no relationship to that misconduct. TR:561. Student characterized McCune School as a "prison" where all the students were felons except him. TR:157. Students had to wear uniforms provided by the Family Court. TR:160-61. He stated that everyone at that school was "ignorant" and that he couldn't concentrate at that school because everyone was talking all the time. TR:162-63. He would get into confrontations because others would make fun of him for doing his work. TR:164.

141. Student was questioned about Plaza Academy and stated that he liked it there because it gave him freedom and he was not treated like a criminal. TR:200. He acknowledged that he had behavior issues while there. TR:200.

142. In addition to the testimony from Dr. Gastin referenced above, Dr. Gastin testified that she was familiar with IDEA eligibility criteria including the fact that a student had to have a need for special education. TR:1338. Dr. Gastin defined special education as that education provided by special education certified staff that is different from and above and beyond what the District provides for all students. TR:1484. She further testified that special education is something different from differentiated instruction which is available to all students. TR:1485-86. Dr. Gastin testified that a student's medical diagnosis does not automatically equate to IDEA eligibility. TR:1480.

143. Dr. Gastin testified that she never had reason to suspect that Student had an IDEA disability. TR:1340-41. Student's grades were adequate, he was articulate, could process information and had relationships. TR:1340. In addition, during meetings, she found him to be attentive. TR:1340, 1342, 1614. In her opinion, Student could choose to behave appropriately, but made choices not to work and to engage in what she considered delinquent or maladjusted behavior. TR:1340, 1472-76. She stated: "Because Student's behaviors are behaviors of his choice. He knows whether to choose to be okay or not. . . . He doesn't go into rages, throw fits. He doesn't hide in corners. You know, he can make relationships. He's not a victim of any sort. . . .[H]e's personable. He's confident in himself." TR:1341.

144. Dr. Gastin further testified that, in her opinion, Student is socially maladjusted rather than a student with a disability. TR:1342-43. Dr. Gastin defined a socially maladjusted student possessing characteristics such as being attention seeking, manipulative, and cunning in relationships to get what they want. TR:1522-23. Maladjusted students also engage in behaviors that are risk-taking and are disruptive and insubordinate. TR:1522-27, 1614. As she stated, "the offenses that I've seen him for were calculated offenses, things he had to think about in order to do or get done." TR:1342, 1622, 1626-27, 1649-50. This type of behavior is not characteristic of an IDEA disability, but would be more expected in a socially maladjusted student. TR:1367. At hearing, Dr. Gastin testified that the types of behaviors reflected in the District's records for the 2006-07 school year were consistent with delinquent behavior and not with the characteristics that would create suspicion of a need for special education. TR:1354.

DISCUSSION AND DECISION RATIONALE

The party seeking relief in a due process hearing has the burden of proof. *Schaeffer v. Weast*, 546 U.S.49 (2005); *Stringer v. St. James R-I School District.*, 446 F.3d 799 (8th Cir. 2006); *West Platte R-II School. District v. Wilson*, 439 F.3d 782 (8th Cir. 2006). Petitioners must sustain their burden of proof by a preponderance of the evidence, the standard appropriate to most civil proceedings and the standard utilized by reviewing courts of hearing panel decisions. *Blackmon v. Springfield R-XII School Dist.*, 198 F.3d 648, 654 (8th Cir. 1999); 20 U.S.C. § 1415(i)(2)(B); *Doe v. Defendant I*, 898 F.2d 1186, 1191 (6th Cir. 1990) (finding Student has the burden of proving by a preponderance of the evidence that a complained of IEP was inadequate; citing *Tatro v. State of Texas*, 703 F.2d 823, 830 (5th Cir.), *aff'd in part and rev'd in part sub nom., Irving Independent School District v. Tatro*, 468 U.S. 883 (1984)).

.The IDEA requires that all children with disabilities as defined by the statute receive a free appropriate public education (FAPE) designed to meet their unique needs. 20 U.S.C. § 1412(a) (1)(A); 20 U.S.C. § 1401(9). The regulations implementing IDEA at 34 C.F.R. Part 300 define a child with a disability as a child:

> evaluated in accordance with §§ 300.304 through 300.311 as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance . . ., an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.

34 C.F.R. § 300.8(a)(1). The regulations specifically state that even if a child has one of the listed disabilities "but only needs a related service and not special education, the child is not a child with a disability under this part." 34 C.F.R. § 300.8(a)(2)(i).

"Special education" is defined by the IDEA as "specially designed instruction." 20 U.S.C. 1401(29). "Specially designed instruction" is defined as "adapting, as appropriate to the needs of an eligible child. . . the content, methodology, or delivery of instruction – (i) [t]o address the unique needs of the child that result from the child's disability; and (ii) [t]o ensure

access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children." 34 C.F.R. § 300.39(b)(3).

The IDEA mandates a "Child Find" obligation. 20 U.S.C. § 1412(a)(3). Each state must have policies and procedures to ensure that "[a]ll children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located and evaluated…." 34 C.F.R. § 300.111(a)(1).

The State of Missouri in its State Board of Education Special Education Regulations (hereinafter "State Plan") states the policy of the State of Missouri with regard to Child Find on p. 18 as follows:

> It is the policy of the State of Missouri that all children with disabilities, residing in the state, including children with disabilities who are homeless children or are wards of the state, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services are identified, located, and evaluated. This requirement applies to highly mobile children with disabilities (such as migrant and homeless children) and children who are suspected of being a child with a disability and in need of special education even though they are advancing from grade to grade.

The State of Missouri also requires public schools to annually assist in Child Find by conducting the following activities:

> (A) Publishing one public notice in local newspapers that describes the district's responsibility to provide special education and related services to children ages 3 to 21;
> (B) Airing one public notice on local radio or television stations during general listening hours which describes the same responsibilities;
> (C) Placing posters in administrative offices of each building describing the same responsibilities;
> (D) Providing written information through general distribution to the parents/guardians of enrolled students describing the same responsibilities.

State Plan at p. 19.

In addition to the publicity about a school district's IDEA obligations to advise the public and its patrons of its general obligations under the IDEA, the public requirement, a local school district has an affirmative obligation to actively identify children who are suspected of having disabilities. *Wiesenberg v. Board of Education*, 181 F. Supp.2d 1307, 1310-11 (D. Utah 2002). This duty is triggered when a district "has reason to suspect a disability and reason to suspect that special education and related services may be needed to address that disability." *Department of Eduation v. Cari Rae S.*, 158 F. Supp.2d 1190, 1194 (D. Hawaii 2001); *Strock v. Independent School District No. 281*, 2008 WL 782346 *7 (D. Minn. 2008).

A school district's Child Find obligation with respect to a specific child requires a two-part analysis: can the student be identified as having a specific physical or mental impairment and does the student require special education and related services because of that impairment? *See A.P. v. Woodstock Board of Education*, 50 IDELR 275 (D. Conn. 2008) (stating "the fact that a child may have a qualifying disability does not necessarily make him "a child with a disability" eligible for special education services under the IDEA" and noting that the child must also require special education and related services, citing *Alvin Independent School District v. A.D.*, 503 F.3d 378, 383 (5th Cir. 2007)). Once a district determines that it has reason to suspect a child has a disability and suspects that the child may need special education services because of that disability, the district must conduct a comprehensive evaluation to determine if that child is to receive special education and related services under the IDEA. 34 C.F.R. § 300.301. This evaluation must be done "within a reasonable time after school officials have notice of behavior likely to indicate a disability." *Strock*, 2008 WL 782346 *7; *W.B. v. Matula*, 67 F.3d 484, 501 (3rd Cir. 1995).

While Parents have stated the issues as the failure of the School District to timely evaluate Student and to identify Student as a child with a disability under the IDEA, the threshold issue is whether the School District based upon all the facts at its disposal, should have ***suspected*** that Student was a child with a disability under the IDEA, which then would have triggered the requirement of an IDEA evaluation. The test is two-part: even if the School District should have suspected that Student had a disability of some nature, the analysis then turns to whether the school district should have ***suspected*** that Student needed special education as a result of that disability. If the School District should have suspected that Student was a child with a disability, then the School District was under an obligation to so evaluate him in accordance with the IDEA's evaluation requirements to determine if Student was in fact a "child with a disability" as defined by the IDEA.

Accordingly, the panel reviews the evidence objectively to determine whether the Petitioners have sustained their burden of proof to establish by a preponderance of the evidence that the School District should have suspected that Student was a child with a disability under the IDEA and failed to so identify him, a two-part analysis where the child must be suspected of both having an disability and suspected to be in need of special education and related services by reason of that disability.

Applicable Statute of Limitations

The regulations implementing the IDEA's statute of limitations for the filing of due process complaints by parents or by the local educational agency state in pertinent part as follows:

> § 300.507 Filing a due process complaint.
> (a) General.
> (1) A parent or a public agency may file a due process complaint on any of the matters described in § 300.503(a)(1) and (2) (relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child).

(2) *The due process complaint must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process complaint,* or, if the State has an explicit time limitation for filing a due process complaint under this part, in the time allowed by that State law, except that the exceptions to the timeline described in §300.511(f) apply to the timeline in this section.

§ 300.511 Impartial due process hearing.
(e) Timeline for requesting a hearing. *A parent or agency must request an impartial hearing on their due process complaint within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the due process complaint,* or if the State has an explicit time limitation for requesting such a due process hearing under this part, in the time allowed by that State law.
(f) Exceptions to the timeline. The timeline described in paragraph (e) of this section does not apply to a parent if the parent was prevented from filing a due process complaint due to--
(1) Specific misrepresentations by the LEA [local education agency] that it had resolved the problem forming the basis of the due process complaint; or (2) The LEA's withholding of information from the parent that was required under this part to be provided to the parent.

[Emphasis added].

Comments contained in the Federal Register, Vol 71, No. 156, p. 46706, define what is meant in 34 C.F.R. §300.511(f)(2) by the term "withholding of information from the parent that was required under this part." The Federal Register states:

> These exceptions include situations in which the parent is prevented from filing a due process complaint because the LEA withheld from the parent information that is required to be provided to parents under these regulations, *such as failing to provide prior written notice or a procedural safeguards notice that was not in the parent's native language,* as required by §§ 300.503(c) and 300.504(d), respectively."

[Emphasis added].

The State Plan also provides for a two year statute of limitations, with the same exceptions as set forth in above. State Plan at p. 64.

The panel will limit the relevant time period in this case to two years prior to the date the original Complaint was filed on October 21, 2008, to October 21, 2006, which is the 2006-07 school year. There is no evidence in the record that the District made "specific misrepresentations . . . that it had resolved the problem forming the basis of the due process complaint", nor is there any credible evidence that the School District had withheld information from Parents that it was required to provide under the IDEA. As more further discussed *infra,* there is no evidence that the School District failed in its public notification requirements to patrons of the School District regarding its obligations under the IDEA. Mother testified that she

had in fact received planners and other information from the School District containing IDEA notifications. The fact that Mother may not have thought that the information pertained to Student at the time does not constitute misinformation on the part of the School District. *See D.K. v. Abington School District*, 110 LRP 18675 (E.D. Pa. 2010) (Court upheld hearing officer's finding that "the District was not obligated to provide Parents with notice concerning their right to request an educational evaluation, nor did the District withhold information from Parents regarding [Student's] right to an educational evaluation."). Neither is there any credible information in the record that Parents were advised to go elsewhere for services and were thereby dissuaded from pursing their IDEA rights. Since the panel finds no exceptions to the IDEA's statute of limitations, the relevant record for purposes of the panel's decision begins in the 2006-07 school year through the date of the initial complaint. *Fern v. Rockwood R-VI School District*, 2007 WL 1655673 (E.D. Mo. 2007).

Child Find obligations under IDEA and the Missouri State Plan

Public Child Find Requirements

A public school fulfills its public Child Find responsibilities under IDEA when it engages in the state's prescribed publicity requirements. *See, e.g., Doe v. Metropolitan Nashville Public School*, 9 Fed. Appx. 453, 456 (6th Cir. 2001) (holding that the distribution of informational material to area schools, agencies, and professionals who encounter children with disabilities brought this school district in compliance with Child Find); *Mr. and Mrs. T. v. Lewiston School Committee*, 2000 WL 1052016 (D. Me. 2000).

The District presented documentary evidence that it satisfied the State's Child Find publicity requirements by posting notices in buildings, in the media and in student planners. Mother testified that she received and reviewed that information, although she did not connect the IDEA notices to Student. She also testified that upon receipt and review of that Child Find information, she did not contact anyone at the District to question whether it was applicable to Student.

The panel finds that the School District complied with the IDEA's Public Child Find obligations.

Identification of Student as a Child with a Disability

As discussed above, a child with a disability under IDEA is one who is in need of special education and related services. A student who has a disability of some type is not in need of special education when that student requires the use of regular education interventions, including the use of differentiated instruction. *Ashli v. State of Hawaii*, 2007 U.S. Dist. LEXIS 4927 (D. Hawaii 2007). The *Ashli* court states:

> A school may ensure that a student benefits from the educational program by modifying the regular classroom setting such as by providing differentiated instruction.
>
> . . . .

> There is nothing in either the IDEA or in the state or federal implementing regulations to indicate that a student would qualify as a "student with a disability" when the school voluntarily modifies the regular school program by providing differentiated instruction which allows the child to perform within his ability at an average achievement level.

Id. at *28.

Because "differentiated instruction is different from specially designed instruction" and because the student could achieve at grade level with the use of differentiated instruction, the student in that case was not a student with an IDEA disability. *Id.* at * 31. *E.M. v. Pajaro Valley Unified School District*, 109 LRP 54340 (N.D. Cal. 2009) (holding that because student performed well with general education interventions, the student did not require special education - general education small group settings helped the student with distractibility); *A.P. v. Woodstock Board of Education*, 50 IDELR 275 (D. Conn. 2008) (concluding that because elementary school student made progress with the use of general education interventions, there was no error in failing to refer him for a special education evaluation); *Sidney C. v. Hawaii Department of Education*, 47 IDELR 65 (D.C. Hawaii 2007) (finding that teacher's need to adapt the regular education program and use of differentiated instruction did not demonstrate that the student's ADHD created a need for special education). Likewise, designating students as "at risk" for grade retention does not equate to a suspicion for a special education referral. *E.M. v. Pajaro Valley Unified School District*, 109 LRP 54340.

Testimony at the hearing included references to Student having ADHD, ODD, depression, an Emotional Disturbance and Social Maladjustment.

The disabilities of Attention Deficit Hyperactivity Disorder or Attention Deficit Disorder are not specifically named as disabilities within the 34 C.F.R. § 300.8(a)(1) definition of a child with a disability. These disabilities are within the category of "other health impairment" (OHI) and further described by the State Plan at p. 24-25 following 34 C.F.R. § 300.8(c)(8) as:

> "Other Health Impairment" means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment that is due to chronic or acute health problems, such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette Syndrome, and adversely affects a child's educational performance.
>
> Criteria for Initial Determination of Eligibility
>
> A child displays a Health Impairment when:
> A. a health impairment has been diagnosed by a licensed physician, licensed psychologist, licensed professional counselor, licensed clinical social worker, or school psychologist, and

B. the health impairment adversely affects the child's educational performance.

Oppositional Defiant Disorder (ODD) is not specifically listed in the State Plan. Dr. Donovan considered this to be a form of conduct disorder. TR:481. Depression and social maladjustment are discussed in reference to Emotional Disturbance in the IDEA regulations. Regardless of the diagnosis, the criteria for finding a child suffers from "Other Health Impairment" requires a finding that the disability has an adverse effect on the child's educational performance. A medical diagnosis of a disorder which fits within the OHI category is not sufficient in and of itself for referral or eligibility. *See Ashli*, 2006 U.S. Dist. LEXIS 75016 at *24-25.

The court in *Strock*, 2008 WL 782346 *7 dealt with the issue that an ADHD diagnosis automatically entitles the student to IDEA eligibility by stating as follows:

> The mere existence of an ADHD condition does not demand special education. Children having ADHD who graduate with no special education or any § 504 accommodation are commonplace.

In analyzing a Child Find claim brought by parents of a child with a non-verbal learning disability who had received special interventions from the regular classroom teacher for assistance with inattention, the district court stated:

> The Parents seem to argue that "Child Find" requires LEAs [local education agencies] to designate every child who is having any academic difficulties as a special education student. But this is not the law.

In *Alvin Independent School District v. A.D.* the district court found that the student did not require special education despite the diagnosis of ADHD. 2006 U.S. Dist. LEXIS 75016 (S.D. TX 2006). The court found that the doctor's recommendations with respect to that diagnosis "do not meet the legal requirement for showing a special education need." *Id.* at *15. The district court found the administrative hearing officer's reliance on the testimony of the student's doctors to be misplaced and that the hearing officer did not "give the requisite consideration" to the student's teachers and other school staff who testified that the student was not in need of special education. *Id.* at 16. As noted by the court:

> The opinions of these educational professionals are in conformity with the facts that A.D. was passing his classes and mastering the TAKS test; critical indications that A.D. was receiving appropriate educational benefit from AISD. A.D.'s behavioral problems simply do not provide the basis for an educational need in the face of his otherwise appropriate educational and social progress.

Id.; *see also Ashli v. State of Hawaii*, 2007 U.S. Dist. LEXIS 4927 (D. HA 2007) (affirming hearing officer decision that student with medical diagnosis of ADHD was not other health impaired even where the parent stated that the child was distractible and somewhat hyperactive where teacher testified that student, with the use of differentiated instruction and an intervention plan, was meeting grade level expectations).

Assuming that the School District was aware of Student's diagnosis with ADHD within the limitations period[13], the panel does not find any objective reason for the School District to suspect Student had an OHI because Student did not display a need for special education. Parents have offered no evidence to support their allegation that that the School District failed in its Child Find obligations by failing to identify Student as Other Health Impaired other than Student's medical diagnoses of ADHD and ODD. Parents provided no credible evidence to the effect that the medical diagnoses adversely affected his educational performance or indicated a need for special education during the limitations period. The testimony from Student's psychologists, some only seen after the filing of the due process complaint, did not support the contention that Student was in need of special education and related services. As more fully discussed *infra*, the witnesses did not have the requisite knowledge of IDEA and special education to support any statements made regarding Student's need for such services.

The evidence presented by the School District demonstrated that Student was able to maintain focus when he chose and participate in the general curriculum consistent with or above the level of his peers. There was no evidence presented that it was these disabilities that affected his educational performance. A student's receipt of passing grades and ability to make academic progress is a strong indicator that the child does not need specialized instruction. *See K.M. v. Wappingers Central School District*, 688 F. Supp.2d 282, 296-98 (S.D.N.Y. 2010) (Noting that the IDEA does not define "adverse effect on educational performance", the Second Circuit has determined that it refers solely to academics – if a student's disabilities do not impede the student's ability to obtain an educational benefit, then the student is not eligible for special education). The *Ashli* court also had this to say about the "adversely affects" standard:

> If a student is able to learn and perform in the regular classroom taking into account his particular learning style without specially designed instruction, the fact that his health impairment may have a minimal adverse effect does not render him eligible for special education services.

2007 U.S. Dist. LEXIS 4927 *28.

In *A.P. v. Woodstock Board of Education*, the court concluded that, because an elementary school student made progress with the use of general education interventions, the school district did not err in failing to refer that student for a special education evaluation. 50 IDELR 275 (D. Conn. 2008).

The evidence presented supports a finding that Student was not merely passing from grade to grade but was making educational progress. He was achieving beyond the level of many of his peers and his grades in the smaller group settings afforded by the alternative school

13. While Mother testified that she had given the School District a copy of Dr. Haynes' report in 2002, the panel does not find this testimony credible. The report was not in the School District's records until the due process complaint was filed in October 2008 and Mother delivered a packet of information to the School District, including this report. However there was evidence contained in a school note that Mother mentioned the Student's ADHD to School District personnel in August 2006 (R-2 at 51) and there was a report from Dr. Wubbenhorst from ReDiscover noting ADHD received in September 2007. R-20 at 230.

environments were beyond what would have been seen from the typical special education student. The District presented evidence that the District uses differentiated instruction and other alternative strategies that are available to all students who need such strategies. When Student received those, he was able to progress through the curriculum. His test scores put him above that of his classmates in several categories and above grade level. *See Strock*, 2008 WL 782346 *7 (court dismissed ADHD student's child find claim when student received average or above-average marks when he completed required work and was provided help with his organizational skills and received passing marks on Minnesota Basic Skills Test).

With respect to the other mentioned disabilities at the hearing – ODD, depression, emotional disturbance and social maladjustment – only Emotional Disturbance is specifically listed as a separate category of disability by the IDEA and the Missouri State Plan, which describes the specific criteria that a student must meet, based on evaluation, to be considered a student with an Emotional Disturbance. 34 C.F.R. § 300.8(c)(4); State Plan at 22-23. Those criteria include the overall requirement that the student be in need of special education. 34 C.F.R. § 300.8(a); State Plan at 22. As noted in the IDEA regulations, emotional disturbance does not apply to children who are socially maladjusted unless those children also are emotionally disturbed. 34 C.F.R. § 300.8(c)(4)(ii).

According to the State Plan:

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.

Student's various medical and/or psychological diagnoses were not and are not determinative of whether the District had reason to suspect an IDEA disability or whether Student was eligible under the IDEA. *Strock*, 2008 WL 782346 *7; *Mr. and Mrs. N.C. v. Bedford Central School District*, 473 F. Supp.2d 532, 545 (S.D.N.Y. 2007) (upholding administrative decision finding that student with behavioral problems was not emotionally disturbed under the IDEA where the student had a medical diagnosis of ADHD and the student's disciplinary and behavioral issues included disruption, inattentiveness, impulse-control problems, and other misbehaviors that resulted in multiple suspensions); *Brendan K. v. Easton Area School District*, 2007 U.S. Dist. LEXIS (E.D. Pa. 2007) (student with ADHD who exhibited behavioral problems that resulted in school suspensions was not emotionally disturbed even where those behaviors at times adversely affected his educational performance and finding student was socially maladjusted); *Maricus W. v. Lanett City Board of Education*, 141 F. Supp. 2d 1064 (M.D. Ala. 2001) (holding that student who exhibited academic and behavioral difficulties "periodically throughout" his school career was not emotionally disturbed and district voluntarily implemented a behavior plan; noting that the "IDEA is not a panacea for all of life's ills.").

While it is undisputed that Student exhibited behavioral problems at school, there was no evidence to support Parents' argument that those behaviors were the result of an emotional disturbance when judged by the IDEA criteria above. Student's medical diagnoses alone do not justify "reason to suspect." The medical testimony presented by Parents at the hearing was from individuals who admitted that they were not knowledgeable or well-versed in IDEA and its eligibility requirements, including the need for special education. Further, the witnesses acknowledged that Student behavior mirrored the characteristics of a social maladjustment. Student may have exhibited characteristics of inappropriate behavior, but each of the District employees who were called to testify on the District's behalf stated that, based on observations and knowledge of Student in the school environment, there was no reason to suspect an educational disability because Student chose to engage in disruptive behaviors and knew what he was doing and the consequences of what he was doing. And even if it could be argued that there should have been some suspicion on the part of the School District that Student's depression[14] or conduct issues might be an IDEA Emotional Disturbance, there was no showing of an adverse impact on educational performance as a result of these disabilities. Indeed, some of Student's admitted drug use would explain some of his behaviors and contribute to his educational performance.

Two of the above cited cases are particularly pertinent to the current fact situation. In *Brendan K.*the court stated that "[c]ourts and special education authorities have routinely declined to equate conduct disorders or social maladjustment with serious emotional disturbance." While Brendan both "clearly exhibited inappropriate behavior under normal circumstances" and depression, listed under the criteria for Emotional Disturbance, there was no

14. The panel will note that Student's accident clearly could have impacted his emotional state. Behaviors arising from this would be expected and would arise as a result of a specific crisis and not satisfy the criteria to be considered an Emotional Disturbance within the meaning of the IDEA. See Dr. Donovan's testimony at TR:476.

indication that he suffered from an inability to learn that could not be explained by intellectual, sensory, or health factors or that he was unable to build or maintain satisfactory interpersonal relationships or that he tended to develop physical symptoms or fears associated with personal or school problems.

In *Maricus W.*, the parents argued that the testimony of a psychologist "tips the scales" in their favor. 141 F. Supp2d at 1069. The Court disagreed and stated that the parents had not proved that the psychologist used the appropriate state-mandated criteria for emotional disturbance. On the other hand, the school teachers disagreed with the psychologist. The Court found "[s]uch dissention is significant because although emotionally disturbed children normally exhibit consistent, uniform misconduct, multiple experienced educators testified that [student] often acted appropriately." *Id.* The Court also found the parents' testimony to be clouded by bias and that parents position on not wanting special education had changed "only when it because clear that [student] could avoid severe disciplinary measures – including an impending transfer to an alternate school – if [student] was classified as disabled." *Id.*

The term "socially maladjusted" is not defined under the IDEA or the Missouri State Plan. However the IDEA excludes students who are socially maladjusted from the definition of emotionally disturbed. 34 C.F.R. § 300.8(c)(4). The Fourth Circuit has defined social maladjustment as "continued misbehavior outside acceptable norms." *Springer v. Fairfax County School Board*, 134 F.3d 659, 664 (4th Cir. 1998). The *Springer* court stated:

> Courts and special education authorities have routinely declined, however, to equate conduct disorders or social maladjustment with serious emotional disturbance…. Indeed, the regulatory framework under IDEA pointedly carves out 'socially maladjusted' behavior from the definition of serious emotional disturbance. This exclusion makes perfect sense when one considers the population targeted by the statute. Teenagers, for instance, can be a wild and unruly bunch. Adolescence is, almost by definition, a time of social maladjustment for many people. Thus a "bad conduct" definition of serious emotional disturbance might include almost as many people in special education as it excluded…. Any definition that equated simple bad behavior with serious emotional disturbance would exponentially enlarge the burden IDEA places on state and local education authorities. Among other things, such a definition would require the schools to dispense criminal justice rather than special education.

Id. at 664.

The cases cited by Petitioners were reviewed by the panel and found not pertinent to the panel's decision. Petitioners quote extensively from *N. G. v. District of Columbia*, 556 F. Supp.2d 11 (D.C. 2008) in support of their contention that Student should have been suspected of having an emotional disturbance based on clinic depression and OHI based on her ADHD. However, the student in *N.G.* had a diagnosis of clinical depression which Student does not have. Other than a post-complaint diagnosis by Dr. Donovan, no medical doctor had found Student to be depressed. The *N.G.* student also had a history of suicide attempts, had been treated in-patient at a psychiatric hospital, been treated by a doctor for two years for depression prior to the hearing

and her parents repeatedly requested help from the school district. No such extreme behavior presents itself here. And Parents pointedly did not ask that Student be considered for any special education services despite knowing of the existence of the School District's obligation in this regard.

Petitioners second cited case, *N.B. v. Hellgate Elementary School District*, 541 F.3d 1202 (9th Cir. 2008), involves a child who transferred into the defendant's district from another district already with an IEP. The defendant district had student's educational records from the originating district from day one. The panel finds no persuasive authority from this citation.

Parents herein failed in their burden of proof to show that Student exhibited one of the five listed criteria for an emotional disturbance for over a long period of time, to a marked degree and that the condition adversely affected educational performance. There was no consistency component to Student's inappropriate behavior as the District staff testified that Student was capable of and often did behave inappropriately, especially when provided the structure of an alternative setting. Further, Mother's request for special education appears motivated by a desire to avoid suspension or expulsion of her son which understandably would affect her testimony.

The panel finds that the evidence presented at hearing does not support a finding by a preponderance of the evidence that the School District should have suspected an IDEA Emotional Disorder as contrasted to a social maladjustment. The medical witnesses who testified on Petitioners' behalf described behaviors consistent with ODD and social maladjustment. None of those witnesses was aware that social maladjustment serves as a possible exclusion to emotional disturbance. None of the psychologists called by Petitioners to testify was aware of the IDEA requirement that the student be in need of special education and none was familiar with the nature of that requirement. Mother also was unaware of the requirement and, when asked what she wanted for Student, testified that she just wanted him to have extra assistance. In contrast, the District's witnesses testified that they did not suspect that Student had a disability or a need for special education. The District's witnesses described Student in a manner consistent with the social maladjustment. They described a student who was in control of his actions and who purposefully made poor choices to gain attention or to seek the approval of his peers. District witnesses further testified that Student's behavioral issues could be addressed through BIST and the District's other non-traditional/alternative programs such as Lewis & Clark and McCune. These non-traditional programs did not provide "special education" to Student.

The panel finds that while Student had medical diagnoses of ADHD and ODD and at possibly at some point depression and a conduct disorder, the Parents did not sustain their burden of proof to show that the School District should have identified Student as a child with a disability under the IDEA as the disabilities did not adversely affect educational performance and the School District had a reasonable belief that Student did not need special education and related services as a result of the disabilities.

Parents alleged that the District denied Student a free appropriate public education (FAPE). However, a school district is only required to provide FAPE to a student with a disability as defined by the IDEA. *See* 20 U.S.C. § 1412(a)(1)(A). Failure to locate and identify

and then evaluate a potentially IDEA eligible child does constitute a denial of FAPE. *N.G. v. District of Columbia*, 556 F. Supp.2d 11, 16 (D.C. 2008). However, because the evidence showed that the District had no reason to suspect an IDEA disability or a need for special education, Student was not entitled to FAPE and there was no denial of FAPE. Because Student has no right to FAPE, Petitioners have no right to the reimbursement that they requested to seek in this hearing.

CONCLUSIONS OF LAW

The hearing panel makes the following conclusions of law on Petitioner's issues:

1. The Student is now and has been a resident of the Fort Osage R-1 School District at all times relevant to this due process proceeding, as defined by Section 167.020 R.S.Mo. The School District had no reason to suspect Student was a child with a disability under the IDEA and thus did not fail to so identify him as that term is defined by the IDEA regulations, 34 C.F.R. Section 300.8 and Section 162.675(1) R.S.Mo., during the timeframe covered by this due process complaint, from October 21, 2006 through October 21, 2008.

2. After the Parents requested an evaluation of Student on October 17, 2008, the School District promptly began implementing the evaluation procedures required by Missouri and federal law.

3. As the School District did not identify Student as a child with a disability, the claims based upon denial of a free appropriate public education including injunctive relief and reimbursement are denied.

DECISION

The hearing panel unanimously finds in favor of the Respondent Fort Osage R-1 School District on all issues raised by the Petitioner's due process Complaint and Amended Complaint.

APPEAL PROCEDURE

This order constitutes the final decision of the Missouri Department of Elementary and Secondary Education in this matter. Pursuant to § 162.962 R.S.Mo., the following procedures apply to requests for judicial review:

1. Proceedings for review may be instituted by filing a petition in the state circuit court of the county of proper venue within forty-five (45) days after the receipt of the notice of the agency's final decision and are governed by Chapter 536, R.S.Mo., to the extent not inconsistent with other provisions of Chapter 162 R.S.Mo. or 34 C.F.R. Part 300.

2. The venue of such cases shall be at the option of the plaintiff, be in the Circuit Court of Cole County, or in the county of the plaintiff's residence.

3. You also have a right to file a civil action in federal or state court pursuant to the Individuals with Disabilities Education Act, 34 C.F.R. § 300.516.

IT IS SO ORDERED this 3rd day of September, 2010.

Janet Davis Baker
Chairperson

Accord:

Dr. Terry Allee

Rand Hodgson

Copies sent this date to:

Petitioners (by regular and certified mail)
Respondent (by regular and certified mail)
Deborah Johnson, attorney for Petitioners (by regular mail and electronic mail)
Teri Goldman, attorney for Respondent (by regular mail and electronic mail)
Dr. Terry Allee (by regular mail and electronic mail)
Rand Hodgson (by regular mail and electronic mail)
Jackie Bruner, DESE (by regular mail)
Wanda Allen, DESE (by electronic mail)