

BEFORE THE THREE PERSON DUE PROCESS HEARING PANEL

EMPOWERED BY THE STATE BOARD OF EDUCATION

PURSUANT TO SECTION 162.961 RSMO.

In the Matter of _____, a student with a disability, by and through his parents, _____,
Petitioners and Windsor C-1 School District, Respondent

Katherine M. Black, Esq.

P. O. Box 309

Carbondale, IL 62903-0309

Mr. Randall Boyer.

Superintendent of School

Windsor C-1 School District

6208 Highway. 61-67

Imperial, MO 63052-2311

Teri B. Goldman, Esq.

Blackwell Sanders Peper Martin

720 Olive Street, #2400

St. Louis, MO 63101

Karen Aslin, Ed. D.

Lonny Morrow, Ed.D.

Diane A. Gibson, Chairperson

Due Process Hearing Panel

Request for Due Process Received March 10, 1998

Due Process Hearing Held July 15-18, 1998

Decision Issued August 21, 1998

STATEMENT OF ISSUES

Whether the Windsor C-1 School District violated the Individuals with Disabilities Educational Act ("IDEA",) and deprived Student of a free appropriate public education ("FAPE") by:

I. Failing to identify him as eligible for special education and related services;

II. Obtaining an evaluation of Student that was inadequate and not conducted at the proper time;

III. Determining a placement for Student that was inappropriate and not in the least restrictive environment; and

IV. Preparing individualized educational programs (IEPs) for Student that were deficient because of the inadequacy of the recommended placement, services, and annual goals and objectives.

FINDINGS OF FACT

1. Student is a _____ year-old boy who was born _____, and lives with his parents and younger sister in the Windsor C-1 School District "District". Student has lived in the District at all times material to this controversy.

2. In May, 1997, Student participated in a pre-kindergarten screening that was offered by District. While Student's social/emotional rating was high, deficiencies were identified in the areas of cognitive and motor. Joint Exhibit ("J") 2 @ 5.

3. Various medications had been prescribed for Student for impulse control "on and off" since he was in preschool but Parents did not tell District that Student had been on medication at that time.

4. His low scores on the screening (First Step Test) qualified Student to attend summer school at Windsor Elementary School ("Windsor") for two weeks during the summer of 1997 to prepare him for kindergarten. Transcript ("Tr.") 812.

5. At the conclusion of the session, in a pre-kindergarten summary, Ms. Jones, the summer school teacher who would also be the teacher in the regular kindergarten classroom in the fall,

noted that Student exhibited behavior problems and had difficulty interacting socially with peers and adults. Respondent's Exhibit ("R") 4. She noted deficits in fine motor skills and cognitive thinking.

6. Ms. Jones stated that she was "very concerned with Student's outburst, irrational thinking and at times, for the safety of the other children." Id. He needed an adult to monitor him constantly in order to diffuse a problem and redirect him before the situation escalated. Id. Although there was testimony by Mr. Wilfong that she considered this statement to be extreme, the Panel considers it a reliable expression of the classroom teacher's reaction to Student's behavior at the time.

7. Ms. Jones stated in her notes that Student had been removed from his peer group on occasion and from the classroom at least three times during the session. Id. @ 5 & 6. She recommended kindergarten placement in a small class with more than one adult present as well as "constant communication with parents." The parents agreed to place Student in the developmental kindergarten program known as KIDZ for the 1997-98 school year. This class was offered to meet the needs of children who might be developmentally delayed. Tr. 807.

8. The developmental kindergarten class, which was taught by Mrs. Wilfong with the help of a part-time aide, consisted of, approximately twelve students. Ms. Wilfong had no training in special education until February, 1998, when she attended a conference on ADHD. Tr. 863. This was two months after Student was withdrawn from school by his parents. She took a graduate level class in 1996 or 1997 that covered the Safe Schools Act. She had no in-service training on that law. Tr. 957. During her undergraduate studies, she had some training in behavior modifications, though not extensive. Tr. 972.

9. The regular kindergarten class had twenty-five students. Two days a week, the two classes, which were located in separate buildings, were combined. The developmental class also had music and physical education in a different location from its classroom and was transported by bus to those classes. Although originally the children in the developmental class got recess, it was eliminated early in the semester. Being in two different buildings was very strenuous and stressful for pupils and teachers. Tr. 845. The school day was three hours long for the developmental class.

10. Mrs. Wilfong recorded the difficulties Student was having in the classroom in a personal log. Tr. 815, R-6. She kept such a log on students she thought she might refer to the District's Care Team. Tr. 816. The Care Team exists to determine whether there are additional alternative

intervention strategies that a classroom teacher can utilize before referring a student for a special education evaluation. Tr. 721.

11. Mrs. Wilfong's notes reflect that from at least September 3 onward, Student engaged in aberrant behavior on numerous occasions. R. 6. Between September 3, when the first entry was made, and October 15, the date of Student's first suspension, she logged comments on sixteen different days. Nine of those reflected behavior problems/concerns with Student. On two occasions, Student was taken to Ms. Runge, the counselor, due to difficulties with compliance and behavior. Tr. 1011.

12. Ms. Wilfong attempted to implement interventions including informal social skills training, some positive reinforcement and redirection. Tr. 820. She also used a light system as a warning method and utilized the technique of time out. Tr. 831. There was no data taken regarding the effectiveness of these interventions. Tr. 922.

13. The light system utilized colors to indicate the kind of day the child had, e.g. green meant a good day, yellow was a warning and red was for a bad day. Often it involved putting a sticker on a pupil's folder which would remain there indefinitely. Tr. 832. Sometimes, plastic bracelets or coupons were used instead of stickers. The teacher used the system daily and intended it to signal behavior to the parents so they could talk to their children. Tr. 833. However, about three days prior to Student's withdrawal from school, Ms. Wilfong modified the system of lights with Student in a way that did not clearly communicate to Parents student's overall behavior on any given day.

14. At the beginning of the year, time outs were given in the classroom. They lasted five minutes for five-year-old Student. In October, at the request of Parents, Ms. Wilfong began giving time outs in the doorway to avoid stimuli. Eventually Student was given tasks to do during time outs such as writing or completing his work. Tr. 921. Student's response to time outs was inconsistent. Tr. 832. Ms. Wilfong did not maintain a log of time outs. Ms. Runge, the counselor, kept Student in time out for longer periods: once for about twenty minutes and another for about thirty. Tr. 1011-12.

15. Student's behavior deteriorated during the month of November. Tr. 859, 889. After Student's suspension from school, Ms. Jensen, the Director of Special Education, observed in the classroom, but never made recommendations to Ms. Wilfong. Tr. 980.

16. Dr. Kenney, Student's treating psychologist, talked to Ms. Wilfong in mid-October about the light system technique, but she kept using it. Tr. 835-86. By November 4, Ms. Wilfong was

convinced that she needed other interventions and was considering referring Student to the Care Team. Tr. 837. She learned that Student had been diagnosed ADHD on November 4. Tr. 837.

17. Ms. Wilfong testified that she preferred to make observations for a 'fairly lengthy,, time while trying interventions. If those were not effective, she would try others. Only if those other interventions were not successful would she refer a student to the Care Team. Tr. 826. She never referred Student to the Care Team or for testing. When efforts at disciplining Student in the classroom did not work, Ms. Wilfong referred him to the assistant principal/disciplinary officer. Tr. 854-55. Her efforts at positive reinforcement with Student had inconsistent results. Tr. 918. At the time of the suspensions, by her own statement, Student's classroom teacher had exhausted all resources in the classroom and turned the matter over to the administrators. Tr. 990.

18. The Panel finds that the classroom teacher lacked the training, education, resources and experience necessary to effectively deal with Student and his behavior and/or to recognize that he was likely to be a child with a disability who was entitled to the protections of the IDEA.

19. At Dr. Kenney's suggestion, Parents requested a meeting with school personnel to convey recommendations for dealing with Student in the classroom. J. 4. The meeting was held October 3, 1997, "to come up with ideas of what to do for Student." Tr. 656 (Borman).

20. The Panel finds that at least by October 3, 1997, Student's record at school dating from the time of prekindergarten screening, the observations of him by District professional staff, and the expressions of concern by his Parents and District personnel combined to provide notice to the District that Student was likely a child with a disability who was entitled to the protections of the IDEA. Sufficient interventions had been tried without success and District should have referred Student for an evaluation.

21. On October 15, 1997, Student struck a fellow student in the forehead with a pencil. Testimony indicated that the other pupil had been holding the pencil when Student grabbed it from her and, in the ensuing struggle, struck her with it. The blow left a one inch raised line across the forehead but did not break the skin. J. 6 @ 13. The letter sent home by the assistant principal indicates Student "tried to poke a girl's eye out with his pencil." R. 12.

22. Upon notification by Student's classroom teacher, Ms. Borman, Assistant Principal and the major disciplinary officer for the elementary school, completed a report for the Sheriff's Department and suspended Student from school for three days. After the suspension had expired and Student returned to school, six days after the incident, Ms. Borman and a deputy

sheriff took Student out of the kindergarten class to speak with him about the incident and the possible consequences of hurting others. Tr. 949. Student was the only kindergarten child suspended during the 1997-98 school year. Tr. 776 & 905.

23. Ms. Borman became acquainted with Student during summer school when he was brought to her in connection with an incident and acted very rude while in her office. Tr. 679. She followed up with several days of observation in the classroom. Tr. 653. Her daughter was a student in the developmental kindergarten during the 1997-1998 school year, and Ms. Borman was frequently in the classroom. Tr. 654. Her training in special education consisted of a three hour course completed as part of her masters degree. Tr. 683. Her training concerning the Safe Schools Act consisted of printed information distributed by District principals who had attended a training session. Tr. 798.

24. Ms. Borman testified that if a child assaults another child, she has no discretion and is required by the Safe Schools Act to report the incident to the sheriff's department. Tr. 651.

25. Ms. Borman testified that the District discipline policy gives her the right to suspend students. The policy was not introduced into evidence. Borman stated that she has consistently suspended for acts of violence "where someone assaults another person." Tr. 655.

26. On October 17, Parents, by letter to Ms. Borman, notified the District that Dr. Kenney, Student's psychologist, diagnosed Student with Attention Deficit Hyperactivity Disorder (ADHD) and that Student was on medication for treatment of that disorder. Petitioners' Exhibit ("P") 18. Parents requested that District develop a 504 Plan for Student and provide him with a psychological evaluation and I.Q. testing..

27. This letter followed a phone call to Ms. Borman either on the same day or the day before, in which Student's mother advised Borman of the ADHD diagnosis and requested a 504 Plan. Tr. 190, 191, 195. MS. Borman did not advise Student's teachers of his diagnosis at that time.

28. On October 29, Student walked up to another kindergarten student and hit the child on the shoulders with both fists. He was again reported to the Sheriff's Department whose report indicates "further action requested." J. 10, R. 6 @ 15. As a result of Student's act, his classmate was sent to the school nurse. J. 10. Ms. Borman prevented Student from going with his class to a pumpkin patch on a Halloween field trip as a consequence of this behavior, Tr. 659. P. 27. Ms. Borman knew before this incident occurred that Student had been diagnosed with ADHD. Tr. 661.

29. On October 31, Dr. Kenney talked with Ms. Borman by phone and registered his disapproval of using consequences with Student that were far removed in time from the behavior. Tr. 732-34. Kenney was disturbed that the District involved the Sheriff's Department and disagreed with the use of suspension with Student. Tr. 666.

30. The integration of the developmental kindergarten into the regular kindergarten classroom was discontinued on November 4. This was the end of the mainstreaming of the developmental kindergarten class. Tr. 845. The majority of Student's behavior problems occurred when the two classes were combined. Tr. 230.

31. Parents presented District with a list of items that they wanted addressed in a 504 Plan. at a meeting on November 5. They asked that the evaluation be delayed three or four days until Student's medication was regulated. P.31, Tr. 278-79. A document incorporating some of Parents' suggestions was drafted and titled "504 Plan for [Student]" J. 13 @ 30. The plan provided for the use of suspensions for serious behavioral incidents. Parents disagreed with District's use of suspension with Student. Tr. 675.

32. Student was referred for testing on November 5. J-11. On the same date, District completed a Notice of Action for an initial evaluation seeking parental consent to an evaluation. Student's father signed the consent on November 7. J. 12. District's records indicate that procedural safeguards were given on 10/27/97, 11/5/97, 2/20/98, 3/10/98, 5/1/98 and 6/5/98. J. 56. Petitioners do not claim that procedural violations of the IDEA occurred.

33. A speech/language screening was conducted on 11/5/97 by observation and there were no concerns noted. R. 17 @ 29. An intellectual/cognitive adaptive screening instrument given by observation raised no concerns, and the results of an academic achievement screening conducted by Mrs. Wilfong and Taylor on 11/4 were considered satisfactory. Concerns were noted in connection with the social/emotional/behavioral screening which noted over sensitivity to sound, oppositional behavior, and aggression toward other students. Id. @30.

34. The Evaluation Plan completed by Ms. Bridges, Tr. 1081, on November 4, 1997, apparently in anticipation of the 11504 Meeting on November 5, indicates that evaluations would be conducted in the areas of health, intellectual-cognitive, academics, and social/emotional/behavioral and specifies the data collection procedures and the name/position of the person who will administer the testing in each instance. R. 18.

35. The evaluation plan did not call for assessments in all the areas of Student's disability. For example, the hearing screening does not reflect any concern, yet Student's history as reflected

on the health motor screening states that he has a hole in his eardrum and may have a hearing loss in his left ear. The evaluation plan reflects that no problem is suspected.

36.The Speech/language Screening noted that a developmental speech error had been made and the person performing the screening by observation testified that she was surprised when student responded with short answers instead of sentences since she considered him to be a very high ability child. Tr. 1087. She did not note a concern.

37.The Health Motor Screening notes concerns and things to ADHD, Student being on medication, and seeing a psychologist and a pediatric neurologist. It also contains the words motor skills=motor/fine motor. The plan provided for the observation of the Student's current behavior by the Psychometrist and Jensen.

38.Dr. Kenney documented his diagnosis of ADHD and obsessive Compulsive Disorder ("OCD") in a letter to Parents dated November 9, 1997. J-14. Parent notified District on November 16 that Student had been placed on new medication and that his treating neurologist and his psychologist suspected a diagnosis of OCD. J16, T 237. She also raised the issue of in-service training for staff in ADHD and OCD.

39.Parents were contacted by juvenile court on November 20 as a result of the report to the sheriffs department.

40.Another incident occurred near Thanksgiving when Student's father was present at school for the Thanksgiving Feast. At the end of recess, Student ran over to a classmate, made a claw with his hand and hit her very hard with his hand twice. Tr. 745. Some witnesses considered Student's actions as an attack, yet Ms. Borman, who saw the entire incident, imposed no discipline and made no report to the Sheriff's Department. Tr. 675.

41.On December 1, the evaluation of Student was commenced. According to the Comprehensive Individual Assessment, the instruments used to evaluate Student included the WIAT, StanfordBinet-4, BES-2, and ADDES . occupational therapy and physical therapy evaluation were also administered. J-27. In an audiological evaluation conducted on December 5, the audiologist discovered a hearing loss and a central auditory processing evaluation was not completed at that time. J. 21.

42.On December 2, Student verbally threatened to kill a fellow student. P. 48. When the teacher attempted to persuade the child to say how she felt about the incident, Student kicked the teacher in the knee and threatened to kick her in the stomach. J. 19. The Assistant Principal

suspended student from school for two days and reported the incident to the Sheriff's Department.

43. Parents notified District on December 4 that Student would be home schooled through December 12. P. 51, R. 19. By letter dated December 3, 1997, Dr. Kenney wrote the District expressing concerns about the District's treatment of Student and recommending the use of alternative strategies. J. 20. By the time the District received this letter, Parents had withdrawn Student from school. Tr. 281.

44. The Panel finds that the major disciplinary officer for the school district could not recognize the differences between varying degrees of assault and inconsistently applied her own definition to situations occurring with Student. Although she claimed that the Safe Schools Act deprived her of any discretion regarding reporting Student to the Sheriff's Department, she, in fact, exercised discretion when she reported him for the incidents involving the pencil and kicking the teacher in the knee, but did not report him when he hit a pupil hard with his fists on the shoulders and when he made his hand into a claw and hit a child hard on the arm twice. There were other reported incidents of Student's behavior that apparently could have resulted in reports to the Sheriff but did not. see e.g. P.41 & 42.

45. On December 11, Parents wrote District stating that Student would continue to be home schooled until testing was completed and a meeting was held to review the results. Student was scheduled to have occupational therapy and physical therapy evaluations on December 18. Parents requested a meeting for December 18 with school personnel to discuss test results. J-22. Student has been home schooled since that time.

46. Parents received a letter from the Division of Family Services on December 16 as a result of the report to the sheriff's department.

47. Testing was completed on December 18 except for central auditory processing test which was going to be repeated after Student had ear surgery. Tr. 1038-39.

48. Near the time of Student's final suspension in early December, Parents sought expert advice concerning Student's behavior and educational program. They consulted Dr. David Berland, a psychiatrist specializing in child adolescent psychiatry, and Behavioral Consultants, a psychology group, for evaluation. The Parents sought recommendations for educational programming for Student. Tr. 393.

49. Dr. Rankin, Ph. D., is a clinical psychologist who is employed by Behavioral Consultants, a psychology group practice that focuses on treatment of adults, adolescents and children. Tr. 430.

50. Dr. Monica Frank, Ph. D., Director of Behavioral Consultants, is a clinical psychologist who treated and evaluated Student. She administered the Kaplan Assessment Battery for Children to Student on December 13, 1997. The results caused her to question Student's diagnosis of ADHD and indicated that Student had a learning disability that was interfering with his academics and his ability to understand social interactions. Tr. 516. She considered that more information was necessary to assess Student's disability. Tr. 563. She suggested neuropsychological testing.

51. In her testing of Student, Dr. Frank did not contact District or seek information about his school functioning because Student had already been withdrawn from school and the problems presented by Parents were behavioral. Tr. 540.

52. Student began attending one of Dr. Rankin's children's groups weekly in November, 1997, and when Dr. Rankin formed a group for Asperger's children only in May, 1998, he joined that group. Tr. 441-42. In the Asperger's group, Dr. Rankin targets very specific social skills in the small structure necessary for those children to understand nonverbal and verbal communication. Tr. 431-32. She stated that following directions, changing activities, and interacting with other children are very hard for Student. Tr. 437.

53. Dr. Rankin administered the WISC-III, J. 45, to Student. She interpreted the results to indicate a weakness in Student's understanding of abstract concepts which leads him into difficulty with social skills. Tr. 456. He has significant difficulty with perception, and visual cues. Id. And he has trouble linking the antecedents of behavior with the consequences, i.e. grabbing the toy away from his sister and a time out. Id. 457-57. He would not learn from a time out without an explanation.

54. In Dr. Rankin's view, Student cannot learn from being suspended because the consequence is too far removed from the behavior. Tr. 459. Even the short delay between the act and being taken to the office and then suspended would be too great. He needs immediate feedback. Id. Suspension contributes to a sense of low esteem instead of giving Student specific direction regarding better choices. Id.

55. Drs. Rankin and Frank wrote the District superintendent on December 15, 1997, stating their view that the discipline policies being utilized by the District with Student were inappropriate and ineffective and recommending initiating a positive behavioral management plan. Dr. Rankin

offered to provide behavioral consultation to District staff. J. 69. She was never contacted by the District.

56. Parents sought recommendations for educational programming from Dr. Berland. In order to understand what was going on with Student, Berland believed greater evaluation was necessary. Tr. 386. Berland took him off medication and monitored his situation through conversations with Dr. Frank. Berland noted that "the most striking thing about the boy ... was his ability to read." Tr. 385.

57. In January, 1998, Dr. Rankin began helping Parents develop and implement a behavior management system at home. Tr. 443. Three times a week for five weeks, she spent three and one-half hours with Student's family. Her role was to observe Student's and Parents, behavior, make suggestions and create opportunities for Student to practice social skills with other children in a controlled environment. Id. Dr. Rankin suggested structuring time outs differently and initiating a positive reinforcement system at home. She created opportunities for Student relating to emotions and social skills once she realized through observation his need for more education in those areas. Tr. 445. Student would frequently misinterpret other children's feelings toward him, become frustrated and strike out. Tr. 446. Although she did not take specific data, Dr. Rankin considered that Student's behavior improved while she was going into the home. Tr. 502, 508.

58. On January 6, 1998, Parents attended the diagnostic staffing with Windsor personnel to review the evaluation results and determine if Student was eligible for special education services under the IDEA. The diagnostic team relied on the testing referred to in the Evaluation Plan and Dr. Kenney's diagnosis. Tr. 1040. The decision was made to diagnose Student as Other Health Impaired. J-26 @ 87.

59. The District convened the initial IEP conference on February 20, 1998. The Present Level of Performance, which had been prepared prior to the meeting by the school psychologist, stated, in part, that Student's "reading, comprehension, and spelling are above grade level. His math skills are not as well developed as his reading skills. Student's cognitive ability is in the average range. With the exception of math, his achievement is above his cognitive level." J. 31 @ 102.

60. Behavior control was noted as a difficulty which became pronounced during group activities and "change times." It was noted that during these times Student makes derogatory statements to peers and teachers and touches others inappropriately. It is difficult to verbally redirect him and he is sometimes removed from group activities due to his behavior.

61. The annual goals incorporated into the IEP include: "Student will improve his fine motor tasks; Student will develop behaviors that enhance self-concept; Student will develop and use appropriate interaction skills; Student will develop school related behaviors, and Student will improve his motor skills.

62. The stated objectives include: Student will improve his ability to use scissors by practicing cutting activities in the classroom; Student will improve his ability to write with practice in the classroom as well as using a pencil grip; Student will begin to use the keyboard to improve his fine motor tasks; Student will begin to identify his emotions through role playing, happy, mad, sad, frustrated, rejected, etc.; Student will respect other people's space by refraining from touching others inappropriately four out of five times; Student will accept an authority figure's answer when requesting to engage in an activity - the answer may be yes or no - four out of five times; during group activities, Student will demonstrate appropriate behavior eight out of ten times; Student will use appropriate voice quality when speaking to others eight out of ten times; Student will follow oral directions with success receiving only one prompt per five minute interval; Student will throw and catch a ball with one other person; Student will improve his walking by engaging in activities such as walking the balance beam and heel toe walking.

63. A two page document entitled Teaching Students with Poor Attention Abilities was appended to the IEP together with a page headed 11504 Plan for M 11 The "504 Plan", is identical to the document that resulted from the meeting held November 5. The Panel finds that the "504 Plan" is not a behavior management plan.

64. Parents disagreed with the statement in the Present Levels of Performance that Student was receiving services under a 504 Plan since they did not believe that Plan was ever implemented. T. 304 They strongly disagreed with the continued use of suspensions as discipline and on March 6, 1998, filed a request for a due process hearing with the Department of Elementary and Secondary Education ("DESE").

65. The Panel finds the evidence to establish that at all times Parents cooperated with District and acted in good faith.

66. In her testimony, Mary Jo Jensen, District Director of Special Education, observed that Objective A at 103 and Objective C at 103 are not measurable or criterion referenced and that the goal is not referred to in the Present Level of Performance. Tr. 1194. She stated that at the time the specific objectives for fine motor were developed, they did not have enough information to develop the measurable objectives. Tr. 1220. The discipline part of the behavior management

plan from the "504 meeting" became the behavior management plan for the February IEP. Tr. 1209.

67. Berland saw Student again in February and June and ultimately, diagnosed him with Asperger's Syndrome based on clinical history and mental status examination. Tr. 389. He arrived at the diagnosis after reading Dr. Grueneich's report, talking with Dr. Frank, and interacting with Student.

68. Dr. Frank diagnosed Student with Asperger's Syndrome independently. Tr. 523. Asperger's is referred to as a social learning disability or a nonverbal learning disability. Id. She is secure with the diagnosis because it is the only one which describes all the aspects of Student's profile. Tr. 525.

69. Children with Asperger's have the same universal characteristics as those with autism including problems interacting with others on a social level. T. 93. As a group, they have particular difficulty with transition due to a lack of predictability. T. 96. This includes physical transition, i.e. going from one place to another, or different people, or within an activity. T. 97

70. Berland stated that a child with Asperger's Syndrome has problems relating-trouble reading social cues. He is awkward, clumsy in his motor functioning. He may be excessively preoccupied with one thing. A key aspect of Asperger's is language. The child would not have normal prosody - he would not use inflection in his voice to make points. When he tells jokes they don't make sense because of the monotonous or singsong method of delivery. Tr. 38990. The behaviors defined in A, B, and C of the document entitled Behavioral Intervention Plan contained in Student's IEP dated 6/17/98 are typical of Asperger's children according to Berland. Tr. 387, R. 56 @ 112. Asperger's children are at a higher risk for attention deficit disorder and obsessive compulsive disorder. Tr. 406. Asperger's Syndrome, ADHD, and OCD are not mutually exclusive diagnoses but can co-exist in one individual.

71. Berland stated that Student doesn't generalize his learning and will not learn simply by punishment. He will learn by one-to-one or one-to-two interview. Tr. 395. He equated punishing Student for his behavior with punishing a diabetic child for not controlling his blood sugar. Tr. 395. He opined that a one day suspension imposed immediately after Student engaged in an unacceptable act would not be likely to get Student to change his behavior. Tr. 427.

72. Appropriate consequences for negative behavior would include the loss of privileges for liked activities and time outs. Student needs positive feedback and reinforcement as often as possible.

Tr. 423. Suspensions or like discipline should not be employed, according to Berland. Teachers who interact with Student should have an understanding of autism and its variations.

73. Much of Student's behavior is directly related to his level of frustration with his significant deficits, according to Dr. Frank. E.g. with motor activities, he became extremely frustrated when he could not do them adequately, particularly since he realized that his peers could. Tr. 526. Any program offered for Student must involve persons who understand Asperger's.

74. In Berland's view, the preferred way of dealing with Student's behavior is prevention. Student should be in a setting where he is understood and where optimal educational programming can be offered by specially trained teachers who can recognize the triggers to the behavior. Consultation with the child psychiatrist is very important. Tr. 396. Medical intervention should be considered. If interventions do not succeed and Student poses a physical threat to others, other settings should be considered outside the mainstream. Tr. 396.

75. The characteristics of an appropriate program for Student would be a class of six to eight children with the opportunity for as much interaction with non-disabled children as possible and an abundance of teacher attention. Tr. 418, He should not have contact with mentally retarded or behavior disordered peers who would model antisocial behavior, but having peers present is very important. Tr. 395, 405. The school should be intellectually challenging and Student should be able to build on his exceptional reading ability. Tr. 405. The school should be able to work closely with Dr. Frank who would pick up on speech and language needs. Id. Student should receive an occupational therapy assessment. Tr. 426.

76. Dr. Frank stated her view that the June, 1998, IEP, R-56, indicates a lack of understanding of Asperger's and Student's needs and of properly implementing a behavior management plan. Tr. 529-30. She notes disagreement with the plan of intermittent reinforcement. Student needs positive reinforcement very frequently while the IEP doesn't seem to require that. R. 56 @ 113, Tr. 553, 559-60.

77. Calling the sheriff is inappropriate for Student because it reinforces that Student is bad without explaining what he's done or is supposed to do. Tr. 531. Suspension will not teach Student appropriate behavior. Id.

78. When Parents disagreed with the District's audiological evaluation, District authorized an assessment from an independent evaluator. Dr. Gail Santucci, Ph.D. evaluated Student on March 25, 1998 and May 11, 1998 for auditory acuity and auditory processing skills. As a result of Student's performance on those tests she recommends: improving access to auditory

information by improving the listening environment by means of a personal, or if feasible, a classroom FM assistive listening device; a thorough speech and language assessment by a certified speech-language pathologist; use of computer software such as EAROBICS or FAST FORWARD; the encouragement of skills such as singing and clapping, dancing, playing musical instruments as well as guessing games involving verbal skills; sensitivity to Student's confusion when information is presented in more than one modality at a time; a classroom teacher with certain characteristics and a classroom with limited exposure to outside distractions; and reevaluation within one year. J. 43 @ 138.

79. Royal Grueneich, Ph. D., pediatric neuropsychologist and licensed psychologist completed a neuropsychological assessment of student on May 20, 1998. This assessment, with its behavior and cognitive components, was comprised of an interview with Student and Parents in March, 1998, and testing conducted on May 20. At the time of this assessment, Student had been diagnosed with Asperger's syndrome.

80. During testing, Dr. Grueneich observed Student's behavior. Parents completed the Child Behavior Checklist and the Conner's Parent Rating Scales. Student was given the Roberts Apperception Test. J. 148.

81. Testing was conducted in the skill areas of: language (Woodcock-Johnson Psychoeducational Battery-Revised, Word Definitions Differential Ability Scales, Clinical Evaluation of Language Fundamentals, Language Competence and Summary Scores; spatial/constructional (Leiter International Performance Scale Revised, Composite Scores, NEPSY Arrows, Developmental Test of Visual Motor Integration, and Gestalt Closure Kaufman Assessment Battery for Children); attention (Gordon Diagnostic System); memory (children's Memory Scale, Index Scores); executive (NEPSY Attention/Executive Domain; and sensorimotor (Grooved Pegboard, Finger Tapping, and NEPSY Sensorimotor Functions). J. 153-156. The purpose of this testing was to ascertain Student's strengths and weaknesses and determine their implications for his behavioral and academic functioning. T. 130. His process in making a neuropsychological assessment is to compare specific test scores to cognitive ability. Id. 158.

82. Dr. Grueneich reported that Student performed in the low average to average range on measures of language, visual-spatial, and sustained attention skills while he demonstrated significant deficits on measures of executive function, fine motor coordination, and reproduction of hand positions. J. 149. He characterized Student's difficulties as high levels of anxiety with resistance to changes in routine, a weak appreciation of social reality, interpersonal dynamics,

and the perspectives of other people, and a limited ability to deal constructively with problems and to control and self-regulate his behavior. Id. @ 149-50.

83. Dr. Grueneich opined that Student's neuropsychological profile and his behavioral symptoms are consistent with the diagnosis of Asperger's syndrome. Id. @ 149. He recommended development of an IEP addressing Student's behavior difficulties because the child's needs in school programming exceed those in academics at the present time. Id. @ 150. In addition, he made twelve specific recommendations for student's school programming. Id. @ 150-53.

84. A controversy exists regarding whether Asperger's is a version of higher functioning autism or a separate disorder. T. 131. For programming purposes, a child with Asperger's is like a child with autism except that he/she functions at a much higher level. T. 131.

85. Dr. Grueneich stated that by suspending Student or reporting him to the sheriff, he is being punished for something he is not able to control. He does not have the usual child's ability to respond to problems and constructively solve them. A program that deprives Student of recess, occupational therapy, and/or speech therapy would be inappropriate. T. 169. If the right program were done well, Student may be able to function well without much extra intervention. T. 179.

86. Work on a second IEP was begun in early June and completed on June 17, 1998. R. 56. Two meetings led to the development of this IEP. Parents attended the first conference, but did not return for the second. Services are to be initiated on 8/25/1998 at the beginning of Student's first grade year.

87. In the June IEP, Student is also diagnosed as Other Health Impaired. The Present Levels of Performance reviews his physical condition, speech and language, intellectual/cognitive development, achievement, and social emotional functioning. one page lists modifications. Id. @ 104. The seven stated goals are:

(1). Student will develop appropriate school-related behaviors by at least one standard score when measured on the BES behavior Rating Scale by three teachers working with Student;

(2). Student will develop and use appropriate interaction skills;

(3). Student will develop solutions options by at least one standard score when measured in the area of interpersonal difficulties on the BES behavior Rating Scale by three teachers working with

(4). Student e language for a variety of pragmatic functions in spontaneous language to be evaluated through the use of tape recorders and video taping. Pre and post evaluations will occur in order to measure improvement;

(5). Student will develop visual motor skills by increasing his ability level from 5 years, 7 months to 6 years, 7 months on the test of visual motor skills;

(6). Student will improve his motor skills by raising his basal level by 10 months when measured on the Peabody Developmental Motor Scale;

(7). Student will develop behaviors that enhance self concept by increasing the areas of physical symptoms/fears and unhappiness/depression at least one standard score to be measured on the BES Behavior Rating Scale by at least three teachers working with Student.

88. Each of the objectives was accompanied by evaluation criteria. A behavioral intervention plan defines behavior and notes that when Student returns to Windsor, a behavioral consultant will aid in the further development of the plan. The classroom management plan/selection of resources consists of recommendations made by Dr. Grueneich for Student's programming. Consequences/reinforcements are listed as are the measures for managing aggressive and/or assaultive behaviors.

89. Suspension for one day is included as a consequence for physical aggression toward students, staff or himself which may cause bodily harm. Hitting or kicking others are listed as behaviors that could result in suspension. Consequences, reinforcement contingencies for positive behavior are listed. Placement is a self-contained special education classroom where Student will receive 1800 minutes of education per week: 1450 will be in the special education classroom and 350 will be in the regular classroom. Student will be mainstreamed for meals, recess, transportation, health services, recreational activities, special interest groups and clubs.

90. Parents disagreed with this IEP primarily because placement was to be in a classroom within the fifth and sixth grade center and not in the regular elementary building and suspension continued to be a consequence for certain types of behavior. T. 312-14. It became an issue after the request for due process was filed and during the preheating conference on July 15, the parties agreed to amend the request for due process to include issues concerning the 2/20/98 and the 6/16/98 IEPS.

91. Student attended a two week recreational program at The Miriam School ("Miriam") during the summer of 1998. T. 38. Miriam is a private not-for-profit school for children between the

ages of four and 12 of average ability who have mild to moderate difficulties in learning speech and language, fine and gross motor, behavior and attention. T. @34. Miriam has a few students with the diagnosis of behavior disorder and others who have behavioral issues. T. 65.

92. Dr. Rankin visited The Miriam School with Student and Parents. Tr. 461. Her observation was that the school was sensitive to Student's needs, both educational and social. Tr. 462. Although being in a classroom of children who are mentally retarded or who have severe compliance and behavior problems would not be appropriate for Student, being with learning disabled children would be appropriate. Tr. 463.

93. Ninety to ninety-five per cent of Miriam students are designated with a category of disability (of the current enrollment, 76 of 78). The majority have been diagnosed with language impairments and/or learning disabilities. Some students diagnosed with Asperger's Syndrome have attended Miriam.

94. All Miriam teachers are certified in learning disabilities and behavior disorders. The staff includes three speech and language therapists and three occupational therapists. T. 87. Currently, there are seventy-eight children enrolled in the school. There is a ratio of one teacher to ten students during the regular school year. T. 41. There are ten children in each classroom except there are only eight in the youngest group which is the four, five, and six year olds.. T. 63, 81, The program is a segregated one. Because they selectively admit, however, the population is not necessarily the same one as in the public school setting. T. 89. The school has successfully helped students make the transition from Miriam back into their school district after one year. T. 37.

95. If a child is disruptive and a danger to himself/herself or to another student, the student is placed in a time out room which is then locked. R. 42. This is used only in an extreme situation, e.g. when a child has a tantrum. T. 84. Miriam also uses loss of recess time as a negative consequence. T. 70. During the 1997-98 school year, Miriam had three students with a formal medical diagnosis of Asperger's. T. 71. The areas of need of Student are the specific ones that Miriam serves. T. 75. In March, 1998, Parents applied for Student to attend Miriam for the 1998-1999 school year and he has been accepted. T. 52.

96. While Student was at Miriam, he received training in alternative methods of handling frustration, anger and impulsiveness and in communicating his feelings. This training was effective. Id. @ 40, 466-67. Time out, the technique of isolating a student from the group for a period of time, is utilized at Miriam as a negative consequence. T. 41. For time out to be

effective with a child with Asperger's Syndrome, one must explain what occurred in concrete terms.

97. Based on her interaction with Student during the summer of 1998 while he was attending The Miriam School summer recreational program, Dr. Rankin stated that Student has made friends and expressed her view that Student's experience there has been a positive one. Tr. 467.

98. Student continues to receive social skills training at Behavioral Consultants and to participate with other children with the Asperger's diagnosis. T. 300

99. The Panel reserved its ruling on several objections to evidence at the hearing and notes that none of the evidence objected to is material or sufficiently germane that the Panel decision is based that evidence.

100. The Findings of Fact contained herein may be construed as Conclusions of Law and the Conclusions of Law may be construed as Findings of Fact.

CONCLUSIONS OF LAW

101. The Three-Member Hearing Panel was validly constituted and has jurisdiction of Petitioners, claims of violations of the Individuals with Disabilities Education Act ("IDEA") pursuant to 20 U.S.C. 5 1415(e)(1990) and S 162.961 RSMO. Panel Ex.1.

102. The forty-five day statutory timeline was validly extended upon requests by one or both parties. This decision has been issued by August 21, 1998, in accordance with the forty-five day timeline, as extended. *See below*, Deviations from Forty-five Day Timeline.

103. The IDEA, 20 U.S.C. §1400, et. seq., was amended effective June 4, 1997. However, the provisions of the reauthorized act relating to individualized education programs ("IEPs") did not take effect until July 1, 1998. IEPs developed after July 1 are governed by the requirements of the IDEA as amended.

104. The IDEA requires that all children with disabilities be provided a free appropriate public education ("FAPE"). 20 U.S.C. 51400(c)(1990).

105. Student is a child with a disability for purposes of the IDEA. 20 U.S.C. §1401(a)(1)(1990).

106. FAPE is defined in the IDEA as special education and related services that: (1) are provided under public supervision and at public expense without cost to parents; (2) meet the standards

of the state educational agency; (3) include an appropriate preschool, elementary, or secondary school education; and (4) are provided in conformity with the individualized education program required by §1414(a)(5) of the act. 20 U.S.C. §1401(a)(18)(1990)

107. The requirement that all students with disabilities be provided a FAPE is satisfied when the school district provides personalized instruction with sufficient support services to enable the disabled child to benefit educationally from the instruction. *Foley v. Special School District*, 927 F. Supp. 1214(E.D.Mo. 1996).

108. The educational program offered by the District is appropriate if it is "reasonably calculated to enable the child to benefit educationally." *Peterson v. Hastings Public school.*, 31 F.3d 705, 707 (8th Cir. 1994) *quoting Board of Education v. Rowley*, 458 U.S. 176, 206-07 (1982).

109. At the administrative level, the school district has the burden of proving that it complied with the IDEA. *E.S. v. Independent School District, No. 196*, 135 F.3d 566 (8th Cir. 1998).

110. All children with disabilities residing in the State ... who are in need of special education and related services, must be identified, located, and evaluated. 20 U.S.C. § 1412(a)(3). This requirement was adopted as policy by the Missouri Department of Elementary and Secondary Education ("DESE"). State Plan for Part B of the IDEA, Fiscal Year 1995-98 (Nov. 1996)("State Plan").

111. The District shall implement alternative intervention strategies within the regular education program before a referral for a special education evaluation is made. The progress of students should be monitored to determine if student learning has improved or has remained unaffected. A decision to refer for a special education evaluation shall be made when acceptable progress is not evident. State Plan, III (d) @ 15.

112. The requirement to implement alternative intervention strategies may be waived if the student is suspected of having a significant disability requiring services or if the parents request waiver and the implementation of evaluation procedures. *Id.*

113. Prior to providing special education and related services, the District shall conduct a full and individual initial evaluation of the child. 20 U.S.C. 33 §1414 (a)(2)(1997).

114. Student must receive an evaluation that is sufficiently full and comprehensive that the evaluation team can determine whether Student has a disability and needs special education and

related services. State Plan VIII @ 61. The evaluation process must be tailored to the particular child.

115. A child must be evaluated in all areas of suspected disabilities, 20 U.S.C. S 1414(b)(3)(C), and the District must make sure that the assessment tools and strategies used provide relevant information that will directly aid the determination of the educational needs of the child. Id. @ (3)(D).

116. Where a student suspected of having a disabling condition is determined to need a comprehensive evaluation, the district shall develop an evaluation plan, based on a review of screening information, to assess the student in all areas of suspected disability and conform with the requirements outlined in Section VIII, Protection in Evaluation Procedures, of the State Plan. State Plan @ VIII.

117. The evaluation plan will determine the appropriate formal and informal assessment procedures to document eligibility for a disability identification as detailed in Appendix A, Definitions and Eligibility Criteria. State Plan @ IV.

118. The eligibility criteria for the category Other Health Impaired states that the multidisciplinary team may determine that a student has an Other Health Impairment if appropriate diagnostic information identifies the presence of a medically confirmed physical or health impairment and an educational problem caused by the physical or health impairment. Id., IV.@ A-30.

119. The presence of these two criteria can only be determined by appropriate diagnostic information which would include a comprehensive physical and health evaluation by a licensed physician or licensed psychologist/licensed professional counselor and a comprehensive educational evaluation by personnel familiar with the assessment of students with physical or health impairments. Id.

120. In addition each evaluation plan shall include observations of the student as follows: (1) a team member other than the student's regular teacher shall observe the student's academic performance in the regular classroom setting, or (2) in the case of a student . . . out of school a team member shall observe the student in an environment appropriate for a student of that age. Id. VIII @ 62.

121. The evaluation shall be sufficiently comprehensive to document a disabling condition, include data from sources other than achievement tests, and assess in all areas of suspected

disability including, where appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communication status, and motor abilities. Id.

122. The written diagnostic summary should reflect the total functioning of the student based on information collected rather than listing isolated pieces of information and must include certain specific components. Id. @ 64

123. In conducting the evaluation, the District shall;

(1) use a variety of assessment tools and strategies to gather relevant functional and developmental information, including information from the parent, that may assist in determining whether the child is a child with a disability and the content of the child's individualized education program;

(2) not use any single procedure as the sole criterion for determining eligibility or an appropriate educational program; and

(3) use technically sound instruments to assess. 20 U.S.C. 33 §1414(b)(2)(1997).

124. The assessment tools and strategies used should provide relevant information that directly assists the determination of the educational needs of the child. 20 U.S.C. §1414 (b)(3)D)(1997).

125. A child who has not been determined to be eligible for special education and related services under this part (Part B] and who has engaged in behavior that violated any rule or code of conduct of the local educational agency ("LEA") ... may assert any of the protections provided for in this part if the LEA had knowledge (as determined in accordance with this paragraph) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred. 20 U.S.C. §1415(k)(8)(a)(1997).

126. District shall be deemed to have knowledge that a child is a child with a disability if:

(i) the parent of the child has expressed concern in writing... to personnel of the appropriate educational agency that the child is in need of special education and related services;

(ii) the behavior or performance of the child demonstrates the need for such services;

(iii) the parent of the child has requested an evaluation of the child pursuant to 51414; or

(iv) the teacher of the child or other personnel of the local educational agency, has expressed concern about the behavior or performance of the child to the director of special education of such agency or to other personnel of the agency. 20 U.S.C. §1415(k)(8)(1997).

127. If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under paragraph (1) or (2), the evaluation shall be conducted in an expedited manner. *Id.* @ (C)(ii).

128. Under IDEA regulations relating to personnel development, it is reasonable to expect that educators have the ability to spot certain disabilities, and administrators should ensure that educators in direct contact with students have appropriate training to do so. 34 C.F.R. SS 300.380-.387.

129. Where Parents disagree with the District's evaluation and procure an independent evaluation, they may be entitled to reimbursement. *Evans v. District No. 17*, 841 F. 2d 824 (8th Cir. 1988).

130. To determine timeliness of identification, consider whether District had reason to suspect Student had a disability which required special education, whether behavior problems were remarkable, and whether student made academic progress during that time. *Birmingham v. Board of Education*, 28 IDELR 405 (1998)

131. In order to receive funds for special education, local educational agencies must develop an IEP for each child with a disability at the beginning of each school year and review and, if appropriate, revise the IEP's provisions periodically and not less than annually. 20 U.S.C. 1401 (a) (20) and 1414 (a) (5) (1990). educational agencies must develop an IEP for each child with a disability at the beginning of each school year and review and, if appropriate, revise the IEP's provisions periodically and not less than annually. 20 U.S.C. SS 1401(a)(20) and 1414(a)(5)(1990).

132. An IEP is a written statement for a child with a disability that is developed through the efforts of a representative of the local educational agency, the teacher, the parents or guardian of the child and, when appropriate, the child in a meeting. 20 U.S.C. 33 §1401(a)(20)(1990).

133. An IEP developed prior to July 1, 1998, shall include:

1. a statement of the present levels of educational performance of the child;

2. a statement of annual goals, including short-term instructional objectives;
3. a statement of the specific educational services to be provided to the child, and the extent to which such child will participate in regular educational programs:
 - (1) a statement of needed transition services when appropriate;
 - (2) the projected date for initiation and anticipated duration of the services; .
 - (3) and appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved. 20

U.S.C. §1401(a)(20)(1990).

134. In order for an IEP to be valid, the procedural safeguards established by the IDEA must be followed and the IEP must be substantively appropriate. *Evans v. District No. 17*, 841 F. 2d 824 (8th Cir. 1988).

135. Since the student was eligible for services under the IDEA, an IEP should have been developed instead of a 504 plan. The program Parents placed student in was appropriate despite the fact it was more restrictive. Student made educational progress while attending the program and the previous District placement was unsuccessful. *Muller v. Committee*, 28 IDELR 188 (1998).

136. The IDEA requires a school district to provide parents with procedural safeguards including access to records pertaining to their child, the opportunity to participate in meetings regarding the identification, evaluation, and educational placement of the child, and the provision of a FAPE. 20 U.S.C. 1415 (b) (1) (1997).

137. The procedural safeguards also assure parents of the opportunity to obtain an independent educational evaluation of the child and of the receipt of written prior notice whenever the District proposes or refuses to take certain actions including initial referral/notice of intent to evaluate, initial placement, subsequent notice of intent to reevaluate, and notice of significant change in placement. *id.* @ (b)(3).

138. These procedural safeguards attempt to ensure that parents actively participate in their child's education. *Yankton School District v. Schramm*, 93 F.3d 1369 (8th Cir. 1996)(citations omitted).

139. Where the student's right to an appropriate education was compromised, the parents' opportunity to participate in the development of an IEP was seriously hampered, or the student was deprived of educational benefit as a result of the procedural violation, an IEP may be set aside. *Independent School District No. 283 v. S.D.*, 88 F.3d 556 (8th Cir. 1996).

140. Equitable considerations are relevant in fashioning appropriate relief under the IDEA. *Moubry v. Independent School District NO. 696*, 951 F. Supp. 867 (D. Minn. 1996). Appropriate relief is designed to ensure the student is properly educated within the meaning of the IDEA. *Id.*

141. It is uniformly recognized that compensatory education is a proper remedy under IDEA. See, e.g. *Burlington School Comm. v. Department of Education*, 471 U.S. 359 (1996).

142. Compensatory education is an available remedy where a student has not received special education services to which he was entitled. *miener v. state of Missouri*, 800 F. 2d 749, 753 (8th Cir. 1986).

143. The remedy is intended to provide the child with the services the child was originally entitled to receive. *Kohn*, 17 EHLR 522, 523 (OSEP 1991). Compensatory education must be proportionate to the services not received.

144. In any instance when any person is believed to have committed an act which if committed by an adult would be assault in the first, second or third degree. . . while on school property . . . the principal shall immediately report such incident to the appropriate local law enforcement agency and to the superintendent, except in any instance when any person is believed to have committed an act which if committed by an adult would be assault in the third degree and a written agreement as to the procedure for the reporting of such incidents. . . has been executed between the superintendent of the school district and the appropriate local law enforcement agency. §167.117 RSMO (1996) (Safe Schools Act)

DECISION

The Three Member Due Process Hearing Panel is unanimous in its decision, based upon the Findings of Fact and Conclusions of Law above, that the Windsor C-I School District deprived Student of a free appropriate public education in violation of the Individuals with Disabilities Education Act.

I. The Panel finds that the District failed to identify Student as a child with a disability who was eligible for special education and related services in a timely manner and that Student was deprived of educational opportunity and benefit as a result of this failure.

From his first moment as a pupil in the District, Student exhibited signs of being a child with a disability. The pre-kindergarten screening singled him as a child who might be developmentally delayed. During his two weeks of summer school at Windsor, his weaknesses in cognitive and motor were confirmed and his social problems noticed. His behavior attracted the attention of the major disciplinary officer in the District. After having him in class for only two weeks, his teacher expressed her concern with his outbursts and irrational thinking and for the safety of the other children.

During the first month of the regular school year, his classroom teacher recorded seven instances of unacceptable behavior. The teachers used at least nine different interventions. Although Student had some good days, there was no credible testimony that he made real progress.

The District is correct in its assertion that it was required to implement alternative intervention strategies before referring Student for a special education evaluation although that requirement can be waived. The District was also required to monitor his progress and when Student failed to show acceptable progress,, the District was required to refer.

The evidence convinces the Panel that Student should have been referred in early October. This evidence is contained in Findings of Fact ("F/F") Nos ???and? above. At the latest, when on October 15. this five-year-old child engaged in behavior that the disciplinary officer considered to be violent necessitating a report to the sheriff and suspension from school, the District could no longer ignore the red flag that this was a child with a disability and exercise its own duty to refer. Even though the classroom teacher was frustrated with the inconsistent results of her interventions, this Student never even made it to the Care Team.

The Panel rejects the District's position that because Student's ultimate diagnosis of Asperger's Syndrome escaped the experts for a time and was difficult to pinpoint, the District was relieved of its responsibility to identify and evaluate at an early stage. The District is never relieved of its burden to identify, locate, and evaluate children with disabilities within its borders who are in need of special education and related services. otherwise, the IDEA's goal of providing full educational opportunity could not be met.

Because of District's delay in identifying Student, he was deprived of needed special education and services while his behavior deteriorated resulting in five days of suspension from school, three reports to the sheriffs department, a missed field trip, and many instances of unsuccessful interventions by his teachers. It is significant that in more than twelve hundred pages of testimony, there is almost no attention given to Student's academic education. Clearly, his education at Windsor consisted primarily of behavioral incidents and ineffective efforts to correct his department, all made with good intentions but without adequate resources or understanding of his disability.

II. The Panel finds that the District obtained an evaluation of Student that was inadequate and not conducted at the proper time resulting in harm to Student and depriving him of educational benefit and, thus, a free appropriate public education.

The evaluation conducted by the District was not timely. As explained above, once the interventions were tried, and Student failed to progress, the District should have referred and begun the evaluation process on or about October 3. On the record before us, such action by the District could have resulted in the completion of the evaluation at least by mid-November with implementation of an appropriate IEP shortly thereafter.

Furthermore, although Student had not been identified as eligible for special education and related services, once the District suspended him from school and/or deprived him of the Halloween field trip or otherwise disciplined him for violating a District rule or code of conduct, the District was obligated to expedite an evaluation if it had knowledge that Student was a child with a disability before the behavior that led to the disciplinary action.

Such knowledge is imputed to the District because: (1) Parents wrote the assistant principal on October 17, 1997, expressing concern that Student needed special education and requesting an evaluation, IQ testing, a "504 Plan," and a meeting to discuss activities for Student (in which case the triggering date would have been no later than October 29);

(2) Student's many incidents of poor behavior, which did not improve in response either to classroom interventions, suspension from school, or other punishments or consequences, demonstrated that he needed services (triggering date no later than October 15);

(3) Parents requested an evaluation-on October 17, 1997, (triggering date no later than October 29); and

(4) Ms. Wilfong expressed concern about Student's behavior to Ms. Runge, a Windsor elementary school counselor, prior to October 1, 1997, when Ms. Wilfong took Student to the counselor for help with Student's noncompliance and behavior (triggering date no later than October 15).

Any one of these scenarios would have been enough to trigger an expedited evaluation. Had District properly responded to Student's behavioral incidents and moved to put an IEP in place with appropriate services to Student, the Panel finds that the deterioration of his behavior in November, and perhaps even some of the incidents in October, may have been avoided.

Secondly, the Evaluation Plan devised by the District was faulty and the resulting evaluation was inadequate.

As we have discussed in Findings of Fact Nos. 34 and 35, the Evaluation Plan did not call for assessments in all the areas of Student's disability. The Health section of the Evaluation Plan notes that a problem is suspected but only seeks information about motor, including "current motor/fine, gross motor skills, and visual motor."

Significantly, nowhere in the Evaluation Plan is there an indication of the comprehensive physical and health evaluation by a physician or psychologist/professional counselor that is required to document eligibility for Other Health Impaired. Nor does the plan indicate the sort of comprehensive educational evaluation contemplated by the State Plan and vital to a determination that Student has an Other Health Impairment.

An evaluation plan that is insufficient cannot lead to a full and comprehensive evaluation. Student's evaluation must be sweeping enough to document his disabling condition, include data from varied sources and assess in all areas of suspected disability.

The diagnostic summary states in more than one place that Student is diagnosed with ADHD, yet there is no supporting documentation except for an Attention Deficit Disorder Evaluation Scale completed by the classroom teacher. "Parent interview" is the source of one reference and "records" the source of another. The summary ends with the conclusionary statement that Student "has a health impairment that means limited alertness due to a chronic health problem." The Panel finds that the evaluation underlying this conclusion does not contain appropriate diagnostic information to support this conclusion.

There was reliable information available to the District from clinical psychologists and Student's treating psychiatrist that the District did not use in its evaluation, although it referred to some of it on the first page of the Comprehensive Individual Assessment. Parents were willing to make

this information available, and its utilization would have resulted in a more complete and comprehensive evaluation.

III. The Panel finds that the least restrictive environment issue raised by Petitioners need not be reached separately.

IV. The Panel finds that the District violated the IDEA and deprived Student of a FAPE when it prepared IEPs for Student that were deficient.

IEP dated February 23, 1998

Before turning to the adequacy of the IEP, the Panel states its concern with the delay that occurred between the diagnostic staffing on 1/6/98 and the IEP meeting almost seven weeks later. The regulations implementing the IDEA require the meeting to be held within thirty days of the determination that the child needs special education and related services.

The Panel is mindful that the auditory processing test was scheduled to be given for the second time after Student had ear surgery in January. However, the necessity to re-administer this test did not justify delaying the development and implementation of Student's IEP, particularly where he was completely without services. An interim IEP should have been developed soon after the diagnostic staffing. The four month delay between the Parent's referral and the meeting of the IEP team deprived Student of educational opportunity and benefit during that time.

Just as there was a failure of linkage between the evaluation plan and the evaluation, there is not a sufficiently close connection between the information contained in the diagnostic summary and the individualized education program.

For example, one of the five goals in the IEP is that Student will develop behaviors that enhance self-concept, while the diagnostic summary neither mentions self-concept nor identifies it as a deficiency. Conversely, while the diagnostic summary states that Student engages in "inappropriate touching", with his classmates, deals poorly with transitions, has difficulty in group activities and is difficult to verbally redirect, these behaviors are not addressed in Student's IEP.

Although Student was found to have a mild deficiency in the area of fine motor, there is a disproportionate amount of attention given to that deficiency in the goals and objectives. The problems noted in the audiological evaluation with attending or processing are not reflected in the present levels of performance or in the goals and objectives.

Within the IEP itself, there is not a direct relationship between the present levels of performance and the goals and objectives. For example, the first annual goal listed is to improve his fine motor tasks whereas there is no deficiency in fine motor noted in the present level of performance. Conversely, behavioral problems are noted in the present levels of performance, yet there is no behavioral management plan or information about positive behavior management. Some of the goals and objectives lack measurable criteria. Extended school year is never referenced.

The discipline methods of time out with activities furnished to Student during the period of isolation and suspension for serious behavioral incidents do not meet Student's individual needs. The Panel finds that by including suspension as a consequence for behavior that is an attribute of Student's disability in his IEP, the District acknowledges that it does not have the resources necessary to meet Student's need for special education and related services.

The Panel finds that the individualized education plan developed for Student on February 23, 1998, is inappropriate and not calculated to provide educational benefit and deprived Student of a free appropriate public education. The Panel further finds that Student was deprived of a free appropriate public education for approximately the entire 1997-98 school year.

IEP dated June 17, 1998

At the hearing, the parties agreed to place the June IEP in issue. However, the Panel considers that the adequacy of this IEP does not affect what has gone before, but only looks prospectively toward the 1998-99 school year.

The IEP completed in June was apparently also based on the Evaluation Plan of 11/4/97 and much of the discussion above applies equally to this instrument. The team had a great deal of professional guidance and expertise available to it in its formulation of the June IEP including reports from Drs. Frank, Grueneich, and Santucci which it references in the present levels of performance. It is not clear that these evaluations were relied upon in developing the IEP.

The District did not conduct an observation of Student at any time after he left Windsor in December, 1997. Although it was denied permission to observe him during a group session conducted by Behavioral Consultants, there was no evidence indicating that District was precluded from observing Student at his home. Extended school year was not considered.

There is not a consistent direct relationship between the present levels of performance and the stated goals in the IEP. For example, the goal of developing behaviors that enhance self concept

does not relate to a deficiency noted in the present levels of performance. motor skills continue to receive disproportionate emphasis while behavior needs are not adequately addressed. The objectives that address Student's behavior concerns are not specific enough to allow a determination of whether Student is progressing toward his needs.

The IEP states that Student will be suspended from school for one day for physically aggressive behavior including hitting and kicking others, behaviors typical of and associated with Student's disability, Asperger's Syndrome. Although the Panel can envision an egregious situation that might justify a one day suspension, a District that must resort to suspending a six-year-old for hitting and kicking lacks the resources necessary to meet that child's needs.

The Panel finds and concludes from the evidence before us, including the June IEP, that the District has not developed a sufficient capability to properly educate and manage Student so as to provide him with a free appropriate public education.

REMEDY

Compensatory education is intended to provide the special education services a child was originally entitled to receive but did not. As Student was entitled to an appropriate education, the Panel concludes that before a program of education can be awarded as compensation, it must be found to be appropriate for Student. it must provide personalized instruction with enough support services to enable the disabled child to benefit educationally from the instruction.

The record contains a great deal of testimony from knowledgeable experts who are well-acquainted with Student and his needs, about the kind of program he requires in order to benefit from his education. See, e.g. F/F Nos.71, 72, 74, 75, 83, & 85. An abundance of information about The Miriam School and its program was presented at the hearing by Miriam's admissions director. See, F/F Nos. 93-96. Student's personal experience at Miriam in its summer recreational program provides another indication that Student can benefit in that setting.

Based on the Findings of Fact referred to above and the relevant Conclusions of Law, Panel finds that The Miriam School is an appropriate placement for Student. The Panel is mindful of the requirement in the Third Circuit that in order to obtain compensatory education, a gross or prolonged deprivation of the right to a FAPE must be shown. Even though this standard of proof has not been adopted in the Eighth Circuit, the Panel finds that Petitioners have established a gross deprivation.

Accordingly, in order to compensate for the denial of a free appropriate public education at public expense, the Panel orders:

1. The District shall pay for Student's education at The Miriam School for the 1998-99 school year and shall furnish transportation as a related service.

2. District shall develop an IEP for Student in consultation with a representative from The Miriam School, the Parents, and the appropriate individuals according to the IDEA. The Panel expects the IEP team to rely on any and all reliable and relevant information including the reports from the professionals who have followed and/or treated Student. Because it will not be necessary for these individuals to personally appear at the IEP meeting, parents' request for the expenses connected with the writing of the IEP is denied.

3. District shall obtain a comprehensive speech and language evaluation of Student for consideration at IEP meeting. The Panel suggests that a member of the staff at The Miriam School be utilized for this evaluation.

4. Dr. Santucci's recommendations regarding the use of either EROBICS or FAST FORWARD shall be incorporated into the IEP together with appropriate speech/language therapy.

5. District shall reimburse Drs. Grueneich, Berland, Frank and Rankin for the expenses connected with their diagnostic evaluations of Student.

6. In preparation for Student's return to the District for the 1999-00 school year, District shall provide training in critical areas of Student's academic program including the behavioral aspects. The Panel suggests that District consult an expert in applied behavioral analysis. This training shall be required of all professional staff who may have contact with Student during his schooling in the District, which will include a significant part of the elementary teaching staff. Parents shall be notified of the training and provided with the opportunity to participate.

EXPLANATION OF DEVIATION FROM FORTY-FIVE DAY TIMELINE

The Parents' request for due process was received by the Department of Elementary & Secondary Education March 10, 1998, resulting in a statutory timeline of April 24. During the prehearing conference held April 7, the parties jointly requested that the timeline be extended. The due process hearing was scheduled for July 7 and then rescheduled for July 15, and the statutory timeline was extended to August 21, 1998. Supporting documentation can be found in

Panel Exhibit #2. This decision was rendered and sent to counsel for the parties on August 21, 1998.

All concur in the result.

Panel Member Aslin would limit the finding that District has denied a FAPE to Student to the District's failure to identify Student in a timely manner.

Karen Aslin, Ed.D., Hearing Officer

Lonny Morrow, Ed. D. Hearing officer

Diane A. Gibson, Chairperson

Dated this 21st day of August, 1998.