

Before the  
Administrative Hearing Commission  
State of Missouri



, IN THE INTEREST	)	
OF, )	)	
	)	
Petitioner,	)	Case No. 18-1002
	)	
vs.	)	
	)	
SPECIAL SCHOOL DISTRICT OF	)	
ST. LOUIS COUNTY,	)	
	)	
Respondent.	)	

**DECISION**

We find that the Special School District of St. Louis County (District) denied a free and appropriate public education (FAPE) to (Student) in violation of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 et seq., when it chose not to timely evaluate Student and determine that Student was a child with an educational disability.

**Procedure**

On October 15, 2018, (Parent) filed a due process complaint on behalf of her daughter, Student, against the District. On October 26, 2018, the District filed a response to the due process complaint, which, in part, challenged the sufficiency of the complaint. On October 29, 2018, we found the complaint sufficient. On December 19 and 20,

2018, we convened a hearing.<sup>1</sup> Parent appeared in person *pro se*, on behalf of Student.<sup>2</sup>

Attorney James Thomeczek with Thomeczek & Brink LLC appeared on behalf of the District.

This case became ready for our decision on January 14, 2019, when the last written brief was due.

### **Findings of Fact**

1. Student is years old and lives in the School District of University City (SDUC). She is in h grade and attends Lieberman Learning Center (Lieberman), an alternative school in SDUC.<sup>3</sup>

2. On April 24, 2018, (the end of seventh grade) the District identified Student as a student with a disability under the IDEA after it found she met the eligibility criteria for emotional disturbance.

#### *Student's Elementary School Records*

3. Student attended Pershing Elementary School (Pershing) within SDUC from kindergarten through fifth grade. Student's school records report, in part, the following:

- a. Kindergarten (2009-2010 School Year) – Student had “hysterical fits” when she did not get her way, and her teacher noted that this behavior should be watched. Student found the academic work hard and she was behind most other children, but was otherwise happy, helpful, polite, and worked hard. Summer school was recommended, and it was determined that Student would repeat kindergarten (2 absences and 4 tardies).
- b. Kindergarten (2010-2011 School Year) – In the beginning, Student achieved top rank academically and was considered one of the leaders in the class. It was noted that Student got upset when a substitute teacher was present and

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<sup>1</sup> On December 13, 2018, the District filed a motion to dismiss because Parent did not comply with the 5-day disclosure rule. This Commission denied the motion, but precluded Parent from calling any witness not otherwise disclosed in Parent's prehearing conference statement and from admitting evidence not otherwise previously disclosed to the District.

<sup>2</sup> Student's father also attended the hearing although not named in the due process complaint.

<sup>3</sup> Section 162.825 permits the creation of a special school district for the purpose of providing special education and related services to students with disabilities within the component districts of which it is comprised. The SDUC is part of the Special School District of St. Louis City. The District is currently providing Student with special education services.

sometimes refused to go to a specialist's class, especially Art. Her teacher thought this was attention seeking behavior. By third quarter, Student's behavior had deteriorated, had "terrible outbursts," and she was a "danger to herself and everyone around her when they occur." This impacted Student's ability to learn. By fourth quarter, Student had "calmed down," and the teacher had "no clue what brought on her hysterics and that is a worry." The teacher did not think Student was "over the problem yet." She still needs support with math and reading (11 absences and 10 tardies).

Ex. C.

- c. Kindergarten School Disciplinary Records state, in part, that:
- i. September 14, 2010 - Student screamed for approximately 30 minutes, tore a bulletin board, tried to tear a teacher's scarf, kicked and hit the teacher and said she hated the teacher and wanted her to die. The teacher did not know what triggered the event. Student was suspended for 2 days.
  - ii. January 26, 2011 - Student cried and screamed all day and refused staff direction from 3 teachers and the principal. Student was suspended for 2 days.
  - iii. February 14, 2011 - Student was told to eat more lunch before going to recess and she cried. Once back in the classroom she trashed the room, bit, scratched and kicked [a teacher] in the stomach. The teacher had never seen Student "so violent." Student was suspended for 4 days.
  - iv. March 8, 2011 - Student was suspended for poor behavior (record illegible as to specific acts) for 5 days.

Ex. E.

- d. First Grade (2011-2012 School Year) – Student was a good citizen but needed to improve self-control and did not complete assignments. Student had trouble with reading, but improved and was expected to test at grade level. Student listened and knew how to ask for help and was later deemed to have set "the standard for good behavior as a student." Student's academic scores were all "exceeding expectation" or "adequate progress" (8 absences and 4 tardies).
- e. Second Grade (2012/2013 School Year) – Student had several areas of concern academically during various quarters, including following directions; self-discipline; working cooperatively; aspects of writing, reading summary, vocabulary, and comprehension; and aspects of math including subtraction, multiplication, estimation, geometry, money, and justifying math concepts in writing. Student was classified as smart,

helpful, and polite, but did not stay focused at times, worried more about others rather than finishing her own work, needed to listen and put forth her best effort, and was reading below grade level (5 absences and 17 tardies).<sup>4</sup>

- f. Third Grade (2013/2014 School Year) – Academically, Student achieved the required standards or nearly met or made progress except in the area of division in mathematics. The only teacher comment was to encourage Student to continue to read and practice math over the summer (8 absences and 9 tardies).<sup>5</sup>
- g. Summer School after Third Grade Year – Student achieved standards in behavior expectations (was respectful, responsible, safe for peers and self, followed routines and behavior expectations, monitored own behavior, and internalized corrective feedback), mathematics and organization and memory aids. She made progress toward the standards in science enrichment and engaged in the learning process.
- h. Fourth Grade (2014/2015 School Year) – Academically, Student made adequate progress toward grade level or achieved or exceeded grade level in all areas. There were no teacher comments other than Student was a pleasure to have in class and she needed to read over the summer (1 absence and 3 tardies).<sup>6</sup>
- i. Summer School after Fourth Grade Year – Student achieved grade level in science enrichment, mathematics, behavior expectations, and engaged in learning process. Student made progress toward grade level standards in organization and memory aids, but was not making sufficient progress in English Language Arts (ELA) (reading two or more grade levels below).
- j. Fifth Grade (2015/2016 School Year) – At the end of the academic year, Student was above average in science, achieved grade level in math and social studies, and made adequate progress toward grade level in communication arts. The only teacher comment was

[Student] has performed at Basic, Proficient, and Advanced levels this Quarter. Often, [Student] has lacked motivation to complete given tasks. Please encourage her to change this behavior for next year.

Student's disciplinary records indicate that on December 14, 2015, Student received an out-of-school suspension for 1 day for fighting<sup>7</sup> (4 absence and 4 tardies).<sup>8</sup>

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<sup>4</sup> All absences and tardies were first period only.

<sup>5</sup> All absences and tardies were first period only.

<sup>6</sup> All absences and tardies were first period only.

<sup>7</sup> The record contains no details of this incident.

<sup>8</sup> All absences and tardies were 1<sup>st</sup> period only.

k. End of Summer School after 5<sup>th</sup> grade year – Student was above average in language arts, average in reading, math, and social studies and below average in science, work habits, general behavior, and personal/social development.<sup>9</sup>

4. While Student attended Pershing, the school social worker was Stacy Miller.

Miller has a Bachelor's degree and Master's degree in social work.

5. Miller recalled Student engaging in crying fits and meltdowns mainly in Student's first year of kindergarten.

6. Miller recalled that Student had good attendance while at Pershing and did not try to avoid school. No one recommended to Miller that Student be evaluated for an educational disability. Miller did not see Student as a concern.

7. Michelle Williams-Turner has been a school counselor for the SDUC for 13 years. She was the school counselor at Pershing while Student attended. Williams-Turner has an undergraduate degree, a Master's degree in elementary education with a special reading certification, and a second Master's degree in counseling.

8. As a school counselor, Williams-Turner's duties included focusing on students' personal and social development, academic achievement, career readiness, and independent work study. She is the first person a classroom teacher would contact if the teacher was concerned that a student may have a disability or had academic concerns.

9. Williams-Turner recalled Student's difficulties in kindergarten, and believed that Student struggled because Student had never attended preschool and wanted to be with her mother.

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<sup>9</sup> The record contains no further details.

10. Student was one of Williams-Turner's favorite students. Williams-Turner was close with Student and her family, and remained close throughout Student's elementary school years.

11. Williams-Turner never suspected Student as having a disability. Student's teachers never approached Williams-Turner with any concerns regarding Student. Due to the close relationship with Student's family, if Williams-Turner had any suspicions that Student needed to be evaluated for an educational disability, she would have initiated it. Parent never asked Williams-Turner to evaluate Student.

12. Williams-Turner observed that Student neither loved nor hated school. Student went to school, was quiet, did not like a lot of attention drawn to her, had friends, and was social.

13. Williams-Turner remembers Student having about three emotional outbursts every year through 5<sup>th</sup> grade.<sup>10</sup> Williams-Turner vaguely recalled the school having to switch Student's fourth grade teacher due to a concern with Student.<sup>11</sup>

14. Williams-Turner routinely spoke to a school counselor at Brittany Woods Middle School (Brittany Woods) regarding incoming sixth graders. Williams-Turner told the counselor, Kelly Douglas, that Student was quiet, did not like a lot of attention, was very sweet, and needed somebody in the building to connect with and she will be fine.

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<sup>10</sup> Williams-Turner testified at the hearing that she did not recall Student having any meltdowns or having to sit in her office on several occasions after kindergarten. She further testified that she observed Student having general student issues from time to time, such as having an issue with her hair, but the issues were resolved without further incident. It was noted in Student's evaluation report (Ex. 19) that Williams-Turner reported to Brittany Woods that Student displayed about three emotional outbursts a year through 5<sup>th</sup> grade. No further details were provided about the specifics of the outbursts.

<sup>11</sup> No evidence was adduced regarding the specifics of this issue.

*Brittany Woods Middle School*

*6<sup>th</sup> Grade (2016/2017 School Year)*

15. On August 17, 2016, at the beginning of Student's 6<sup>th</sup> grade year, Parent requested that SDUC perform an initial evaluation to determine if Student was a child with an educational disability.<sup>12</sup>

16. The request was reviewed by the school counselor, Rashaad Davenport, and the District's school psychologist, Chrystal Henkelman.

17. Davenport sent Parent a copy of her Procedural Safeguards under the IDEA.

18. Davenport has an undergraduate degree in elementary education, a Master's degree in counseling, and an Educational Specialist degree in educational leadership/school administration. He has served as a school counselor at various schools in the St. Louis area for several years.

19. Henkelman has been a school psychologist with the District for eight years. She has an undergraduate degree in psychology and an educational specialist degree. She is also state certified as a school psychologist.

20. In response to Parent's request for an evaluation, Davenport obtained medical, social, emotional, and academic information about Student between August 15, 2016 and September 1, 2016, from the following individuals or tests:

- a) Parent interview and questionnaire;
- b) Interview with Williams-Turner;
- c) Student interview about what Student thought she needed to be successful;
- d) Interview with school nurse which revealed Student has no reported medical condition and took no medications;

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<sup>12</sup> Although Parent argues that the District should have evaluated Student in elementary school, Parent testified that she did not initiate an early request for an evaluation because she was unaware of her rights to do so until Student was in middle school.

- e) Interview with school language and speech pathologists, which revealed Student had no reported issues in this area;
- f) Observations made by two of Student's teachers, Ms. Pennington (science teacher who Student was least responsive to) and Mr. Sausele (ELA teacher who Student was most responsive to) regarding Student's academic and social-emotional functioning as reported in a questionnaire;
- g) Student's reading screener test, SIPPS, which she passed;
- h) Student's speech evaluation, CELF 5, which she passed;
- i) Student's work samples;
- j) Student's grades and attendance during the first two and a half weeks of sixth grade, which stated she was making a B in social studies, F in math, an A in ELA, and an A in physical education. Student's attendance was good (Student was never absent except the first day of school and she received a few tardies, which is common for students attending a new school);
- k) Student's IQ test scores from the Kaufmann Brief Intelligence test administered to Student on August 29, 2016, which identified Student's IQ as 82;
- l) Student's district wide assessments from February 1, 2016 and January 1, 2015; and
- m) Davenport's observations of Student.

21. When Parent spoke to Davenport to make the referral, Parent stated that during Student's elementary years, Student had some emotional concerns, panic attacks, separation anxiety, possible emotional disturbances, had meltdowns since she was five years old, and repeated kindergarten due to emotional concerns. Parent's biggest concern was that Student had problems when redirected. Parent also stated that Student did not like to be called out in front of class, and when Student was placed under pressure, she was very sensitive at times, so it was better to correct her behavior away from her classmates. Parent requested counseling for Student.



22. Williams-Turner told Davenport that Student needed to have a relationship with a school staff member so when she is having a breakdown or meltdown she can go and speak with the staff member, such as Davenport. Davenport did not take this discussion to suggest Student had emotional disability concerns; rather, Student would benefit from having a developed relationship with school personnel as she transitioned into middle school.

23. Pennington and Sausele's teacher observations regarding Student were made within the first two and a half weeks of Student attending middle school.

24. Sausele's observations regarding Student's social and emotional behavior were primarily that Student: a) did not appear to listen when spoken to daily; b) was reluctant to engage in tasks requiring effort weekly; c) easily got off track multiple times a day; d) left her seat without permission multiple times a day; e) talked excessively weekly; f) was argumentative with teacher daily; g) was easily annoyed daily; h) deliberately annoyed others weekly; i) refused to comply with the teacher's request weekly; j) blamed other for mistakes or misbehavior daily; k) engaged in verbal aggression against peers or adults weekly, but never physical aggression, property damage, or threatening others; l) demanded immediate response from others multiple times a day; m) lied to avoid responsibility for actions weekly; n) was pessimistic, apathetic and unmotivated to participate in most activities daily; o) refused to speak and preferred to be alone in social settings weekly; p) reacted inappropriately to the success of others and demonstrated excessive and inappropriate worry weekly; and q) was teased and teased others weekly.

25. Sausele reported that Student's social and emotional behavior never consisted of Student: a) leaving the room without permission or eloping from school; b) engaging in self-destructive behavior (scratches, bites, cuts, or threats to hurt herself or commit suicide), property damage, threatening or intimidating others, stealing, or bullying; c) inappropriate sexual

behavior; d) displaying diminished interest in activities she enjoys; e) being overly self-critical regarding personal appearance or likeability or indicating that no one likes her; f) becoming pale, vomiting, or passing out when nervous or frightened, or reporting episodes of fear, discomfort, sweating, trembling, chest pain, or choking; g) expressing unreasonable fear or demonstrating significant changes in appetite; h) complaining of intrusive thoughts, urges or images, or engaging in unusual or repetitive behaviors such as washing hands; i) reporting difficulty concentrating; or j) reporting being bullied or isolated by students.

26. With regard to Student's academic behavior, Sausele reported that Student: a) did not bring homework and materials to class and lost necessary materials weekly; b) lacked follow through on classroom tasks and delayed starting assignments until the last minute daily; c) made careless errors, rushed through work, and understood but was unable to follow multi-part directions due to forgetting weekly; d) had a short attention span and had trouble concentrating daily; e) demonstrated low level of engagement in academic subjects and became overwhelmed by large or complex assignments weekly; f) was easily distracted, did not think before acting, started but did not finish tasks, was unable to repeat instructions back to teacher in sequence, overreacted to small problems, and had difficulty coming up with alternative solutions to problems weekly; and g) needed close supervision, help from teacher, and got out of her seat unnecessarily multiple times a day.

27. Pennington's observations regarding Student's social and emotional behavior were similar except that she did not report some of the behaviors noted by Sausele.<sup>13</sup> Pennington reported that Student: a) listened and was attentive when spoken to; b) smiled, laughed, demonstrated happiness, and was not pessimistic, apathetic or unmotivated; c) spoke

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<sup>13</sup> The observations regarding a specific behavior may vary between the two teachers as to whether a behavior occurred multiple times a day, daily or weekly.

in social situations and did not prefer to be alone or react inappropriately to the success of others; e) did not demonstrate inappropriate worry; and f) did not tease and was not teased by other students.

28. Pennington's report regarding Student's academic behavior was incomplete with no significant information.

29. Davenport observed that Student's behavior was age appropriate and that she got along with her peers. He noted from gathering all the information that: a) Student's general attitude was good; b) her preferred learning characteristic was that she responded well to positive praise; c) her gifts or strength was that she "works well"; d) her area of challenge was "getting along with adults." He also noted that Student had trouble calming herself down when she gets angry, and shutting down completely when she feels wronged. Ex. 4.

30. While Davenport was gathering information on Student, the school convened a "Care Team"<sup>14</sup> for Student to discuss possible interventions that may assist Student independent of Davenport's review.

31. The Care Team decided to implement some interventions that included allowing Student to pick a partner during group time in classes such as science because Student worked better with someone she liked; otherwise, Student might become frustrated and leave the room. The team also decided that Student should be corrected in private, allowed to have access to the school counselor, allowed a "brain break" when she got frustrated, and allowed to show an ID card when she needed to leave and speak with a school counselor rather than verbalizing her need in class.

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<sup>14</sup> A Care Team was a group of pertinent school staff personnel, including some of Student's teachers, that developed intervention strategies to help Student succeed. The school used Care Teams for students who had academic or disciplinary issues regardless of whether they also had an educational disability.

32. Once Davenport gathered all the information regarding Student, he met with Henkelman to review the data. Their professional opinion was not to go forward with an evaluation of Student, in part, because Student had only been in the school for two and half weeks and her elementary school information did not indicate an ongoing concern.

33. Because Student was beginning her sixth grade year, Henkelman was looking to see if Student had a history of severe social/emotional concerns that was consistent and pervasive, and whether she had a history of an inability to learn, lack of friends, difficulty making relationships with peers and staff, and symptoms of severe depression, anxiety, social withdrawal, and psychosomatic issues as opposed to a student who just did not want to follow a teacher's directive and would rather do her own thing, create her own rules, and get in trouble with her friends.

34. Henkelman and Davenport noted Student's kindergarten concerns, but also noted Student's improvement and lack of a Care Team in elementary school, which suggested the school had no concerns regarding Student. Also, in elementary school Student's grades were fine. Henkelman, Davenport, and Student's teachers were just getting to know Student. Henkelman and Davenport viewed Student's behavior to be more in line with a social maladjustment, including purposeful and controlled behavior such as not wanting to comply with the rules. They noted no signs of depression, anxiety, or social withdrawal that one would typically see with emotional disturbance.

35. Due to what Davenport and Henkelman believed to be social maladjusted behavior, the school decided to continue to use the intervention method implemented for Student.

36. On September 1, 2016, the District issued a Notice of Action (NOA) informing parent that it was refusing Parent's request for an initial evaluation because the documentation

did not support the suspicion of a disability. The NOA was based on a review of data gathered by Davenport.

37. Student's grades improved somewhat in the first quarter of her 6<sup>th</sup> grade year, but later declined.

38. Student's full 6<sup>th</sup> grade school records state that academically Student had inconsistent grades in all subjects. Her best class was ELA Lab 6 where she received a B first quarter, an F second quarter, an F third quarter, and an A fourth quarter. Her worst class was Social Studies where she received a D the first quarter, an F second quarter, an F third quarter, and an F fourth quarter. It was noted that daily attendance and being on time each day affected her academic success in school.

39. Student had 38 absences and 66 tardies. Her overall attendance was 88% because Student was absent or tardy to one or more classes in a day, but was not absent full days. Davenport prefers student attendance to be at 90%.

40. School disciplinary records report that on:

- August 12, 2016 – Student disrupted class and had conference with administrator.
- October 26, 2016 – Student absent from class and received a 1 day in-school suspension.
- October 31, 2016 – Student disrupted class and received a 1 day in-school suspension.
- November 10, 2016 – Student refused staff direction and received a 1 day in-school suspension.
- November 22, 2016 - Student was absent from two classes and received a conference with administrator and a 1 hour detention.
- November 28, 2016 – Student disrupted class and received conference with administrator and then skipped a class and received another conference with the administrator.

- November 30, 2016 – Student disrupted class and received a 2 day out-of-school suspension.
- December 5, 2016 – Student refused staff direction and disrupted class and received a 5 day out-of-school suspension and a conference with administrator.
- December 12, 2016 – Student refused staff direction and was later absent from class and received conference with administrator.
- January 26, 2017 – Student was tardy and received a 1 day in-school suspension.
- February 17, 2017 – Student absent from class and received a 1 day in-school suspension.
- February 28, 2017 – Student disrupted class and received a conference with administrator.
- April 14, 2017 – Student had a level 2 or 3 violation<sup>15</sup> and received a conference with administrator.
- April 17, 2017 – Student had a level 2 or 3 violation and received a 5 day out-of-school suspension.
- April 25, 2017 – Student used profanity and inappropriate language and received a 3 day in-school suspension.
- May 1, 2017 – Student used profanity and inappropriate language and received a 5 day out of school suspension.
- May 10, 2017 – Student failed to attend class and received an 8 day in-school suspension.
- May 15 2017 – Student failed to attend class and received a 5 day out-of-school suspension.

41. Student’s disciplinary actions involved “arguing and ignoring with teachers and principal, cursing and using profanity, disrupting class, refusing to put items away, cutting class, roaming the halls, threatening other students, refusing to work, insulting peers, refusing

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<sup>15</sup> The record does not describe a level 2 or 3 violation.

to sit in class, leaving room without permission, continuing disruption of classroom, not bringing appropriate materials to class, and being disrespectful toward others.”<sup>16</sup> Ex. 19.

*7<sup>th</sup> Grade (2017/2018 School Year)*

42. On August 15, 2017, Parent made a second request that Student be evaluated to determine if she was a child with a disability. Parent expressed concerns that Student:

- a. Had social/emotional behaviors that impeded her ability to learn.
- b. Displayed oppositional behavior, and refused to comply with adults’ requests.
- c. Did not engage in time management, keep track of her belongings, complete homework within a reasonable time with minimal help, perform basic math tasks, admit she has done something wrong, or respond to discipline.
- d. At times, did not display self-confidence, became easily frustrated or angry, had poor memory skills, appeared unhappy, and did not have friends her own age.
- e. Never has headaches, stomach aches, fears that interfere with her daily functioning or causes sleepiness, and did not appear anxious or overly sensitive to smells, loud noises, or textures.

43. Student’s Care Team determined that Student’s grades and number of absences and tardiness were concerning. Therefore, the school placed Student in its UCLA program at the beginning of the school year. UCLA was a placement of Student in a smaller class setting for all core classes and the teachers came to students instead of the students being dismissed between classes. This was designed to remove the distractions in the hallway and limit free time because it was determined that most of Student’s incidents were in the hallway or class disruptions. Also, the UCLA program had the school social workers work more closely with the students.

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<sup>16</sup> No other specifics were provided regarding Student’s behavior giving rise to discipline.

44. Davenport and Henkelman went through a similar process as they did the year before, but did not obtain teacher observation checklists.

45. Davenport and Henkelman decided not to go forward with an evaluation of Student because they again determined that Student engaged in social maladjusted behavior such as her use of profanity, skipping class, running down the hall with other students laughing and having a good time, and continuing to run and laugh when a teacher tried to stop them with no signs of depression, anxiety, social withdrawals, crying a lot or having her emotions get in the way.

46. On September 7, 2017, the District issued an NOA informing Parent that it was refusing Parent's request for an initial evaluation because the documentation did not support the suspicion of a disability. The NOA was based on a review of data gathered by Davenport consisting of student records and disciplinary information, parent input, district-wide and state assessments, and intervention information.

47. The District implemented UCLA at the beginning of Student's 7<sup>th</sup> grade year. After Student was later suspended due, in part, to her excessive absences and tardies, the school moved Student into a more restrictive environment, The Academy. This was a 10 week program where students do not have any electives other than physical education. Students stay in one room so movement is restricted. The program is used for students with behavior issues and for students that need academic remediation. The program uses a system called ReadTheory to improve reading skills and comprehension.

48. While in 7<sup>th</sup> grade, Student continued "to exhibit behavioral difficulties and consequently [has] received multiple disciplinary referrals and suspensions for offenses such as refusing staff requests, class disruptions, using profanity, using inappropriate language,



fighting, and cutting class.” Ex. 19. While attending The Academy, Student was “frequently skipping class/elopeing, lacking motivation to begin or complete her class work, and refusing to accept consequences for making poor choices ... wants to be socially accepted, exhibits low self-esteem, is apathetic, and lacks trust of others.” *Id.*

49. Student did not take advantage of tutoring services made available to her.

50. On February 8, 2018, Parent made a third request for a special education evaluation. She expressed concern that Student eloped from class, was unmotivated, did not like to be singled out, shut down, found school work too hard, was leery of new settings, her academic levels were below expectation in reading fluency, math and written expression, she did not adapt to changes in her environment, did not handle frustration well, did not join group activities consistently, appeared depressed and withdrawn at home, was always alone and felt like her peers and teachers disliked her, lacked confidence to complete school work independently, could be defiant at home and school, ran away from home for two days over summer 2017, was overly concerned with physical appearance, compared herself to others, and responded to academic tasks by shutting down or replying, “I don’t know.” Ex. 19.

51. The school again gathered similar data on Student as before. Student’s teacher reported that Student needed to improve citizenship, skipped class, did not complete assignments, was not working to capacity, showed inconsistent effort, and had been observed running, hiding, and eating lunch in the restroom.

52. On March 7, 2018, the District determined that a disability was suspected of Student and an evaluation was warranted in the areas of intellectual cognition, social/emotional behavior, and academic achievement due to characteristics that were found by Henkelman to have existed over an extended period of time.

53. Davenport and Henkelman testified that they determined an evaluation was proper at this point because the intervention methods such as the UCLA team were not successful. They observed new behaviors such as Student being scared to go to class and hiding in the hallway alone or under the stairways, and the social worker noted Student wanted to stay with her more often, Student would be in a fetal position in a chair, and Student expressed more anxiety and fear.

54. The District conducted an evaluation of Student including cognitive assessments, observations of Student in different settings, rating scales completed by teachers and parent, academic testing, and a functional behavioral assessment.

55. Student was given: a) the Wechsler Intelligence Scale for Children, Fifth Edition, and received standard scores of 90 to 109, which was within the average range for children her age with a full IQ of 88; b) Kaufman Test of Educational Achievement, Third Edition which when compared with her IQ indicated that Student's academic skills were very consistent or commensurate with her ability level; c) the Behavior Assessment Scale for Children, Third Edition (BASC-3), which indicated clinically significant concern regarding Student's conduct problems, adaptability, study skills and adaptive skills, attention problems and functional communication; and d) Henkelman did a Student interview.

56. When Student's BASC-3 scores were compared to those her own age, it was determined that Student was "At-Risk" for anxiety and depression, and the scores were within the "Clinically Significant Range" for aggression, withdrawal, leadership, and overall behavioral symptoms index, externalizing problems, learning problems, and school problems. Ex. 19. Further, it was determined that Student had "a tendency to become easily upset, frustrated, and/or angered in response to environmental changes, had difficulty controlling and maintaining her behavior and mood, had a tendency to react negatively when faced with

changes in everyday activities or routines, had difficulty overcoming stress and adversity, and frequently engaged in rule-breaking behavior such as cheating or deceptions.” Ex. 19.

57. The school social worker, Allegra Grawer, reported that on April 4, 2018, Student was anxious about going to class, and often responded by avoiding class altogether. Grawer reported that Student at times is seen hiding in various places in the building such as under staircases, she is typically alone when she skips classes and lunch time, she requires frequent encouragement and reassurance from adults at school, and is self-conscious. Grawer also reported that Student will roll into a ball in her office.

58. On April 9, 2018, Student was alleged to have participated in making a prank call to the University City Police Department claiming there were shots being fired at school. As a result of this, Student was suspended by SDUC for 10 days, and after a disciplinary hearing was suspended for another 170 days.

59. On April 24, 2018, the District determined that Student had an educational disability of emotional disturbance due to the following characteristics that were found by Henkelman to have existed over an extended period of time:<sup>17</sup>

[Student] demonstrates a general pervasive mood of unhappiness or depression. Specifically [Student] lacks resiliency and the ability to cope and adapt to various school environments. She often responds by engaging in negative behaviors including skipping class, eloping, refusing staff requests, not completing her school assignments, and disrupting the work of others. Per the social history provided by her mother, [Student] demonstrates significant difficulty handling frustration, joining group activities, transitioning to new or different situations, and complying with rules. [Student] reportedly appears to be sad and reserved. She lacks self-esteem, is apathetic, and believes others at school do not like her. According to school staff, [Student] is often by herself when she skips class periods and appears to do so to avoid tasks (this was confirmed by the results of the completed FBA). She requires frequent

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<sup>17</sup> On the same day, the District held a manifestation determination meeting to determine if Student’s alleged conduct resulting in her suspension was a manifestation of her disability. Student’s father attended the manifestation determination hearing, and Parent did not. The District determined Student’s alleged conduct was not a manifestation of her disability. No appeal was filed regarding the District’s determination, and the District’s determination is not an issue in this case.

reassurance and verbal encouragement from others to go to class and participate. She frequently lacks motivation at school and appears to exhibit a diminished interest in various school activities . . . Her academic skills on the KTEA-3 measured within the Average to slightly Below Average ranges for her grade-level; however, [Student] is currently failing all of her academic classes and reports that school is challenging for her. Other concerns reported by school staff on the BASC-3 include [Student] often refuses to follow the rules at school and has conduct problems, is easily upset and angry, has trouble controlling and maintaining her mood and behavior, reacts negatively when faced with challenges in everyday activities or routines, and has significant difficulty overcoming stress and adversity. Such difficulties were confirmed by various observations of her behavior in different school settings.

Ex. 19.

60. Henkelman also reported that Student's characteristics:

[H]ave existed to a marked degree as indicated by [Student'] receiving numerous disciplinary referral and school suspension. She has received various supports including some counseling and being placed in a self-contained setting for general education [sic] students at Brittany Woods Middle School. However, she continues to demonstrate significant behavioral difficulties and is failing the majority of her academic courses.

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[Student] will need specialized instruction in coping skills and strategies and in any academic area adversely impacted by her inability to regulate her emotions and behaviors effectively.

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The team has determined that the disability is not primarily the result of social maladjustment or transient symptoms due to a specific crisis or stressful experience.

61. On May 3, 2018, the District issued an NOA informing Parent that Student's placement was changed to home setting. This was done due to Student's suspension and the approaching end of the school year.

62. On May 6, 2018, the District implemented an individualized education plan (IEP) for Student with Parent's input. Student's IEP called for her to receive academic instruction through regular education, but through special education she was to receive 60

minutes a week each in reading, written expression, study skills, self-advocacy, and social skills.

63. Student's 7th grade school records state that academically Student was making Ds and Fs in most subjects with one C first quarter in English Language Arts 7 and one B in first quarter Academic Lab (63 absences and 49 tardies).<sup>18</sup>

64. Student's disciplinary records state that:

- a. On January 5, 2018, Student engaged in fighting with injury and was suspended for 10 days. It was also recommended that Student be suspended until the end of the school year, but the suspension was held in abeyance pending no further infractions.
- b. On April 20, 2018, Student was suspended for 170 days for placing two calls to 911 that indicated there was a shooter in the building.<sup>19</sup> On April 24, 2018, a manifestation decision was reached that Student's conduct was not a manifestation of her disability.<sup>20</sup> Student was given home bound instruction until the end of the 2017/2018 school year and then allowed to serve the completion of her suspension at Lieberman.

65. Once placed on homebound instruction for the 2017-2018 school year, Student used an online curriculum.

66. Student's progress report dated May 30, 2018, states that Student completed most of her assignments with help; she is "very good with math; she is good with using the computer program; and she learns well to follow patterns especially in math." Ex. 34.

Student's reported weakness were:

[T]hat when she does not want to work she has behaviors that are difficult to overcome. She has cried very loudly in the library and she has refused to talk, listen or to work on any assignments. Most of the time she was willing to do work. Her attitude is usually good at the beginning of instruction but when she decides she has had enough it was difficult to keep her engaged in her instruction. Her attendance has some issues. She was late two times and did not show one time. She did progress well in the session we were able to do this month.

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<sup>18</sup> The absences and tardies included various periods throughout the day.

<sup>19</sup> Parent testified that Student did not make the phone calls.

<sup>20</sup> Parent did not appeal this suspension or the manifestation determination.

67. Student's homebound progress report dated August 2, 2018, states that Student attended three sessions of eight scheduled sessions and four were missed due to sleep problems. The report noted that Student's attitude was positive; she worked the entire sessions that she attended; she received 100% on her geography quiz, 80% on her science knowledge quiz, between 70% and 100% on her scientific inquiry assignments, 100% on measurement pre-test, and 100% on English clauses, independent clauses, and phrases.

68. In August 2018, the Family Court of St. Louis County Juvenile Administration performed a psychological evaluation of Student. The evaluation determined that Student had a history of displaying excessive distress, worry, and persistent reluctance about school. The report gave her a diagnosis of Generalized Anxiety Disorder and Attention-Deficit Hyperactivity Disorder because she had problems with inattention, hyperactivity, poor impulse control, and heightened arousal. It stated "that ongoing familial stressors exacerbate [Student's] negative mood resulting in feelings of sadness, pessimism, resentment, and increased withdrawal ... it's possible the stress between her parents may be contributing to her report of depressive symptoms thereby she was diagnosed with Other Specified Depressive Disorder." Ex. A.

69. The report also stated that Student struggles academically and may have some anxiety about school resulting in her problems with poor grades, skipping class, refusing staff directives, loitering in the hallways, etc. The treatment recommendations included:

- a. Student to maintain a stable residence with appropriate adult supervision;
- b. Student and family follow through with Court-ordered therapy services;
- c. Student would benefit from a small class environment with individual instruction and alternative education programs such as Project LEARN "would be ideal" as well as working with a school counselor if her behaviors continue;

- d. Student receive psychiatric services to address her problems with anxiety, inattention, hyperactivity, and depression; and
- e. Student should consider joining community organizations that would improve her mood and give her opportunities to develop positive friendships.

70. The Family Court's psychological evaluation conclusion that Student suffers from generalized anxiety is consistent with the District's emotional disturbance diagnosis. The Court's diagnosis of ADHD-Combined Presentation is not consistent with emotional disturbance. The Court's diagnosis of Specific Depressive Disorder related to a single episode and not pervasive or significant, and a child affected by parental relationship distress is environmental.<sup>21</sup>

71. On August 28, 2018, Student's IEP was amended with Parent's input. Student was moved off of homebound instruction and placed at Lieberman for half days for the next school year.

*8<sup>th</sup> Grade Year (2018-2019 School Year)*

72. Student is currently enrolled at Lieberman and being provided special education services through the District.

73. Mary Wheat is Student's special education teacher (case manager) at Lieberman.

74. Wheat has been a special education teacher for 20 years and has been at Lieberman for two years. She has an undergraduate degree in regular and special education and a Master's degree in instructional process.

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<sup>21</sup> This expert opinion came from Henkelman. Tr. Vol. II, at 159.

75. As Student's case manager, Wheat monitors Student's progress on her IEP goals, assists, tutors, and supports Student, and makes sure Student is doing her academic work.

76. At Lieberman, Student has both special education and general education requirements. Student's E2020 course is an online curriculum for students who need credit recovery or students who do not have access to an actual class setting.

77. In October 2018, the District again amended Student's IEP to add 40 minutes a week of social work counseling for Student.

78. Wheat routinely tracks Student's progress on her IEP goals and reports the information to Parent. As of early December 2018, Student was making adequate progress on all nine of her IEP goals.

79. With regard to Student's general academic goals, Student can ask Wheat any time during the school day for assistance.

80. With regard to Student's general academic classes, the E2020 online course work, Student has completed between 3.3% to 10% of the course work, but she should be closer to 50-70% completed. Student has a C+ average in one class and 90% in another. Student's academic progress is concerning to Wheat because Student is not completing or properly working on her assignments, and Student is not logging into her online coursework.

81. Wheat observed a difference between Student's academic performance and ability. Student's academic ability is "roughly within a range of grade level," but her motivation, effort, and performance does not always reflect her ability. Tr. Vol II at 229.

82. When Student is given the opportunities to do her work, she does not always put time into it. "She sits and works and when she does – the 10 percent one in particular, she's progressed further – she does extremely well. She reads it well. She understands it well and



answers the questions well.” She is not meeting her goals due to attendance and due to lack of motivation.

83. In late September 2018, Student informed Wheat that she felt overwhelmed with ELA. Wheat began to focus on having Student work on the subject with her. Wheat observed Student using complete sentences, and noticed that Student was writing on a 7<sup>th</sup> to 8<sup>th</sup> grade level as expected.

84. Student had physical contact with her math teacher this school year.<sup>22</sup> Wheat was informed that the school made a hotline call regarding the teacher. Wheat does not think it is a safe environment for Student to learn, and because of this, Wheat attends math class with Student so there is another “set of adult eyes in the room.” Tr. Vol II at 268.

85. Wheat was made aware of “danger issues” with Student on the way home from school, which Parent reported to the District.<sup>23</sup> Student informed Wheat that she is frightened or upset. Student has come to the school upset three times, one of which Student was “very upset.” Tr. Vol II at 233.

86. Student is generally friendly and outgoing at school. Student engages with other students, acts like a normal teenager, and is not otherwise upset about issues.

#### General Information Regarding Student

87. Student has not been in trouble within the community other than for her actions resulting in her 170 day suspension.

88. In 2013, Student received family therapy. She also received brief counseling services at school during her 7<sup>th</sup> grade year.

89. Student’s achievement scores are commensurate with her full scale IQ scores.

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<sup>22</sup> The details of the incident are not in the record.

<sup>23</sup> The details of these incidents are not in the record.

90. State MAP scores are state standards and are “a little different” from SDUC’s standards. Tr. Vol I at 207. If a student scores a basic on the MAP test, it equates to being proficient in a classroom. Student’s MAP scores have consistently been basic or below basic, but her below basic raw scores are close to basic. For example, Student had a score of 572 when basic required a score of 573. MAP scores alone do not indicate a disability.

### **Evidentiary Issues**

We overrule all objections taken with the case.

### **Conclusions of Law**

We have authority to hear this case pursuant to § 162.961.<sup>24</sup> The burden of proof is on the party seeking relief, in this case the Parent. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). Parent must prove her case by a preponderance of the evidence, which is evidence showing, as a whole, that “the fact to be proved [is] more probable than not.” *Kerwin v. Mo. Dental Bd.*, 375 S.W.3d 219, 229-30 (Mo. App. W.D. 2012).

We must judge the credibility of witnesses, as well as the weight and value of the evidence. *Faenger v. Petty*, 441 S.W.3d 199, 204 (Mo. App. W.D. 2014). We have the discretion to believe all, part, or none of the testimony of any witness. *Dorman v. State Bd. of Registration for the Healing Arts*, 62 S.W.3d 446, 455 (Mo. App. W.D. 2001). When there is a direct conflict in the testimony, we must make a choice between the conflicting testimonies. *Harrington v. Smarr*, 844 S.W.2d 16, 19 (Mo. App. W.D. 1992).

In her due process complaint, Parent pleads that the District failed to provide FAPE when it: a) failed to timely evaluate Student for a disability, including failing to collect necessary data and falsifying grades; b) failed to provide or offer proper IEP services such as

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<sup>24</sup> Statutory references are to RSMo 2016 unless otherwise noted.

assistive services, tutoring, private placement, and therapy from outside sources; and c) did not properly place Student after progress monitoring repeatedly indicated Student had not made progress toward her IEP goals (least restrictive environment).

Parent also pleads in her complaint that the District: a) retaliated against Student's family for filing a civil rights complaint in an unrelated incident; b) personally injured Student through mental anguish, depression, and anxiety; c) breached a duty; and d) engaged in professional negligence. We do not have authority to hear these aspects of Parent's due process complaint. Accordingly, we dismiss these claims for lack of authority to hear them.

In her complaint, Parent does not state a time frame as to when the alleged violations took place. Under the IDEA, parents must file their due process complaint within two years of the date they "knew or should have known" of the violation, unless the state has its own statute of limitations, in which case the state's statute controls. 20 U.S.C. § 1415(f)(3)(C). Because Parent filed her due process complaint on October 15, 2018, Parent's appeal cannot pertain to the District's September 1, 2016 NOA denying Parent's request for an evaluation during Student's 6<sup>th</sup> grade year. Our review is limited to the District's interaction with Student as of October 15, 2016.

#### *General Overview of IDEA*

The IDEA requires states that receive federal funds to educate children with disabilities by providing FAPE to all eligible children. *Andrew F. ex rel. Joseph F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988, 993 (2017). Under the IDEA, all children with disabilities are entitled to FAPE designed to meet their unique needs. 20 U.S.C. § 1400(d)(1)(A) and 34 C.F.R. §300.1(a). Missouri's State Plan for Special Education (2017) (State Plan) generally defines FAPE as regular and specialized special education and related services provided at public expense, under public supervision and direction without charge to the parents that meet

the educational standards of the state educational agency and are provided in conformity with the Student's IEP. State Plan, Regulation IV, §A, page 42.

The IDEA does not prescribe any substantive standard regarding the level of education a disabled child should be accorded. *Board of Education of Hendrick Hudson Central School District, Westchester County, et al. v. Rowley*, 458 U.S. 176 (1982). It does require the school district to “provide a disabled child with such special education and related services ‘in conformity with the [child’s] individual education program.’” *Endrew*, 137 S.Ct. at 994, quoting 20 U.S.C. § 1401(9)(D).

The primary vehicle for carrying out the IDEA’s goals is the IEP. 20 U.S.C. § 1414. An IEP is a specialized course of instruction developed for each disabled student, taking into account that child's capabilities. 20 U.S.C. § 1414(d)(1)(A). Educational authorities must identify and evaluate disabled children, develop an IEP for each one, and review every IEP at least once a year. Sections 1414(a)-(c), (d)(2) and (4). The IEP is not required to maximize the educational benefit to the child, or to provide each and every service and accommodation that could conceivably be of some educational benefit. *Rowley*, 458 U.S. at 207. Instead, it must be designed to be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew*, 137 S.Ct. at 999.

#### *Child Find*

The IDEA requires each school district to ensure that “all children with disabilities ... regardless of the severity of their disabilities ... who are in need of special education and related services, are identified, located, and evaluated ...[.]” 20 U.S.C. § 1412(a)(3)(A). This “child find” requirement extends to students that are suspected of having a disability, despite progressing from grade to grade, and triggers a school district’s duty when a district has “reason to suspect [a student has] a disability.” 34 C.F.R. § 300.111(c)(1); *Hansen v. Republic*

*R-III School District* 2010 WL 8768477, \*5 (Feb. 5, 2010) citing *Dep't of Educ. State of Hawaii v. Cari Rae S.*, 158 F.Supp.2d 1190, 1194 (D.Haw. 2001).

The IDEA requires a school district to conduct an initial evaluation in which it assesses “all areas of suspected disability.” 20 U.S.C. §§ 1414(a)(1)(A), (b)(3)(B). This assessment must consider available diagnoses, health history, and specific health needs necessary to assist a child in school. See *L.J. by & through Hudson v. Pittsburg Unified Sch. Dist.*, 850 F.3d 996, 1008 (9th Cir. 2017). A failure to diagnose a disability does not constitute a FAPE violation per se – especially in the case of ailments that are difficult to diagnose. *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249 (3<sup>rd</sup> Cir. 2012). A procedural violation results in a denial of FAPE when the “procedural inadequacy:” (1) “compromises the pupil’s right to an appropriate education;” (2) “seriously hampers the parent’s opportunity to participate in the formulation process;” or (3) “causes a deprivation of educational benefits.” *Independent School Dist. No. 413, Marshall v. H.M.J. ex rel. A.J., M.N.*, 123 F.Supp.3d 1100, 1108 (D. Minn. 2015).

However, there is an inferred requirement that school districts identify disabled children within a reasonable time after notice of behavior that likely indicates a disability. *Todd by Todd v. Elkins Sch. Dist. No. 10*, 105 F.3d 663 (8th Cir. 1997), citing *W.B. v. Matula*, 67 F.3d 484, 501 (3d Cir. 1995). There is no specific time at which the failure to identify a disability becomes unreasonable, but if it fails to do so, the school district necessarily denies FAPE. *Bd. of Educ. of Wappingers Cent. Sch. Dist. v. M.N. on Behalf of J.N.*, No. 16-CV-09448(TPG), 2017 WL 4641219, at \*7 (S.D.N.Y. Oct. 2017).

The absence of the court providing a “bright-line rule” is not “an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review” and such deference is “based on the application of expertise and the exercise of judgment by school authorities” and “[a] reviewing court may fairly expect those

authorities to be able to offer a cogent and responsive explanation for their decision” *Endrew*, 137 U.S. at 1001-1002, *citing*, in part, *Rowley*, 458 U.S. at 206. Nevertheless, this does not negate a hearing officer’s duty to weigh the credibility of the witnesses and consider the impact of the testimony of expert witnesses. *Bd. of Educ. of Montgomery County v. S.G.*, 2006 WL 544529 (D.Md. Mar. 2006).

#### *Response to Intervention (RTI)*

A school district “must not deny referrals or delay initial evaluations for students suspected of having a disability and needing special education and related services on the basis that they are utilizing a response to intervention approach.” *Office of Special Education, OSPE 11-07*, January 21, 2011. A school district “cannot point to their use of RTI strategies as a basis for delaying or denying the evaluation,” however, a school district may deny an evaluation if it does not suspect a disability. *Id.* “A multi-tiered instructional framework, often referred to as RTI, is a schoolwide approach that addresses the needs of all students, including struggling learners and students with disabilities, and integrates assessment and intervention within a multi-level instructional and behavioral system to maximize student achievement and reduce problem behaviors.” *Id.*

#### *Emotional Disturbance*

An educational diagnosis is different from a medical diagnosis. According to 34 C.F.R. § 300.8(c), the definition of emotional disturbance for purposes of an educational diagnosis is:

4(i) *Emotional Disturbance* means a condition exhibiting **one or more** of the following characteristics **over a long period of time** and to a marked degree that **adversely affects a child’s educational performance**:

- (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
- (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

- (C) Inappropriate types of behavior or feelings under normal circumstances.
  - (D) A general pervasive mood of unhappiness or depression.
  - (E) A tendency to develop physical symptoms or fears associated with personal or social problems.
- (ii) Emotional disturbance includes schizophrenia. The term does not apply to children who are **socially maladjusted**, unless it is determined that they have an emotional disturbance under paragraph (c)(4)(i) of this section.

(Emphasis added.)

The State Plan further states that “a child displays an emotional disturbance when:”

- (1) Through evaluation procedures that must include observation of behaviors in different environments and an in-depth social history, the child displays one of the [characteristics in 34 C.F.R. § 300.8(c)(4)(i)].
- (2) 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 in time. Difficulties may have occurred prior to the referral for evaluation; and
- (3) 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.

State Plan, Regulation III, § B, at 25-26 (emphasis added).

#### *Social Maladjustment*

The term “socially maladjusted” is not defined by the IDEA. In *Springer v. Fairfax County School Board*, 134 F.3d 659 (4th Cir.1998), the court defined the term as “continued misbehavior outside acceptable norms” and “a persistent pattern of violating societal norms

with lots of truancy, substance abuse, i.e., a perpetual struggle with authority, easily frustrated, impulsive, and manipulative.” *Springer*, 134 F.3d at 664. The court went on to state that:

[c]ourts and special education authorities have routinely declined . . . to equate conduct disorders or social maladjustment with serious emotional disturbance . . . 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.

*Id.*

The student in *Springer* was found to be socially maladjusted rather than emotionally disturbed. The evidence showed that the student progressed successfully from grade to grade, maintained positive relationships with teachers and peers, and participated in extracurricular activities until the 11<sup>th</sup> grade when he began stealing, sneaking out of his house, skipping school, and using marijuana and alcohol. *Id.* at 661. In 11<sup>th</sup> grade, the student continued to score in the average to superior range on standardized tests, but his grades suffered due to skipping class and failing to complete assignments. Additionally, “the overwhelming consensus” among the psychologists who examined the student was that he did not suffer from an emotional disturbance. *Id.* at 665.

In *Hansen ex rel. J.H. v. Republic R-III School Dist.*, 632 F.3d 1024 (8<sup>th</sup> Cir. 2010), the court discussed the difference between the student in its case and the student in *Springer* in order to highlight the difference between a student with an emotional disturbance and one that was merely socially maladjusted. The student in *Hansen*, J.H., was in 7<sup>th</sup> grade and made death threats, changed from happy to very angry, had five disciplinary referrals and 13 days’ suspensions in one month, and overall during 7<sup>th</sup> grade he had approximately 25 disciplinary



referrals, and was unsuccessful academically until he was on medication. The school had J.H. evaluated by a doctor who diagnosed him as having conduct disorder, bipolar disorder not otherwise specified, and determined he needed further testing for attention deficit hyperactivity disorder (ADHD). The school district determined that J.H. did not have an educational disability but was socially maladjusted, and the hearing officer agreed. On appeal, the district court reversed the hearing officer's decision and held that J.H. suffered from an educational disability of serious emotional disturbance and other health condition due to a diagnosis of ADHD. The court explained the difference between J.H. and the student in *Springer*, and stated:

In contrast, J.H. received numerous disciplinary referrals over a four-year period for threatening students and teachers, fighting with other students, and treating his peers and teachers with disrespect. After working with J.H., Republic's school-based mental health clinician, Peggy Defazio, described him as socially unsuccessful due to his limited social skills and terminated their relationship because he threatened her. Unlike the student in *Springer* who started to fail his courses because he skipped class and refused to turn in assignments but continued to perform above average on standardized tests, J.H. consistently struggled to pass his classes, failed the standardized test he was required to pass for advancement to the seventh grade, and suffered academically because of his diagnosed bipolar disorder.

*Id.* at 1027.

#### *Evaluation of Student's Behavior Pursuant to IDEA*

In the present case, the severity of Student's conduct falls below that of J.H. and the student in *Springer*. Until Student was evaluated by the Family Court of St. Louis County Juvenile Administration in August 2018, she was never diagnosed with a health or emotional condition. Furthermore, the record does not indicate that Student was ever prescribed medication for any health condition or diagnosis, and she did not show a history of repeated extreme physical aggression or self-harm. On the other hand, Student's conduct can be distinguished from that of the student in *Springer*. Student has no history of drug or alcohol

abuse or general misconduct in the community (except for the reported prank phone call regarding an active shooter), struggled academically over several school years, cut class numerous times in 6<sup>th</sup> and 7<sup>th</sup> grade, and was disciplined 18 times in 6<sup>th</sup> grade for “arguing and ignoring with teachers and principal, cursing and using profanity, disrupting class, refusing to put items away, cutting class (38 absences and 66 tardies), roaming the halls, threatening other students, refusing to work, insulting peers, refusing to sit in class, leaving room without permission, continuing disruption of classroom, not bringing appropriate materials to class, and being disrespectful toward others.” Ex. 19. Likewise, in 7<sup>th</sup> grade Student continued to cut class (63 absences and 49 tardies), and received “multiple disciplinary referrals and suspension.” *Id.* This conduct continued despite the school’s implementation of intervention methods designed to provide a more structured school environment for Student with additional resources.

More specifically, Student’s conduct must be evaluated against the five characteristics defining emotional disturbance for purposes of an educational diagnosis. Only one of the five characteristics is required to be present for a child to have an emotional disturbance as long as the characteristic(s) are not due to social maladjusted behavior and are present “over a long period of time and to a marked degree that adversely affects a child’s educational performance.” 34 C.F.R. § 300.8(c). According to the State Plan, an extended period of time ranges from two to nine months depending upon the age of the child. State Plan, Regulation III, §B, at 25-26.

During the first few weeks of Student’s 6<sup>th</sup> grade year, her teachers observed Student engaging in defiant behavior against them and her peers, including being argumentative, deliberately annoying others, refusing to comply with directives, blaming others for mistakes or misbehavior, and engaging in verbal aggression. This is consistent with Parent’s statement

that Student had emotional concerns, and Parent's biggest concern was that Student had problems when redirected. Likewise, the teachers observed that these behaviors affected Student's educational performance, and the school records establish that Student is capable of making better grades than she made in 6<sup>th</sup> grade. Furthermore, Davenport observed that Student's biggest concern was "getting along with adults" and she had trouble calming herself down. Ex. 4.

These behaviors meet the first two characteristics of emotional disturbance, which are: a) "An inability to learn that cannot be explained by intellectual, sensory, or health factors;" and b) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers." 34 C.F.R. § 300.8(c). However, Student was transitioning into middle school and did not have a significant history of such behaviors during elementary school. Also, Parent's first evaluation request came at the beginning of Student's 6<sup>th</sup> grade year when school personnel were just beginning to get acquainted with Student. Furthermore, the denial of Parent's initial request for Student to be evaluated in 6<sup>th</sup> grade falls outside the two-year statute of limitations. Therefore, the issue is whether the District violated "child find" during the latter part of Student's 6<sup>th</sup> grade year and the first part of her 7<sup>th</sup> grade year.

We recognize that courts have found that failure to diagnosis a disability does not constitute a FAPE violation per se, especially in the case of ailments that are difficult to diagnose. *See D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249 (3d Cir. 2012). Distinguishing whether Student's 6<sup>th</sup> grade behaviors were the result of social maladjusted behavior or an emotional disturbance is such a case. The District did not find Student's history alarming and determined Student's conduct was typical teenage misbehavior as opposed to emotional disturbance. The school put interventions in place to assist Student and continued to observe Student. As for 6<sup>th</sup> grade, we defer to the school authorities who possess the expertise for their

explanation as to why they did not evaluate Student. However, there is a continuum of behavior that at some point becomes dispositive.

Parent again requested an evaluation of Student at the beginning of 7<sup>th</sup> grade. At this point, the school knew its 6<sup>th</sup> grade interventions were ineffective and its additional intervention at the beginning of 7<sup>th</sup> grade was proving unsuccessful, the ULCA program. In addition, Student was making little or no progress in school, showed no signs of improving her behavior, and continued to show signs of concerning characteristics such as mistrust, apathy, and otherwise defiant behavior toward her teachers and her peers. She has numerous suspensions, absences, and tardies. Furthermore, while Student had many absences and was tardy to class numerous times, she was not missing whole days of school, and while this behavior affected her grades, it was not a single factor.

By the beginning of the Student's 7<sup>th</sup> grade year, the District has a reasonable time to consider the totality of Student's 6<sup>th</sup> grade year, and Student's continuing difficulties and lack of progress early in her 7<sup>th</sup> grade year. Moreover, the evidence supports a finding that Student's behavior was not simply due to social maladjusted behavior. This is because on April 24, 2018, the District finally determined Student had an educational disability, and its justifications included a majority of the behavior Student exhibited in 6<sup>th</sup> grade. The District determined Student has an emotional disturbance due to her general pervasive mood of unhappiness or depression, lack of resiliency, inability to cope and adapt to various school environments, inclination to become easily upset and angry, trouble controlling and maintaining her mood and behavior, reacting negatively to everyday challenges, exhibiting difficulty overcoming stress, and her negative behaviors such as skipping class, eloping, refusing staff requests, incomplete school work, and disrupting others. *See*, Ex. 19. The

District also relied upon Parent's reported concerns regarding Student which had not changed significantly from 6<sup>th</sup> and 7<sup>th</sup> grade.

Henkelman testified that the District decided to evaluate Student after Parent's third request because the interventions were unsuccessful and school personnel were starting to see new behaviors such as Student being scared to go to class, hiding in the hallway alone or under the stairways, and being in a fetal position in a chair or expressing more anxiety or fear. However, these new reported characteristics were only a small part of the overall reason the District cites for its decision to evaluate Student and to later determine she met the characteristics of emotional disturbance. Further, Student consistently met the first two characteristics of emotional disturbance as defined by the IDEA.

The evidence supports in its totality that the District failed to evaluate Student upon Parent's second evaluation request made at the beginning of Student's 7<sup>th</sup> grade year and to determine that Student was a child with the educational disability of emotional disturbance thereby denying her FAPE. The evidence, primarily from school records, established that Student is much closer to the student in *Hansen* than the student in *Springer*. Furthermore, the intervention methods used in 6<sup>th</sup> grade and the beginning of 7<sup>th</sup> grade were unsuccessful and RTIs have limited applications when it comes to determining whether a student should be evaluated. *See Houston Independent School District v. Texas State Educational Agency*, 113 LRP 2100 ("Educational need is not strictly limited to academics but also includes behavioral progress and the acquisition of appropriate social skills as well as academic achievement." This also includes family related behavior problems) (internal citations omitted).

#### *Remedies*

We have broad discretion to offer equitable relief to compensate Student for the District's denial of FAPE. With respect to the District's failure to evaluate Student upon

Parent's request at the beginning of Student's 7<sup>th</sup> grade year, the right to compensatory education accrues at the point the District should have evaluated and then determined Student had an educational disability. Parent made her request on August 15, 2017, which the District rejected on September 7, 2017. On April 24, 2018, the District determined that Student has an educational disability. On May 6, 2018, the District implemented an IEP after Parent's third evaluation request. Accordingly, Student went without special education services for almost eight months or 34 weeks (September 7, 2017 to May 3, 2018). Therefore, we find that Student is entitled to 32 weeks (accounting for one week for both Christmas and Spring break) of compensatory special education for the same services and the same amount of time for each identified service as stated in Student's most recent IEP. The District has the discretion on how it will implement the required compensatory education. We also find that the District shall convene an IEP meeting for Student within 15 school days of this decision to determine if Student's placement in her current math class is appropriate due to the interaction that occurred between Student and her teacher, and whether Student's reported "danger issues" to Wheat involves any IDEA issues that need consideration.

We do not find, as pled by Parent, that the District failed to provide or offer proper IEP services such as assistive services, tutoring, private placement or therapy from outside sources, other than our findings above. Also, we find that the District has taken no action that prevents Student from making progress on her IEP goals.

We deny Parent's other requests for compensation that were made at the hearing. Parent requested that Student be placed at a private school, Logos, where she can obtain additional therapeutic services. Parent requested the following be paid into a dedicated special needs account that she controls on behalf of Student:

- a. Logos tuition for four and a-half years at \$29,000 per year.

- b. Funding for four years at a community college because Student will not be able to receive any scholarships, the family cannot afford college tuition and the District's actions have placed her behind academically.
- c. Eight and a half years of tutoring.

Parent has not met her burden of proof on these issues. Furthermore, money damages are not available in an IDEA claim. *Bradley v. Arkansas Dept. of Educ.*, 301 F.3d 952, 957 (8th Cir. 2002).

### **Summary**

We grant Parent's due process complaint on grounds that the District failed to timely evaluate and identify student as a child with an educational disability of emotional disturbance. We order the District to provide eight months of compensatory services to Student as stated above to ensure Student receives FAPE as required by law. In addition, the District shall convene an IEP meeting for Student within 15 school days of this decision to determine if Student's placement in her current math class is appropriate and to discuss and consider the implications under the IDEA of Student's report of "danger issues" as discussed above.

SO ORDERED on January 22, 2019.

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RENEE T. SLUSHER  
Commissioner

### Appeal Procedure

Please take notice that this is a final decision of the Administrative Hearing Commission and you have a right to request review of this decision. Per §162.962, when a review of this decision is sought, either party may appeal as follows:

- (1) The court shall hear the case without a jury and shall:

- (a) Receive the records of the administrative proceedings;
  - (b) Hear additional evidence at the request of a party; and
  - (c) Grant the relief that the court determines to be appropriate, basing its decision on the preponderance of the evidence.
- (2) Appeals may be taken from the judgment of the court as in other civil cases.
- (3) Judicial review of the administrative hearing commission's decision may be instituted by filing a petition in a court of competent jurisdiction.
- (4) Except when provided otherwise within this chapter or Part 300 of Title 34 of the Code of Federal Regulations, the provisions of chapter 536 are applicable to special education due process hearings and appeal of same.
- (5) When a commissioner renders a final decision, such decision shall not be amended or modified by the commissioner or administrative hearing commission.

The right to appeal and time limit is addressed in 34 C.F.R. §300.516.