STATE DEPARTMENT OF EDUCATION
DUE PROCESS PROCEEDING
STATE OF OKLAHOMA

DUE PROCESS HEARING DECISION
CASE NO. 2060

PETITIONER: [Parent]

REPRESENTATIVE: Pro Se

RESPONDENT: [Public School]

REPRESENTATIVE: [School Attorney]

HEARING DATE: December 11, 12, 13, 2013

HEARING DECISION: January 20, 2014

HEARING OFFICER: Hugh V. Rineer

I. Background

Student was born on [date]. He attends [School District]. The Student has been identified as a student with a disability, and his category of eligibility is Other Health Impaired (ADHD).

II. Procedural Safeguards

The School District has complied with all aspects of the required procedural safeguards set forth in 20 U.S.C. §1415. In particular, the parties met the full disclosure requirement by exchanging lists of witnesses and documentary evidence at least five days prior to the hearing. By agreement of all parties, the deadline for the Hearing Officer to enter his findings, conclusions and decisions was extended beyond the 45-day time limit to 14 days following receipt of the proposed findings of fact and conclusions of law, that is, the parties' closing arguments.

III. Issues and Purpose of the Hearing

Parent alleges the District failed in its child find/identification duties to appropriately evaluate and identify the Student as having a specific learning disability and to address all the Student's areas of need and to provide personalized instruction. Parent also alleges that the District failed to devise appropriate and measurable goals and objectives based on present levels of performance in all the Student's areas of need as to the 9/14/2012 IEP. The parent alleged that the Student's teachers, principal and school personnel repeatedly failed to implement his Behavior Intervention Plan from 12/9/2011 to 5/13/2013. Finally, parent also alleges District did not timely respond to her request for an Independent Education Evaluation.

IV. Findings of Fact

1. Student is a [age] boy, currently attending [school] in the [School District].

2. Student meets the requirements of Other Health Impaired (ADHD) and is eligible for special education and related services under the Individuals with Disabilities Education Act.

3. Student has been on an Individualized Education Plan since his enrollment in the [School District].

4. Student has had three Functional Behavior Assessments and three Behavior Intervention Plans.

5. Student has demonstrated numerous and significant behavior problems his entire time at [School District].

6. The Behavior Intervention Plans have, for the most part, failed to significantly change Student's behavior.

7. No evidence was presented regarding whether or not the Student is treated by a physician for ADHD medication. There were brief references to two different medications. The evidence appeared to indicate that the first medication did not work. There was some evidence that when the Student was on the second medication, he did better when on it than off,

8. Student was evaluated by the District from December 9, 2009 through January 6, 2010 by the school psychologist. The reason for the referral stated, "Student was referred for evaluation to provide information about his current functioning levels. He is turning nine this summer, and his category needs to be changed from developmentally delayed. He is currently served in a part-time special education classroom with an assistant." The report further stated, 'Medical information provided indicates he is in good health and has diagnosis of Attention Deficit Disorder and Asperger's. He wears glasses and hearing is within normal limits. He is currently taking no medication." [emphasis added] (District Ex. 26)

9. Student was administered the Wechsler Abbreviated Scale of Intelligence. His performance on the WASI reflected a verbal IQ of 114, a performance IQ of 102, and a full-scale IQ of 109.According to the report, "This places his measurable intelligence within the high average classification range." (District Ex. 26)

10. The reason for referral did not indicate that it was to determine the presence or absence of a specific learning disability or for that matter any disability. It was simply to provide information about his current functioning level, apparently so that his category could be changed from developmentally delayed. (District Ex. 26)

11. The evaluator stated in her psychological evaluation regarding projective drawings, "Student drawing suggested he misses his father, he feels some environmental

pressures, and that he has feelings of insecurity and fantasizing." (District Ex. 26)

12. The clinical interview indicated, "The Student's responses reflect fantasizing, poor reality contact and environmental pressures." (District Ex. 26)

13. The sentence completion test reflected, "Responses of this instrument may indicate a person fantasizing, good self-esteem, poor reality contact, and oppositionality." (District Ex. 26)

14. The Behavior Assessment System for Children (BASC) showed clinically significant categories by the teacher for depression, a-typicality, withdrawal, and at-risk categories of hyperactivity, anxiety, attention problems, aggression. Mother's clinical significant scores were even higher and more numerous. Both parent and teacher agreed that depression and withdrawal were clinically significant and that anxiety and attention problems were at risk. (District Ex. 26)

15. The BASC-2 Composite T-scores, both teacher and mother agree that the behavioral symptom index are clinically significant. While mother indicated that externalizing problems, internalizing problems were clinically significant, teacher indicated both were at risk. (District Ex. 26)

16. The Achenbach Child Behavior Checklist (CBCL) and the Teacher Report Form (TRF) indicated clinical significance by the parent in anxious, depressed, anxiety problems, oppositional defiant problems, internalizing problems, obsessive compulsive problems. The teacher scored clinical significance in somatic complaints, social problems, thought problems,attention problems, rule-breaking problems, aggressive behavior, somatic problems, attention deficit hyper problems, oppositional defiant problems, conduct problems, internalizing problems, externalizing problems, and post-traumatic stress problems. Both the teacher and the parent agreed on internalizing problems and on clinically significant problems with oppositional defiant. (District Ex. 26)

17. The evaluator summary states at No. 3, "Psychological testing indicates the presence of several emotional indicators that could be impacting his educational performance. These include: anxiety, depression and poor reality contact." [emphasis added] (District Ex. 26)

18. Evaluator's No. 8 suggested modifications to help promote the Student's success in the classroom may include: "To effectively learn, a student must be able to attend and concentrate on a task long enough to commit the skills or information being taught into memory. This test indicates Student has difficulty stay [sic] on task for a sufficient amount of time to adequately comprehend what is being taught. Shorter work instruction period might be helpful. He might also respond to frequent reinforcement. He might also benefit from more repetition than other students. Systematic review of past material might also prove beneficial. Another possibility would be memory training tasks such as teaching him how to relate concepts together in memory chains." [emphasis added] (District Ex. 26)

19. Nothing in the report addressed the problems identified by parent, teacher and the evaluator, that being the emotional problems exhibited by the Student. (District Ex. 26)

20. A second evaluation was conducted by the District. The date of the evaluation was May 5, 2011. The examiner was the same individual who conducted the previous examination. (Parent Ex. Page 118, et seq.)

21. The reason for referral in background information states, "Student was referred for reevaluation at the request of his parent, his private psychologist and his attorney who wanted to determine his current academic functioning levels. Psychologist suspected the possibility of learning disabilities. Student has diagnosis of Attention Deficit Disorder and Oppositional Defiant Disorder. He is currently served under the category of Other Health Impairment." (Parent Ex. Page 118, et seq.)

22. The only test administered was the Woodcock-Johnson III: Tests of Achievement (WJ-III). (Parent Ex. Page 118, et seq.)

23. Examiner stated under General Appearance and Test Behavior, "Student was brought to the testing session by his mother due to a suspension. He was evaluated in the principal's office. He needed much encouragement and was given Skittles for a reward. Guidelines were given at the beginning of each subtext for the number of Skittles he could earn, for example, one Skittle for each five correct answers. He was often off task and had to be reminded that he was being timed. He had difficulty sitting still." (Parent Ex. Page 118, et seq.)

24. Although the private psychologist stated he suspected the possibility of learning disabilities, there was no determination as to whether or not there was a learning disability. (Parent Ex. Page 118, et seq.)

25. There was no comparison of intellectual potential to current scores. However, the examiner did indicate in her summary at No. 2, "Student's testing indicates that he is functioning below average in four of the eight areas evaluated." (Parent Ex. Page 118, et seq.)

26. Examiner's suggested modifications include, "The affective domain (emotion) is the provider of energy needed for cognitive functioning. To be an effective learner, a student must be able to direct energy toward a learning task. Student displayed behavior during the testing indicating he may have trouble investing the energy required to gain full benefit from learning activities. If this testing behavior is consistent with classroom behavior, he may not be utilizing enough energy to effectively comprehend instruction." [emphasis added] (Parent Ex. Page 118, et seq.)

27. Suggested modifications further stated, 'To effectively learn, a student must be able to attend and concentrate on a task long enough to commit the skills or information being taught into memory. This test indicates Student has difficulty stay [sic] on task for a sufficient amount of time to adequately comprehend what is being taught. Shorter work instruction periods might be helpful. He might also respond to frequent reinforcement. He might also benefit from more repetition than other students. Systematic review of past material might also prove beneficial. Another possibility would be memory training such as teaching him how to relate concepts together in memory chains." [emphasis added] (Parent Ex. Page 118, et seq.)

28. Examiner also had the following suggested modification, "Student will probably have trouble comprehending grade level reading material. When required to read for instructions, he will need thorough verbal explanations. All reading material should be adjusted to a level commensurate with his abilities." (Parent Ex. Page 118, et seq.)

29. A psychological evaluation was conducted by parent's private psychologist on July 6, 2010. (District Ex. 3)

30. In his report, the psychologist states the reason for referral as follows, "Student was an eight year old young boy referred for evaluation of his neurodevelopmental status with the goal of determining his most accurate diagnosis. Student has previously been diagnosed with ADHD and Asperger's Disorder. However, there have been individuals that have questioned the diagnosis of Asperger's Disorder. The current evaluation will seek to determine whether he does or does not have Asperger's Disorder and also determine what, if any, disorders he does have as well as the most appropriate mechanisms for treating those disorders." [emphasis added] (District Ex. 3)

31. Psychologist provided in part this background information, "Also provided for review were a number of documents including what is believed to be his current IEP (undated), his MEEGS form dated 4-6-2010, occupational therapy evaluations dated 4-5-2008 and 2-23-2010, psychological evaluation by another psychologist dated 12-2008, school observations by a previous private psychologist dated 4-9-2010, speech therapy evaluations by a speech pathologist dated 6-15-2009, school psychological evaluation dated 1-2010, and functional behavior analysis by a contract BCBA dated 6-2010." (District Ex. 3)

32. Psychologist stated that his information indicated that Student was previously tried on Strattera, which reportedly made him cry a great deal. He was not, at that time, taking any psychotropic medications, and his medical history is positive for amblyopia, hyperopia, and astigmatism. [emphasis added] (District Ex. 3)

33. Psychologist noted difficulties for Student had arisen as it relates to fine motor functioning and visual motor integration. (District Ex. 3)

34. Psychologist notes in his review of records that the BASC completed at school revealed hyperactivity, anxiety, attention problems, aggression, poor reality testing and poor adaptability. (District Ex. 3)

35. Psychologist also acknowledged the behavioral ratings on the BASC-II indicating significant elevations on hyperactivity, aggression, conduct problems, anxiety, depression, attention problems, a-typicality and social withdrawal. (District Ex. 3)

36. Psychologist noted a report from the previous private psychologist from December 2008 that indicated such things as a demonstration of a high level of impulsive and disruptive behavior, engaging in negative behavior such as slamming a chair or knocking into something, disruptive behavior including running out of the classroom, routine engagement in inattentive, hyperactive and impulsive behaviors, overtly defiant and uncooperative. (District Ex. 3)

37. Psychologist referred to the evaluation of intellectual functioning in the previous private psychologist's report, which he stated revealed the following scores:VCI=89; PRI=79; WMI-86; PSI=68 on the WISC IV. (District Ex. 3)

38. The psychologist also noted from the previous private psychologist's report that Student had CBCL scores indicating significant elevations in anxiety, depression, social problems, thought problems, attention problems and aggressive behavior. (District Ex. 3)

39. The psychologist finally noted some of BCBA's observations conducted in June 2010 reporting that Student showed physical aggression, refusal to cooperate, self injury, verbal aggression. (District Ex. 3)

40. The psychologist noted his behavioral observations. He indicated that the testing was done in one day, that some of Student's social interactions were immature in nature, but he seemed to display awareness of this fact in his facial expressions and use of eye contact prior to and following negative behavior. During the testing, Student was somewhat uncooperative and required regular redirection by the examiner. Considerable efforts were made to elicit optimum performance from Student, including using positive reinforcement, take regular breaks, and varying the difficulty of tasks. Student responded well to these interventions and appeared to give good effort as long as these supports were in place." (District Ex. 3)

41. He ruled out autism spectrum disorder. (District Ex. 3)

42. He stated on sensory motor and perceptual functioning that Student displayed significantly below par handwriting skills for his age with inconsistent formation,

size, and spacing of letters. Manual dexterity was within the mildly deficient range. (District Ex. 3)

43. On language functioning, the psychologist stated that the language functioning has been evaluated previously but did state overall language is within normal limits. (District Ex. 3)

44. Social perspective taking was mildly lower than his peers, but his observed behavior indicated appropriate awareness of the perception of others. (District Ex. 3)

45. With regard to memory functioning, the psychologist noted that although Student is believed to have deficiencies in these areas, it is believed to stem primarily from poor attention. (District Ex. 3)

46. Student also seemed to have difficulty putting forth the energy necessary to do well on these tasks. (District Ex. 3)

47. The Student's executive functioning was slower and less accurate than his peers. (District Ex. 3)

48. The psychologist stated regarding adaptive and emotional/behavioral functioning that Student's behavioral functioning was evaluated on the Vanderbilt scale, which screens for symptoms of common childhood behavioral and emotional disturbances. The measure was completed by his mother and teacher. Both of their responses were quite similar and indicative of frequent problems with inattention, impulsivity, and hyperactivity. Also noted were symptoms of oppositional behavior, reported as more frequent at school. Mild symptoms of depression were also noted. (District Ex. 3)

49. Psychologist diagnosed Student with Attention Deficit Hyperactivity Disorder, Oppositional Defiant Disorder and Disorder of Written Expression. (District Ex. 3)

50. It is noted that the pictures of Student entered into evidence by Petitioner show that Student was wearing glasses in only one of the five photos. Evidence indicated that he was not always wearing his glasses. (Parent Ex. Page 1)

51. The September 17, 2013 IEP provided the following:

52. The Review of Existing Data (RED) form addressed the presenting concerns as needing to review the independent

evaluation completed by a certified academic language therapist. It also states that the Student has had frequent evaluations which are summarized on an attached spreadsheet. The document indicates that the Student had all A's and B's the last nine weeks of school, which would have been 2012-2013 school year. It further states that he has had several behavioral problems in the past, but his behavior improved greatly in the last nine weeks of school. It indicated he had a new Functional Behavioral Assessment completed in the spring. It was implemented experimentally on or about April 4, which would have been 2013. Finally, it indicates that the Student started medication for ADHD after Spring Break 2013. [emphasis added] (District Ex. 12)

53. The RED indicated there was no additional assessments needed for the reason that the team just met to review outside agency report and update the annual IEP. (District Ex. 12)

54. The primary disability category was listed as Other Health Impaired. (District Ex. 12)

55. The parent attended the IEP but declined to sign the IEP. (District Ex. 12)

56. The notification of meeting dated September 10, 2013 stated that the meeting was to discuss other options, that being IEE to determine alternatives for ()RTC, develop and implement IEP and BIP. (District Ex. 12)

57. Current assessment data used according to Page 1 of 6 of the September 17, 2013 IEP were scores based on a June 17, 2013 independent reading evaluation, the CTOPP-2, the WJ-III, the GORT-4, the TOWL-3. (District Ex. 12)

58. The grade level math indicator test was given by the special education math teacher on August 19, 2013, and a grade equivalent score of 3.8 was achieved. (District Ex. 12)

59. The objective statement provides the following: The Student is a 7tx′ grade student at Junior High. When Student focuses on his work, he does well and can perform on grade level. He was doing well the first few weeks of school but is becoming more and more disruptive. [emphasis added] He has had several good days where he completes assignments, listens respectfully, and gets along well with his peers. The teachers feel he is very capable of this behavior and have high expectations for his progress. (District Ex. 12)

60. A Behavior Intervention and Support Plan was attached to the IEP. (District Ex. 12)

61. Page 2 of the DIP included a strategy/intervention which stated, "Include goals on his IEP that highlight the replacement behavior is being taught." Behavior plan also provided for a review in one year. (District Ex. 12)

62. A review of the testamentary evidence is highlighted by the following:

The Director of Special Education testified that the reading specialist, who was employed by the District, was not qualified to administer certain tests. Her administration of the tests was a rogue act. (Transcript Page 64) The principal of the District at one of the IEP meetings refused to allow that teacher to attend the IEP meeting. (Transcript Page 258) It was information that should have been shared at the IEP meeting with the team.

63. The Director of Special Education testified that Student was also receiving special services, but his behavior got in the way, that Student's Oppositional Defiant Disorder and his ADHD accounted for Student's behavioral issues. When comparing evaluations, which on the face of them showed the Student regressing rather than progressing, the Director of Special Education stated that Student was not a willing participant in his second evaluation and that it was a good example of the Student's non-cooperation. The Director of Special Education also indicated that the Student was never assessed for a learning disability. (Transcript Pages 71, 83)

64. The Director of Special Education testified that Student could not function without an aid and that he needed the one-on-one to protect others. (Transcript Pages 138, 139)

65. Testimony from teachers and staff was that they did their best to follow the Behavior Intervention Plans. (Transcript Pages 151, 152, 210, 282)

66. The Special Education teacher indicated that the Student's problem with learning were discipline and behavior. She testified the Student had problems staying on task. He would stop his testing, he would refuse to finish his testing, he would walk out of class, he would yell, he would be disrespectful, he would hit other students, knock things off of walls. (Transcript Pages 174, 178, 185, 186)

67. The school psychologist testified that she could not tell if the Student had a learning disability because of his behavior. His lack of progress in his education was due to his inability to pay attention, missing instruction, refusing to work, leaving class. The school psychologist also testified that she had children who are emotionally disturbed and a lot more severe than Student but has success with those other students to the extent that they were controllable. (Transcript Pages 211, 212, 213)

68. The principal testified that Student did not have a problem understanding. He disagreed with Petitioner in the Petitioner's contention that Student escaped classes because he could not learn. He further disagreed with Petitioner's contention that because Student was years behind his peers, he wanted to escape. (Transcript Pages 262, 263)

69. The principal cited examples of bad behavior, including refusal to work, walking in and walking out of class, physical aggression against students and staff, not receiving instruction because he elected to be out of the classroom. He testified that the Student chose not to follow his Behavior Intervention Plan. (Transcript Pages 280, 281, 282, 283)

70. The 6th grade Special Ed teacher testified that she administered the PIAT R to the Student at the beginning of the year, that his results were good but could have been better, however, he lost interest and quit. She testified that his placement had been changed to half day all special ed because of discipline. (Transcript Pages 300, 301)

71. Student's 5th grade reading teacher testified that Student had a difficult time staying on task. The Student made noises, he stood up, he indicated he did not want to be in class, he often became frustrated. (Transcript Page 327)

72. The Special Education Coordinator, who did the third Functional Behavior Assessment, indicated that the Student did not have difficulty with assignments, did not have difficulty during instruction, did not need a lot of prompting, could function independently. (Transcript Pages 334, 335, 336)

73. A BCBA who did the second Behavior Intervention Plan testified that the Student demonstrated escape behaviors, that he did not have difficulties learning. Almost

every time she observed the Student, he demonstrated inappropriate verbal behavior such as yelling, making noises, whistling, stating he did not want to be where he was, that he hated classes, that people should shut up, he was aggressive and oppositional. She also recommended counseling. The witness also testified that the Student was not interested in the reward system. The witness testified that she felt that the Behavior Intervention Plan was effective. She further testified that she did not think the Student thought he was stupid. She did not think that the Student had problems learning. (Transcript Pages 351, 352, 353, 357, 364, 365, 369, 371, 372)

74. The assistant principal testified that he did not believe that the Student had difficulties learning. The Student did spend time in his office, which he testified was better than the Student running out of the school. (Transcript Pages 375, 376, 377)

75. Parent testified that Student's extreme behaviors were sometimes a result of the aid following Student around and recording his actions. Parent testified that she did not accept as true some of the reports from the school to her regarding Student's behavior, particularly when Student denied his bad behavior. She indicated that for the period of time that the Student was in a half day situation, he had no support to address his behaviors and that he did not receive any counseling through the school. She testified that in her opinion, the Student tries his best to succeed. Parent did request a particular reading program and an Orton Gillingham multi-sensory program. Parent did not believe that Student's behavior was the issue regarding his learning deficits.

76. The Student's psychologist testified that he has had the Student in therapy for a year and that he has responded fairly well with behavior being the main focus. (Transcript Page 447)

77. The only testimony provided by the psychologist regarding his discussions with Student and the Student's behavior were that the Student felt treated unfairly because of the one-on-one aid recording his behavior. (Transcript Page 461)

78. The psychologist indicated that the half day placement was a step in the right direction but that it would have been better to figure out a way to keep the Student in

school all day. He testified that the Student was not in danger of harming himself or others or of committing serious bodily harm to anyone. He testified that the Behavior Intervention Plans were too negative and improperly implemented. (Transcript Pages 465, 469)

79. Student's current Special Ed teacher testified that the Student's behavior is fairly good with some really bad days. She testified to the type of curriculum that she is using to demonstrate that it is effective. His test results are dependent on the type of day he is having. She also testified that the days that the Student takes his medications are good days. The days that he does not take his medications, there are fights and cursing people out. She testified that the Behavior Intervention Plan is working but that the Student does cross the line, resulting in discipline that is not within the Behavioral Intervention Plan. (Transcript Pages 596, 597, 620, 622)

80. Student is prescribed glasses. No evidence was presented during the hearing whether the amblyopia was corrected.

81. The private psychologist did not perform any intellectual functioning testing, instead relying on inconsistent data, i.e. the school psychologist and previous private psychologist.

V. The Law

Under the IDEA, the District is required to provide a "free appropriate public education" ("FAPE"), which

> means special education and related services that -
> (A) have been provided at public expense, under public supervision and direction, and without charge;
> (B) meet the standards of the State education agency;
> (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and
> (D) are provided in conformity with the individualized education program ["IEP"] required under section 1414(d) of this title.

20 U.S.C. § 1401(8)(2003).

The IDEA defines the term "special education" as

specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including

(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and
(B) instruction in physical education.

20 U.S.C. § 1401(25)(2003).

The IDEA defines "related services" as

transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

20 U.S.C. 1401(22)(2003).

The IDEA requires that a State ensure the "least restrictive environment" to provide FAPE for a child with disabilities.

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5)(A)(2003).

In Board of Education of Hendrick Hudson Central School Dist., Westchester County v. Rowley, 458 U.S. 176 (1982), the United States Supreme Court discussed the meaning of a "free appropriate

public education." The Court identified the following two-part test to determine whether a school district is meeting its obligation to provide a child with a disability a free appropriate public education:

> Therefore, a court's inquiry in suits brought under § 1415(e)(2) is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

Id. at 206-07.

The IDEA does not require public schools to maximize a child's potential or to provide the best possible education or psychological program. Johnson By and Through Johnson v. Independent School Dist. No. 4 of Bixby, Tulsa County, Oklahoma, 921 F.2d 1022, 1028-29 (citing Rowley, 458 U.S. at 197 n.21). Rather a child's entitlement to a fee appropriate public education is satisfied by the provision of "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Rowley, 458 U.S. at 203.

IDEA Regulation 34 CFR, Part 300.8, Child with a Disability, states at (a)(1): Child with a disability means a child evaluated in accordance with Sections 300.304-300.311 as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as "emotional disturbance"), an orthopedic impairment, autism, traumatic brain injury, and other health impairment, a Specific Learning Disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.

(c)(4)(i) defines emotional disturbance to mean 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 school problems.

(c) (9) defines other health impairment to mean having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that—(i) is due to chronic or acute health problems such as Attention Deficit Disorder or Attention Deficit Hyperactivity Disorder, and (ii) adversely affects a child's educational performance.

(c)(10) defines specific learning disability as follows: (i) General. Specific learning disability means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. (ii) Specific learning disability does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or environmental, cultural, or economic disadvantage.

34 CFR §300.111 regarding Child Find states (a) General (i) the State must have in effect policies and procedures to ensure that—(i) all children with disabilities residing in the state regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated, and (ii) a practical method is developed and implemented to determine which children are currently receiving needed special attention and related services.

300.111(c) states that Child Find also must include (1) children who are suspected of being a child with a disability under Section 300.8 and in need of special education, even though they are advancing from grade to grade.

300.111(d) states nothing in the Act requires that children be classified by their disability so long as each child who has a disability that is listed in 300.8 and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under Part B of the Act.

34 CFR Part 300.502 addresses Independent Educational Evaluations. (d) provides that if a Hearing Officer requests an Independent Educational Evaluation as part of a hearing on a Due

Process Complaint, the cost of the evaluation must be a public expense.

Regional School District No. 9 v. Mr. and Mrs. M, 53 IDELR 8, U.S. District Court Conn., 2009. The standard for triggering the Child Find duty is suspicion of a disability rather than factual knowledge of a qualifying disability.

Marshall Joint School District No. 2 v. CD, 54 IDELR 307, U.S. Court of Appeals 7th Cir., 2010. The court clarified that the appropriate question is not whether the disability may affect educational performance but whether in reality it does.

BS v. Placentia Yorbalinda Unified School District, 51 IDELR 237, U.S. Court of Appeals 9th Cir., 2009 (an unpublished decision). Instead of asking whether the IEP was adequate in light of the student's progress, the pertinent question is whether an IEP was appropriately designed and implemented so as to provide the student with a meaningful benefit.

DB v. Bedford County School Board, 54 IDELR 190, U.S. District Court, W.D. Va., 2010. The court held that the IEP did not provide a FAPE to a student with ADHD since the school failed to properly evaluate and address whether the student also had a specific learning disability.

Mr. and Mrs. I v. Maine School Administrative District 55, 480 F.3d 1, 47 IDELR 121, U.S. Court of Appeals 1st Cir., 2007. The court held that a student with Asperger's Syndrome was eligible for special education services in spite of the fact that she was doing well academically. The adverse effect on her educational performance was the impact of her disability on her social skills and communication skills since the court found that nothing in the IDEA supports the conclusion that educational performance is limited to academic performance. In addition, the court found the IDEA term adverse effect does not have a qualifier such as substantial or significant. Therefore, any adverse effect meets the standard. Finally, the court found that the student was in need of specialized instruction in social skills, and therefore, met the eligibility requirement of being in need of special education.

Yates v. Washoe County School District, 51 IDELR 7, U.S. District Court Nev., 2008. The court held that there is no provision in the IDEA requiring a behavioral intervention plan to be included in the IEP, however, the IEP must include the various intervention supports and strategies deemed necessary to address

the student's behavior that impede his or her learning or that of other children.

MZ v. Bethlem Area School District, 57 IDELR 5, U.S. District Court, E.D. of Penn., 2011. The court held as a matter of law the Hearing Officer erred by not ordering the school to pay for the TEE. When the Hearing Officer concluded that the evaluation was inappropriate, the IDEA requires a full IFS, not simply ordering the school to expand and update its appropriate evaluation.

Harris v. District of Columbia, 108 LRP 373, 46, U.S. District Court, Dist. of Columbia, 2008. The court held that a Functional Behavior Assessment is an evaluation under the IDEA, and therefore, parents have the right to request an independent FBA if they disagree with the school's assessment. The regulations implementing the IDEA nowhere define educational evaluation, but they do stress the broad scope of evaluations in general, defining evaluation as procedures used to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs. Evaluations must take into account a holistic perspective of the child's needs and the evaluating agency accordingly is compelled to use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors. The court ordered that the school provide the parents an independent FBA since the last FBA was conducted two years ago. [emphasis added]

VI. Discussion and Rationale:

Petitioner filed a rambling 29-page Amended Complaint which is very difficult to follow. At the conclusion, after considering all of the evidence, reviewing all documents, reviewing the closing arguments of the parties, the arguments come down to the following:

It is Petitioner's contention that the District is not providing a Free Appropriate Public Education to Student because the District is not educating the Student in such a way as to address his alleged dyslexia. Petitioner contends that Student's behavior problems are a result of Student's inability to learn because of his dyslexia, and if his special education services provided to him a multi-sensory program, among other things, his dyslexia would be addressed and his behavior would improve.

District contends that categorizing the Student as Other Health Impaired (Attention Deficit Hyperactivity Disorder) requires the District to provide special education services. District contends that the classification of the Student is not relevant provided

the services are being provided to the Student. The District dismisses the diagnosis of a specific learning disability, particularly dyslexia. District does not offer a reason for Student's bad behavior other than ADHD.

Petitioner argues that the District should be using a certain methodology to educate Student. District's contention is that parent cannot choose which methodology the District will use.

1. The Student is not receiving an education because his bad behavior causes him to miss class, act out, etc.

2. The evidence indicates that he is out of class as much as he is in class. The evidence indicates that three Behavioral Intervention Plans have failed.

3. The Student had an aid who was never referred to as a paraprofessional. No evidence was presented on what the purpose of the aid was.

4. It does not appear that the staff had a great deal of success with changing behavior using the Behavior Intervention Plans.

5. The school psychologist implied that Student is not controllable.

6. To give the Student a fresh start in sixth grade, the Student was put on a consult IEP and put in regular classes. The experiment was a failure.

7. Although the Student's psychologist said Student responded fairly well, he did not indicate what 'fairly well" meant or what he was doing with the Student. It was not working at school.

8. Student's psychologist did not observe the Student in the school setting.

9. The previous testing and observations noted numerous problems in social and emotional development but failed to obtain the Student's responses.

10. Notwithstanding the Behavioral Intervention Plans, there did not appear to be much support given to the Student in the school environment.

11. The question I am left with is "What is wrong with this Student that causes his behavior to be so bad and hinder his education?"

12. The evidence did not answer that question.

VII. Decision

1. The Hearing Officer finds that the District failed in its Child Find Identification duties.

2. The District failed to devise appropriate measurable goals and objectives based on present levels of performance because the District has never determined what is driving the Student's behavior and lack of success in school.

3. The District failed to implement the Student's Behavior Intervention Plan as evidenced by its efforts with three different Behavior Intervention Plans, none of which have proved successful.

4. The District has failed to provide a complete and thorough Independent Educational Evaluation.

The District is to provide and pay for an Independent Educational Evaluation in the following areas taken from Written Notice to Parents OSDE Form 8 Descriptions of Evaluation Procedures:

- Health/Medical: Health and medical history, information about child's health and medical status or medical diagnostic evaluation to determine a medically-related disability to be performed by a pediatric M.D. or D.O.
- Vision: Assessment of visual acuity, field of vision, and vision functioning as necessary to determine a vision-related disability to be performed by a pediatric opthamologist.
- Hearing: Assessment of hearing functioning and extent of hearing impairment as necessary to determine a hearing-related disability to be performed by a Ph.D. audiologist.
- Motor: Assessment of gross and/or fine motor skills and abilities in relation to educational needs to be performed by a licensed occupational therapist.
- Communication/Language: Speech skills (including articulation, voice, fluency, and oral-motor) and/or receptive and expressive language skills and abilities (including phonology, morphology, syntax, semantics, and pragmatics) to be performed by a Masters level speech and language therapist.
- Academic Achievement: Assessments to measure academic achievement in such areas as listening comprehension, oral

expression, basic reading skills, reading comprehension, reading fluency, mathematics calculation, mathematics problem solving, and written expression skills to be performed by a Ph.D. child psychologist.

® Intellectual/Cognitive: Individually administered assessment of child's ability to learn, including overall mental ability and cognitive functioning to be performed by the same Ph.D. child psychologist.

® Perceptual/Processing: Child's abilities to perceive and/or process information through visual, auditory, and sensorimotor means to be performed by the same Ph.D. child psychologist.

❍ Developmental: Assessment of child's developmental history, skills, and abilities in relationship to expectations for the age group to be performed by the same Ph.D. child psychologist.

❍ Psychological, Social/Emotional: Information collected and assessments of the child's social skills/emotional status, psychological concerns, and behavior (may include data collection, rating scales, behavioral observations, interviews, personal inventories, and projective tests) to be performed by the same Ph.D. child psychologist.

® Observation in Classroom/Other Environment: Observations of child's performance and functioning in the classroom and/or other appropriate settings to be performed by the same Ph.D. child psychologist

❍ Functional Behavior: Information collected and assessments of the child's functional behavior (may include date collection, rating scales, behavioral observations, interviews, and personal inventories) to be performed after all reports have been provided.

® Adaptive Behavior: Assessment of child's general behavior in the school and home settings (may include adaptive behavior skills and activities in the community) to be performed after all reports have been provided.

The referral question is to address each area and answer the specific questions. It is to rule in or out each problem vis a vis the problems observed at school. The testing must include direct involvement on the part of the Student vis a vis his difficulties relating to the referral questions. That is, he is to provide his rating scales, etc.

Both the parent and the District shall choose three individuals who have not had any contact with Student to perform each of the assessments ordered. If a common name appears on each

list, that person will be retained to provide the evaluation. If no common name appears, then District shall chose one of parent's names. The evaluations are to be scheduled within fourteen (14) days from the date of this Order and completed as quickly as the evaluators can complete them but no later than forty-five (45) school days from the date of this Order.

VIII. Appeal Statement

Unless appealed, this decision is binding upon all parties. Either party may appeal this decision by filing a written notice with Special Education Section, State Department of Education, 2500 N. Lincoln Blvd., Oklahoma City, OK 73105. The appeal must be made within 30 days of the receipt of this decision.

IT IS SO ORDERED this [20th] day of [January] 2014. _____ [Signature}
Hugh V. Rineer

Att. Appendix I - Witness List
Appendix II - Admitted Exhibit List

_____

CERTIFICATE OF MAILING

This is to certify that on this [20th] day of January, 2014, a true and correct copy of the above and foregoing Decision was mailed, postage prepaid, and e-mailed to the following:

[Parent]

[School District Attorney]

STATE DEPARTMENT OF EDUCATION
DUE PROCESS PROCEEDING
STATE OF OKLAHOMA

[Parent] on behalf of A.V., Student,	)	
Petitioner,	)	
vs.	)	DPH No. 2060
[School]	)	
Respondent.	)	

APPENDIX I

WITNESS LIST

FOR PETITIONER/PARENT:

1. [], Director of Special Education, []
2. [], School Psychologist, []
3. [], Principal, []
4. [], 5th Grade Reading/Language Arts Teacher, []
5. [], Special Education Coordinator, []
6. [], Board Certified Behavior Analyst, []
7. [], Elementary Assistant Principal, []
8. [], Parent
9. [], Pediatric Neuropsychologist, Private Practice
10. [], Certified Academic Language Therapist, Licensed Dyslexia Therapist, Certified Teacher, Master

Instructor for [] Center, and Remedial Reading Specialist for [], Private Practice

11. [], Speech Language Pathologist, Private Practice

FOR RESPONDENT/DISTRICT:

1. [], Teacher previously employed by []
2. [], Special Education Teacher, []
3. [], Reading Specialist Title 1 Literacy Coach, []

STATE DEPARTMENT OF EDUCATION
DUE PROCESS PROCEEDING
STATE OF OKLAHOMA

[Parent],
on behalf of Student,

Petitioner,

vs. DPH No. 2060

[] PUBLIC SCHOOLS,

Respondent.

APPENDIX II

ADMITTED EXHIBIT LIST

FOR PETITIONER/PARENT:

Petitioner did not number her exhibit book with exhibit numbers. Each page of her exhibit book was individually numbered. She provided a document with exhibit numbers with references to the page numbers in the exhibit book. It was not clear during the hearing if the exhibit numbers were totally accurate. I have attached to this document the Petitioner's document which shows her exhibit numbers and page numbers. The following exhibits were not admitted into evidence: Pages 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 25, 44, 45, 66, 67, 68, 69, 70, 71, 72, 73, and 74-96. The audiotape was not admitted.

FOR RESPONDENT/DISTRICT:

1. October 28, 2013 Written Notice to Parent.

2. November 8, 2008 Psychological Consultation Evaluation by [].

3. July 6, 2010 Psychological Evaluation July 6, 2010 by [].

4. October 28, 2011 Reading Test by [].

5. June 7, 2013 Independent Reading Evaluation by [].

6. September 27, 2013 Overview of HWJR Reading Program and related attachments.

7. Fall Semester 2013 Story written by [].

8. August 14, 2006 Federal Register/Vol. 71 No. 156/Rules and Regulations.

9. Report from What Works Clearing House-Unbranded-Orton Gillingham-based interventions.

10. April 24, 2008 to April 5, 2013 Evaluations of [].

11. April 2, 2013 [] overview of [] Behavioral Issues.

12. September 17, 2013 IEP Packet.

13. May 20, 2013 IEP Packet.

14. December 12, 2012 IEP Packet.

15. November 7, 2012 IEP Packet.

16. May 7, 2012 Assistive Technology Assessment Packet.

17. September 14, 2012 IEP Packet.

18. August 17, 2011 IEP Packet.

19. May 5, 2011 IEP Packet.

20. April 7, 2011 [] Comment Form.

21. June 2, 2010 OSDE Form 8 by [] Schools.

22. October 18, 2010 IEP Packet.

23. March 10, 2011 IEP Packet.

24. September 23, 2010 IEP Packet.

25. September 3, 2010 IEP Packet.

26. March 4, 2010 IEP Packet.

27. September 4, 2009 IEP Packet.

28. May 8, 2009 IEP Packet from [] Schools

29. May 7, 2012 IEP Packet.

30. February 19, 2013 IEP Packet.

31. November 7, 2013 E-mail from [] to [].

32. September 4, 2012 Letter from [] to [].

33. IDEA Regulation's 300.8C(10) Specific Learning Disabilities Section 300.306 Determination of Eligibility. Additional Procedures for Identifying Children with Specific Learn Disabilities Section 300.307 and 300.308. Section 300.310 Observation Section 300.311 Specific documentation for eligibility determination.

34. All Exhibits listed by the Parent and not objected to by the [] School District.

FROM HEARING OFFICER:

1. E-mail between Petitioner and [].