

**STATE OF OKLAHOMA  
DEPARTMENT OF EDUCATION  
SPECIAL EDUCATION RESOLUTION CENTER  
DUE PROCESS PROCEEDING**

**DUE PROCESS HEARING DECISION  
CASE NO. 2013**

**PETITIONER:**

**REPRESENTATIVE:**

**RESPONDENT:**

**REPRESENTATIVE:**

**HEARING DATES:** Wednesday, June 15, 2011; Thursday, June 16, 2011;  
Friday, June 17, 2011; and Thursday, July 21, 2011

**HEARING DECISION:** August 19, 2011

**HEARING OFFICER:** Catherine Welsh

## **I. BACKGROUND**

The student who is the subject of this due process complaint and hearing is eleven years old. The student is identified as a child with a disability under the Individuals with Disabilities Act (IDEA) and qualifies for special education and related services under the IDEA disability category of Other Health Impaired as a result of a diagnosis of attention deficit disorder.

Parent filed an original due process complaint through her attorney on February 28, 2011. The [ ] Public School District (the District), through its attorney, filed a request to dismiss the action in full due to the complaint being insufficient, as well as a response to the complaint. On March 11, 2011, an order was issued by this Hearing Officer to amend the complaint.

A document titled Exhibit "A" to Amended Due Process Complaint, which this Hearing Officer deemed an amended complaint in compliance with the March 11, 2011 order, was then submitted by parent on March 22, 2011.<sup>1</sup> The District again objected to sufficiency of the amended complaint. Parent responded to this objection. On April 1, 2011, the Hearing Officer then issued an Order as to Outstanding Issues to Date, Including: (1) Parent's Request for Subpoenas, and (2) District's Request for Dismissal as to Sufficiency of Parent's Amended Complaint. As part of this order, the Hearing Officer gave specific instructions to Parent's counsel as to the contents of the complaint.

Parent then submitted a Second Amended Due Process Complaint on April 11, 2011. On April 21, 2011, the District submitted its Response to Petitioner's Second Amended Due Process Complaint along with its Second Objection to Sufficiency and Request for Dismissal. On April 22, 2011, the Hearing Officer deemed the Second Amended Due Process Complaint

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<sup>1</sup> The Exhibit "A" to Amended Due Process Complaint has a Certificate of Mailing attached showing that the document was mailed to the individuals listed on the Certificate on March 2, 2011. This is a typographical error and should read March 22, 2011.

Sufficient in the Order as to Sufficiency of Second Amended Complaint. A First Amended Scheduling Conference Order was issued by the Hearing Officer on April 13, 2011, amending the original Scheduling Conference Order issued on March 11, 2011.

On April 26, 2011, Parent submitted Petitioner's Response to Respondent's Second Objection to Sufficiency and Request for Dismissal, though a ruling as to sufficiency of the Second Amended Complaint issued on April 22, 2011. On April 29, 2011, Parent also filed a Motion to Vacate in Part and Modify in Part the Order as to Sufficiency of Second Amended Complaint. As a result of these pleadings, on May 2, 2011, the Hearing Officer issued an Order as to Motion to Vacate in Part and Modify in Part the Order as to Sufficiency of Second Amended Due Process Complaint.

On April 28, 2011, at the instruction of the Hearing Officer, Parent submitted Petitioner's Brief in Support of the Application of an Exception to the Timeline for Requesting a Hearing and/or the Tolling of the Two Year Statute of Limitations. The District submitted its Response in Objection to Petitioner's Brief in Support of the Application of an Exception for Requesting a Hearing and/or the Tolling of the Two Year Statute of Limitations on May 4, 2011. The Hearing Officer subsequently ruled that the two year statute of limitations under the IDEA would not be tolled in this case. It should be noted that this ruling by the Hearing Officer also included a ruling on the May 4, 2011 request by parent for an independent evaluation. On May 6, 2011, the Hearing Officer issued an Order as to the Application of an Exception to the Timeline for Requesting a Hearing and/or the Tolling of the Two Year Statute of Limitations.

On May 6, 2011, the Parent requested that this Hearing Officer compel discovery or impose sanctions or find the District in contempt. That same day the Hearing Officer denied Petitioner's Motion to Compel, or in the Alternative, Motion for Contempt or Sanctions due to

lack of jurisdiction pursuant to the Oklahoma Administrative Procedures Act (the Administrative Code).

Subsequently, multiple subpoenas were requested for issue by this Hearing Officer, and multiple objections from both parties were submitted. On May 18, 2011, an informal telephonic conference was had between the parties and the Hearing Officer to discuss the objections to the subpoenas. Subpoenas were then issued by the Hearing Officer. Pre-hearing submissions and witness and exhibit lists were submitted in accordance with the Amended Scheduling Order deadlines.

The hearing on this due process complaint was commenced on Wednesday, June 15, 2011 and continued on Thursday, June 16, 2011; Friday, June 17, 2011; and Thursday, July 21, 2011, on which date it was concluded with the Parent resting and the District calling no witnesses of its own.

## **II. PROCEDURAL SAFEGUARDS**

Prior to the hearing, a determination was made that the District had complied with all aspects of the required procedural safeguards.

## **III. SUMMARY OF ISSUES**

The Second Amended Due Process Complaint submitted on April 11, 2011 is the operative complaint for this due process hearing. The Second Amended Due Process Complaint (the Complaint) consists of sixteen numbered complaints, some with sub-parts.

On April 22, 2011, following the submission of the Complaint, the Hearing Officer determined that she did not have jurisdiction consider, much less to rule upon, the "Other Claims" listed in Paragraph Fourteen, Fifteen, and Sixteen of the Complaint. As such, contentions listed in numbered paragraphs fourteen, fifteen and sixteen were dismissed.

Further, on April 22, 2011, following the submission of the Complaint, which requested that the two year statute of limitations period under the IDEA be tolled, the Hearing Officer entertained briefing by both parties as to the issue of tolling. The Hearing Officer ruled that Parent's request to toll the statute of limitations and/or for exception to the timeline for requesting a hearing is denied in full.<sup>2</sup> As such, the claim listed in Paragraph One was dismissed.

As of April 22, 2011, therefore, claims numbered Paragraphs Two through Thirteen remained. During the pre-hearing conference held on June 6, 2011, this Hearing Officer requested that Parent's review the claims they submitted to determine which were still viable based on the evolution of this litigation. On June 6, 2011, Parent's counsel was instructed by the Hearing Officer to review claims numbered Paragraphs 2, 4, 5, 6, 7, 8, and 11. Tr. Prehearing Conference, June 6, 2011, p. 31, lines 22-25. Subsequently, Parent voluntarily withdrew contentions in numbered Paragraphs 4, 5, and 6, noting that Paragraphs 2, 7, 8, and 11 remained. As such, contentions and claims numbered in Paragraphs 2, 3, 7, 8, 9, 10, 11, 12, and 13 proceeded to Hearing. Tr. p. 6, lines 13-17.

This Hearing Officer further narrowed Parent's complaints into the following legal issues:

(1) Did the District fail to provide a free and appropriate public education (FAPE)

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<sup>2</sup> As noted under the Background section of this decision, On April 28, 2011, at the instruction of the Hearing Officer, Parent submitted Petitioner's Brief in Support of the Application of an Exception to the Timeline for Requesting a Hearing and/or the Tolling of the Two Year Statute of Limitations. The District submitted its Response in Objection to Petitioner's Brief in Support of the Application of an Exception for Requesting a Hearing and/or the Tolling of the Two Year Statute of Limitations on May 4, 2011. The Hearing Officer subsequently ruled that the two year statute of limitations under the IDEA would not be tolled in this case. It should be noted that this ruling by the Hearing Officer also included a ruling on the May 4, 2011 request by parent for an independent evaluation. On May 6, 2011, the Hearing Officer issued an Order as to the Application of an Exception to the Timeline for Requesting a Hearing and/or the Tolling of the Two Year Statute of Limitations.

(encompassing claims numbered Paragraphs numbered 8, 9, 10, 11, and 12); and (2) Did the District fully and properly evaluate Student (encompassing claims numbered 2, 3, 7, and 13).

#### **IV. GENERAL FINDINGS OF FACT**

1. The Student's date of birth is [date] and he is currently [number] years old. School Exhibit ("SE") 55. The Student will attend the [number] grade for the 2011-2012 school year. Tr. p. 899-900, lines 1; 25-1. The Student has been in attendance at the District since he participated in the Head Start program at age 4. Petitioner's Exhibit ("PE") 4.

2. The Student is identified as a child with a disability under the Individuals with Disabilities Education Act. He qualifies for special education and related services under the IDEA disability category of Other Health Impaired as a result of his attention deficit disorder ("ADD"). School Exhibits (SE) 8, 17, 19. The Student had a diagnosis of speech impairment due to articulation delay and received speech therapy services from the District from February 13, 2004 to January 19, 2010. PE 4.

3. For the 2008-2009 school year, the Student was in [number] grade at [name] Elementary School. While in the [number] grade, individualized education plans (IEP) dated August 29, 2008 and January 20, 2009 were in place. While in the [this] grade, the Student received his academic instruction from teacher [EC], except for reading that was provided by special education teacher [CH] beginning on January 20, 2009. The Student also received speech language therapy twice per week from speech pathologist [MP]. Tr. p. 285 lines 1-7; p. 596 line 24 through p. 597 line 9; p. 668 line 12 through p. 669 line 6; SE 23, 28.

4. During the 2009-2010 school year, the Student was in [next] grade at [name] Elementary School. While in [this] grade, IEPs dated January 20, 2009 and January 19, 2010 were in place. While in [this] grade, the Student received his academic instruction from teacher

[LW], except for reading that was provided by special education teacher [CH]. The Student also received speech language therapy twice per week from speech pathologist [MP] through January 19, 2010. Tr. p. 285 lines 1-7; p. 784 lines 17-24; SE 28, 38.

5. During the 2010-2011 school year, the Student was in the [next] grade at [name] Elementary School. While in [this] grade, IEPs dated January 19, 2010 and January 13, 2011 were in place. While in [this] grade, the Student received his academic instruction from teacher [BL], except for reading that was provided by special education teacher [CH]. SE 38, 55; PE 8, 20.

6. The Student has difficulty staying awake in many of his classes. Tr. p. 261-64, 603, 669-72, 814, 869-70, 871-72; PE 48.

7. Following commencement of the Hearing, Parent presented the District with documentation from a Dr. [A.M.], M.D. that diagnosed the Student with sleep apnea. PE 55.

8. The Student testified that he believes he is learning while attending Heavener Public Schools. Tr. p. 395 lines 5-7.

## **V. GENERAL CONCLUSIONS OF LAW AND RATIONALE FOR DECISION**

1. The IDEA two-year statute of limitations bars all claims made by the Petitioner against the District prior to February 28, 2009. SE 107.

2. The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). As the parties attacking the Student's educational programming, the Petitioner (Parent) bears the burden of proof as to all of her claims against the District.

3. Equitable considerations are relevant in fashioning relief under the IDEA. Therefore, it is appropriate to consider the Parent's conduct into consideration in the analysis. *Burlington v. Department of Educ.*, 471 U.S. 359, 374 (1984); *W.G. v. Board of Trustees of Target Range Sch. Dist.*, 960 F.2d 1479, 1486 (9th Cir. 1992); *Garcia ex rel. Garcia v. Board of Educ. of Albuquerque Pub. Schs.*, 2007 WL 5023652, \*3 (D. N.M. January 10, 2007).

## **VI. SPECIFIC FINDINGS OF FACT AND CONCLUSIONS OF LAW AND RATIONALE FOR DECISION**

### **LEGAL ISSUE I: DID THE DISTRICT PROVIDE STUDENT WITH A FREE APPROPRIATE PUBLIC EDUCATION (FAPE)?**

#### **General Conclusions of Law Related to FAPE**

1. Under the *Individuals with Disabilities Education Act* ("IDEA") a free appropriate public education "FAPE" is defined as special education and related services that are provided at public expense, meet the standards of the state educational agency, include an appropriate preschool, elementary, or secondary school education, and are provided in conformity with an individualized education program ("IEP"). 20 U.S.C. § 1401(8).

2. "In all matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate education only if the procedural inadequacies: (i) impeded the child's right to a free appropriate public education; (ii) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents' child; or (iii) caused a deprivation of educational benefits." 20 U.S.C. § 1415(f)(3)(E)(ii); *O'Toole v. Olathe District Schools Unified School District No. 233*, 144 F.3d 692, 707 (10th Cir. 1998) (quoting *Roland M v. Concord School Committee*, 910 F.2d 983, 994 (1st Cir. 1990)).

3. Under the IDEA, the District's obligation is to provide the Student a “free appropriate public education.” The IDEA specifically defines a “free appropriate public education” as follows:

The term "free appropriate public education" 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 educational 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 required under section 1414(d).

20 U.S.C.A. § 1402(9).

4. The IDEA defines the term "special education" as:

[S]pecially 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.A. § 1402(29).

5. “Specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction –

- (i) To address the unique needs of the child that result from the child's disability; and
- (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.”

20 U.S.C.A. § 1401(26); 34 C.F.R. § 300.34(a).

5. In *Board of Educ. of Hendrick Hudson Central School Dist. V. Rowley* ("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.**

458 U.S. at 206-07 (emphasis added) (footnote omitted).

6. The IDEA does not require public schools to maximize a child's potential or to provide the best possible program. *Rowley*, 458 U.S. at 200-01; *Johnson v. Independent School District No. 4*, 921 F.2d 1022, 1028 (10th Cir. 1990), *cert. denied*, 114 L. Ed. 2d 79 (1991). Rather, a child's entitlement to a free 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. The benefit conferred must be "meaningful." *Cedar Rapids Community School District v. Garret F.*, 526 U.S. 66, 73.

7. As used in this part, the term individualized education program or IEP means a written statement for each child with a disability that is developed, reviewed, and revised in a meeting in accordance with §§300.320 through 300,324, and that must include –

- (1) A statement of the child's present levels of academic performance, including –

- (i) How the child's disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children); or
  - (ii) For preschool children, as appropriate, how the disability affects the child's participation in appropriate activities;
- (2) (i) A statement of measurable annual goals, including academic and functional goals designed to –
- (A) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and
  - (B) Meet each of the child's other educational needs that result from the child's disability;
- (ii) For children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;
- (3) A description of –
- (i) How the child's progress toward meeting the annual goals described in paragraph (2) of this section will be measured; and
  - (ii) When periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;
- (4) A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child –
- (i) To advance appropriately toward attaining the annual goals;
  - (ii) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities; and

- (iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section;
- (5) An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in paragraph (a)(4) of this section;
- (6)
  - (i) A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 612(a)(16) of the Act; and
  - (ii) If the IEP Team determines that the child must take an alternate assessment instead of a particular regular State or districtwide assessment of student achievement, a statement of why –
    - (A) The child cannot participate in the regular assessment; and
    - (B) The particular alternate assessment selected is appropriate for the child; and
- (7) The projected date for the beginning of the services and modifications described in paragraph (a)(4) of this section, and the anticipated frequency, location, and duration of those.

34 C.F.R. § 300.320; 20 U.S.C. § 1414(d)(1)(A) and (d)(6).

8. “In all matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate education only if the procedural inadequacies (i) impeded the child's right to a free appropriate public education; (ii) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or (iii) caused a deprivation of educational benefits.” 20 U.S.C. § 1415(f)(3)(E)(ii); *O'Toole v. Olathe District Schools Unified School District No. 233*, 144 F.3d 692, 707 (10<sup>th</sup> Cir. 1998) (quoting *Roland M. v. Concord School Committee*, 910 F.2d 983, 994 (1<sup>st</sup> Cir. 1990)).

9. If a student's proposed IEP is reasonably calculated to provide some educational benefit, a parents' preference for a student's educational methodology, no matter how well intentioned, is not required to be implemented by a school district. *Logue by and through Logue v. Shawnee Mission Pub. Sch. Unified Sch. Dist. No. 512*, 959 F. Supp. 1338 (D. Kan. 1997), *aff'd* 153 F.3d 727 (10th Cir. 1998); *Bradley ex rel. Bradley v. Arkansas Dept. of Educ.*, 443 F.3d 965 (8th Cir. 2006); *Tucker by Tucker v. Calloway County Bd. of Educ.*, 136 F.3d 495 (6th Cir. 1998).

10. School districts determine the appropriate methodology to be used to implement a child's IEP. Parents, "no matter how well motivated—do not have a right under IDEA to compel the school district to provide a specific program or employ a specific methodology for the education of their disabled child." *Logue By and Through Logue v. Shawnee Mission Pub. Sch. Unified Sch. Dist. No. 512*, 959 F. Supp. 1338, 1351 (D. Kan. 1997), *aff'd*, 153 F.3d 727 (1998); *see also Tucker by Tucker v. Calloway County Bd. of Educ.*, 136 F.3d 495, 506 (6<sup>th</sup> Cir. 1998) ("Case law is clear that they [parents] are not entitled to dictate educational methodology or to compel a school district to supply a specific program for their disabled child.").

11. A parent's preference for a student's educational methodology is not required to be implemented by a school district when a student's proposed IEP is reasonably calculated to provide some educational benefit. *Logue by and through Logue v. Shawnee Mission Pub. Sch. Unified Sch. Dist. No. 512*, 959 F. Supp. 1338 (D. Kan. 1997), *aff'd* 153 F.3d 727 (10th Cir. 1998); *Bradley ex rel. Bradley v. Arkansas Dept. of Educ.*, 443 F.3d 965 (8th Cir. 2006); *Tucker by Tucker v. Calloway County Bd. of Educ.*, 136 F.3d 495 (6th Cir. 1998).

12. The District could select any methodology or combination of methodologies it deemed appropriate to implement The Student's IEPs.

13. The IDEA does not require public schools to maximize a child's potential or to provide the best possible program. *Rowley*, 458 U.S. at 200-01; *Johnson v. Independent School District No. 4*, 921 F.2d 1022, 1028 (10<sup>th</sup> Cir. 1990), *cert. denied*, 114 L. Ed. 2d 79 (1991). Rather, a child's entitlement to a free 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. The benefit conferred must be “meaningful.” *Cedar Rapids Community School District v. Garret F.*, 526 U.S. 66, 73 (1999).

14. When determining whether a student's educational program is reasonably calculated to confer educational benefit, “due weight” must be given the opinions of school officials responsible for the student's education. *A.E. v. Independent School District No. 25*, 936 F.2d 472, 475 (10<sup>th</sup> Cir. 1991).

15. An IEP is not a contract and a school district is not obligated under the IDEA to adhere to each and every provision of an IEP. No denial of FAPE exists where a school district’s failure to implement a provision of an IEP is non-material to the student’s education. *Ms. K. v. City of South Portland*, 407 F. Supp.2d 290 (D. Me. 2006); *Van Duyn v. Baker School District J5*, 502 F.3d 811 (9th Cir. 2007).

16. The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). As the party attacking the Student’s educational programming, the Petitioner (Parent) bear the burden of proof as to all of her claims against the District.

17. Equitable considerations are relevant in fashioning relief under the IDEA. Therefore, it is appropriate to consider the Parent’s conduct into consideration in the analysis. *Burlington v. Department of Educ.*, 471 U.S. 359, 374 (1984); *W.G. v. Board of Trustees of*

*Target Range Sch. Dist.*, 960 F.2d 1479, 1486 (9th Cir. 1992); *Garcia ex rel. Garcia v. Board of Educ. of Albuquerque Pub. Schs.*, 2007 WL 5023652, \*3 (D. N.M. January 10, 2007).

18. It is the responsibility of the LEA [a school district] to provide special education and related services to children with disabilities in accordance with an IEP. This does not require that the school district, teachers, or others who implement the IEP are to be held accountable if a child does not achieve all of the stated annual goals and short-term objectives or benchmarks (for children who are taking alternate assessments aligned to alternate achievement of the standards) established on the IEP. However, teachers and responsible personnel of school districts must make good faith efforts to implement the IEP and assist the child in achieving these annual goals and benchmarks or objectives. *Policies and Procedures for Special Education in Oklahoma (2007)*, p. 116.

19. Where a District makes a good-faith effort to assist a student to achieve the student's goals, the student's "failure to achieve his goals does not equate to a failure by the [District] to implement the IEP." *J.K. v. Fayette County Bd. of Educ.*, 45 IDELR 35, 5, 2006 WL 224053 \*6 (E.D. Ky. Jan. 30, 2006).

**Parent Complaint Numbered Paragraph 8:**

**The District violated IDEA by failing to consider extended school year services at the January 19, 2010 and January 13, 2011 IEP team meetings.**

**8(a) The August 30, 2007 and August 29, 2008 IEPs concluded that no ESY was needed within the first two weeks of the school year without any testing or assessment to evaluate.**

**Findings of Fact**

1. The Petitioner filed her initial due process hearing complaint against the District on February 28, 2011.
2. The Student's August 30, 2007 IEP was in effect from August 30, 2007 through August 29, 2008. SE 19, 23.
3. The Student's August 29, 2008 IEP was in effect from August 29, 2008 until January 20, 2009, when it was replaced by a new annual IEP. SE 23, 28.

**Conclusions of Law**

1. The IDEA requires that a parent shall request a due process hearing within two years of the date the parent knew or should have known about the alleged action that forms the basis of the complaint. 20 U.S.C. § 1415(f)(3)(C); 34 C.F.R. § 300.511(e).
2. The Petitioner's claims set forth in Parent Complaint 8(a) are barred by the IDEA's applicable statute of limitations. 20 U.S.C. § 1415(f)(3)(C); 34 C.F.R. § 300.511(e).

**8(b) The January 20, 2009 IEP concludes ESY is not needed without any testing or assessment, regression or recoupment.**

**Findings of Fact**

1. The Student's January 20, 2009 IEP was in effect from January 20, 2009 through January 19, 2010. SE 28, 38.

2. The child's reading teacher, [CH], testified that if she noticed an emerging skill for a student before the end of the school or before an extended break in time, she would consider ESY services for that Student. Tr. p. 738 lines 2-12.

3. [CH] would recommend ESY services if she were afraid that emerging skills might be lost. Tr. p. 738 lines 13-16.

4. If [CH] had been working with a student for a period of time to develop a skill and noticed that at the end of the school year, or summer break, that that skill was emerging and she was afraid that when school began that skill would be lost, that would fit her definition of regression. Tr. p. 738 line 20 through p. 739 line 3.

5. Based on [CH]'s observations of the Student after school breaks, it is her opinion that the Student did not regress. Tr. p. 699 lines 12-19. [CH] did not believe ESY services were appropriate, though it was a team decision.

6. The Signature Page of the January 20, 2009 IEP reflects the IEP team's determination that ESY services are not necessary for the Student. The Parent signed the Signature Page and marked the box "Agree" to the right of her signature. Tr. p. 628 lines 11-14; p. 698 lines 10-19; SE 28 # 106.

7. The IEP team also completed an OSDE Form 16 "Consideration for Extended School Year (ESY) Services" form at the January 20, 2009 IEP team meeting. This document, signed by the Parent, reflects that the IEP team determined that ESY services were not necessary for the provision of FAPE for the Student. SE 28 ## 108-09.

8. The Parent did not note any disagreement with respect to ESY services on the January 20, 2009 IEP. Furthermore, the Parent testified that the District has never prevented her

from making any comments or noting any disagreements on an IEP for the Student. Tr. p.1022 lines 5-8; SE 28.

### Conclusions of Law

1. Whether ESY services are appropriate for a student is a decision to be made by the IEP team. Petitioner is a member of the IEP team and was in attendance at and substantially participated in the January 20, 2009 IEP team meeting.

2. The Petitioner did not establish by a preponderance of credible evidence that the Student's IEP team failed to properly consider ESY services at the January 20, 2009 IEP team meeting.

3. Petitioner failed to establish by a preponderance of credible evidence that ESY services were necessary for the Student while the January 20, 2009 IEP was in effect.

**8(c) The August 30, 2007, August 29, 2008, and January 20, 2009 IEPs incorrectly conclude that [the student] has access to nondisabled children. When school is not in session, [the student] has little or no contact with nondisabled children because his sibling is disabled.**

### Findings of Fact

1. The Student's August 30, 2007 IEP was in effect from August 30, 2007 through August 29, 2008. SE 19, 23.

2. The Student's August 29, 2008 IEP was in effect from August 29, 2008 until January 20, 2009, when it was replaced by a new annual IEP. SE 23, 28.

3. The IEP team completed an OSDE Form 16 "Consideration for Extended School Year (ESY) Services" form at the January 20, 2009 IEP team meeting. Factor 8 on page 1 of this document indicates as follows:

8. Ability of the child to interact with nondisabled children: Yes

[Student] interacts with nondisabled children everyday.

The Parent signed this document reflecting that the IEP team determined that ESY services were not necessary for the provision of a free appropriate public education for the Student. SE 28 ## 108-09.

4. No evidence was introduced or presented at hearing as to this claim or showing that the Student has little or no contact with nondisabled peers.

### **Conclusions of Law**

1. The IDEA requires that a parent shall request a due process hearing within two years of the date the parent knew or should have known about the alleged action that forms the basis of the complaint. 20 U.S.C. § 1415(f)(3)(C); 34 C.F.R. § 300.511(e).

2. The May 6, 2011 order issued by this Hearing Officer ruled that, “All claims outside the two-year IDEA statute of limitations are barred from the hearing in this case.”

3. The Petitioner’s claims set forth in Parent Complaint 8(c) with regard to the January 30, 2007 and January 29, 2008 IEPs are barred by the IDEA’s applicable statute of limitations. 20 U.S.C. § 1415(f)(3)(C); 34 C.F.R. § 300.511(e).

4. The Petitioner, has the burden of proof in this matter and has failed to establish by a preponderance of credible evidence that the Student’s IEP Team failed to properly consider the Student’s inability to interact with nondisabled peers in regards to the January 20, 2009 IEP relating to ESY services

5. No credible evidence was produced during this Hearing that the Student has little or no contact with nondisabled peers during the summer.

6. Petitioner's claim that the IEP team failed to consider the Student's ability to have contact with nondisabled peers with regard to the January 20, 2009 IEP was brought without any basis in fact.

**8(d) The District failed to consider ESY in the January 19, 2010 and January 13, 2011 IEP meetings.**

**Findings of Fact**

1. [CH] testified that during the 2010-2011 school year there were discussions regarding extended school year services for the Student and that she personally went over ESY services with the Petitioner. Tr. p. 324 line 9 through p. 325 line 7; p. 879 lines 2-20.

2. The Signature Page of the January 19, 2010 IEP reflects that the IEP team determined that ESY services were not necessary for the Student. Parent signed the Signature Page of this January 19, 2010 IEP and marked the box "Agree" to the right of her signature. SE 38 # 122.

3. [BL] was the Student's [number] grade teacher during the 2010-2011 school year. Tr. p. 853 lines 4-6. [BL] testified that she did not note any academic regression in the Student at the beginning of the [number] grade year that was not typical of an average [number] grader. Tr. p. 899 lines 14-24.

4. At the January 13, 2011 IEP team meeting, Petitioner was accompanied by [JF]. [JF], while employed as a speech-language pathologist with the [name] County Health Department, offered assistance to the Petitioner at the meeting, including serving as an advocate for the Petitioner and the Student, giving the Petitioner advice on matters that did not pertain to speech-language services, and giving recommendations to the Team related to the Student's day-

to-day education not related to speech-language services. Tr. p. 507 lines 6-9; p. 516 line 25 through p. 520 line 18.

5. School District members of the IEP team believed [JL] was acting in the capacity as an advocate for the Petitioner and the Student at the January 13, 2011 IEP team meeting. Indeed, testimony reflected that [JL] did most of the speaking at the meeting for the Petitioner. This was in sharp contrast to prior IEP team meetings when the Petitioner, as Student's mother, participated actively. [CH] has been in attendance at all of the Student's IEP team meetings, and she noted that the Petitioner has participated, spoken, and otherwise actively engaged in IEP team meetings. [CH] noted that it was unusual for Petitioner to be quiet in a meeting. In IEP team meetings prior to 2011 the Petitioner voiced opinions at the meetings. In particular she made positive comments about the Student's progress, with comments that she felt the Student had progressed in his reading and that she felt like he was reading better. Tr. p. 739 lines 10-17, 21-25, p. 740 lines 1-16, 22-25; p. 744 line 24 through p. 745 line 2; p. 908 line 19 through p. 909 line 7.

6. [JF] and District witnesses testified that the IEP team, including Petitioner, considered ESY services at the January 13, 2011 IEP team meeting and determined they were not necessary for the Student. Tr. p. 491 lines 15-21; p. 891 lines 13-20.

7. The January 13, 2011 has a signature page attached that reflects the IEP team's determination that ESY services are not necessary for the Student. The Petitioner signed the Signature Page and marked the box "Agree" to the right of her signature. SE 55 # 147.

8. In addition to parent, [JF], as Petitioner's perceived advocate and speech pathologist of choice, signed the January 13, 2011 IEP as an IEP team member. She, too, checked the box to the right of her signature indicating that she agreed with the IEP. [JF], who

has also served as a special education teacher and special education director at another school district in Oklahoma, testified that she has never signed an IEP that she has believed, as written, was not reasonably calculated to provide a meaningful educational benefit on the Student. She stated that this included the Student's January 13, 2011 IEP. Tr. p. 507 lines 6-9; p. 515 line 14 through p. 516 line 20; p. 521 lines 2-17; SE 55 # 147.

9. Neither Petitioner, nor [JL] ever told the IEP team that either of them believed the Student's January 13, 2011 IEP, as written, was not reasonably calculated to confer a meaningful educational benefit on the Student. Tr. p. 745 lines 3-7; 8-13.

10. The Student progressed from [number] grade to [the next numbered] grade at the end of the 2010-2011 school year. [BL] does not anticipate the Student will regress by the time school begins for [next] grade. [BL] testified that she thinks the Student is ready to go to the [next] grade and can do the work required for [that] grade. Tr. p. 899 line 25 through p. 900 line 18.

### **Conclusions of Law**

1. The Petitioner did not establish by a preponderance of credible evidence that the Student's IEP Team failed to properly consider ESY services at the January 19, 2010 and January 13, 2011 IEP team meetings.

2. Petitioner's claim that the District failed to consider ESY at the January 19, 2010 and January 13, 2011 IEP team meeting was brought without any basis in fact.

**8(e) The January 20, 2009 IEP reflects that regression was occurring in math during the school year from January 16, 2009 through May 14, 2009 and again from October 23, 2009 through January 15, 2010;**

**8(f) The January 20, 2009 IEP does not enable the school to evaluate regression or recoupment because no scores are recorded when school starts in August 2009. Instead, the District waits to record scores on September 24, 2009.**

### **Findings of Fact**

1. [EC] was the Student's [number] grade teacher during the 2008-2009 school year. Tr. p. 596 line 24 through p. 597 line 11. [EC] testified that she both attended and participated in the Student's January 20, 2009 IEP team meeting, at which extended school year services were discussed. Tr. p. 614 line 9 through p. 615 line 1; p. 628 lines 11-14.

2. [EC] recalls that there was discussion at the January 20, 2009 IEP team meeting regarding whether the Student was regressing in math. Tr. p. 640 lines 14-19.

3. [EC] testified that by looking solely at the Student's math grades it may appear the Student regressed; however, the Student had multiple missing assignments which caused his grade to be failing. [EC] testified that during one nine-week period during the 2008-2009 school year, the Student had twenty-two (22) assignments that were not handed in. Tr. p. 613 line 6 through p. 616 line 25.

4. [EC] testified her work with the Student everyday in class showed her that the Student understood the material and knew what to do. The Student never told [EC] that he did not understand an assignment and needed help with it. Tr. p. 617 lines 1-20; p. 640 line 14 through p. 641 line 13.

5. The Student was administered a Stanford test in April 2009 while the Student was in [number] grade. The Student's score on the Stanford test for total mathematics showed a grade equivalency of 2.6. The same test results showed that the Student's score in mathematics

problem solving was a grade equivalency of 2.1, and his grade equivalency in mathematics procedures was 3.4. Tr. p. 647 lines 20 through p. 648 lines 21; p. 649 lines 12-20; p. 649 line 25 through p. 650 line 8; SE 29.

6. [EC] believes the Student made meaningful educational progress in her class with the [the] grade curriculum during the 2008-2009 school year. Ms. [EC] believed that the student was prepared to commence [the next] grade for the start of the 2009-2010 school year. Tr. p. 655 lines 5-14. Indeed, [EC] stated that she believed that the Student could do [the next] grade work and be successful. Tr. p. 656 lines 1-13.

7. [EC] also relied upon the Student's in-class papers and tests to conclude he had made educational progress. [EC] that the Student was meeting his IEP goal of scoring 70 and above on computation of whole numbers of less than 100 if the entirety of his performance was examined. Indeed, [EC] stated that she brought the Student's class work, tests, and other in-class papers to the IEP team meeting and discussed these with Petitioner. She further stated that she stayed in contact with the Student's mother about his progress during the school year. At no time did the Petitioner express any complaints to [EC]. Tr. p. 658 lines 1-20.

8. [LW] was the Student's [number] grade teacher during the 2009-2010 school year. Tr. p. 784 line 22 through p. 785 line 1.

9. [LW] gave the Student regular classroom tests that were part of the curriculum in order to determine that he was meeting his math goal. Tr. p. 790 lines 19-22. [LW] testified that the Student's math grades for the 2009-2010 school year was made up of only test grades and did not include daily assignments. Tr. p. 794 lines 6-25; SE 45 #20.

10. [LW] explained that the Student's math grade sheets include entries that say PROJ, which are assessments of 100 facts. At the beginning of the school year, the assessment

will include 100 addition problems, and the students are given five minutes to complete them. The Student's project grade on September 17, 2009, was a 35%. On September 25, 2009 he received 12%. On October 7, 2009 he received 51%. When the Student was taking these assessments he was awake and alert, but typically would not finish them. He would begin the assessment and then just stop and quit. Tr. p. 795 line 1 through p. 797 line 1; SE 45 #20.

11. [LW] testified that there were times that the Student would score well on an assignment and then would test on almost the same material on a different day and flunk. The inverse was also true, with the Student testing on material well and then flunking an assignment covering the same materials. Tr. p. 797 line 22 through p. 799 line 15; SE 45.

12. The Student really enjoyed [LW]'s class and came to life when the class was doing math. He asked questions and he loved to try to figure things out and answer them. The Student's hand was up more than average because he enjoyed math. n strongly believed that the student's performance on paper was not indicative of his ability. Tr. p. 799 line 17 through p. 800 line 7.

13. In the late spring of 2010, the Student took the Oklahoma Core Curriculum Test in mathematics and scored 708, which is proficient for [number] grade math. Tr. p. 840 line 25 through p. 841 25; SE 42.

14. [LW] taught the Student mathematics and she believes that the Student benefited from his education. Tr. p. 840 lines 6-15.

15. [LW] believes that the Student's January 20, 2009 IEP was reasonably calculated to confer a meaningful educational benefit to the Student. Tr. p. 834 line 24 through p. 840 line 2.

### **Conclusions of Law**

1. [Number] grade teacher [EC] and [number] grade teacher [LW] were both credible witnesses.

2. The Student's January 20, 2009 IEP, as written, was reasonable calculated to confer a meaningful education benefit on the Student in the least restrictive environment.

3. The Student received a meaningful educational benefit from his January 20, 2009 IEP. Petitioner has failed to establish by credible evidence that the Student was denied a meaningful educational benefit from his January 20, 2009 IEP.

4. The Student was provided a free appropriate public education in the least restrictive environment from his January 20, 2009 IEP. The Petitioner has failed to meet her burden to establish by credible evidence that Student was not provided a free appropriate public education in the least restrictive environment from his January 20, 2009 IEP.

5. The Petitioner failed to show by a preponderance of evidence that the Student regressed in math, let alone while his January 20, 2009 was in effect.

**8(g) Regression during the school year is also apparent from the January 19, 2010**

**IEP with respect to math from October 29, 2010 through January 14, 2011 (Christmas Break) and in reading from March 26, 2010 through January 14, 2011.**

**8(h) Where regression is occurring during the school year, at breaks, and even when school remains in session, the failure to provide ESY constitutes substantial harm and a denial of FAPE.**

**Findings of Fact**

1. [LW] was the Student's [number] grade teacher during the 2009-2010 school year. Tr. p. 784 line 22 through p. 785 line 1. [LW] has been a teacher for eighteen years, the last fourteen of which have been at the District. [LW] is currently certified by the Oklahoma State Department of Education to teach early childhood, elementary education, and grade six through eight language arts, social studies, and science. Tr. p. 784 lines 17-21; p. 834 lines 3-12; SE 101.

2. While the Student was enrolled in [LW]'s class, [LW] administered regular classroom tests that were part of the curriculum in order to determine if Student was meeting his math goal. Tr. p. 790 lines 19-22.

3. The Student's math grades for the 2009-2010 school year reflect only test grades and do not include daily assignments. Tr. p. 794 lines 6-25; SE 45 #20.

4. The Student's math grade sheets include entries that say PROJ. These are assessments of 100 facts. At the beginning of the school year, the assessment will include 100 addition problems, and the students are given five minutes to complete them. The Student's project grade on September 17, 2009, was a 35%. On September 25, 2009 he received 12%. On October 7, 2009 he received 51%. When the Student was taking these assessments he was awake

and alert, but typically would not finish them. He would begin the assessment and then stop and quit. Tr. p. 795 line 1 through p. 797 line 1; SE 45 #20.

5. [LW] testified that there were times that the Student would score well on an assignment and then would test on almost the same material on a different day and flunk. The inverse was also true, with the Student testing on material well and then flunking an assignment covering the same materials. Tr. p. 797 line 22 through p. 799 line 15; SE 45.

6. Student appeared to really enjoy [LW]'s class, as she described him coming to life during math class. According to [LW], the Student asked questions and loved to try to figure things out and answer math problems. The Student's hand was up more than average because he enjoyed math. What the Student was giving in the classroom on paper did not seem to be indicative of his ability through in-class performance. Tr. p. 799 line 17 through p. 800 line 7.

7. In the late spring of 2010, the Student took the Oklahoma Core Curriculum Test in mathematics. The Student scored 708, which is proficient for [number] grade math. Tr. p. 840 line 25 through p. 841 25; SE 42.

8. [LW] taught the Student mathematics and she believes that the Student benefited from his education. Tr. p. 840 lines 6-15.

9. Further, [LW] also taught the Student reading. [LW] believes that the Student's reading abilities improved during the 2009-2010 school year. Tr. p. 840 lines 16-19.

10. [LW] testified that she believes that the Student's January 20, 2009 IEP was reasonably calculated to confer a meaningful educational benefit to the Student. Tr. p. 834 line 24 through p. 840 line 2.

11. [BL] was the Student's [number] grade teacher during the 2010-2011 school year. Tr. p. 852 line 23 through p.853 line 6.

12. [BL] has been a teacher for two years at the District. [BL] is currently certified by the Oklahoma State Department of Education to teach early childhood and elementary education. Tr. p. 852 line 23 through p.853 line 2; SE 100.

13. [BL] did not note any academic regression in the Student at the beginning of the [number] grade year. Indeed, she stated that the Student was showing no greater regression beyond that typical of an average [number] grader. Tr. p. 899 lines 14-24.

14. [BL] used progress reports and the Student's grades in order to track his progress toward his math goal. Tr. p.854 lines 3-13.

15. In order to assess whether the Student could use numbers and numbered relationships to acquire basic facts with 70% accuracy, a goal of the IEP, [BL] relied on the Student's daily math lessons and regular tests he took in the classroom. Tr. p. 854 lines 19-24.

16. [BL] did have discussions with the Student as to the Student's progress in math. His assignments and class work were also sent home for her to review. If the Student did not score a certain grade, then the plan was for Petitioner, as Student's mother, to sign the assignment or test and send it back to [BL]. Tr. p. 856 lines 15-18.

17. [BL] believes that the Student met his math goal in the January 19, 2010 IEP, which stated that the Student would use numbers and number relationships to acquire basic facts with 70% accuracy. She based her belief that Student met this goal using the Student's math grade and tests in the class room. Tr. p. 856 line 23 through p. 857 line 7.

18. The Student's math grades were lower throughout the 2010-2011 school year because there were unfinished assignments or work that was not turned in. Tr. p. 857 line 24 through p. 859 line 4; SE 66.

19. [BL] attended an IEP team meeting for the Student on January 13, 2011. Tr. p. 859 lines 5-8.

20. At the January 13, 2011 IEP meeting a new math goal was established for the Student. In order to implement the math goal, the team, at the suggestion of [JF], decided that they were going to utilize a tri-cut folder to help the Student break the math problems down into smaller pieces. Using this tri-cut folder, the Student would do five problems at a time and his total number of problems was reduced to twenty from thirty. [BL] also continued to help the Student with his math goal on a one-on-one basis. Tr. p. 859 line 19 through p. 860 line 8; SE 55.

21. In order to determine whether the Student met his math goal in his January 13, 2011 IEP, which is to use a variety of problem solving approaches to analyze, extend, and create patterns with 70% accuracy, [BL] would rely on the Student's grades. Tr. p. 861 line 8 through p. 862 line 3.

22. With respect to the Student's math goal from his January 13, 2011 IEP, [BL] advised the Student's mother of his progress and struggles. [BL] stated that she informed the Student's mother that the one area holding Student back was his failure to turn in his work. They discussed Student getting his work done during the after school program. [BL] spoke with staff in the after school program that was helping the Student to make sure that they sat down and helped him do his math. Tr. p. 862 line 18 through p. 863 line 19.

23. [BL] believes that the Student made more than minimal progress during Spring of 2011 towards his January 13, 2011 IEP math goal. She bases this belief on her one-on-one work with the Student and observing his skill set. The homework and assignments that the Student actually completed resulted in a B average. The Student only received bad marks when he failed to complete homework and assignments. Tr. p. 863 line 25 through p. 864 line 16.

24. [LW] testified that she did not believe the Student was reading at the [number] grade level when he entered her classroom at the beginning of the 2009-2010 school year. Tr. p. 800 lines 22-24.

25. At the beginning of a school year, the students are given the SRI test and that test gives the District a Lexile score to look at. That Lexile score is translated into a grade level. Tr. p. 800 lines 2-6. The Lexile test is not administered by grade level. The students take the test and it gives the grade level for the student. Tr. p.758 line 22 through p. 759 line 2.

26. The Lexile is not a reading program. The Lexile tells what level the student is reading. It is, actually, a tool for the library staff so that the librarian knows what level books are appropriate for the Student. The Lexile is not used as a grading tool; rather, it is used as a tool for assessing a students' progress in reading. Reading Counts tests are when the Student goes to the library and checks out a book, reads the book, and takes a quiz on it. Ms. [CH] requires students to take a Reading Counts test once a week. The Reading Counts quiz tests the student's comprehension over the book they've just read. Tr. p. 760 lines 18-24; p. 761 lines 9-25; p. 762 lines 1-25.

27. [CH] testified that she believes the Lexile is a recognized assessment tool as part of the reading counts program. Tr. p. 760 line 25 through p. 761 line 2.

28. On August 18, 2008, [CH] administered a Wide Range Achievement Test (Revision 3) ("WRAT 3") to the Student. This WRAT 3 shows the Student has a reading grade score of [number] grade. Tr. p. 684 lines 1-5; p. 685 lines 3-6; SE 25 # 082.

29. [CH] administered a WRAT 3 test to the Student on January 13, 2010. This WRAT 3 reflects that the Student's reading score is on [number] grade level. Tr. p. 685 lines 15-17; SE 41 #111.

30. The fact that the Student was still being reflected as having a reading score of the [number] grade level on January 13, 2010 did not indicate to [CH] that there was a lack of progress in reading by the Student. Tr. p. 685 lines 12-20.

31. [CH] believes the Student made reading progress from 2008 to January 2010 based on her listening to him read and the fact that the Student's Lexile scores were increasing. The Student was able to check out more sophisticated books and was reading them. [CH] also looked at his grades, spoke to his regular teacher, and considered the grade level of the books that he was passing on his reading counts. Tr. p. 687 lines 16-24.

32. [CH] administered a WRAT 3 test to the Student on January 4, 2011. This WRAT 3 reflects that the Student's reading score is on [next higher number] grade level. SE 57 #007.

33. The WRAT 3 test identifies how much progress the Student has made toward increasing his reading skills. Based on the Student's WRAT scores from August 18, 2008 through January 2011, the Student's reading grade level has increased from [number] grade to [next higher number] grade, which is one year of progress during three years of direct instruction and reading. Tr. p. 680 lines 17-22; p. 689 line 15 through p. 691 line 1; p. 691 lines 7-10; SE 25 # 082; SE 57 #007.

34. Achievement tests would also be considered in identifying the Student's grade level in reading over this same period of time. Those achievement tests would include the State OCCT or the ALRAP. Tr. p. 691 lines 11-14; p. 691 line 24 through p. 692 line 1.

35. The Student met his reading goal in the January 20, 2009 IEP which was that he would increase his reading skills by nine months on the [number] grade level. Tr. p. 693 line 10 through p. 694 line 1; SE 28 # 103.

36. [CH] testified that the reading goal on the January 19, 2010 IEP – that the Student increase his reading level to grade 3 – was an appropriate goal for that IEP. This was not based on the WRAT 3 score alone because on some days the Student might be sleepy or not trying his best and the test would not show the Student’s correct level or reading. For these reasons, [CH] also used her daily experience in teaching reading to the Student. Tr. p. 694 lines 2-25; SE 38 # 120; p. 717 line 22 through p. 718 line 2.

37. On August 18, 2009, which was near the beginning of the Student’s [the next number] grade year, the Student was given a benchmark test as part of the Voyager reading program. This testing and its results come from [that year’s] grade testing materials. The Student scored 94 % correct on this benchmark test. Tr. Vol. 4, p. 803 lines 11-14; p. 804 line 7 through p. 805 line 1; p. 806 lines 10-17; SE 35 #006.

38. [LW] received extensive instruction in giving the benchmark assessments that are part of their Voyager program. [LW] also received training in SRI, but it wasn’t as extensive as the Voyager training she received. Tr. p. 830 line 23 through p. 831 line 7; SE 35; SE 44.

39. The SRI assessment given to the Student on May 5, 2010, indicates that the Student’s Lexile is 498, which is “Basic - Below Grade Level.” Had the Student scored three points higher, his Lexile would have been “Proficient – On Grade Level.” Tr. p. 833 line 6 through p. 834 line 2; SE 44.

40. [LW] believes that the Student’s reading abilities improved during the 2009-2010 school year. Tr. p. 840 lines 16-19.

41. [CH] instructed the Student at a [number] grade reading level for a portion of the 2010-2011 school year. Tr. Vol. 3, p. 763 line 15-21.

42. [CH] uses the Voyager reading and Marie Carbo reading methodologies for direct instruction with the Student. [CH] has also used the Buckle Down reading methodology with the Student in preparation for achievement test. Tr. p. 716 line 12 through p. 717 line 3; SE 108, #31-43.

43. The Marie Carbo reading program does not have a daily data sheet or benchmark that allows tracking of the Student's progress throughout the year. However, there are computer generated reporters for the Voyager program. In order to obtain the Student's Voyager benchmark progress, [CH] prints a page off the computer for the Student to read. The Student has a minute to read the passage to [CH] to see how many words they can get correct in that minute. The words that are underlined are the words that the Student missed. The last word that is underlined is the final word that the Student got through reading in one minute. Tr. p. 718 lines 3-7; p. 718 lines 22-23; p. 732 lines 4-7; SE 61 ## 070-071.

44. On August 30, 2010 the Student's Voyager Benchmark 1 score was 69. On December 1, 2010, the Student scored 104 as reflected on Benchmark 2. Because the Student scored on task, he went on to [number] grade level. In a Benchmark given to the Student on May 16, 2011, the Student scored 108, which was two points from being on track. [CH] believes that the Student could have done better on this test but that he kept falling asleep while she was administering it. Tr. p. 718 lines 3-7, 22-23; p. 719 line 17 through p. 720 line 9; p. 720 lines 15-18; p.721 line 24 through p. 722 line 11; p. 724 lines 4-8; p. 732 lines 11-24; p. 733 lines 4-7, 10-15; SE. 61, ## 004, 005, 070, 071.

45. The growth in the Student's Voyager Benchmark score during his [number] grade year demonstrates significant progress and is consistent with what [CH] observed in her

classroom providing direct instruction in reading one hour each day during the Student's [number] grade year. Tr. p. 733 line 24 through p. 734 line 10.

46. On September 1, 2010, the Student received a Lexile score of 596, which was 4 points below the Lexile score range for [number] grade students. On December 9, 2010, the Student received a Lexile score of 479. Then, on May 18, 2011, the Student received a Lexile score of 440, which was 156 points lower than the Student's September 1, 2010 Lexile score. To obtain a Lexile score, a test is taken on a computer and it consists of a passage that the Student is supposed to read and then the Student answers questions on the computer concerning it. It should take about twenty to thirty minutes to take the test, but when the Student took the May 18, 2011 test, he only took about five minutes to take the test. The Student had to retake the test several times and each time he was just clicking through the answers quickly. [CH] does not feel like the Student was putting forth an effort on the May 2011 Lexile test. Tr. p. 727 lines 23-25; p. 728 lines 1-17; 735 lines 6-17; p. 736 lines 17-23; p. 737 lines 1-17; SE 63.

47. The drop of 156 Lexile points for this Student from September 2010 to May 2011 does not reflect the progress that the Student made with the Voyager program in [CH]'s classroom, and it does not comport with [CH]'s observations of the Student's reading ability based on teaching him an hour a day for the entire [number] grade year. Tr. p. 737 lines 18 through p.738 line 1.

48. Even though the Student's Lexile score dropped between September of 2010 and December of 2010, he was reading higher level books than he was at the beginning of the school year. When the Student came to [BL]'s classroom in the [number] grade, he was checking out [one grade lower] books. The Student wanted to check out [grade level] books so [BL] let him

do so. The Student was taking Reading Counts tests on those [grade level] grade books and passing them. Tr. p. 866 line 6 through p. 867 line 22; SE 63.

49. [BL] testified that she does not believe the Student's Lexile score of 440 at the end of May 2011 accurately reflects the Student's reading abilities. [BL] testified that the Student's reading ability and reading comprehension increased from the beginning to the end of the year. Tr. p. 897 lines 3-12.

50. [BL] based her belief that the Student made reading progress on the type of books the Student was checking out of the library and reading. According to [BL], the Student was excited about books on bugs or lizards. When the Student finished reading a book, he would come and tell [BL] what he read with accuracy. The Student also did oral book reports in class, which he was not required to do because he did reading with [CH]. The Student enjoyed participating and doing oral book reports. The Student typed out posters to go along with his book reports. [BL] stated that this shows that the Student understood what he was reading and that he was excited to discuss the books he completed. The books were generally grade level] non-fiction books. Tr. p. 897 line 14 through p. 898 line 7.

51. [BL] knows for certain what level of books the Student was checking out because she assisted the Student in checking out books when he lost library privileges for failing to return his books. The Student picked the books out that [BL] checked out for him. Tr. p. 899 lines 1-13.

### **Conclusions of Law**

1. [Number] grade teacher [LW] was a credible witness. Special education teacher [CH] was a credible witness. [Number] grade teacher [BL] was a credible witness.

2. The Student made meaningful educational progress in math and reading during the 2009-2010 and 2010-2011 school years.

3. Petitioner has failed to show by a preponderance of credible evidence that the Student suffered regression in math with the January 19, 2010 IEP in place from October 29, 2010 through January 14, 2011. Petitioner has failed to show by a preponderance of credible evidence that the Student suffered regression in reading from March 26, 2010 through January 14, 2011.

4. The Petitioner has failed to establish by a preponderance of credible evidence that the Student's IEP Team failed to properly consider ESY services at any time, including the Student's [number] and [number] grade years.

**Parent Complaint Numbered Paragraph 9:**

**The January 19, 2010 and January 20, 2011 [sic] IEPs are defective and deny [the Student] a FAPE.**

**9(a) The above identified IEPs provided a goal for math but did not provide any special education services in math to [the Student].**

**9(b) The District failed to implement the above identified IEP with respect to math.**

**9(c) The District's failure to provide special education services in math in 2009 and 2010 has resulted in denial of meaningful educational benefit to [the Student] and a denial of a FAPE.**

### Findings of Fact

1. On August 18, 2008, [CH] administered the WRAT 3 to the Student. The Student's score for mathematics shows a grade equivalency of [number] grade. SE 25, 28.
2. The Student's January 20, 2009 IEP was written while the Student was in [number] grade. SE 28.
3. The January 20, 2009 IEP lists a consultation in math, four times per year, to be provided by [CH]. SE 28.
4. The January 20, 2009 IEP contains a single math goal, that: "[Student] will compute whole numbers less than 100 with 70 % accuracy." SE 28.
5. Standard 2 of the Oklahoma Priority Academic Student Skills ("PASS") for [number] grade mathematics provides: "Standard 2: Number Sense and Operation – The student will use numbers and number relationships to acquire basic facts and will compute with whole numbers less than 100." Oklahoma Priority Academic Student Skills, Mathematics, Grade [number] (<<http://sde.state.ok.us/Curriculum/PASS/Subject/math.pdf>> at p.7).
6. The math goal written into the Student's January 20, 2009, IEP was taken from the SEAS program, which is a special education program provided through the State Department of Education. Tr. p. 747 lines 1-17; SE 28.
7. This math goal is a goal related to PASS standards, which are standards that are taught to assist the Students on their achievement tests. The State Department of Education mandates that all public schools within the State of Oklahoma teach the PASS standards. The math goal in the Student's January 20, 2009 IEP is a [number] grade appropriate PASS standard that was also unique to the Student's needs. Tr. p. 748 lines 1-17; p. 769 lines 3-21; SE 28.

8. The January 20, 2009 IEP's single math goal states that it will be measured by grades and standardized tests. SE 38.

9. [EC], the Student's [number] grade teacher, testified that the Student consulted with [CH] regarding math as required in his IEP. Tr. p. 636 lines 15-23; p. 669 lines 4-6.

10. [EC] was responsible in helping the Student achieve computing whole numbers less than 100 with seventy percent accuracy. Tr. p. 633 lines 5-17.

11. [EC] testified that by looking solely at the Student's math grades it may appear this Student regressed; however, in the case of the Student, he had multiple missing assignments which caused his grade to fall to failing. [EC] testified that during one nine week period during the 2008-2009 school year, the Student had twenty-two assignments that were not handed in. Tr. p. 613 line 6 through p. 616 line 25.

12. [EC] testified that her work with the Student daily in class allowed her to conclude that the Student understood the materials being taught. Never once during the 2008-2009 school year did the Student ever tell [EC] that he did not understand an assignment and needed help. Tr. p. 617 lines 1-20; p. 640 line 14 through p. 641 line 13.

13. The Student was administered a Stanford test, including the mathematic sub-test, in April 2009 while the Student was in [number] grade. The Student's score on the Stanford test for total mathematics showed a grade equivalency of 2.6. The Student's score in mathematics problem solving was a grade equivalency of 2.1, and his grade equivalency in mathematics procedures was 3.4. Tr. p. 647 lines 20 through p. 648 lines 21; p. 649 lines 12-20; p. 649 line 25 through p. 650 line 8; SE 29.

14. [EC] believes the Student made meaningful educational progress in her class with the [number] grade curriculum during the 2008-2009 school year and that he was ready for promotion to the [next] grade. Tr. p. 655 lines 5-14.

15. Based on her experience of teaching the Student in s[number] grade [EC] thought the Student would be successful in [the next ] grade. Tr. p. 656 lines 1-13.

16. Other data that [EC] relied on in order to determine that the Student made educational progress was his in-class papers and tests. These demonstrated to [EC] that the Student was scoring seventy percentile and above on computation of whole numbers of less than 100. [EC] brought these papers and showed Petitioner during the IEP team meeting. She also stayed in contact with the Student's mother about his progress. At no time did the Petitioner express any complaints. Tr. p. 658 lines 1-20.

17. [LW] was the Student's [number] grade teacher during the 2009-2010 school year. Tr. p. 784 line 22 through p. 785 line 1.

18. [LW] gave the Student regular classroom tests that were part of the curriculum in order to determine that he was meeting his math goal. Tr. p. 790 lines 19-22. The Student's math grades for the 2009-2010 school year reflect only test grades and do not include daily assignments. Tr. p. 794 lines 6-25; SE 45 #20.

19. The Student's math grade entries include the sub-heading PROJ. These are assessments of 100 facts. At the beginning of the school year, the assessment includes 100 addition problems. The students are given five minutes to complete the addition problems. This Student's project grade on September 17, 2009 was a 35%. On September 25, 2009, the Student received a score of 12%. On October 7, 2009, the Student received a score of 51%. When the

Student was taking these assessments he was awake and alert, but typically would not finish, with [LW] noting that he would "just quit." Tr. p. 795 line 1 through p. 797 line 1; SE 45 #20.

20. [LW] testified that there were times that the Student would get a math grade of an A, B, or C on an assignment and then would test on basically the same material on a different day and flunk. Sometimes the Student would test on material and finish and get an A and the very next day do an assignment with the same material and flunk it. Tr. p. 797 line 22 through p. 799 line 15; SE 45.

21. The Student really enjoyed class in [LW]'s class and came to life when the class was doing math. He asked questions and he loved to try to figure things out and answer her questions. The Student's hand was up more than average because, in [LW]'s opinion, he genuinely enjoyed math. What the Student was giving in the classroom on paper did not seem to be indicative of his ability. Tr. p. 799 line 17 through p. 800 line 7.

22. On January 13, 2010, [CH] administered the WRAT 3 to the Student. The Student's score for mathematics shows a grade equivalency of [number] grade. SE 38, 41.

23. The Student's January 19, 2010 IEP was written while the Student was in [number] grade. SE 38.

24. The Student's January 19, 2010 IEP does not provide for any direct instruction by a special education teacher for math. SE 38.

25. The January 19, 2010 IEP contains a single math goal. It provides that "[Student] will use numbers and number relationships to acquire basis facts with 70 % accuracy." [LW], the Student's [number] grade teacher, testified that this goal means that the Student would memorize or know his facts, being additions, subtraction, multiplication, division, with 70% accuracy. Tr. p. 819 lines 4-10; SE 38.

26. Standard 2 of the Oklahoma Priority Academic Student Skills (“PASS”) for [number] grade mathematics states as follows: “Standard 2: Number Sense and Operation – The student will use numbers and number relationships to acquire basic facts. The student will estimate and compute with whole numbers.” Oklahoma Priority Academic Student Skills, Mathematics, Grade [ ] (<<http://sde.state.ok.us/Curriculum/PASS/Subject/math.pdf>> at p.10).

27. The January 19, 2010 IEP’s single math goal states that it will be measured by grades and standardized tests. SE 38.

28. In late spring of 2010, the Student took the Oklahoma Core Curriculum Test (“OCCT”) for Grade [ ] mathematics. This test covered the concepts contained within the PASS skills for [number] grade mathematics. The Student scored 708 on this test, which placed him at the “Proficient” level. Tr. p. 840 line 25 through p. 841 line 25; SE 42.

29. [LW] measured the Student’s progress towards this goal using the Student’s grades. The OCCT administered to the Student in mathematics during the spring of 2010 would have been the achievement test to measure the Student’s progress towards this goal. Tr. p. 819 line 11 through p. 820 line 12.

30. [BL], the Student’s [number] grade teacher, believes that the Student met his math goal in the January 19, 2010 IEP, which was to use numbers and number relationships to acquire basic facts with 70% accuracy. She bases this belief on the Student’s math grade and tests in the class room. Tr. p. 856 line 23 through p. 857 line 7. According to [BL], the Student’s math grades were lower throughout the 2010-2011 school year because there were unfinished assignments or work that was not turned in. Tr. p. 857 line 24 through p. 859 line 4; SE 66.

31. On January 4, 2011, [CH] administered the WRAT 3 to the Student. The Student’s score for mathematics shows a grade equivalency of [number] grade. SE 55, 57.

32. The Student's January 13, 2011 IEP was written while the Student was in [number] grade. SE 55.

33. The Student's January 13, 2011 IEP does not provide for any direct instruction by a special education teacher for math. SE 55.

34. At the January 13, 2011 IEP team meeting a new math goal was established for the Student. It provides that "[Student] will use a variety of problem-solving approaches to analyze, extend and create patterns with 70 % accuracy." In order to implement the math goal, the team, at the suggestion of [JF], agreed to utilize a tri-cut folder to help the Student break the math problems down into smaller pieces. Using this tri-cut folder, the Student would do five problems at a time and his total number of problems was reduced to twenty to thirty. [BL] implemented this tri-cut folder procedure immediately after the IEP team meeting. [BL] also continued to help the Student with his math goal on a one-to-one basis. Tr. Vol. 4, p. 859 line 19 through p. 860 line 8; SE 55.

35. Standard 1 of the Oklahoma Priority Academic Student Skills ("PASS") for [number] grade mathematics states as follows: "Standard 1: Algebraic Reasoning: Patterns and Relationships – The student will use a variety of problem-solving approaches to create, extend and analyze patterns." Oklahoma Priority Academic Student Skills, Mathematics, Grade [ ] (<http://sde.state.ok.us/Curriculum/PASS/Subject/math.pdf> at p.13).

36. The January 13, 2011 IEP's single math goal states that it will be measured by grades and standardized tests. SE 55.

37. In order to determine whether the Student met his math goal in his January 13, 2011 IEP, [BL] relied on the Student's grades. Tr. p. 861 line 8 through p. 862 line 3; SE 55.

38. With respect to the Student's math goal from his January 13, 2011 IEP, [BL] testified that she advised the Student's mother of his progress and weaknesses. Specifically, [BL] stated that she informed the Student's mother that she felt like Student could do the work proficiently but his failure to turn in work was impeding his grades. [BL] stated that she discussed with Petitioner the Student finishing his work during the after school program. [BL] spoke with staff in the after school program that was helping the Student to make sure that they sat down and helped him do his math. The conversations between [BL] and the Student's mother occurred both in the fall and again after January toward the end of the school year. Tr. p. 862 line 18 through p. 863 line 19.

39. [BL] was aware that the Student was on an IEP in the fall of 2010. During the fall of 2010, the modifications that [BL] provided for the Student included extended time to complete his work, one-on-one help in the classroom, reading his work aloud, and assisting him with one-on-one reading. She also stated that she gave him one-on-one instruction in math and spelling. Tr. p. 853 line 7 through p. 854 line 2.

40. During the fall of 2010, [BL] did not modify the Student's grade in math; she just reduced his amount of work. Tr. p. 861 lines 5-7.

41. [BL] believes that the Student made more than minimal progress during the spring of 2011 towards his January 13, 2011 IEP math goal. She bases this belief on her one-on-one work with the Student and personally seeing what the Student could do. The homework and assignments that the Student completed he did fairly well on – usually B's. The ones that the Student did not complete were the ones that he made bad grades on. Tr. p. 863 line 25 through p. 864 line 16.

42. [BL] testified that the Student appeared to enjoyed math during the 2010-2011 school year while in her classroom. Tr. p. 896 lines 10-11.

43. The Student testified that his teacher,[BL], helped him on his math and his spelling. The Student testified that his [number] grade teacher was nice to him and that she tried to help him. Tr. p. 392 lines 24 through p. 393 line 25; p. 432 lines 20-21.

### **Conclusions of Law**

1. [Number] grade teacher [EC] was a credible witness. [Number] grade teacher [LW] was a credible witness, as was [number] grade teacher [BL].

2. Both the Student's January 20, 2009 and January 19, 2010 IEPs, as written, were reasonably calculated to confer a meaningful education benefit on the Student in the least restrictive environment.

3. The School District properly and fully implemented the January 20, 2009 IEP as required under law. The School District properly and fully implemented the January 19, 2010 IEP as required under law.

4. The Student received a meaningful educational benefit in math in the least restrictive environment from both his January 20, 2009 and January 19, 2010 IEPs.

5. The Student was provided a free appropriate public education in the least restrictive environment both his January 20, 2009 and January 19, 2010 IEPs.

6. The Petitioner has failed to establish by credible evidence that the Student was denied a meaningful educational benefit from both his January 20, 2009 and January 18, 2010 IEPs.

7. The Petitioner has failed to establish by credible evidence that the Student was denied a free appropriate public education in the least restrictive environment while his January

20, 2009 IEP was in effect. Additionally, the Petitioner has failed to establish by credible evidence that the Student was denied a free appropriate public education in the least restrictive environment while his January 19, 2010 IEP was in effect.

8. The Petitioner failed to prove by a preponderance of credible evidence that the District denied the Student a free appropriate public education in the least restrictive environment at any time.

9. The Petitioner did not establish by a preponderance of credible evidence that the District failed to implement any provision of the Student's IEPs with respect to math.

10. The Petitioner failed to prove by a preponderance of credible evidence that the District failed to implement the Student's IEPs in any material or significant way.

**Parent Complaint Numbered Paragraph 10:**

**The February 9, 2007, August 29, 2008, January 20, 2009 IEPs are defective because the speech therapy goals are insufficient.**

**10(a) The February 9, 2007, August 29, 2008, January 20, 2009 IEPs established a goal that [the Student] would demonstrate increased speech intelligibility by producing target sound in conversational speech with 80% accuracy.**

**10(b) The above identified IEPs fail to identify the "target sound" such that progress cannot be measured.**

**10(c) The District failed to preserve or maintain any progress data following the February 9, 2007 IEP.**

**10(d) The August 29, 2008 and January 20, 2009 IEPs indicate that [the Student] was at 80% accuracy immediately after implementation of the IEPs such that the goal did not confer meaningful educational benefit. Further, the notations indicate that progress remained at 80% accuracy throughout the year such that no progress occurred, thereby confirming that no meaningful educational benefit was derived.**

**Findings of Fact**

1. The Petitioner filed her initial due process hearing complaint against the District on February 28, 2011.

2. The Student's August 30, 2007 IEP was in effect from August 30, 2007 through August 29, 2008. SE 19, 23. The Student's August 29, 2008 IEP was in effect from August 29, 2008 until January 20, 2009, when it was replaced by a new annual IEP. SE 23, 28.

3. The Student's August 29, 2008 and January 20, 2009 IEPs contain identical goals to address articulation issues the Student was experiencing as well as communication skills in general: "[Student] will demonstrate increased speech intelligibility by producing target sound in conversational speech with 80 % accuracy." Tr. p. 340 lines 14-22; SE 23, 28.

4. Under both the Student's August 29, 2008 IEP and January 20, 2009 IEP, the Student was provided speech-language therapy twice per week. These services were provided by [MP], a licensed speech pathologist by the Oklahoma State Department of Education. Tr. p. 285 lines 4-7; p. 285 line 21 through p.286 line 3; SE 23, 98.

5. [MP] also observed the Student outside of speech-language therapy sessions to determine how he was interacting with other children and teachers and to see if he was utilizing and generalizing the skills he was learning outside of the speech therapy room. Tr. p. 338 lines 1-17; p. 339 lines 10-25.

6. Although the Student had reached his speech-therapy goal in speech therapy sessions, [MP] noticed that he was not generalizing certain sounds, like his letter R sounds, when he was outside of speech therapy. [MP] gave an example of hearing the child not generalizing his R sounds while on the playground. As a result, and because [MP] believed that the Student was capable of reaching 100% on his articulation, [MP] did not recommend discontinuation of

speech therapy services until the January 19, 2010 IEP team meeting. Tr. p. 316 lines 17 through p. 323 line 14; SE 23, 28.

7. [MP] believes that based upon the Student's progress, she could have recommended the cessation of speech services 6 months prior to when she did at the January 19, 2010 IEP team meeting. Tr. p. 322 line 19 through p. 323 line 4.

8. [MP] believes that the Student is applying in real life what he was taught through speech therapy classes. Tr. p. 323 lines 15-18.

9. During the 2009-2010 school year when the Student was receiving speech services from [MP], she prepared progress notes. These progress notes were either sent home with a Student or [MP] would lead them with a teacher to be provided to the parent. [MP] did not retain copies of them. Tr. p. 312 lines 7-15.

10. [MP] administered the Arizona Articulation test to the Student on January 18, 2010 and scored it that same day. Tr. p. 291 lines 13-24; SE 39. [MP] advised [CH], the Student's special education teacher, that the Student had passed the Arizona Articulation test with a score of 100% correct. Tr. p. 305 lines 4-9.

11. [MP] believes that the Arizona Articulation Test is a reliable test to assess articulation. Tr. p. 291 line 25 through p. 292 line 2.

12. [MP] used the Arizona articulation test as the basis for supporting her recommendation to the IEP team that the student speech services be discontinued. Tr. p. 292 lines 3-10.

13. [MP] was qualified to use the Arizona articulation test on the Student and had received specific instruction on the administration of this test. Tr. p. 293 lines 5-25.

14. [MP] provided the results of the Arizona articulation test to the mother at the January 19, 2010 IEP team meeting. Tr. p. 300 lines 9-12.

15. [MP] was present at and participated at the January 19, 2010 IEP team meeting for the Student. Tr. p. 301 lines 13-22.

16. The Student's private speech-language pathologist, [JF], evaluated the Student in late 2010 to early 2011. [JF] testified that while she believed the Student still demonstrated mild articulation errors, they were not significant enough to impede academic functioning or his communication within the community. Tr. p. 487 lines 2-19.

### **Conclusions of Law**

1. The IDEA requires that a parent shall request a due process hearing within two years of the date the parent knew or should have known about the alleged action that forms the basis of the complaint. 20 U.S.C. § 1415(f)(3)(C); 34 C.F.R. § 300.511(e). By Order dated May 6, 2011, this Hearing Officer found that "All claims outside the two-year IDEA statute of limitations are barred from the hearing in this case." SE 107.

2. Therefore, Petitioner's claims arising prior to February 28, 2009 are barred by the IDEA's applicable statute of limitations. 20 U.S.C. § 1415(f)(3)(C); 34 C.F.R. § 300.511(e).

3. Speech pathologist [MP] was a credible witness.

4. The Student's speech goals were agreed to by his IEP team, including the Petitioner, and were proper and sufficient to address his unique needs.

5. The Petitioner failed to establish by a preponderance of credible evidence that from February 28, 2009 to the present the District denied the Student a free appropriate public education simply because the Student's speech therapy goals in his January 20, 2009 IEP failed to identify a "target sound."

6. The Petitioner failed to prove by a preponderance of the credible evidence that from February 28, 2009 to present the District denied the Student a free appropriate public education because the District did not keep copies of the Student's progress reports and report cards that were sent home to Petitioner.

7. The Petitioner failed to prove by a preponderance of credible evidence that the District failed to report the Student's progress as often as it reported progress for non-disabled children.

8. The Petitioner failed to prove by a preponderance of the credible evidence that from February 28, 2009 to the present the Student's speech goals were not calculated to provide meaningful educational benefit.

9. The Petitioner failed to prove by a preponderance of the credible evidence that the Student's speech goal in his January 20, 2009 IEP failed to confer a meaningful educational benefit to the Student.

10. The Petitioner failed to prove by a preponderance of the credible evidence that the Student failed to make meaningful educational progress in speech from February 28, 2009 to present.

11. The Petitioner failed to prove by a preponderance of the credible evidence that the Student's speech goals during the operative time period – two years prior to the filing of due process on February 28, 2011, were defective or otherwise deficient.

**Parent Complaint Numbered Paragraph 11:**

**The District violated IDEA by failing to preserve and maintain records thereby effectively depriving Parent of the ability to have meaningful participation in the IEP process, resulting in substantive harm and depriving [the Student] of a FAPE.**

**11(a) District failed to maintain and preserve speech therapy progress notes and claims that all notes were sent home with [the Student] from 2004 to the present.**

**11(b) Parent did not receive speech therapy progress notes.**

**11(c) District failed to maintain record of the dates on which speech therapy sessions occurred from 2004 to the present.**

**11(d) District failed to maintain and preserve Math progress notes to demonstrate progress toward the goals established in the IEPs.**

**11(e) District failed to maintain and preserve standardized math test results which were intended to enable monitoring of progress.**

**11(f) District failed to maintain and preserve progress notes associated with the direct reading instruction provided for in the IEPs.**

**11(h) [sic] District failed to maintain and preserve standardized reading test results which were intended to enable monitoring of progress.**

**11(i) The lack of progress notes and testing or assessment data deprived Parent of the ability to assess whether the proposed goals and services were appropriate, thereby effectively depriving Parent from meaningful participation.**

#### **Findings of Fact**

1. The Petitioner filed her initial due process hearing complaint against the District on February 28, 2011.

2. [CH] testified that during IEP team meetings, she always goes over the Student's rate of progress with the parent. It is standard procedure at an IEP team meeting to ask the parent for input. Tr. p. 698 lines 4-9; p. 821 lines 16-19.

3. Typically at an IEP team meeting, [CH] will go through the IEP documents with the parent, and will have a discussion. Tr. p. 837 lines 3-13.

4. [CH]'s planner indicates that the Student had one-on-one reading instruction five days a week with [CH]. [CH] provides direct instruction in reading to the Student every school day. The planner does not indicate days that the Student may have been absent, but [CH] can

identify dates he would have missed in PowerSchool. Tr. p. 700 line 17 through p. 701 line 10; SE 108 ##003-030.

5. Per the Student's IEPs in effect during the operative time period, the Petitioner was informed of the Student's progress every nine (9) weeks by way of progress report or report card. SE 28, 38, 55.

6. During the 2009-2010 school year when the Student was receiving speech services, [MP] prepared progress notes. These progress notes were either sent home with the Student or [MP] would leave them with a teacher to be provided to the parent. Tr. p. 312 lines 7-15.

7. Petitioner testified that [number] grade teacher [EC] brought papers and tests with her to the Student's IEP team meeting. These documents demonstrated the Student's progress and that he was not turning in work. Tr. p. 977 line 22 through p. 978 line 7.

8. During the Student's [number]-grade year, and as part of regular classroom procedure, [LW] would send home lessons that the Student completed in class and tests for the Student's parent to look at everyday in his homework folder. The parent was to have signed the Student's agenda indicating that she received the Student's work and was aware of it. The Student's parent was to send the agenda back with the Student to school everyday. [LW] believes that the Student's parent would have been able to determine whether the Student was reaching his IEP goals by looking at his grades daily. Tr. p. 791 lines 11-18.

9. [LW] does not remember the Petitioner ever raising any concerns regarding the Student's education. Tr. p. 842 lines 10-18; p. 843 lines 1-3.

10. During the Student's [number] grade year, the Petitioner only attended the first parent-teacher conference held in November 2010. No parent of the Student attended any other parent-teacher conferences during that school year. Tr. p. 906 lines 1-9.

11. The only concerns that the Student's mother raised at the first parent-teacher conference were her concerns with the Student's math and reading. At that conference, the Petitioner and [BL] spoke about things that they would do, including the use of the agenda to keep the Petitioner informed. The Petitioner also wanted [BL] to call her if the Student had any discipline problems before he was taken to the office. The Student's mother never contacted [BL] regarding the Student's grades. Tr. p. 906 line 25 through p. 907 line 13.

12. Samples of the Student's work, including daily lessons and tests, were discussed with the Petitioner at the parent-teacher conference. Tr. p. 876 line 6-9.

13. On the date of one of the parent-teacher conferences, the Petitioner came to school to pick up the Student before dismissal time. When the Petitioner told [BL] that she would not be at the parent-teacher conference, [BL] spoke with the Petitioner about the Student in the hall. Tr. p. 906 lines 12-18.

14. [BL] is available to meet with parents whenever parents want to meet. The Student's mother never called or attempted to reschedule a time to talk to [BL]. Tr. p. 906 lines 19-24.

15. [BL] discussed the Student's progress with the Petitioner. Additionally, the Student's assignments and class work were also sent home for her to review. If the Student did not score a certain grade, then mother was to sign it and send it back to [BL]. Tr. p. 856 lines 15-18.

16. Petitioner testified that she did look through the Student's agenda that was used when the Student was in [number and number] grade. Petitioner testified that she did not read the material that was in the Student's agenda, either her daughter or the Student's father did. Petitioner did save the work that was sent home in the Student's agenda and kept them in a box of papers up until June 2011. However, she threw them away when soda pop was spilled on them. Tr. p. 997, line 11 through p. 998, line 7.

17. Parent's advocate [JF] testified that in light of the fact that Petitioner has difficulties reading, a written progress report would not be useful to her. Tr. p. 591 lines 11-15.

### **Conclusions of Law**

1. The IDEA requires that a parent shall request a due process hearing within two years of the date the parent knew or should have known about the alleged action that forms the basis of the complaint. 20 U.S.C. § 1415(f)(3)(C); 34 C.F.R. § 300.511(e). By Order dated May 6, 2011, the Hearing Officer found that, "All claims outside the two-year IDEA statute of limitations are barred from the hearing in this case." SE 107. The Petitioner's claims arising prior to February 28, 2009 are barred by the IDEA's applicable statute of limitations. 20 U.S.C. § 1415(f)(3)(C); 34 C.F.R. § 300.511(e).

2. [Number] grade teacher [EC] was a credible witness, as were [number] grade teacher [LW] and [number] grade teacher [BL]. Special Education teacher [CH] was a credible witness.

3. Petitioner was not a credible witness. In her own testimony, Petitioner directly contradicted herself and her own chosen speech pathologist [JF]. Petitioner was present for the testimony of every witness during the hearing, though she did leave a few hours early one day of the hearing due to a personal health issue.

4. The Petitioner failed to prove by a preponderance of the credible evidence that from February 28, 2009 to present the District violated the IDEA by failing to preserve and maintain records, thereby effectively depriving the Petitioner of the ability to have meaningful participation in the IEP process.

5. The Petitioner failed to prove by a preponderance of the credible evidence that from February 28, 2009 to present the District violated the IDEA by failing to preserve and maintain records, thereby resulting in substantive harm to the Student.

6. The Petitioner failed to prove by a preponderance of the credible evidence that from February 28, 2009 to present the District violated the IDEA by failing to preserve and maintain records, thereby depriving the Student of a free appropriate public education.

7. The Petitioner failed to prove by a preponderance of credible evidence that she did not receive speech therapy progress notes.

8. The Petitioner failed to prove by a preponderance of credible evidence that the Student was denied a free appropriate public education as a result of the District failing to maintain and preserve speech therapy notes.

9. The Petitioner failed to prove by a preponderance of credible evidence that the Petitioner was denied the ability to have meaningful participation in the IEP process as a result of the District failing to maintain and preserve speech therapy notes.

10. The Petitioner failed to prove by a preponderance of credible evidence that the Student was denied a free appropriate public education as a result of the District not maintaining records of the dates speech-language therapy was provided to the Student.

11. The Petitioner failed to prove by a preponderance of credible evidence that the Petitioner was denied the ability to have meaningful participation in the IEP process as a result of

the District not maintaining records of the dates speech-language therapy was provided to the Student.

12. The Petitioner failed to prove by a preponderance of credible evidence that the Student was denied a free appropriate public education as a result of the District not maintaining and preserving math progress notes to demonstrate progress toward the goals established in the Student's IEPs during the operative time period – within two years of the filing of the Petitioner's due process hearing complaint on February 28, 2011.

13. The Petitioner failed to prove by a preponderance of credible evidence that the Petitioner was denied the ability to have meaningful participation in the IEP process as a result of the District not maintaining and preserving math progress notes to demonstrate progress toward the goals established in the Student's IEPs during the operative time period – within two years of the filing of the Petitioner's due process hearing complaint on February 28, 2011.

14. The Petitioner failed to prove by a preponderance of credible evidence that the Student was denied a free appropriate public education as a result of the District not maintaining and preserving standardized math test results to demonstrate progress toward goals established in the Student's IEPs during the operative time period – within two years of the filing of the Petitioner's due process hearing complaint on February 28, 2011.

15. The Petitioner failed to prove by a preponderance of credible evidence that the Petitioner was denied the ability to have meaningful participation in the IEP process as a result of the District not maintaining and preserving standardized math test results to demonstrate progress toward goals established in the Student's IEPs during the operative time period – within two years of the filing of the Petitioner's due process hearing complaint on February 28, 2011.

16. The Petitioner failed to prove by a preponderance of credible evidence that the Student was denied a free appropriate public education as a result of the District not maintaining and preserving progress notes associated with the direct reading instruction provided for in the Student's IEPs during the operative time period – within two years of the filing of the Petitioner's due process hearing complaint on February 28, 2011.

17. The Petitioner failed to prove by a preponderance of credible evidence that the Petitioner was denied the ability to have meaningful participation in the IEP process as a result of the District not maintaining and preserving progress notes associated with the direct reading instruction provided for in the Student's IEPs during the operative time period – within two years of the filing of the Petitioner's due process hearing complaint on February 28, 2011.

18. The Petitioner failed to prove by a preponderance of credible evidence that the Student was denied a free appropriate public education as a result of the District not maintaining and preserving standardized reading test results which were intended to enable monitoring of progress towards the Student's reading goals in the Student's IEPs during the operative time period – within two years of the filing of the Petitioner's due process hearing complaint on February 28, 2011.

19. The Petitioner failed to prove by a preponderance of credible evidence that the Petitioner was denied the ability to have meaningful participation in the IEP process as a result of the District not maintaining and preserving standardized reading test results which were intended to enable monitoring of progress towards the Student's reading goals in the Student's IEPs during the operative time period – within two years of the filing of the Petitioner's due process hearing complaint on February 28, 2011.

20. The Petitioner failed to prove by a preponderance of credible evidence that the lack of progress notes and testing or assessment data deprived the Petitioner of the ability to assess whether the proposed goals and services were appropriate, thereby effectively depriving Petitioner from meaningful participation during the operative time period – within two years of the filing of the Petitioner’s due process hearing complaint on February 28, 2011.

21. The Petitioner failed to prove by a preponderance of credible evidence that the District failed to report progress for the Student as often as it reported progress for non-disabled children.

22. The Petitioner failed to prove by a preponderance of the credible evidence that from February 28, 2009 to present the District denied Petitioner the ability to meaningfully participate in the Student’s IEP Team meetings.

**Parent Complaint Numbered Paragraph 12:**

**The 09, 10 and 11 IEPs which provided for direct instruction in reading were defective because the special education service was not reasonably calculated to provide meaningful educational benefit.**

**12(a) The January 20, 2009 IEP indicates that Parent has requested that [the student] have special class for reading.**

**Findings of Fact**

1. In accordance with the Student’s January 20, 2009 IEP, the Student began attending [CH]’s classroom where she provided the Student with direct reading instruction one period daily, five times a week. Tr. p. 668 line 12 through p. 669 line 3; SE 28.

### Conclusions of Law

1. The Petitioner has failed to prove by a preponderance of the credible evidence that the District failed to provide special individualized reading instruction for the Student on January 20, 2009.

2. The Petitioner has failed to prove by a preponderance of the credible evidence that the District failed to provide special individualized reading instruction for the Student in accordance with his January 20, 2009 IEP.

**12(b) The District failed to perform any assessment, testing or evaluation of [the Student's] current level of academic achievement in reading, such that there was no information upon which to base the decision that direct instruction in reading would enable [the Student] to meet the established goal. In fact there was no information to determine what would be an appropriate goal for [the Student] in reading.**

**12(c) The January 20, 2009 IEPs goal of increasing [the Student's] reading skills by 9 months on the [number] grade level was not met as confirmed by the January 13, 2010 WRAT 3 standard score 84, grade score 2. Yet, the District ignored this information when implementing the January 19, 2010 IEP and established a goal that [the Student] would increase his reading skills by 9 months on the [number] grade level, knowing that [the Student] had not attained a [number] grade level and had not met the previous goal. The January 19, 2010 goal was not based on available data and failed to establish a goal that would enable [the Student] to obtain meaningful progress.**

**12(d) The District failed to consider a research based reading program when direct instruction in reading was provided on January 20, 2009.**

**12(e) The District failed to provide a research based reading program when [the Student] failed to meet or make appropriate progress toward the January 20, 2009 goal.**

### Findings of Fact

1. [CH] has been employed by the [] School District as a special education teacher for nineteen (19) years. [CH] has been a special education teacher for twenty-one (21) years. [CH] is certified by the Oklahoma State Department of Education as a special education teacher

and in the areas of learning disabilities, autism, traumatic brain injury, and other health impaired. She is also certified to teach in art, social studies, language arts, and elementary education. Tr. p. 664, line 12 through p. 665 line 12; SE 96.

2. [CH] first instructed the Student in 2007 when he was in [number] grade and was placed an IEP, though he remained in the regular education classroom. Tr. p. 665 lines 15-23.

3. In accordance with the Student's January 20, 2009, January 19, 2010, and January 13, 2011 IEPs, the Student attended [CH]'s classroom where she provided the Student with direct reading instruction one period daily, five times a week. Tr. p. 668 line 12 through p. 669 line 3; SE 28, 38, 55.

4. The Lexile is not a reading program; rather it helps to identify the grade level the student is reading. It is a tool for the library so that the librarian knows what level books the students are able to read and should check out. The Lexile is not used as a grading tool; rather, it is used as a tool for assessing a students' progress in reading. By contrast, Reading Counts tests are the tool used to assess comprehension when the Student goes to the library and checks out a book, reads the book, and takes a quiz on it. [CH] requires students to take a Reading Counts test once a week. Tr. p. 760 lines 18-24; p. 761 lines 9-25; p. 762 lines 1-25.

5. [CH] testified that she believes the Lexile is a recognized assessment tool as part of the reading counts program, as it helps identify the grade level of book appropriate for the child. Tr. p. 760 line 25 through p. 761 line 2.

6. On August 18, 2008, [CH] administered a Wide Range Achievement Test (Revision 3) ("WRAT 3") to the Student. This WRAT 3 shows the Student has a reading grade score of [number] grade. Tr. p. 684 lines 1-5; p. 685 lines 3-6; SE 25 # 082.

7. [CH] again administered a WRAT 3 test to the Student on January 13, 2010. This WRAT 3 reflects that the Student's reading score is on [numbered] grade level. Tr. p. 685 lines 15-17; SE 41 #111.

8. The fact that the Student was still testing with a reading score of the [number] grade level on January 13, 2010 did not indicate to [CH] that that there was a lack of progress in reading by the Student. Tr. p. 685 lines 12-20.

9. [CH] believes the Student made reading progress from 2008 to January 2010 based on the Student's oral reading skills and the fact that the Student's Lexile scores were increasing. [CH] also looked at his grades, spoke to his regular teacher, and considered the grade level of the books that he was reading and passing on his Reading Counts. Tr. p. 687 lines 16-24.

10. [CH] administered a WRAT 3 test to the Student on January 4, 2011. This WRAT 3 reflects that the Student's reading score is on [number] grade level. SE 57 #007.

11. The WRAT 3 test identifies how much progress the Student has made toward increasing his reading skills. Based on the Student's WRAT scores from August 18, 2008 through January 2011, the Student's reading grade level has increased from [number] grade to [number] grade - one year of progress during three years of direct instruction and reading. Tr. p. 680 lines 17-22; p. 689 line 15 through p. 691 line 1; p. 691 lines 7-10; SE 25 # 082; SE 57 #007.

12. Achievement tests would also be considered in identifying the Student's grade level in reading over this same period of time. Those achievement tests would include the State OCCT or the ALRAP. Tr. p. 691 lines 11-14; p. 691 line 24 through p. 692 line 1.

13. The Student met his reading goal in the January 20, 2009 IEP, which was that he would increase his reading skills by nine months on the [number] grade level. Tr. p. 693 line 10 through p. 694 line 1; SE 28 # 103.

14. [CH] testified that the reading goal on the January 19, 2010 IEP – that the Student increase his reading level to grade 3 – was an appropriate goal for that IEP. This was not based on the WRAT 3 score alone because on some days the Student might be sleepy or not trying his best and the test would not show the Student’s correct level or reading. For these reasons, [CH] also used her daily experience in teaching reading to the Student. Tr. p. 694 lines 2-25; SE 38 # 120; p. 717 line 22 through p. 718 line 2.

15. On August 18, 2009 – at the beginning of the Student’s [number] grade year – the Student was given a benchmark test as part of the Voyager reading program. This testing and its results come from [number] grade testing materials. The Student scored 94% correct on this benchmark test Tr. Vol. 4, p. 803 lines 11-14; p. 804 line 7 through p. 805 line 1; p. 806 lines 10-17; SE 35 #006.

16. [LW], the Student’s [number] grade teacher, received extensive instruction in giving the benchmark assessments that are part of their Voyager program. [LW] also received training in SRI, but it wasn’t as extensive as the Voyager training she received. Tr. p. 784 line 22 through p. 785 line 1; 830 line 23 through p. 831 line 7; SE 35; SE 44.

17. The SRI assessment given to the Student on May 5, 2010, indicates that the Student’s Lexile is 498, which is Basic - Below Grade Level. Had the Student scored three points higher, his Lexile would have been Proficient – On Grade Level. Tr. p. 833 line 6 through p. 834 line 2; SE 44.

18. [LW] believes that the Student's reading abilities improved during the 2009-2010 school year. Tr. p. 840 lines 16-19.

19. [CH] instructed the Student at a [number] grade reading level for a portion of the 2010-2011 school year. Tr. Vol. 3, p. 763 line 15-21.

20. [CH] uses the Voyager reading and Marie Carbo reading methodologies for direct instruction with the Student. [CH] has also used the Buckle Down with the Student in preparation for achievement test. Tr. p. 716 line 12 through p. 717 line 3; SE 108, #31-43.

21. The Voyager reading and Marie Carbo reading methodologies are research based programs. SE 108 ## 31-43.

22. The Marie Carbo reading program does not have a daily data sheet or benchmark that allows tracking of the Student's progress throughout the year. However, there are computer generated reporters for the Voyager program. In order to obtain the Student's Voyager benchmark progress, [CH] prints a page off the computer for the Student to read. The Student has a minute to read the passage to [CH] to see how many words they can get correct in that minute. The words that are underlined are the words that the Student missed. The last word that is underlined is the final word that the Student got through reading in one minute. Tr. p. 718 lines 3-7; p. 718 lines 22-23; p. 732 lines 4-7; SE 61 ## 070-071.

23. On August 30, 2010 the Student's Voyager Benchmark 1 score was 69. On December 1, 2010, the Student scored 104 as reflected on Benchmark 2. Because the Student scored on task, he went on to [number] grade level. In a Benchmark given to the Student on May 16, 2011, the Student scored 108, which was two points from being on track. [CH] believes that the Student could have done better on this test because he kept falling asleep while she was administering it. Tr. p. 718 lines 3-7, 22-23; p. 719 line 17 through p. 720 line 9; p. 720 lines 15-

18; p.721 line 24 through p. 722 line 11; p. 724 lines 4-8; p. 732 lines 11-24; p. 733 lines 4-7, 10-15; SE. 61, ## 004, 005, 070, 071.

24. The growth in the Student's Voyager Benchmark score during his [number] grade year demonstrates significant progress and is consistent with what [CH] observed in her classroom providing direct instruction in reading one hour a day during the Student's [number] grade year. Tr. p. 733 line 24 through p. 734 line 10.

25. The chart on the Student's Lexile report indicates the grade of students and what they are reading Lexile range should be in that grade. Students in the [number] grade should have Lexile scores that fall between 600 and 900. Tr. p. 736 lines 9-16; SE 63, #12.

26. On September 1, 2010, the Student received a Lexile score of 596, which was 4 points below the Lexile score range for [number] grade students. On December 9, 2010, the Student received a Lexile score of 479. Then, on May 18, 2011, the Student received a Lexile score of 440 – 156 points lower than the Student's September 1, 2010 Lexile score. To obtain a Lexile score, a test is taken on a computer that consists of a passage that the Student is supposed to read and then the Student answers questions on the computer concerning it. It should take about twenty to thirty minutes to take the test, but when the Student took the May 18, 2011 test, he only took about five minutes to take the test. The Student had to retake the test several times, and each time he was just clicking through the answers quickly. [CH] does not feel like the Student was putting forth an effort on the May 2011 Lexile test. Tr. p. 727 lines 23-25; p. 728 lines 1-17; 735 lines 6-17; p. 736 lines 17-23; p. 737 lines 1-17; SE 63.

27. The drop of 156 Lexile points for this Student from September 2010 to May 2011 does not reflect the progress that the Student made with the Voyager program in [CH]'s classroom, and it does not comport with [CH]'s observations of the Student's reading ability

based on teaching him an hour a day for the entire [number] grade year. Tr. p. 737 lines 18 through p.738 line 1.

28. Even though the Student's Lexile score dropped between September of 2010 and December of 2010, he was reading higher level books than he was at the beginning of the school year. When the Student came to [BL]'s classroom in the [number] grade, he was checking out [number] grade books. The Student wanted to check out [current level] grade books, so [BL] let him do that. The Student was taking Reading Counts tests on those [current level] grade books and passing them. Tr. p. 866 line 6 through p. 867 line 22; SE 63.

29. [BL] testified that she does not believe the Student's Lexile score of 440 at the end of May 2011 accurately reflects the Student's reading abilities. [BL] believes the Student's reading ability increased from the beginning of the year to the end. [BL] believes the Student's reading comprehension increased from the beginning of the [number] grade year until the end. Tr. p. 897 lines 3-12.

30. [BL] based her belief that the Student made reading progress on the type of books the Student was checking out of the library and reading. According to [BL], the Student was excited about books on bugs or lizards. When the Student finished reading a book, he would come and tell [BL] what he read with accuracy. The Student also did oral book reports in class, which he was not required to do because he did reading with [CH]. The Student enjoyed participating and doing oral book reports. The Student typed out posters to go along with his book reports. [BL] stated that this shows that the Student understood what he was reading and that he was excited to discuss the books he completed. The books were generally [current level] grade level non-fiction books. Tr. p. 897 line 14 through p. 898 line 7.

31. The Student testified that some of the books he likes to check out of the library are over his skill level but he checks them out anyway because he likes to read them and passes the tests on them. The Student likes to read books about animals. The Student testified that all of the books about animals are his favorite. The Student acknowledged that his teacher, [BL], helped him check books out of the library. Tr. p. 420 lines 11-17, 22-25, p. 421 lines 1-6, 12-14.

32. [BL] knows for certain what level books the Student was checking out because she checked them out for them after he lost his library privileges for not returning books. The Student picked the books out that [BL] checked out for him. Tr. p. 899 lines 1-13.

### **Conclusions of Law**

1. The Petitioner failed to prove by a preponderance of the credible evidence that the District failed to use a research based reading program in the Student's direct instruction in reading.

2. The Petitioner failed to prove by a preponderance of credible evidence that from February 28, 2009 to present the Student's reading goals in his 2009, 2010, and 2011 IEPs were insufficient to meet the Student's individual needs and failed to confer a meaningful educational benefit to the Student.

3. The Petitioner failed to prove by a preponderance of credible evidence that the Student failed to make meaningful educational progress in reading from February 28, 2009 to present.

4. The Petitioner failed to prove by a preponderance of credible evidence that the Student's January 20, 2009, January 19, 2010, and January 13, 2011 IEPs were not reasonably calculated to provide the Student with a meaningful educational benefit in the least restrictive environment.

5. The January 20, 2009, January 19, 2010, and January 13, 2011 IEPs developed for the Student in the District complied with applicable law and requirements, the educational services provided in the IEP addressed his unique educational needs, and the IEP is reasonably calculated to confer a meaningful educational benefit on the Student in the least restrictive environment.

**LEGAL ISSUE II: DID THE DISTRICT COMPLY WITH THE  
IDEA EVALUATION AND RE-EVALUATION REQUIREMENTS?**

**Parent Complaint Numbered Paragraph 2:**

**The District failed to timely assess [the Student] after Parent requested reevaluation of [the Student] resulting in a violation of IDEA.**

**2(a) Parent requested reevaluation of [the Student] on January 20, 2011, testing assessments and/or evaluations were to be conducted by the District within 45 days or no later than March 6, 2011. The District failed to timely assess or evaluate [the Student] when the District initiated assessment by [BG] on March 10, 2011.**

**Findings of Fact**

1. [CH] prepared a Notification of Meeting for the January 19, 2010, IEP team meeting, indicating that discussions would include reevaluation to determine disability and the nature and extent of special education and related services. The Notification of Meeting was mailed to the Student's parents on January 12, 2010. Tr. p. 752 lines 15 through p. 753 line 9; SE 36.

2. On January 19, 2010, a Review of Existing Data ("RED") for the Student was prepared for the purpose of considering reevaluation. As documented on the RED, the Student's IEP team, including Petitioner, determined that no additional evaluations were needed for the Student. Tr. p. 706 lines 3-23; SE 37.

3. A new annual IEP for the Student was agreed to by his IEP team on January 19, 2009. At this meeting, [CH] prepared a Reevaluation Addendum. This Reevaluation Addendum was discussed by the IEP team at the meeting on January 19, 2010 prior to the team signing the IEP. The team determined that while the Student continued to need special education and related services, modifications to the Student's special education and related services were necessary as the Student had met all his speech goals and he no longer needed to attend speech therapy. Tr. p. 750 line 16 through p. 751 lines 23; SE 38 p. 127.

4. Petitioner had input in the decision not to reevaluate the Student. Testimony was provided that the IEP team went over the RED and as a team did not see a need for additional assessments. The Student's mother was at the meeting and agreed and signed. Tr. p. 706 lines 17-23; SE 38 p. 127.

5. [CH] explained the Reevaluation Addendum to the Student's mother at the January 19, 2010, IEP team meeting. The Student's mother did not tell [CH] that she did not understand any part of this document or that she disagreed with the Reevaluation Addendum. The Reevaluation Addendum is part of the Student's January 19, 2010 IEP. The Student's next Three-Year Evaluation due date is January 19, 2013. Tr. p. 752 lines 3-14; SE 38 p. 127.

6. A new annual IEP was agreed to by the Student's IEP team on January 13, 2011. Present at this meeting were [CH], [BL], [DC], [MP], [Mother], and [JF]. [JF] is employed by the [name] County Health Department and is the Student's private speech-language pathologist. Petitioner asked [JF] to attend the January 13, 2011 IEP team meeting ("January 13, 2011 meeting"). Tr. p. 489 lines 7-10; SE 55.

7. At the January 13, 2011 meeting Petitioner requested the District reevaluate the Student for a learning disability or intellectual disability and to have a complete psychological evaluation done for the Student's ADD. SE 56.

8. [JF] began drafting notes summarizing her interaction with the School District and her actions in this case on January 20, 2011. [JF]'s notes regarding the January 13, 2011 meeting were not contemporaneously made; they were made on January 20, 2011. Tr. p. 572 line 20 through p. 573 line 10; SE 78 pp. 72-74.

9. [JF]'s notes of the January 13, 2011 meeting indicate that the Student's mother was asked to sign an IEP prior to completion of discussion. [JF] testified that the use of that language was an error on her part. [JF] believes that the document that the parent was asked to sign was a consent for reevaluation form, not the Student's IEP. Tr. Vol. 3 p. 753 line 15 through p. 754 line 10; SE 78 pp. 72-73.

10. On January 20, 2011 the Student's IEP team met to conduct a RED to initiate the requested reevaluation of the Student. During this meeting there was discussion about the prior evaluations of the Student. The team determined that additional assessments for reevaluation were required from the school psychometrist/teacher/parent. Tr. p. 877 lines 15-18; SE 58.

11. After the Student's mother requested reevaluation of the Student for ADD at the January 13, 2011 meeting, [CH] spoke with the [name] County Special Education Co-Op director to discuss what needed to be done since the Student had already been diagnosed as ADD. Never in [CH]'s twenty-one (21) years of teaching has someone requested a reevaluation for ADD when the Student has already been diagnosed with ADD and that diagnosis was not in dispute by the IEP team. Tr. p. 766 lines 6-14, p. 767 lines 6-16.

12. After consulting with the Co-Op director regarding this unusual request, [CH] decided she should try to obtain the Student's medical records pertaining to his ADD. [CH] prepared a parental consent for the medical records for the Student's parent to sign. The Student's mother refused to sign the medical records consent at the January 20, 2011 meeting on the advice of [JF]. Tr. p. 571 line 22 through p. 572 line 572, p. 744 line 5-18; p. 765 line 22 through p. 766 line 14, p. 767 lines 16-19.

13. [CH] also prepared a parental consent to obtain the Student's records from the [name] County Health Department which the Student's mother signed and dated January 20, 2011. At the January 13, 2011 meeting, [JF] reported that the Student was going to be tested for a central auditory processing disorder. [CH] was trying to obtain that report by asking the parent to sign the parental consent to release of records. Tr. p. 741 line 14 through p. 742 line 18; SE 78 p. 14.

14. On February 8, 2011, [JF] assisted the Student's mother in writing a note to the [name] County Health Department withdrawing consent for the [name] County Health Department to release any information regarding the Student to the School District. Tr. p. 487 line 20 through p. 489 line 4; SE 78 p. 15.

15. While the [name] County Health Department did not release information regarding the Student to the [name] School District in February 2011 because of the revocation of the consent by the Parent, the Parent never withdrew consent for the [name] County Health Department to release information to the parent's advocate, [AC], and the parent's attorneys, The [O] Law Firm. Tr. p. 548 line 22 through p. 549 line 12.

16. The Petitioner filed her initial Due Process Complaint against the District on February 28, 2011. *Due Process Complaint Notice* filed herein.

17. [BG] is employed with [name] County Special Education Co-Op. [BG] has been conducting assessments and testing of students for over twenty years. [BG] holds the following certificates issued by the Oklahoma State Department of Education; 1) school psychologist; 2) elementary education; 3) science middle school; 4) psychometrist; 5) reading specialist; 6) social studies middle school. Tr. p. 96 lines 9 through p. 97 line 7, p. 204, lines 21-23, p. 226 line 15 through p. 227 line 2; SE 99; SE 99.

18. [BG] administered the Woodcock-Johnson, cognitive and achievement evaluation to the Student on March 10 and 11, 2011. She also administered the Berry-VMI to assess the Student's visual processing as part of her evaluation. Tr. p. 122 line 22 through p. 123 line 16, p. 126 line 19 through p. 127 line 7; SE 80.

### **Conclusions of Law**

1. A reevaluation will be conducted at least once every three years, or more often if conditions warrant the need for reevaluation, or if requested by the child's parent or teacher in accordance with the requirements of 34 CFR §§ 300.304 through 300.311. *Policies and Procedures for Special Education in Oklahoma 2007* at p. 74.

2. (a) General. A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with 300.304 through 300.311 - -

(1) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation, or

(2) If the child's parent or teacher requests a reevaluation.

(b) Limitation. A reevaluation conducted under paragraph (a) of this section - -

(1) May occur not more than once a year, unless the parent and the public agency agree otherwise; and

(2) Must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary.

34 C.F.R. § 300.303, 20 U.S.C. § 1414(a)(2).

3. It is permissible to review existing data to determine needed evaluation data as part of the IEP Review meeting. If additional reevaluation data are not needed to determine whether the child continues to be a child with a disability and to determine the child's educational needs, the LEA will document this on the IEP Review (OSDE Form 8 or Reevaluation Addendum) for the three-year reevaluation, or more often for reevaluation consideration as needed. The IEP Review (OSDE Form 8) and the Reevaluation Addendum will document the three-year reevaluation process. In this case a MEEGS (OSDE Form 5) is not necessary. The parent will be provided with a copy of the IEP Review (OSDE Form 8) and/or Reevaluation Addendum informing them of the team's decision and, as appropriate, the Review of Existing Data (OSDE Form 3). Parents are to be informed of their right to request an assessment to determine whether their child continues to be a child with a disability. The LEA is not required to conduct the assessment if the team determines additional data are not needed, unless the parent requests data to determine whether the child continues to be eligible as a child with a disability and to determine the child's educational needs under the IDEA (34 CFR § 300.8). If the determination of the team, including the parent(s), is that no additional evaluation data are needed, the date of the IEP Review (OSDE Form 8) will document the date of the current three-year reevaluation. *Policies and Procedures for Special Education in Oklahoma*, pp. 68-69 and 76.

4. If additional evaluation data are deemed necessary, the additional information, assessments, or evaluations must be completed and the team must reconvene on or before the

three-year anniversary of the previous initial evaluation or reevaluation (*i.e.*, MEEGS (OSDE Form 5) or IEP Review (OSDE Form 8 or Reevaluation Addendum), if used to document the previous reevaluation). The IEP team must consider the additional and existing evaluation results and, as appropriate, revise the IEP. The parent(s) must be provided a copy of the evaluation report and the documentation of the team decisions. *Id.* at p. 76.

5. In contrast to a reevaluation, an initial evaluation of a child to determine if the child is a child with a disability under the IDEA must be completed within forty five (45) school days of receiving parental consent for the evaluation. *Id.* at p. 65.

6. The District is in the process of conducting a reevaluation of the Student pursuant to the Student's mother's January 13, 2011 request. The Student' current three-year reevaluation date is January 19, 2013. [BG]'s March 10 and 11, 2011 assessments of the Student were, therefore, timely. *Policies and Procedures for Special Education in Oklahoma* at p. 76.

7. The Petitioner failed to prove by a preponderance of credible evidence that the District failed to reevaluate the Student as required by the IDEA. *Policies and Procedures for Special Education in Oklahoma* at p. 74.

8. The Petitioner failed to prove by a preponderance of credible evidence that the District was required to complete its reevaluation of the Student within 45 days, or not later than March 6, 2011.

9. After requesting the reevaluation, Petitioner has not participated in good faith in the Student's reevaluation and has prohibited the District from obtaining vital medical information regarding the Student and his disability.

**(b) The District failed to consider the Brief Synopsis of Assessments prepared by [JF] and provided to the District at the January 13, 2011 IEP meeting.**

### **Findings of Fact**

1. A new annual IEP was agreed to by the Student's IEP team on January 13, 2011. Present at this meeting were [CH],[BL], [DC], [MP], Petitioner, and [JF]. [JF] is employed by the [name] County Health Department and is the Student's private speech-language pathologist. Petitioner asked [JF] to attend the January 13, 2011 meeting. Tr. p. 489 lines 7-10; SE 55.

2. After conducting evaluations of the Student, [JF] prepared a three-page Brief Synopsis of Assessment performed on December 29, 2010 & January 7, 2011 ("Brief Synopsis"). During the January 13, 2011 meeting, [JF] provided copies of the Brief Synopsis to the IEP team and the team reviewed and discussed the results of her evaluations. Additionally, [JF] made recommendations for modifications for the Student to the IEP team. Tr. p. 500 lines 7-16; SE 77.

3. [CH] did not amend the Student's January 13, 2011 IEP documents to reflect that [JF] had provided her assessment. Tr. p. 710 lines 11-16; SE 55.

4. At the January 13, 2011 meeting [JF] spoke on behalf of the parent and the Student's mother did not do much speaking at that meeting, if any. It was unusual for the Student's mother to be quiet in a meeting. At other IEP team meetings prior to [JF] being present, the Student's mother interacted with the team members. Tr. p. 739 lines 10-17, 21-25, p. 740 lines 1-16, 22-25.

5. At the January 13, 2011 meeting, the team made changes to the Student's modifications at the request of [JF] that were incorporated into the Student's January 13, 2011 IEP. The additional modifications suggested by [JF] are handwritten on the Adaptations, Modifications, Supplementary Services and Supports. Tr. p. 746 line 7-14; SE 55 # 151.

6. At the time [JF] requested the additional modifications, [CH] believed that [JF] was acting in the role as the parent's advocate. [CH] testified that [JF] was not considerate of the team at the January 13, 2011 meeting. Tr. p. 741 lines 2-13, p. 746 lines 15-18.

7. At the January 13, 2011 meeting [JF] never told the team that she did not believe that the Student's IEP, as written, was not reasonably calculated to confirm meaningful educational benefit on the Student. At the January 13, 2011 meeting, the Student's mother never told the team that she did not believe that the IEP, as written, was not reasonably calculated to confer meaningful educational benefit on the Student. Both [JF] and the Student's mother signed the Student's January 13, 2011 IEP. Tr. p. 745 lines 3-13; SE 55 p. 147.

8. [CH] has never signed an IEP that she did not believe would provide a meaningful educational benefit to the Student for whom the IEP was written. Tr. p. 745 lines 21-25.

9. [JF] reviewed and read all the pages of the Student's January 13, 2011 IEP before she signed it. [JF] knew what she was signing and indicated her agreement with the contents of the IEP by checking the "Agree" box to the right of her signature. Tr. p. 584 lines 14-23; SE 55 # 147.

### Conclusions of Law

1. Parent-initiated evaluations. If the parent obtains an independent educational evaluation at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation—

(1) Must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child; and

(2) May be presented by any party as evidence at a hearing on a due process complaint under subpart E of this part regarding that child.

34 C.F.R. § 300.502, 20 U.S.C. § 1415(b)(1) and (d)(2)(A).

2. The credible testimony and evidence presented at hearing proves the District considered [JF]'s Brief Synopsis at the January 13, 2011 IEP team meeting and implemented recommendations made by [JF].

3. The credible testimony and evidence presented at hearing proves the District included several modifications suggested by [JF] for the Student into the Student's January 13, 2011 IEP.

4. The Petitioner failed to prove by a preponderance of credible evidence that the District did not fully consider [JF]'s Brief Synopsis at the January 13, 2011 IEP team meeting.

**(c) The failure to timely assess [the Student] has caused substantive harm, particularly when considered with the District's failure to consider relevant testing data performed by a credentialed speech language pathologist. The substantive harm is the delay in identification and assessment of [the Student] which has resulted in a denial of a FAPE. Specifically, [JF] recommended speech language therapy for processing and comprehension which should have been included in the January 13, 2011 IEP such that [the Student] has been denied services necessary for [the Student] to have a FAPE.**

### **Findings of Fact**

1. [BG] is employed with [name] County Special Education Co-Op. [BG] has been conducting assessments and testing of students for over twenty years. [BG] holds the following certificates issued by the Oklahoma State department of Education; 1) school psychologist; 2) elementary education; 3) science middle school; 4) psychometrist; 5) reading specialist; 6) social studies middle school. Tr. p. 96 lines 9 through p. 97 line 7, p. 204, lines 21-23, p. 226 line 15 through p. 227 line 2; SE 99.

2. [BG] administered the Woodcock-Johnson, cognitive and achievement evaluation to the Student on March 10 and 11, 2011. She also administered the Berry-VMI to assess the Student's visual processing as part of her evaluation. Tr. p. 122 line 22 through p. 123 line 16, p. 126 line 19 through p. 127 line 7; SE 80.

3. [BG]'s testing of the Student in March 2011 reflects a discrepancy greater than one and a half standard deviations in mathematics. [BG] explained that she had reviewed the Student's four quarterly [number] grade reports in mathematics and that in her opinion, the Student's grades are not indicative of a learning disability in math. Tr. p. 212 lines 1-17; SE 66, 80.

4. In her 2011 evaluation of the Student, [BG]'s testing noted discrepancy of greater than one and half standard deviations in the areas of English and spelling that would be included

within language arts. [BG] is familiar as to what constitutes language arts in the [number] grade at [name] Public Schools. Tr. p. 207 line 12 through p. 208 line 9.

5. The Student's grades for language arts between September 1, 2010 and October 12, 2010 reflect a scattering of A's, F's, B's, and C's. The Student's grades in language arts from October 18, 2010 through December 9, 2010 show a scattering of F's, A's, D's, and a B. This type of scattering of grades is not a pattern that [BG] would expect to see if the Student had a learning disability in English and spelling. These are not the kinds of grades that [BG] finds indicative of a student having a learning disability. Tr. p. 208 lines 10 through p. 209 line 6; SE 64.

6. [BG] also noticed that some of the Student's F's reflected a score of zero out of the total, which reflects that the work was not even attempted by the Student. Tr. p. 209 lines 7-15; SE 80.

7. In her testing of the Student in 2011, [BG] found a discrepancy greater than one and half standard deviations in spelling. However, the Student's quarterly grades in spelling, in [BG]'s opinion, were not indicative of a learning disability. Tr. p. 212 line 18 through p. 213 line 10; SE 67; SE 67.

8. [BG] has also reviewed the Student's reading grades from his [number] grade year. Included within those grades are Reading Counts. To determine a Reading Count, a student reads a small passage or book or some kind of article and then takes a test on it as to the Student's comprehension of the material read. If the student passes the test, the student gets the point for the book. The Student's Reading Counts scores are not indicative of a student who has a learning disability in reading. Tr. p. 209 line 25 through p. 211 line 25; SE 65.

9. The Visual Matching subtest of the Woodcock-Johnson that was administered to the Student in March of 2011 was a timed test. As the examiner, [BG] expected that the Student would score below grade level due to the fact the subtest is timed and the Student has ADD. Consistent with the Student's ADD diagnosis, the Student scored at a [number] grade level. Tr. p. 214 line 6 through p. 215 line 8; SE 80.

10. The Concept Formation subtest of the Woodcock-Johnson assesses the higher order thinking component of a person's cognitive being and is indicative of auditory processing. In performing the subtests, the student has to really listen to the subject and decide in his mind how to work it out. The Student's score on the Concept Formation subtest, 4.9 ([number] grade, ninth month), was not indicative of the Student having an auditory processing disorder. Tr. p. 215 line 9 through p. 216 line 1.

11. The Visual-Auditory Learning subtest to the Woodcock-Johnson also addresses auditory processing. In giving this subtest the examiner teaches the Student something that the Student has never seen before. The Student then has to use that information and repeats it back to the examiner. It does not just assess memory because the Student has to process the new information given to him or her and then present it to the examiner in a sensible order. With regard to this subtest, the Student had a grade of 8.7 (eighth grade, seventh month). This test score also indicated to [BG] that the student did not have an auditory processing disorder. Tr. p. 216 lines 2-22; SE 80.

12. The Concept Formation and Visual-Auditory Learning subtest of the Woodcock-Johnson assess areas that [BG] believes includes auditory processing, and low scores on those subtests would indicate an auditory processing problem to [BG]. However the Student's scores

on these two subtests do not lead her to believe that the Student has any type of auditory processing disorder. Tr. p. 233 lines 3-14.

13. The Concept Formation and Visual-Auditory subtests of the Woodcock-Johnson were administered on the first day the assessments on March 10, 2011 – the day that [BG] believed that the student was putting forth good effort. Tr. p. 216 line 23 through p. 217 line 3.

14. The second day of testing was done in the afternoon because it was reported to [BG] from [CH] that the Student did better in the afternoons. Tr. p. 214 lines 2-5, p. 225 lines 12-19, p. 240 line 9 through p. 241 line 14.

15. The subtests of the Woodcock-Johnson that were administered on the second day of testing include the last two subtest on page 8 and the first set of clustered tests on page 9 of [BG]'s assessment report. Tr. p. 217 lines 4-8; SE 80 pp. 8, 9.

16. With regard to those sixteen subtests, the Student listened to the instructions and started each subtest well. However, the Student stopped putting forth effort to complete many of the subtests. [BG] saw the Student's lack of effort as being indicative of the fact that he was not interested in that particular subtest. Tr. p. 217 line 9 through p. 222 line 15.

17. With regard to the calculations subtest which was administered on the second day of testing, the Student's score reflected a grade equivalency of [number]. [BG] attributes the Student's above grade level score on the subtest to the fact that the Student was interested in the subject and put forth effort. Tr. p. 219 line 11 through p. 220 line 7; p. 221 line 25 through p. 22 line 15; SE 80 p. 9.

18. By looking at the March 2011 evaluation results in isolation, it does not appear that the Student is making educational progress. However, [BG] believes that the Student was

making educational progress based upon the Student's grades during his [number] grade year. Tr. p. 222 line 16 through p. 223 line 2.

19. Particular scores on the Woodcock-Johnson can be pulled down by a poor score on a subtest. One example of this was the Student's oral language score. It was impacted negatively by the Student doing poorly on the understanding directions subtest. This particular subtest was administered on the second day of testing and was one of the subtests which [BG] did not believe the Student was putting forth his best effort. Tr. p. 223 line 15 through p. 224 line 16.

20. [BG] believes that the Student has the ability to perform better on the assessments than the test results indicate. She based this upon the fact that the Student would begin tasks and she could tell that he knew what the examiner wanted. Once he would start if it was a matter in which he was interested, he stayed with it better and gave the examiner better scores. Tr. p. 239 lines 1-9.

21. The fact that the Student's teachers reported that he did better in the afternoon than in the morning was another factor that raised a question in [BG]'s mind as to why the Student's scores on the achievement portion of the evaluations were as low as they were. Tr. p. 225 lines 12-24.

22. The Student testified that during his assessments with [BG] in the [number] grade he tried his best. The Student testified that during the time that he was taking assessments with [BG] that he was falling asleep. [BG] tried to keep him awake during the assessments. The Student testified that he does not know if he could have done better on [BG]'s assessments if he were able to stay awake. Tr. p. 401 lines 12 through p. 402 line 4.

23. In her report as to the evaluations given to the Student in March 2011, [BG] made a number of suggestions as to possible interventions with the Student. However, she had not reviewed the Student's grades at that time. Had she reviewed them, she would probably not have listed the interventions set forth in her report. Tr. p. 245 line 10 through p. 246 line 8.

24. A new annual IEP was agreed to by the Student's IEP team on January 13, 2011. Present at this meeting were [CH], [BL], [DC],[MP], Petitioner, and [JF]. [JF] is employed by the [Name] County Health Department and is the Student's private speech-language pathologist. Petitioner asked [JF] to attend the January 13, 2011 meeting. Tr. p. 489 lines 7-10; SE 55.

25. After conducting evaluations of the Student, [JF] prepared a three-page Brief Synopsis. During the January 13, 2011 meeting, [JF] provided copies of the Brief Synopsis to the IEP team and the team reviewed and discussed the results of her evaluations. Tr. p. 500 lines 7-13; SE 77.

26. At the January 13, 2011 meeting, the team made changes to the Student's modifications at the request of [JF] that were incorporated into the Student's January 13, 2011 IEP. The additional modifications suggested by [JF] are handwritten on the Adaptations, Modifications, Supplementary Services and Supports. Tr. p. 746 line 7-14, SE 55 p.151.

27. [JF] did not make any changes to the Student's IEP goals 1 and 2 prior to signing the January 13, 2011 IEP. [JF] did not request any speech language goals be included in the January 13, 2011 IEP for the Student despite the fact that in her Brief Synopsis, [JF] recommends "Speech Language Therapy to address strategies for increasing processing and comprehension skills." Tr. p. 522 lines 4-10; SE 55, 77.

28. [JF] reviewed and read all the pages of the Student's January 13, 2011 IEP before she signed it. [JF] knew what she was signing and indicated her agreement with the contents of the IEP by checking the agree box. Tr. p. 584 lines 14-23; SE 55 p. 147.

29. At the January 13, 2011 meeting, [JF] never told the team that she did not believe the Student's IEP, as written, was not reasonably calculated to confirm meaningful educational benefit on the Student. At the January 13, 2011 IEP team meeting, the Student's mother never told the team that she did not believe that the IEP, as written, was reasonably calculated to confer meaningful educational benefit on the Student. Both [JF] and the Student's mother signed the Student's January 13, 2011 IEP. Tr. p. 745 lines 3-13; SE 55 p. 147.

### **Conclusions of Law**

1. A reevaluation will be conducted at least once every three years, or more often if conditions warrant the need for reevaluation, or if requested by the child's parent or teacher in accordance with the requirements of 34 CFR §§ 300.304 through 300.311. *Policies and Procedures for Special Education in Oklahoma* at p. 74.

2. The Petitioner failed to prove by a preponderance of credible evidence that the District failed to reevaluate the Student as required by the IDEA. *Policies and Procedures for Special Education in Oklahoma* at p. 74.

3. The credible testimony and evidence presented at hearing proves the District considered [JF]'s Brief Synopsis at the January 13, 2011 IEP team meeting and implemented recommendations made by [JF].

4. The Petitioner failed to prove by a preponderance of credible evidence that the District did not consider [JF]'s Brief Synopsis at the January 13, 2011 IEP team meeting. 34 C.F.R. § 300.502; 20 U.S.C. §§ 1415(b)(1) and (d)(2)(A).

5. The Petitioner failed to prove by a preponderance of credible evidence that the Student's January 13, 2011 IEP is not written to confer a meaningful educational benefit.

6. The Petitioner failed to prove by a preponderance of credible evidence that from February 28, 2009 to present the District has denied the Student services necessary for a free appropriate public education in the least restrictive environment.

**Parent Complaint Numbered Paragraph 3:**

**The District violated IDEA identification requirements by failing to evaluate [the Student] for language impairment.**

**3(a) On January 30, 2007, [BG] concluded from the WJ III results that [the Student's] verbal ability is in the low to low average range. [BG] notes that [the Student's] word knowledge and comprehension is mildly delayed. [BG] further states, [the Student] will probably find age level verbal communication, Knowledge, and comprehension tasks very difficult.**

**3(b) The District was negligent in failing to do any other testing or assessments to evaluate language impairment or the basis for [the Student's] low to low average verbal ability.**

**3(e) [sic] On January 20, 2009 the District conducted a RED wherein the District again had the opportunity to consider the results of the WJ III. The District was negligent in to evaluate, test or assess [the Student] with respect to language impairment.**

**Findings of Fact**

1. The Petitioner filed her initial Due Process Complaint against the District on February 28, 2009. Due Process Complaint Notice filed herein. By Order dated May 6, 2011, the Hearing Officer denied Petitioner's request to toll the statute of limitations and ordered that "all claims outside the two-year IDEA statute of limitations are barred from hearing in this case." SE 107.

3. No District personnel identified a need to evaluate the Student for a language impairment and the Student's mother did not request the District conduct an evaluation for a language impairment. SE 16, 19, 23, 27, 28, 37, 38, 55.

4. The Student's mother participated in every IEP team meeting that was conducted and approved and signed each IEP. SE 16, 17, 19, 23, 28, 38, 55.

5. On January 20, 2009 the Student's mother was present at the IEP meeting and signed and approved the IEP Review as well as the Student's IEP without a request for further evaluations. SE 27, 28.

6. On January 19, 2010 a Review of Existing Data (RED) was completed. The Student's mother agreed and signed the RED that no additional assessments were needed. SE 37.

7. From the beginning of the 2010-2011 school year until the end of February 2011, [BL] did not observe the Student having difficulties with word recognition. At no point in time did [BL] believe that the Student had a difficulty with hearing or written language processing. Tr. p. 882 line 2 through p. 883 line 15.

8. [PE] is employed as a mental health therapist for [name] Psychological services in Poteau. He is licensed in the State of Oklahoma as a licensed clinical social worker, LCSW. [PE] has an associate's degree in behavioral science from Seminole Junior College, a bachelor's degree in social work from East Central University, and a master's degree in social work from Oklahoma University. Tr. p. 20 line 21-22, p. 30 lines 14-18, p. 30 line 23 through p. 31 line 4.

9. [PE] has diagnosed the Student with Attention Deficit Hyper Activity Disorder Predominantly Inattentive Type. As of June 15, 2011, [PE] had spent a total of four hours, in three sessions, with the Student. Tr. p. 34 lines 1-2, 35 lines 14-22.

10. Based on [PE]'s experience in counseling over a hundred [number] graders in the past fifteen years, he found the Student's responses to questions to be age appropriate. [PE] did not note in his report any concerns regarding the Student's inability to understand the questions that he asked the Student. [PE] testified that the Student is probably typical of [number] graders as far as intelligence. Tr. p. 51 lines 3-7, p. 66 lines 13-25, p. 70 lines 18-21.

11. [PE] testified that in his time with the Student, the Student was able to form sentences and he was able to understand the Student's articulation. [PE] testified that he does not recall hearing any problems with articulation or speech formation in the Student. [PE] testified that he did not notice anything that he believed constituted a language impairment in the Student. Tr. p. 51 line 22 through p. 52 line 3, p. 67 lines 8-11, p. 90 lines 14-15.

12. [PE] testified that he did not have any experience with the Student where the Student responded to one of [PE]'s questions with an answer that was not responsive to what was asked. Tr. p.80 lines 6-11.

13. The Student's testimony at the due process hearing demonstrated that the Student has the ability to listen to a question and give an appropriate, meaningful response. The Student testified that in getting to the hospital where he had the sleep study done that once they left [name of town] they had to go through [name] and [name]. He thinks the hospital was in [name of town] or past [name of town]. When asked if the Student liked to sleep a lot because his dad sleeps a lot when he's off work, the Student answered, "no" and then acknowledged that, "that was really actually a silly question." Tr. p. 428 line 2-11, p. 437 lines 11-14.

### **Conclusions of Law**

1. Petitioners claims arising before February 28, 2009 are barred by the IDEA two-year Statute of Limitations.

2. (a) General. A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with 300.304 through 300.311 - -

(1) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation, or

(2) If the child's parent or teacher requests a reevaluation.

(b) Limitation. A reevaluation conducted under paragraph (a) of this section - -

(1) May occur not more than once a year, unless the parent and the public agency agree otherwise; and

(2) Must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary.

34 C.F.R. § 300.303; 20 U.S.C. § 1414(a)(2).

3. The standard the District is to be held to is not "negligence," it is whether a failure to evaluate deprived the student of a free appropriate public education. 20 U.S.C.A. §§ 1401(9), 1412(a)(1), 1414(b).

4. The Petitioner failed to prove by a preponderance of credible evidence that from February 28, 2009 to the present that the Student's IEPs, were not written to provide the Student meaningful educational progress.

5. The Petitioner has failed to prove by a preponderance of credible evidence that from February 28, 2009 to present the District failed to provide the Student a free appropriate public education in the least restrictive environment.

**3(d) [sic] During the 2008-2009 school year, [number] Grade, [the Student] earned a grade of F in all four quarters in language arts and earned an F or D in reading each quarter.**

**3(f) During the 2009-2010 school year, [number] Grade, [the Student] earned an F, D, D, C in each respective quarter in spelling: [the Student] earned a C, D, B, C each respective quarter in language arts;**

**and [the Student] earned D, F, D, F in mathematics.**

**3(g) During the 2010-2011 school year, [number] Grade, [the Student] earned the following grades in the first two quarters - A, D in spelling; C, F in reading; B, D in mathematics; and C, C in language arts.**

**3(h) The above provided the District with sufficient information to form a reasonable belief that special education services may be appropriate with respect to language and other components of speech therapy, in addition to articulation.**

### **Findings of Fact**

1. The Petitioner filed her initial Due Process Complaint against the District on February 28, 2009. Due Process Complaint Notice filed herein.

2. By Order dated May 6, 2011, the Hearing Officer denied Petitioner's request to toll the statute of limitations and ordered that "all claims outside the two-year IDEA statute of limitations are barred from hearing in this case." SE 107.

3. The Student's 2008-2009 IEP was effective from August 29, 2008 through January 20, 2009. SE 23, 28.

4. Despite his grades, the Student testified that he believes that he is learning while attending [name] Public Schools. Tr. p. 395 lines 5-7.

5. The Student testified that he is getting some F's and some A's on his report card. The Student acknowledged that on his last report card he had a lot of F's due to not turning in his work. The Student does not know what he could do to turn in more work so he does not get F's. Tr. p. 429 lines 22 through p. 430 line 8.

6. The Student testified that the only thing he needs in the classroom that would help him achieve in class is to stay awake. The Student testified that if he weren't sleepy during the school day he could get A's in most subjects except spelling and math. The Student testified that

his [number] grade teacher helped him on his math and his spelling. Tr. p. 423 lines 8-15, 20-21, p. 430 lines 18-24.

7. The Student admits that he sleeps a lot at school. The Student agreed that being able to sleep soundly at night and get a good night sleep would make a difference in his performance at school. Tr. p. 395 lines 8-12, p. 411 lines 19-22.

8. [EC] testified that the Student's grades during the 2008-2009 school year ranged from A's to F's. [EC] testified that during one nine (9) week period during the 2008-2009 school year, the Student had twenty-two (22) assignments that were not handed in. The zeros reflected in the Student's grades represent not turning in an assignment. The work that was not turned in does have an effect of lowering the overall score for the Student. Tr. p. 611 lines 16-18, p. 616 lines 23-25, p. 652 line 17 through p. 653 line 6; SE 32.

9. [EC] testified that several times during the 2008-2009 school year the Student told her that he did want to do assignments or that he did not like to do certain assignments. Never once during the 2008-2009 school year did the Student ever tell [EC] that he did not understand an assignment and needed help with it. Tr. p. 617 lines 5-9, 14-20.

10. The Student was administered a Stanford test in the [number] grade. One of the subjects that the Stanford tests covers is mathematics. The Student's score on the Stanford test in [number] grade for total mathematics was a grade equivalency of [Number]. The Student's score in mathematics problem solving is a grade equivalency of [number], and his grade equivalency in mathematics procedures is [number]. Tr. p. 647 lines 20-25, p. 648 lines 13-21, p. 649 lines 12-20, p. 649 line 25 through p. 650 line 8; SE 29.

11. With regard to [number] grade math, the information that is taught builds week by week on the information previously taught. So continuously throughout the school year the

Student is building to the base of the knowledge that he had previously learned. Tr. p. 652 lines 5-16.

12. The Student's grades indicate numerous F's between April 2, 2009 and April 7, 2009. Then on April 20, 2009 there are two A's. This represents to [EC] that the Student can do the work because the previous assignments that he received F's on would have been building blocks for those that he received A's. If the Student could not have done those previous assignments, he would not have been able to score an A on a test. Tr. p. 653 lines 7-24; SE 32 p. 2.

13. The Student's math grades for the 2009-2010 school year reflect only test grades and do not include daily assignments. Tr. p. 794 lines 6-25; SE 45 p. 20.

14. There were times during his [number] grade year that the Student would get a grade of an A, B, or C on an assignment and then would test on basically the same material on a different day and flunk. Sometimes the Student would test on material and finish and get an A and the very next day do an assignment with the same material and flunk it. Tr. p. 799 lines 5-15.

15. In [LW]'s classroom, the Student's participation and understanding in the classroom demonstrated to her that he was capable of doing better work than what he was doing on paper; on tests and homework. Tr. p. 838 lines 10-12.

16. [BL] does not believe that the Student's grades for [number] grade are indicative of his abilities. Tr. p. 904 lines 20-22.

17. The Student's math grades were lower throughout the 2010-2011 school year because there were unfinished assignments or work that was not turned in. Tr. p. 857 line 24 through p. 859 line 4; SE 66.

18. The grades that the Student received from [BL] during his [number] grade year are inconsistent, in that there are some grades A's and some F's and then there is a splattering of grades in between. Tr. p. 894 lines 6-11; SE 64-69.

19. Specifically in math, this splattering of grades is odd in that each lesson builds on the last. Each day there is only one new concept that is taught and maybe two problems of the new concept are on that daily lesson. All the material that is learned is accumulated so it is unusual for the Student to have an A one day and a 50 the next. Tr. p. 894 line through p. 895 line 1.

20. There is a corresponding drop in the Student's grades after the filing of due process. This is primarily attributable to the lack of work being turned in. Tr. p. 908 lines 13-18; SE 64-69.

21. [BG] is employed with [name] County Special Education Co-Op. [BG] has been conducting assessments and testing of students for over twenty years. [BG] holds the following certificates issued by the Oklahoma State department of Education; 1) school psychologist; 2) elementary education; 3) science middle school; 4) psychometrist; 5) reading specialist; 6) social studies middle school. Tr. p. 96 lines 9 through p. 97 line 7, p. 204, lines 21-23, p. 226 line 15 through p. 227 line 2; SE 99; SE 99.

22. [BG] administered the Woodcock-Johnson, cognitive and achievement evaluation to the Student on March 10 and 11, 2011. She also administered the Student the Berry-VMI to assess the Student's visual processing as part of her evaluation. Tr. p. 122 line 22 through p. 123 line 16, p. 126 line 19 through p. 127 line 7; SE 80.

23. The Student's grades for language arts between September 1, 2010 and October 12, 2010 reflect a scattering of A's, F's, B's, and C's. The Student's grades in language arts

from October 18, 2010 through December 9, 2010 show a scattering of F's, A's, D's, and a B. This type of scattering of grades is not a pattern [BG] would expect to see if the Student had a learning disability in English and spelling. These are not the kinds of grades that [BG] finds indicative of a student having a learning disability. Tr. p. 208 lines 10 through p. 209 line 6; SE 64.

24. [BG] also noticed that some of the Student's F's reflected a score of zero out of the total. That grade reflected that the work wasn't even attempted by the Student. Tr. p. 209 lines 7-15; SE 80.

25. [BG] has also reviewed the Student's reading grades from his [number] grade year. Included within those grades are Reading Counts. To determine a Reading Count, a student reads a small passage or book or some kind of article and then takes a test on it as to the Student's comprehension of the material read. If the student passes the test, the student gets the point for the book. The Student's Reading Counts scores are not indicative of a student who has a learning disability in reading. Tr. p. 209 line 25 through p. 211 line 25; SE 65.

26. The Concept Formation subtest of the Woodcock-Johnson assesses the higher order thinking component of a person's cognitive being and is indicative of auditory processing. In performing the subtests, the student has to really listen to the subject and decide in his mind how to work it out. The Student's score on the Concept Formation subtest, [number], was not indicative of the Student having an auditory processing disorder. Tr. p. 215 line 9 through p. 216 line 1.

27. The Visual-Auditory Learning subtest to the Woodcock-Johnson also addresses auditory processing. In giving this subtest the examiner teaches the Student something that the Student has never seen before. The Student then has to use that information and repeat it back to

the examiner. It does not just assess memory because the Student has to process the new information given to them and present it to the examiner in a sensible order. With regard to this subtest, the Student had a grade of [number] which was more than [number] grade levels above the Student's current grade level, [number] grade. This test score also indicated to [BG] that the student did not have an auditory processing disorder. Tr. p. 216 lines 2-22; SE 80.

28. The Concept Formation and Visual-Auditory Learning subtest of the Woodcock-Johnson assess areas that [BG] believes includes auditory processing, and low scores on those subtests would indicate an auditory processing problem to [BG]. However the Student's scores on these two subtests do not lead her to believe that the Student has any type of auditory processing disorder. Tr. p. 233 lines 3-14.

29. The Student's grades in language arts from October 18, 2010 through December 9, 2010 show a scattering of F's, A's, D's, and a B. This type of scattering of grades is not a pattern as [BG] would expect to see if the Student had a learning disability in English and spelling. Tr. p. 208 line 22 through p. 209 line 6; SE 80 p. 1.

30. [BG] also noticed that some of the Student's F's reflected a score of zero out of the total. To [BG], that grade reflected that the work wasn't even attempted by the Student. Tr. p. 209 lines 7-15; SE 80.

31. The Student's grades in [number] grade language arts showed a similar scattering of grades and were not indicative, in [BG]'s experience, of a student having a learning disability in either spelling or English. Tr. p. 209 lines 16-24; SE 80.

32. [BG] has also reviewed the Student's reading grades from his [number] grade year. Included within those grades are reading counts. To determine a Reading Count, a student reads a small passage or book or some kind of article and then takes a test on it as to the

Student's comprehension of the material read. If the student passes the test, the student gets the point for the book. The Student's Reading Counts are not indicative of a student who has a learning disability in reading. Tr. p. 209 line 25 through p. 211 line 25; SE 65.

### Conclusions of Law

1. The Petitioner's claims arising before February 28, 2009 are barred by the IDEA two-year statute of limitations. SE 107.

2. A reevaluation will be conducted at least once every three years, or more often if conditions warrant the need for reevaluation, or if requested by the child's parent or teacher in accordance with the requirements of 34 CFR §§ 300.304 through 300.311. *Policies and Procedures for Special Education in Oklahoma* at p. 74.

3. The Petitioner failed to prove by a preponderance of credible evidence that the District failed to reevaluate the Student as required by the IDEA. *Policies and Procedures for Special Education in Oklahoma* at p. 74.

4. The Petitioner failed to prove by a preponderance of credible evidence any facts or evidence to support Petitioner's contention that the Student has a language impairment.

5. The Petitioner failed to prove by a preponderance of credible evidence that from February 28, 2009 to present the Student's IEPs were not written to confer a meaningful educational benefit.

6. The credible evidence and testimony presented at hearing demonstrates that the Student's grades are negatively affected by missing and incomplete assignments and are not an accurate reflection of his academic abilities. Tr. p. 429 lines 22 through p. 430 line 8, p. 857 line 24 through p. 859 line 4; SE 66.

**3(j) [sic] The District's failure to identify and evaluate [the Student]**

**for language impairment has caused substantive harm  
as confirmed by the findings of [JF].**

**Findings of Fact**

1. [JF] received her master's in speech pathology in 1998 and currently works for the [name] County Health Department as a speech-language pathologist. [JF] holds licensure by the State of Oklahoma as a speech language pathologist and certifications through the Oklahoma State Department of Education as a speech-language pathologist and also in the area of special education holds certifications in hearing impairment, mild-moderate disabilities, elementary principal, secondary principal, and superintendent. Tr. p. 466 lines 8 through p. 467 line 3.

2. [JF] first met the Student after his mother called requesting services for the Student. The Student was scheduled for a screening and evaluation in late December 2010 or early January of 2011. Tr. p. 467 lines 4-13.

3. [JF] administered two assessments to the Student: The Test of Language Development ("TOLD"), and the test of Language Development, and the Test of Auditory Comprehension of Language ("TACL"). Tr. p. 472 lines 11-17.

4. [JF] was able to complete the administration of the TOLD in one session. The results of the TOLD indicated that the Student had a language delay in several areas. The Student's Spoken Language score was below his chronological age, while [JF] could not determine an age equivalency based on this test, she did state that it is significantly lower when compared to the standardized measure of other children the Student's age. [JF]'s assessment indicated that the Student's area of most difficulty were his listening skills, speaking skills, and syntactical skills (ability to formulate grammatical sequences). Tr. p. 473 line 16 through p. 476 line 14.

5. The TACL is a test based upon a child's ability to understand, comprehend, and follow spoken language. According to the results of this test administered by [JF], the Student scored significantly below norms. The Student's overall scores for this test placed him at the four year five month age equivalency (4 yrs., 5 mo.). Tr. p. 476 line 15 through p. 477 line 1.

6. [JF] used the TACL based upon the difficulties the Student had with his listening skills when she administered the TOLD. [JF] used the TACL because the administration of the TOLD was indicative of the Student possibly having a language processing problem or an auditory processing problem. Tr. p. 477 line 12 through p. 478 line 22 through p. 479 line 8.

7. [JF] did not administer the CASL assessment to the Student because it is not an assessment tool that the [name] County Health Department utilizes frequently. Tr. p. 484 lines 17-485 line 1.

8. [JF]'s evaluation of the Student did note areas of concern in articulation and with the Student's language skills, particularly his auditory comprehension skills. [JF] believes that the Student needs speech language services to address his language processing and auditory processing skills. Although [JF] testified that the Student still demonstrated mild articulation errors, they were not significant enough to impede academic functioning or his communication within the community. Tr. p. 487 lines 2-19.

9. Between January 11, 2011 and the date of her testimony, June 17, 2011, [JF] has had approximately ten speech-language sessions with the Student and each session lasted approximately an hour. Tr. p. 522, line 24 through p. 523 line 18; SE 78 pp. 81-92.

10. As a result of the ten speech-language therapy sessions [JF] has had with the Student, she believes that the Student's auditory comprehension language skills are no greater

than an age equivalent of six years five months (6 yrs, 5 mo.). Tr. p.523 line 19 through p. 524 line 15.

11. Based upon the ten speech-language sessions she has had with the Student since January 11, 2011, [JF] believes that the Student's vocabulary skills are in the five to six (5-6) years age range. Tr. p. 524 line 16 through p. 525 line 12.

12. Since starting speech-language services with the Student on January 11, 2011, [JF] testified that in her opinion the Student still has grammatical morphemes at the six (6) year age range. Tr. p. 530 line 18 through p. 531 line 11.

13. Based upon the speech-language services that [JF] has provided the Student since January 11, 2011, she believes that the Student has elaborated phrases and sentences skills at the five to six (5-6) year range. Tr. p. 531 lines 12-22.

14. After [JF] completed her evaluation of the Student and prepared her Brief Synopsis, the Parent asked her to attend the January 13, 2011 IEP team meeting regarding the Student. Tr. p. 489 lines 7-10.

15. [JF] testified that she was present at the January 13, 2011 meeting to support the parent as a speech pathologist. Additionally, [JF] addressed and spoke to items in the IEP outside of speech-language and gave the parent advice on IEP matters that did not pertain to speech-language. This included recommendations to the team for the Student's day to day education not related to speech-language. Some of [JF]'s recommendations were incorporated into the Student's IEP. The team also implemented recommendations that [JF] suggested regarding speech-language in the January 13, 2011 IEP. Tr. p. 516 line 25 through p. 520 line 18.

16. Prior to signing the IEP and noting her agreement with it, [JF] did not request anything be written on the IEP which was refused by the IEP team. [JF] signed the January 13,

2011 IEP as a team member and checked the box indicating that she agreed with the IEP. Tr. p. 515 line 14 through p. 516 line 24.

17. [JF] has never signed an IEP for a student as an IEP team member that she did not believe was reasonably calculated to confer a meaningful educational benefit on the student. Tr. p. 521 lines 2-11.

18. In [JF]'s Brief Synopsis she recommends an audiological assessment to rule out a central auditory processing disorder; she does not indicate a diagnosis of a central processing disorder. SE 77.

19. On January 19, 2011, [JF] requested that the Student's physician, Dr. [name], to provide a referral for further assessment to be conducted by an audiologist to rule out central auditory processing disorder for the Student. Such a referral was not received by the parent from Dr. [name]. Tr. p. 542 line 22 through p. 545 line 14; SE 78 #10.

20. [JF] informed Dr. [name]'s office that she would follow up with them when the Student was out of school regarding the requested referral to an audiologist for a central auditory processing disorder. Although [JF] believes the Student has such a processing disorder, she has not followed up with Dr. [name]'s office in the approximate one month period of time between the end of school and her testimony at the due process hearing. Tr. p. 544 line 20 through p. 545 line 24.

21. [BB] is a speech-language pathologist with the [name] County Special Education Co-Op. [BB] has worked in that capacity for the Co-Op for the past twenty years. [BB] has a master's degree in speech-language pathology and is certified by the Oklahoma State Department of Education for speech-language pathology. Additionally, [BB] holds Oklahoma Licensure by the Oklahoma Board of Examiners for Speech-Language Pathology and holds a

Certificate of Clinical Competence from the American Speech-Language-Hearing Association. Tr. p. 345 lines 1 through p. 346 line 18; SE 97.

22. [BB]'s first contact with the Student occurred in April 2011 after she was contacted by [school name] Special Education Director [DC] and was asked to provide a speech-language assessment of the Student for the school. Tr. p. 346 line 19 through p. 347 line 5.

23. Prior to evaluating the Student, [BB] spoke with [MP] who advised [BB] that she had previously seen the Student for speech, the Student had been released, and that a [name] County Health Department speech pathologist had attended an IEP meeting and had results that the Student showed language deficits. Tr. p. 347 lines 6-16; p. 351 lines 6-17.

24. Prior to evaluating the Student, [BB] neither obtained any records from the School District, nor received any opinions or information from District personnel with respect to the Student's speech and whether or not there was a problem with it. Tr. p. 347 line 24 through p. 348 line 8.

25. [BB] conducted her evaluation on April 13, 2011. Tr. p. 348 lines 13-18.

26. On April 13, 2011, [BB] requested that the Student be brought from class and into the room where the testing was going to occur. The Student entered the room willingly and he was very friendly and seemed at ease. Prior to administering her first assessment, the Peabody vocabulary test, [BB] spent some time in conversation with the Student to get a sample of his conversation speech. [BB] spent approximately ten minutes engaging in conversation with the Student prior to beginning the Peabody. After administering the Peabody, which measures receptive vocabulary, [BB] administered the Comprehensive Assessment of Spoken Language ("CASL") that assesses receptive and expressive language skills – oral language. The Student was tested from 9:30-11:45 a.m., and after a break for lunch and recess, the testing resumed at

1:10 p.m. and finished at 1:50 p.m. Tr. p. 350 line 4 through p. 351 line 5, p. 353 lines 12-18; SE 79.

27. During the administration of the CASL, [BB] did stop the examination and let the Student have a break for lunch and recess. Tr. p. 372 lines 10-13.

28. During the testing on April 13, 2011, the Student was very friendly and talkative when he first entered the session. He was very likable and seemed very relaxed. However, [BB] noticed a significant change in his demeanor as soon as the testing started. The Student seemed to just "shut down" and his expression changed in that he became very sleepy, closing his eyes frequently and yawning. This made the Student very difficult to test. Tr. p. 351 line 18 through p. 352 line 1; p. 358 lines 15-23.

29. Based upon the Student's behavior when he first entered the testing room – very relaxed and very friendly – [BB] had no reason to believe that testing on April 13 would be any different than testing the Student on another day. Tr. p. 352 lines 2-9.

30. [BB] spent approximately forty to forty-five (40-45) minutes administering the Peabody. Although the standard administration time for this assessment is approximately twenty (20) minutes, it took longer because the Student took a very long time to respond. It seemed to [BB], because the Student would close his eyes, that he was having difficulty staying awake. Tr. p. 353 line 15 through p. 354 line 2.

31. Prior to the testing on April 13, [BB] had learned from [DC] that the Student had an IEP and that his disability category was other health impaired – ADD. Tr. p. 354 lines 13-20.

32. When administering the Peabody, [BB] informed the Student that she was going to say a word and that the Student then needed to look at all of the pictures on the page and point to the picture that corresponds with a word that she said. Tr. p. 355 line 17 through p. 356 line 1.

33. When she began administering the Peabody, [BB] started the testing at the recommended starting point for the age of seven (7). [BB] determined that this would be an appropriate starting age for the Peabody as a result of the conversations that she'd had with the Student prior to administering the Peabody, as well as the vocabulary that he was demonstrating during the conversation. [BB] believed that the Student would have some success at this level. Tr. p. 356 line 19 through p. 357 line 3.

34. Although [BB] started an age level which believed the Student would have success, age seven, the Student had difficulty with the age seven tasks. However, [BB] believed that the Student knew the correct response but was simply not responding correctly. For example, when [BB] gave the Student a particular word, he would look directly at the correct response, hover with his finger and circle above the correct response, and then choose and incorrect response. Tr. p. 357 line 4 through p. 358 line 14.

35. In her twenty years as a speech language pathologist, [BB] has never experienced a child reacting negatively to the testing like the Student did. Although [BB] has had children unable to sit to take tests or focus on pictures well enough to take the tests due to behavioral issues or attention problems, the Student's behavior was different than that. Tr. p. 358 line 24 through p. 359 line 10.

36. [BB] had never met the Student prior to conducting the testing on April 13, 2011. Prior to administering the testing on April 13, [MP] had informed [BB] that sleeping and not staying awake in class had been an issue for the Student. Prior to administering the testing on April 13, nobody from the District had told [BB] that they believed the Student's inability to stay awake was intentional. Tr. p. 359 lines 11 through p. 360 line 4.

37. It was [BB]'s perception that the Student was intentionally making it appear that he was falling asleep because he would close his eyes and smile and sit with his eyes closed as if he was asleep. Tr. p. 360 lines 5-10.

38. When the Student was having difficulty with Set Six (6), [BB] backed up to Set Four (4) and started again to just get the Student going with a test. Once he got going, she asked the Student questions from Set Seven (7) again, and he responded to all of the words correctly. Tr. p. 360 line 16 through p. 361 line 21.

39. When [BB] perceived that the Student was not cooperating with the test, she encouraged the Student, told the Student that based on the conversation she had with him before the testing that she believed he knew a lot of and had a very good vocabulary, and told the Student she really wanted him to his best. Tr. p. 361 line 21 through p. 362 line 4.

40. [BB] administered the Peabody in the manner that she did because she believed that she had a better chance of getting a more valid test result than if the Student just immediately failed. Tr. p. 362 line 16 through p. 363 line 14.

41. [BB] believes that the Student's Peabody score is very reliable and if that she had just accepted the Student's initial responses, it would have been a much less reliable test and the Student's vocabulary would have bottomed out way sooner than it actually functions. Tr. p. 363 line 20 through p. 364 line 5.

42. [BB] believes that it was appropriate for her to continue the testing of the Student on April 13, even though she believed that the Student was intentionally giving incorrect answers. Had the Student refused to respond to her questions, [BB] would have stopped the testing and tried again on a different day. However, the Student did not refuse to respond. Tr. p. 365 line 19 through p. 366 line 4.

43. During the administration of the Peabody, [BB] did not permit the Student to take any breaks or do anything to get him to actively participate in the evaluation other than encouraging the Student. Tr. p. 366 lines 5-14.

44. When she administered the Peabody, [BB] never instructed the Student to repeat questions previously given or to rework some of the questions. During the administration of the Peabody, [BB] did not suggest any correct answers to the Student nor did she provide the Students with any cues or any kind of commentary with respect to how the Student was responding to the testing. Tr. p. 365 lines 11-18, p. 366 line 18 through p. 368 line 2.

45. Based upon her conversation with the Student and the score obtained on the Peabody, [BB] felt that it was appropriate for his language and for his age level to administer the CASL. [BB] did not consider administering an assessment other than the CASL because she believed the CASL was appropriate for the Student. Tr. p. 368 lines 8-21; SE 79 p. 044.

46. Prior to testing the Student on April 13, 2011, [BB] reviewed briefly with [MP] the testing results provided by [JF] that had been provided to the Student's IEP team. Tr. p. 368 line 22 through p. 369 line 15.

47. Although she was aware of the assessments [JF] had given the Student, [BB] did not intentionally select different assessment tools. While the tests that [JF] administered are in the repertoire of tests [BB] has, she felt that the CASL was an appropriate test for the Student. Tr. p. 369 line 22 through p. 370 line 2.

48. [BB] does not believe that the TACL administered by [JF] is a test normed for the Student's age. She believes it is normed for ages three years, zero months to nine years, eleven months. Tr. p. 370 lines 3-12.

49. At no time did anybody from this District instruct [BB] about the outcome that was desired with respect to her evaluation of the Student or that they disagreed with [JF]'s results and wanted [BB] to conclude otherwise. Tr. p. 370 line 20 through p. 371 line 5.

50. [BB] did not administer the entire CASL. Rather, she administered the core subtest and believed that that core subtest gave her the information that she needed. Tr. p. 371 lines 6-12.

51. While the standard administration time for the core subtest as a CASL is probably anywhere between thirty to forty-five minutes, it took [BB] longer than that to administer it to the Student because he was acting very sleepy and sitting with his eyes closed. He also pulled some chairs up and tried to lie down on the chairs and indicated that he was tired. He also asked if [BB] could skip some of the pages on the test because he was tired. In short, [BB] had to redirect the Student a lot in order to have him complete the CASL's core subtest. Tr. p. 371 line 13 through p. 372 line 9.

52. While administering the CASL, [BB] did not ask the Student to repeat or rework any questions. Additionally, at no time during the administration of the CASL did the Student request [BB] to repeat a question or ask for clarification. Tr. p. 372 lines 14-17; p. 374 lines 11-14.

53. Although [BB] did not strictly follow the testing protocols for the CASL when giving the example questions and using the start item for an eleven year old, she does not believe that this altered or could potentially have altered the CASL test results because the Student either knew the information or did not. [BB] used her clinical judgment at the time to start the Student on the CASL where the Student felt comfortable and he would have success. Since the Student had a tendency to shut down quickly, [BB] wanted him to build confidence and give her the best

results that the Student could. [BB] does not believe that the manner in which she administered the CASL had an effect on the outcome. Tr. p. 375 line 3 thorough p. 379 line 5.

54. From her conversations with the Student in the testing conducted on April 13, 2011, [BB] did not find the Student's auditory comprehension of language to be at an age equivalency of four years and five months (4 yrs., 5 mos.), as determined by [JF] in her January 11, 2011 Brief Synopsis. Rather, [BB] believes that the Student's age equivalency with respect to auditory comprehension of language is closer to nine years and eight months (9 yrs., 8 mos). Tr. p. 445 line 3 through p. 446 line 20; SE 77, 79.

55. [BB] believes that the Student's grade equivalence with respect to vocabulary was [number] grade, fifth month (4th grade, 5th month), and not an age equivalency of less than three years (< 3 yrs.) as determined by [JF]. Tr. p. 446 line 21 through p. 447 line 14.

56. [JF] and [BB] performed testing that looked at grammatical morphemes-suffixes, word endings, pronoun usage, past tense, plurals and word endings. With regard to grammatical morphemes, [BB]'s testing showed an age equivalency for the Student of eight years and eight months (8 yrs., 8 mos.), and not an age equivalency of three years and nine months (3 yrs., 9 mo.) as reflected by the assessments provided by [JF]. Tr. p. 447 line 15 through p. 448 line 2.

57. [BB] believes that the grade equivalency she obtained in her evaluations could well be low, based upon her observation of the Student's sentenced structure during the conversational period she had with the Student and prior to the April 13, 2011 testing. Tr. p. 448 lines 3-7, p. 448 line 25 through p. 449 line 2; SE 79 p.044.

58. [BB]'s testing reflects an age equivalency of nine years and zero months (9 yrs., 0 mo.) with respect to elaborated phrases and sentences, and not an age equivalency of three years and six months (3 yrs., 6 mo.) as reflected by [JF]'s testing. Tr. p. 448 lines 8-18.

59. During the ten minute conversational period [BB] had with the Student prior to her testing, she did not find the Student's ability to communicate to be at an age level of less than five years (< 5 yrs.). Tr. p. 448 lines 19-24.

60. While she was evaluating the Student, [BB] did not tell the Student that she was conducting a speech evaluation. However, during the testing the Student independently concluded that [BB] was a speech person, like [JF]. Tr. p. 449 line 9 through p. 450 line 3.

61. To her knowledge, nobody at the District had informed the Student that he was going to be evaluated in speech in April of 2011. In fact, [BB] made clear to District personnel that she did not want to evaluate the Student in the speech room as she did not want the Student to affiliate her with speech so as to keep the evaluation as objective as possible. Tr. p. 450 lines 4-17.

62. During the administration of the Peabody, one of the words that [BB] gave the Student was the word "farm." When [BB] gave the Student this word, he answered incorrectly. [BB] found this out of the ordinary because during their conversation before the test was administered, the Student had spoken a lot about animals and deer hunting. This coupled with the rural area in which the Student lives made [BB] feel certain that the Student knew what a farm was. Tr. p. 450 line 18 through p. 451 line 25.

63. The Student acknowledged that he knows what a farm is. Tr. p. 418 lines 17-18.

64. In the twenty years that she has been a speech language pathologist at the Co-Op, [BB] has evaluated several hundred students using similar evaluations or the same evaluations that she used with the Student, and nobody has previously questioned the validity her testing. Tr. p. 452 lines 1-8.

65. It appeared to [BB] that when the Student would close his eyes and have the smile on his face, the Student was playing a game with her. Tr. p. 452 lines 9-20.

66. During her ten minute conversation period with the Student prior to conducting her evaluations, [BB] did not note any problems with the Student's rate of speech and that the Student was not experiencing any difficulty responding to who, what, why, when, and where questions, even though there were some noises occurring outside and in the adjoining room. The Student was not distracted by these noises and [BB] did not believe that the Student was experiencing any type of auditory processing issues. Tr. p. 452 line 21 through p. 453 line 19.

67. Based upon her interaction with the Student during the testing in April of 2011, [BB] believes that the Student has a high level of vocabulary and that he is very knowledgeable about things that are of interest to him. Tr. p. 454 lines 20 -24.

68. Based upon her ten minute pre-assessment conversation that she had with the Student in April 2011, [BB] believes that the Student's conversational skills are at or above grade level. Tr. p. 461 lines 18-23; SE 79 p. 044.

69. The fact that the Student has good quality conversation skills means to [BB] that the Student does not have impairment with respect to expressive language. In [BB]'s opinion, the Student does not have language processing disorder. Tr. p. 462 lines 4-8, lines 15-19.

70. The notes taken by [BB] regarding her pre-assessment conversation with the Student are just samples of the Student's sentence structure at various times throughout the session. They do not reflect a consecutive conversation. Tr. p. 463 lines 13-24; SE 79 # 044.

71. The Student testified that during his assessment conducted by [BB] that he tried hard on the assessments and he did his very best on those assessments. The Student testified that he believes he got a lot of thing right on [BB]'s test. Tr. p. 402 lines 15-21, p. 403 lines 6-8.

72. The Student testified that [BB] did not tell him which picture to point to during the assessment. The Student testified that [BB] told him to keep trying when he got a wrong answer until he got it right. The Student testified that while doing testing with [BB] that he felt like he had to redo the same questions over and over again. Tr. p. 403, lines 4-5, p. 407 lines 9-19, p. 415 line 22-25.

73. The Student testified that he is getting tired of taking all these tests and that he wishes people would just let him do what he needs to do in the classroom. Tr. p. 411 line 13-18.

74. The Student's [number] grade teacher during the 2009-2010 school year, [LW], never suspected that the Student had a learning disability. [LW] did not notice anything whatsoever in the Student that indicated an expressive language disorder. [LW] did not notice anything at all in the Student that indicated that he had a receptive language disorder. [LW] did not notice any difficulties in the Student with reading comprehension. [LW] did not notice anything in the Student that indicated an auditory processing disorder. Tr. p. 799 lines 21-25, p. 829 lines 2-21.

### **Conclusions of Law**

1. The Petitioner failed to prove by a preponderance of credible evidence that from February 28, 2009 to present the Student's IEPs were not written so as to confer a meaningful educational benefit on the Student.

2. The Petitioner failed to prove by a preponderance of credible evidence any facts or evidence to support Petitioner's contention that the Student has a language impairment or a central processing disorder.

3. [JF]'s assessment results are not an accurate indication of the Student's language abilities. [JF]'s conclusions in her Brief Synopsis are not supported by the Student's academic record or the record in this hearing. The Student's own testimony contradicts [JF]'s findings as to the age equivalence level of the Student's language abilities. The Student demonstrated that he is capable of thinking through questions posed to him by the Hearing Officer and Counsel and capable of giving appropriate, and sometimes humorous, responses. The record of the hearing is time-stamped to show the amount of time the Student took to answer a question. The Student carried on a pleasant conversation at a good rate of speed. Tr. p. 429 lines 2-11, p. 437 lines 11-14; SE 64-69, 79.

**Parent Complaint Numbered Paragraph 7:**

**The District violated IDEA by failing to have a qualified, certified speech language pathologist diagnose [the Student], interpret assessment results and make appropriate recommendations.**

**7(a) [MP] has provided speech therapy to [the Student] since [the Student's] first IEP on February 13, 2004.**

**Findings of Fact**

1. [MP] is a speech therapist at Heavener Schools. [MP] has been a speech therapist for thirty years, all in a public school setting. [MP] has a bachelor's degree in speech and hearing therapy that she obtained from Northeastern State University in Tahlequah, Oklahoma in 1981. In the course of obtaining her bachelor's degree, [MP] received specific training on evaluating for expressive and receptive language disorders. As part of her bachelor's degree, [MP] had 285 clinical hours prior to graduating. Tr. p. 278 lines 10-14, lines 17-22, p. 288 line

24 through p. 289 line 5, p. 338 line 18 through p. 339 line 6, p. 340 line 23 through p. 341 line 2; SE 98.

2. When [MP] graduated from college in 1981, she received a certificate from the Oklahoma State Department of Education certifying her as a speech pathologist. She held that certification continuously until she recently became a speech language therapy assistant. Tr. p. 333 line 3 through p. 334 line 9; SE 98.

3. From 2004 to June 30, 2010, [MP] had a standard certificate in speech pathology from the Oklahoma State Department of Education. In 2010, [MP] had to take a certification examination teaching test for speech pathology because the State Department of Education had changed some regulations. [MP] did not pass the certification examination by a total of two (2) points. However, during the summer of 2010, [MP] took a retooling class to retain her certification and passed the retooling class with an "A." Tr. p. 285 line 21 through p. 287 line 19, p. 335 line 12 through p. 336 line 14; SE 98.

4. [MP] has never lost her certification to provide speech services in schools by the Oklahoma State Department of Education, even after she failed her recertification test by two points. Tr. p. 337 lines 4-15.

5. When the Student was in preschool, in approximately 2004, [MP] administered a Test of Early Language Development (TELD) to the Student. The Student's score on the TELD was appropriate for his age. Tr. p. 289 line 13 through p. 290 line 6.

6. [MP] provided speech therapy services to the Student from approximately February of 2004 until January 20, 2010 for articulation issues. Tr. p. 284 lines 20 through p. 285 lines 7.

7. In the thirty years that [MP] has provided speech services, she's never been advised by the State Department of Education that she: 1) could not administer speech language assessments to students; 2) could not provide speech pathology services to students; 3) lacked the qualifications to interpret speech test results; or 4) lacked the qualifications necessary to administer the Arizona Articulation test. Tr. p. 334 line 10 through p. 335 line 11.

### **Conclusions of Law**

1. The Petitioner's claims arising before February 28, 2009 are barred by the IDEA two-year statute of limitations.

2. Standards for all personnel working with children with disabilities in the State of Oklahoma meet the highest requirements with the exception of those certified as speech pathologists at the bachelor degree level. In accordance with 70 O.S. § 6-190.1, "individuals who held a provisional certificate during the 1998-1999 school year in Speech-Language Pathology shall be granted a three-year extension of the provisional certificate by the State Board of Education. On or after July 1, 2002, provisional certificates may be renewed annually, provided the individual documents admission to and progress toward completion of the relevant master's degree program." As part of a plan to meet highest requirements in the State, personnel holding standard certification as speech pathologists will be required to meet highest standards (master's level certification in speech-language pathology) by the year 2010. *Policies and Procedures in Special Education in Oklahoma, 2002, p. 148.*

3. Standards for all personnel working with children with disabilities in the State of Oklahoma meet the highest requirements with the exception of those certified as speech pathologists (therapists) at the bachelor degree level. As part of a plan to meet highest requirements in the State, personnel holding standard certification as speech pathologists would

be required to meet highest standards (master's level certification in speech language pathology) by the year 2010. A one time extension will be offered for speech therapists holding a standard teaching certificate after the 2010 deadline. The speech therapists must provide written documentation to the OSDE, Professional Standards Section, of the following: 1) documentation of service in public schools as a speech therapist in the last 15 years for a period of at least five consecutive years; and 2) documentation of successfully passing the Certification Examination for Oklahoma Educators (CEOE) teaching test in the area of speech pathology. When this documentation is approved applicants will receive a standard teaching certificate in the area of speech pathology valid through July 1, 2015. *Policies and Procedures in Special Education in Oklahoma, 2007, p. 180-81.*

4. The Petitioner has failed to prove by a preponderance of credible evidence that [MP] was not qualified under the Oklahoma State Department of Education personnel guidelines to provide speech therapy services, including diagnosing, interpreting assessment results, and making appropriate recommendations for the Student. *Policies and Procedures in Special Education in Oklahoma, 2007, p. 180-81.*

5. Petitioner's claim has unnecessarily prolonged this litigation and caused the District to incur substantial and unnecessary legal expenses. The Hearing Officer instructed Petitioner's counsel to carefully review this claim, as well as two other claims relating to [MP], and that it was apparent that [MP] was certified through the Oklahoma State Department of Education and that is what was required. Petitioner chose not to pursue the other two claims but went forward with this one when certifications standards were uniform for all claims. *Prehearing Conference transcript, June 6, 2011, pp. 28 line 14 through page 20 line 18.*

**7(b) [MP] is a speech language therapy assistant.**

### **Findings of Fact**

1. From 2004 to June 30, 2010, [MP] had a standard certificate in speech pathology from the Oklahoma State Department of Education. Tr. p. 285 line 21 through p. 286 line 3; SE 98.

2. [MP] provided speech therapy services to the Student from approximately February of 2004 until January 20, 2010 for articulation issues. Tr. p. 284 lines 20 through p. 285 lines 7.

3. In 2010, [MP] had to take a certification examination teaching test for speech pathology because the State Department of Education had changed some regulations. [MP] did not pass the certification examination. However, during the summer of 2010 [MP] took a retooling class to retain her certification and passed the retooling class with an A. Tr. p. 286 line 4 through p. 287 line 19.

4. As of August 1, 2010, [MP] is certified by the State Department of Education as a Speech Language Therapy Assistant. This certification is valid until June 30, 2012. SE 98.

5. [MP] had a valid standard speech pathologist certification from the Oklahoma State Department of Education the entire time that the Student received speech therapy services. Tr. p. 285 line 21 through p. 286 line 3, SE 98.

6. [MP] has never lost her certification to provide speech services in schools by the Oklahoma State Department of Education, even after she failed her recertification test by 2 points. Tr. p. 337 lines 4-15.

### **Conclusions of Law**

1. The Petitioner has failed to prove by a preponderance of credible evidence that [MP] was not qualified by the Oklahoma State Department of Education to provide speech therapy services, including diagnosing, interpreting assessment results, and making appropriate recommendations for the Student. *Policies and Procedures in Special Education in Oklahoma, 2007, p. 180-81.*

2. Petitioner's claim has unnecessarily prolonged this litigation and caused the District to incur substantial and unnecessary legal expenses. The Hearing Officer instructed Petitioner's counsel to carefully review this claim, as well as two other claims relating to [MP], and that it was apparent that [MP] was certified through the Oklahoma State Department of Education and that is what was required. Petitioner chose not to pursue the other two claims but went forward with this one when certifications standards were uniform for all claims. *Prehearing Conference transcript, June 6, 2011, pp. 28 line 14 through page 20 line 18.*

**7(c) [MP] has not earned a Certificate of Clinical Competence in Speech-Language Pathology (CCC-LP).**

**7(d) [MP] is not qualified or certified to diagnose speech or language impairments, to interpret the results or to make recommendations for appropriate speech-language treatment.**

**Findings of Fact**

1. The Oklahoma State Department of Education does not require that a speech therapist be CCC-SLP certified in order to provide speech therapy services in Oklahoma public

schools. *Policies and Procedures in Special Education in Oklahoma, 2007*, p. 180-81, Related Services Personnel Qualifications.

2. From 2004 to June 30, 2010, [MP] had a standard certificate in speech pathology from the Oklahoma State Department of Education. Tr. p. 285 line 21 through p. 286 line 3; SE 98.

3. [MP] provided speech therapy services to the Student from approximately February of 2004 until January 20, 2010 for articulation issues. Tr. p. 284 lines 20 through p. 285 lines 7.

4. In 2010, [MP] had to take a certification examination teaching test for speech pathology because the State Department of Education had changed some regulations. [MP] did not pass the certification examination. However, during the summer of 2010 [MP] took a retooling class to retain her certification and passed the retooling class with an A. Tr. p. 286 line 4 through p. 287 line 19.

5. As of August 1, 2010, [MP] is certified by the State Department of Education as a Speech Language Therapy Assistant. This certification is valid until June 30, 2012. SE 98.

6. [MP] had a valid standard speech pathologist certification from the Oklahoma State Department of Education the entire time that the Student received speech therapy services. Tr. p. 285 line 21 through p. 286 line 3, SE 98.

7. [MP] has never lost her certification to provide speech services in schools by the Oklahoma State Department of Education, even after she failed her recertification test by 2 points. Tr. p. 337 lines 4-15.

8. In the thirty years that [MP] has provided speech services, she's never been advised by the State Department of Education that she: 1) could not administer speech language

assessments to students; 2) could not provide speech pathology services to students; 3) lacked the qualifications to interpret speech test results; or 4) lacked the qualifications necessary to administer the Arizona Articulation test. Tr. p. 334 line 10 through p. 335 line 11.

9. [BB] is a speech-language pathologist with the [name] County Special Education Co-Op. [BB] has worked in that capacity for the Co-Op for the past twenty years. [BB] has a master's degree in speech-language pathology and is certified by the Oklahoma State Department of Education for speech-language pathology. Additionally, [BB] holds Oklahoma Licensure by the Oklahoma Board of Examiners for Speech-Language Pathology and holds a Certificate of Clinical Competence from the American Speech-Language-Hearing Association. Tr. p. 345 lines 1 through p. 346 line 18.

10. Based on her training and twenty years of experience as a speech-language pathologist licensed by the Oklahoma State Department of Education, it is [BB]'s understanding that a speech pathologist licensed by the Oklahoma State Department of Education is authorized: (1) to conduct assessments in the areas of speech-language, (2) to provide speech-language services – that being therapy services to students within an educational setting in the common education schools of Oklahoma, and (3) to interpret the results of speech-language assessment. Tr. p. 458 line 14 through p. 459 line 5-20.

11. Based upon her training experience and certifications, [BB] believes that the administration of assessments, the providing of speech-language services, and the interpretation of assessment results that may have been provided by [MP] as a speech language pathologist licensed by the State Department of Education were within the scope of [MP]'s licensure. Tr. p. 459 line 21 through p. 460 line 4.

12. [BB] believes that based upon her training experience and licensure, [MP], as part of her certification as a speech pathologist by the Oklahoma State Department of Education, was authorized to give recommendations with regard to speech therapy issues affecting students in the public schools of the State of Oklahoma. Tr. p. 460 lines 5-11.

13. [BB] has known [MP], professionally, for eight to ten years. In that time, nobody has ever brought to [BB]'s attention any concerns with respect to any type of speech language evaluation [MP] conducted on students. Furthermore, during this period of time nobody has ever brought to [BB]'s attention any improper speech-language therapy that [MP] has given to students, and nobody has brought to her attention any issues related to the speech language services that were provided by [MP] to the Student, or any issues related to [MP]'s interpretation of assessment results for the Student. Tr. p. 460 line 12 through p. 461 line 17.

#### **Conclusions of Law**

1. The Petitioner failed provide any evidence that the Oklahoma State Department of Education requires a speech pathologist to be CCC-SLP certified to provide speech therapy services in Oklahoma public schools.

2. The Petitioner has failed to prove by a preponderance of credible evidence that [MP] was not qualified by the Oklahoma State Department of Education to provide speech therapy services, including diagnosing, interpreting assessment results, and making appropriate recommendations for the Student.

3. Petitioner's claim has unnecessarily prolonged this litigation and caused the District to incur substantial and unnecessary legal expenses. The Hearing Officer instructed Petitioner's counsel to carefully review this claim, as well as two other claims relating to [MP], and that it was apparent that [MP] was certified through the Oklahoma State Department of

Education and that is what was required. Petitioner chose not to pursue the other two claims but went forward with this one when certifications standards were uniform for all claims.

Prehearing Conference transcript, June 6, 2011, pp. 28 line 14 through page 20 line 18.

**7(e) [MP]'s lack of qualification is apparent from the fact that [the Student's] sole speech goal in the February 9, 2007, August 29, 1008 [sic] and January 20, 2009 IEPs was to demonstrate increased intelligibility by producing target sound in conversational speech with 80% accuracy. This "target sound" was not identified. This goal remained the same even though [MP] documented 80% accuracy throughout the 2008-2009 school year.**

### Findings of Fact

1. The Student's initial IEP is dated August 30, 2007 and was in effect from August 30, 2007 through August 29, 2008. SE 19, 23.

2. The Student's February 29, 2008 IEP was in effect from February 29, 2008 through January 20, 2009. S.E, 23, 28.

3. The Student' January 20, 2009 IEP was in effect from January 20, 2009 through January 19, 2010. SE 28, 38.

4. The Petitioner filed her initial due process complaint on February 28, 2011. Due Process Complaint Notice filed herein.

5. On his August 29, 2008 and January 20, 2009 IEPs, the Student had identical speech goals which indicated that the Student "demonstrate increase speech intelligibility by producing target sound and conversational speech with 80% accuracy" although the Student had reached this goal in speech therapy sessions, [MP] noticed that he was not generalizing certain sounds, like his letter R sounds, when he was outside of speech therapy such as on the playground. As a result, and because [MP] believed that the Student was capable of reaching 100% on his articulation, [MP] did not recommend discontinuation of speech therapy services

until the January 19, 2010, IEP team meeting. Tr. p. 316 lines 17 through p. 323 line 14; SE 23, 28.

6. [MP] believes that based upon the Student's progress, she could have recommended the cessation of speech services 6 months prior to when she did at the January 19, 2010, IEP team meeting. Tr. p. 322 line 19 through p. 323 line 4.

7. The speech goals on the Student's IEP did not contain a "target sound" as they were designed to address the Student's articulation related issues and communication skills in general. Tr. p. 340 lines 14-22.

8. [MP] believes that the Student is applying in real life what he was taught through speech therapy classes. Tr. p. 323 lines 15-18.

#### **Conclusions of Law**

1. The Petitioner's claims arising before February 28, 2009 are barred by the IDEA two-year statute of limitations.

2. The Petitioner has failed to prove by a preponderance of credible evidence that [MP] was not qualified by the Oklahoma State Department of Education to provide speech therapy services, including diagnosing, interpreting assessment results, and making appropriate recommendations for the Student.

3. Petitioner's claim has unnecessarily prolonged this litigation and caused the District to incur substantial and unnecessary legal expenses. The Hearing Officer instructed Petitioner's counsel to carefully review this claim, as well as two other claims relating to [MP], and that it was apparent that [MP] was certified through the Oklahoma State Department of Education and that is what was required. Petitioner chose not to pursue the other two claims

but went forward with this one when certifications standards were uniform for all claims.

Prehearing Conference transcript, June 6, 2011, pp. 28 line 14 through page 20 line 18.

**7(f) No assessment, testing or evaluation of [the Student] by a CCC-SLP was conducted when [MP] terminated speech therapy on January 20, 2010.**

**7(g) [MP] lacked the ability, qualification and credentialing required to determine that [the Student] no longer needed speech therapy, thereby causing substantive harm to [the Student] and denying a FAPE.**

### **Findings of Fact**

1. The Oklahoma State Department of Education does not require that a speech therapist be CCC-SLP certified in order to provide speech therapy services in Oklahoma public schools. Policies and Procedures in Special Education in Oklahoma, 2007, p. 180-81, Related Services Personnel Qualifications.

2. From 2004 to June 30, 2010, [MP] had a standard certificate in speech pathology from the Oklahoma State Department of Education. Tr. p. 285 line 21 through p. 286 line 3; SE 98.

3. [MP] provided speech therapy services to the Student from approximately February of 2004 until January 20, 2010 for articulation issues. Tr. p. 284 lines 20 through p. 285 lines 7.

4. In 2010, [MP] had to take a certification examination teaching test for speech pathology because the State Department of Education had changed some regulations. [MP] did not pass the certification examination. However, during the summer of 2010 [MP] took a retooling class to retain her certification and passed the retooling class with an A. Tr. p. 286 line 4 through p. 287 line 19.

5. As of August 1, 2010, [MP] is certified by the State Department of Education as a Speech Language Therapy Assistant. This certification is valid until June 30, 2012. SE 98. [MP] had a valid standard speech pathologist certification from the Oklahoma State Department of Education the entire time that the Student received speech therapy services. Tr. p. 285 line 21 through p. 286 line 3, SE 98.

6. [MP] has never lost her certification to provide speech services in schools by the Oklahoma State Department of Education, even after she failed her recertification test by 2 points. Tr. p. 337 lines 4-15.

7. In the thirty years that [MP] has provided speech services, she's never been advised by the State Department of Education that she: 1) could not administer speech language assessments to students; 2) could not provide speech pathology services to students; 3) lacked the qualifications to interpret speech test results; or 4) lacked the qualifications necessary to administer the Arizona Articulation test. Tr. p. 334 line 10 through p. 335 line 11.

8. [BB] is a speech-language pathologist with the [name] County Special Education Co-Op. [BB] has worked in that capacity for the Co-Op for the past twenty years. [BB] has a master's degree in speech-language pathology and is certified by the Oklahoma State Department of Education for speech-language pathology. Additionally, [BB] holds Oklahoma Licensure by the Oklahoma Board of Examiners for Speech-Language Pathology and holds a Certificate of Clinical Competence from the American Speech-Language-Hearing Association. Tr. p. 345 lines 1 through p. 346 line 18.

9. Based on her training and twenty years of experience as a speech-language pathologist licensed by the Oklahoma State Department of Education, it is [BB]'s understanding that a speech pathologist licensed by the Oklahoma State Department of Education is authorized:

(1) to conduct assessments in the areas of speech-language, to provide speech-language services – that being therapy services to students within an educational setting in the common education schools of Oklahoma, and (3) to interpret the results of speech-language assessment. Tr. p. 458 line 14 through p. 459 line 5-20.

10. Based upon her training experience and certifications, [BB] believes that the administration of assessments, the providing of speech-language services, and the interpretation of assessment results that may have been provided by [MP] as a speech language pathologist licensed by the State Department of Education were within the scope of [MP]’s licensure. Tr. p. 459 line 21 through p. 460 line 4.

11. [BB] believes that based upon her training experience and licensure, [MP], as part of her certification as a speech pathologist by the Oklahoma State Department of Education, was authorized to give recommendations with regard to speech therapy issues affecting students in the public schools of the State of Oklahoma. Tr. p. 460 lines 5-11.

12. [BB] has known [MP], professionally, for eight to ten years. In that time, nobody has ever brought to [BB]’s attention any concerns with respect to any type of speech language evaluation [MP] conducted on students. Furthermore, during this period of time nobody has ever brought to [BB]’s attention any improper speech-language therapy that [MP] has given to students, and nobody has brought to her attention any issues related to the speech language services that were provided by [MP] to the Student, or any issues related to [MP]’s interpretation of assessment results for the Student. Tr. p. 460 line 12 1.

13. In the thirty years that [MP] has provided speech services, she’s never been advised by the State Department of Education that: 1) she could not administer speech language assessments to students; 2) could not provide speech pathology services to students; 3) lacked the qualifications to interpret speech test results;

or 4) lack the qualifications necessary to administer the Arizona Articulation test. Tr. Vol. 2, p. 334 line 10 through p. 335 line 11.

14. [MP] administered the Arizona Articulation test to the Student on January 18, 2010. [MP] believes that errors in the articulation test are a reliable test for articulation. Tr. p. 291 lines 13 through p. 292 line 2; SE 39.

15. [MP] used the Arizona articulation test as the basis for supporting her recommendation to the IEP team that the student speech services be discontinued. [MP] scored the Arizona Articulation test on the date that it was given – January 18, 2010. Tr. p. 292 lines 3-10, p. 304 lines 7-19.

16. [MP] believes that she was qualified to use the Arizona articulation test on the Student and had received specific instruction on the administration of this test. Tr. p. 293 lines 5-25.

17. During her thirty years of providing speech language services in public schools, no one has challenged the test results as to the Arizona Articulation test administered by [MP] to a student. Tr. p. 340 line 23 through p. 341 line 6.

18. [MP] told [CH], the Student's special education teacher, that the Student had passed the Arizona Articulation test with a score of 100% correct. Tr. p. 305 lines 4-9.

19. [MP] was present at and participated in the Student's January 19, 2010 IEP team meeting and provided the results of the Arizona articulation test to the Student's mother at that meeting. Tr. p. 300 lines 9-12, p. 301 lines 13-22.

20. At the Student's January 19, 2010 IEP team meeting ("January 19, 2010 meeting"), [MP] explained to the Student's mother that he had met all of his speech goals. Tr. p. 309 line 22 through p. 310 line 3.

21. [MP] has never been in an IEP team meeting where one of the team members has disagreed with a recommendation from her that a student's speech services be discontinued. Tr. p. 313 lines 7-24.

22. At the January 19, 2010 meeting, [MP] verbalized that the Student no longer needed speech services. No members of the Student's IEP team, including the Student's mother, disagreed with her recommendation that the Student no longer needed speech services. Tr. p. 314 line 7 through p. 315 line 9.

23. At the January 19, 2010 meeting, the Student's mother did not ask any questions regarding speech. However, as [MP] explained she would often see the Student's mother at various places around town, like the post office, and she and the Student's mother would talk about the Student a lot and how he was doing. Tr. p. 315 lines 12-24.

24. [MP] believes that the Student is applying in real life what he was taught through speech therapy classes. Tr. p. 323 lines 15-18.

25. [BB] is familiar with the Arizona Articulation Proficiency Scale, [number] Revision, as well as the qualifications set forth within the test protocol for the person using that assessment. Based upon her experience as a mentor to [MP], her observations of [MP]'s work for a number of years, and [MP]'s licensure as a speech pathologist by the Oklahoma State Department of Education, [BB] believes that [MP] was qualified based upon the protocols of the Arizona Articulation Proficiency Scale, Third Revision, to administer that test to the Student prior to June 30, 2010. Tr. p. 455 line 20 through p. 458 line 5.

26. In her over twenty years as a licensed speech-language pathologist by the Oklahoma State Department of Education, [BB] has never been informed that speech pathologist

certified by the Oklahoma State Department of Education were not qualified to administer the Arizona Articulation Proficiency Scale, Third Revision. Tr. p. 458 lines 6-13.

27. In her twenty years as a speech-language pathologist licensed by the Oklahoma State Department of Education, [BB] has never been told that a speech pathologist licensed by the State Department of Education was not qualified to administer the Goldman-Fristoe Test of Articulation. Tr. p.458 lines 14-20.

28. It is [BB]'s understanding that a speech pathologist licenses by the Oklahoma State Department of Education is authorized to administer both of those tests. Tr. p. 458 lines 21-24.

### **Conclusions of Law**

1. The Petitioner has failed to prove by a preponderance of credible evidence that [MP] was not qualified by the Oklahoma State Department of Education to provide speech therapy services, including diagnosing, interpreting assessment results, and making appropriate recommendations for the Student.

2. The Petitioner failed to prove by a preponderance of credible evidence that from February 28, 2009 to present the Student's IEP were not written so as to confer a meaningful educational benefit in the least restrictive environment..

3. Petitioner's claim has unnecessarily prolonged this litigation and caused the District to incur substantial and unnecessary legal expenses. The Hearing Officer instructed Petitioner's counsel to carefully review this claim, as well as two other claims relating to [MP], and that it was apparent that [MP] was certified through the Oklahoma State Department of Education and that is what was required. Petitioner chose not to pursue the other two claims but

went forward with this one when certifications standards were uniform for all claims.  
Prehearing Conference transcript, June 6, 2011, pp. 28 line 14 through page 20 line 18.

**Parent Complaint Numbered Paragraph 13:**

**The District violated IDEA by failing to identify and fully evaluate [the Student], thereby violating IDEA.**

**13(a) The District failed to perform a functional behavior assessment in August 2007.**

**Findings of Fact**

1. A multidisciplinary evaluation and eligibility team summary (“MEETS”) was conducted on August 30, 2007 wherein the team determined that the Student qualified as Other Health Impaired due to an ADD diagnosis. SE 17.

2. The Petitioner filed her initial due process complaint against the District on February 28, 2011. *Due Process Complaint Notice* filed herein.

3. By Order dated May 6, 2011, the Hearing Officer denied Petitioner’s request to toll the statute of limitations and ordered that “all claims outside the two-year IDEA statute of limitations are barred from hearing in this case.” SE 107.

**Conclusions of Law**

1. The Petitioner’s claim is barred by the IDEA two-year statute of limitations.

**13(b) The District failed to evaluate [the Student’s] gross motor abilities with full knowledge that [the Student] is unable to run.**

**Findings of Fact**

1. The Student testified that when he is in high school he would like to play football because he likes to play football. The Student testified that he is able to go “noodling,” which

fishing for catfish with his bare hands with his father. Tr. p. 394 line 13 through p. 395 line 4, p. 398 lines 1-5.

2. The Student does not have a problem with falling asleep during recess because he is actually running around, playing basketball, getting hot, and sweating a lot. Tr. p. 414 line 1-4.

3. The Student is able to run and play at recess with the other students. Tr. p. 166 line 6 through p. 167 line 4; SE 83 ## 6, 7.

4. The Student ran around and played like other [number] grade kids. [CL], his [number] grade teacher, never noticed any problems with the Student running and the Student never told her he could not run. Tr. p. 903 lines 2-9.

#### **Conclusions of Law**

1. The Petitioner failed to produce any evidence whatsoever at hearing that the Student suffers any deficiency in his gross motor skills or is unable to run.

2. Petitioner's claim that the student is unable to run unnecessarily prolonged this litigation and caused the District to incur substantial and unnecessary legal expenses.

**13(c) [The Student] received swats for behavior problems on April 8, 2009, May 14, 2009, November 7, 2008, and December 5, 2008.**

#### **Findings of Fact**

1. The Petitioner filed her initial due process complaint against the District on February 28, 2011. Due Process Complaint Notice filed herein.

2. By Order dated May 6, 2011, the Hearing Officer denied Petitioner's request to toll the statute of limitations and ordered that "all claims outside the two-year IDEA statute of limitations are barred from hearing in this case." SE 107.

3. When a teacher brings a student the office for swats, that teacher has done everything they know to do to try to change the student's behavior that they are having problems with. The swats are a last resort. Tr. p. 934 lines 12-16.

4. The [name] School District allows for parents to opt out of swats. Tr. p. 934 line 24 through p. 935 line 2. Pursuant to the [name] Public Schools corporal punishment policy, when discipline is administered it is logged on PowerSchool and a letter is sent home to the Parent. The letter contains the exact language that is reflected in the teacher's log entry. An administrator signs the letter and it also has a place for the parent to sign. Tr. p. 936 lines 2-22; SE 92.

5. The [name] School District had consent from Petitioner to use corporal punishment on the Student. Prior to August 22, 2007, the Student's mother had not previously withdrawn consent to administer corporal punishment to Student. On August 22, 2007, the mother requested that the Student no longer receive swats. Tr. p. 956 lines 19-24, p. 957 lines 9-21, p. 958 line 10 through p. 959 line 14; SE 91 p.164.

6. On November 14, 2007, the Student's mother went to the school and requested that the Student again have swats. After November 14, 2007, the Petitioner never withdrew permission for the School District to administer corporal punishment to the Student. Tr. p. 959 lines 4-14; SE 91 p.163-164.

7. During his [number] grade year the Student was sent to the office for swats for refusing to even try to do his work and for getting mad and saying he is not going to do his work. Tr. p. 643 lines 11-18; SE 91 p.162.

### **Conclusions of Law**

1. The Petitioner's claims arising before February 28, 2009 are barred by the IDEA two-year statute of limitations.

2. School personnel may remove a child with a disability who violates a code of student conduct from his or her current placement to an appropriate interim alternative educational setting, another setting, or suspension, and for additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct. 34 C.F.R. § 300.530.

3. The Petitioner failed to prove by a preponderance of credible evidence that from February 28, 2009 to present the District failed to comply with the IDEA or its own policies concerning the imposition of discipline upon the Student. A manifestation determination was not required for the Student.

**13(d) [The Student] was required to sit out, a portion of recess and/or was suspended due to unfinished homework, failure to complete daily work and/or forgetting to bring homework on October 10, 2008, November 17, 2008, December 10, 2008, March 11, 2009, September 11, 2010, October 12, 2010, November 10, 2010, November 11, 2010, November 18, 2010, November 30, 2010, and January 28, 2011.**

**13(e) The District inappropriately withheld physical activity that is an essential 3 positive behavior intervention that enables a child with ADD to release pent up energy and avoid frustration.**

#### **Findings of Fact**

1. The Petitioner filed her initial due process complaint against the District on February 28, 2011. Due Process Complaint Notice filed herein.

2. By Order dated May 6, 2011, the Hearing Officer denied Petitioner's request to toll the statute of limitations and ordered that "all claims outside the two-year IDEA statute of limitations are barred from hearing in this case." SE 107.

3. The Student was never suspended due to unfinished homework, failure to complete daily work, and/or forgetting to bring homework. On November 11, 2010, he was suspended for one (1) day for fighting with another student. SE 91.

4. During the 2008-2009 school year the Student's [number] grade teacher, [[EC], made multiple entries regarding the Student's behavior in the behavior log. Tr. p. 598 line 13 through p. 599 line 14; SE 91.

5. In order to compensate for some of the time that the Student appeared asleep or inattentive, [EC] would have the Student sit out of PE or recess so that she could and would provide additional instruction to him on a one-on-one basis during that time. Tr. p. 603 line 19 through p. 604 line 21.

6. During his [number] grade year, [BL] did have the Student sit out of recess a couple of times for approximately five minutes each time in order to get the Student to bring his supplies to class. He also sat out a few times to try to get his math work done. This was not done as punishment, but because the Student had not worked on his math during the class time, and [BL] often assisted him with his work during recess time. For a couple of days this would make the Student get his work done in class. [BL] did not make the Student sit out if he was working on his assignments in class. It was only when he only completed a few problems and then slept the rest of the class. When he sat out he did not stay inside. He went outside with [BL] and sat outside on a chair with her where she could help him. Tr. p. 901 line 25 through p. 903 line 1, SE 91.

### **Conclusions of Law**

1. The Petitioner's claims arising before February 28, 2009 are barred by the IDEA two-year statute of limitations.

2. School personnel may remove a child with a disability who violates a code of student conduct from his or her current placement to an appropriate interim alternative educational setting, another setting, or suspension, and for additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct. 34 C.F.R. § 300.530.

3. The discipline alleged by Petitioner does not constitute a disciplinary removal.

(a) For purposes of removals of a child with a disability from the child's current educational placement under §§ 300.530 through 300.535, a change of placement occurs if –

(1) The removal is for more than 10 consecutive school days; or

(2) The child has been subjected to a series of removals that constitute a pattern –

(i) Because the series of removals total more than 10 school days in a school year;

(ii) Because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and

(iii) Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.

(b)(1) The public agency determines on a case-by-case basis whether a pattern of removals constitutes a change of placement.

(2) This determination is subject to review through due process and judicial proceedings.

34 C.F.R. § 300.356; 20 U.S.C. § 1415(k).

4. The Petitioner failed to prove by a preponderance of credible evidence that from February 28, 2009 to present the District failed to comply with the IDEA or its own policies

concerning the imposition of discipline upon the Student. A manifestation determination was not required for the Student.

**13(f) The ADD diagnosis and [the Student's] discipline record constitute clear evidence that [the Student] may need special education services.**

**Findings of Fact**

1. The Student has been on an IEP at the District and receiving special education services and modifications for ADD/Other Health Impaired since August 30, 2007. SE 19.

2. [PE] is employed as a mental health therapist for [name] Psychological services in name of town]. He is licensed in the State of Oklahoma as a licensed clinical social worker, LCSW. [PE] has an associate's degree in behavioral science from Seminole Junior College, a bachelor's degree in social work from East Central University, and a master's degree in social work from Oklahoma University. Tr. p. 20 line 21-22, p. 30 lines 14-18, p. 30 line 23 through p. 31 line 4.

3. [PE] conducted an evaluation of the Student around May or June 2011. [PE] did not give any formal assessments to the Student. The evaluation he performed is a series of questions asked to the Student and his mother about behaviors and things that the Student may have done or been observed doing by others that were presented as problematic by mom or someone else. As part of his assessment [PE] prepared a written report. Tr. p. 31 lines 5-9, 13-25, p. 46 lines 15-16, p. 83 line 19 through p. 84 line 4; Parent's Exhibit 52.

4. [PE] diagnosed the Student with Attention Deficit Hyper Activity Disorder Predominantly Inattentive Type. [PE] based the diagnosis of ADHD on observations of Student and questions he posed to Student's mother about behaviors that are consistently noted with this

diagnosis. [PE] made his diagnosis of the Student after only two sessions. Tr. p. 33 line 21 through p. 34 lines 2-6, p. 65 lines 8-11.

5. The symptomology that [PE] relied on included such things as failing to give close attention to detail and work often making careless mistakes that others would not make, not listening when spoken to directly, failing to complete tasks, easily distracted. There are a total of nine symptoms identified with ADHD Hyper Activity Disorder and Student met the criteria of six of those readily. It requires six of those symptoms in order to make a diagnosis. Tr. p. 34 lines 9-18.

6. [PE] testified that he did not make a diagnosis of this Student with Attention Deficit Disorder because he felt that the diagnosis of ADHD with the subset of Predominantly Inattentive was a better fit. [PE] testified that he does not think there is a great deal of difference between the ADHD Predominantly Inattentive diagnosis and an Attention Deficit Disorder diagnosis. Tr. p. 60 lines 3-14.

7. [PE] was not specifically asked to limit his assessment of the Student with respect to ADHD. [PE] made no other diagnosis of the Student except for Attention Deficit Hyper Activity Disorder Predominantly Inattentive. Tr. p. 69 lines 18-24.

8. At the time he wrote his report, [PE] did not see any other or find a basis for any other type of diagnosis. As of the date of his testimony, June 15, 2011, [PE] would not change his report and would have no additional diagnosis of the Student at this time. Tr. p. 69 line 25 through p. 70 lines 3-9.

9. [PE] testified that in the two hours with the Student prior to writing his June 6 report he did not see anything that indicated to him that the Student could not perform adequately at school. Tr. p. 54 lines 5-9.

10. [PE] testified that interventions appropriate in a classroom setting would be redirection, reinforcement, and graduating consequences. Tr. p. 88 line 25 through p. 89 line 9.

### **Conclusions of Law**

1. The Petitioner has failed to prove by a preponderance of credible evidence that since February 28, 2009 to present the District has failed to provide the student special education services to address the Student's ADD/ADHD diagnosis through his annual IEPs.

2. The Petitioner has failed to prove by a preponderance of credible evidence that since February 28, 2009 to present that the Student's IEPs, as written, were not calculated to provide a meaningful educational benefit.

3. The Petitioner has failed to prove by a preponderance of credible evidence that since February 28, 2009 to present that the Student was denied a free appropriate public education in the least restrictive environment.

### **13(g) The District was negligent in failing to identify or evaluate [the Student] for functional behavior.**

### **Findings of Fact**

1. The only behavior that the Student has exhibited from [number through number] grade that could be impeding his education is sleeping in the classroom. Tr. p. 597 line 23 through p. 598 line 12, p. 672 lines 11-14, p. 673 lines 19-22, p. 674 lines 10-13, p. 696 lines 23-24, p. 814 lines 20-22, p. 871 lines 9-17, p. 884 lines 16-22.

2. The Student's sleeping in the classroom is a problem during the mornings but is generally not an issue in the afternoons. The Student seems to become more alert around 11:00 a.m. Tr. p. 263 lines 13-20, p. 271 lines 24 through p. 272 line 20, p. 419 lines 12-16, p. 814 lines 12-17, p. 842 lines 1-5, 886 lines 2-25; SE 82.

3. The Student's IEP team discussed and considered his sleepiness in every IEP meeting from January 2009 through January 2011. Petitioner was present for all meetings and was part of the conversation regarding the Student's issues with sleeping in school, which resulted in his not getting his work done. Tr. p. 607 line 22 through p. 608 line 1, p. 672 lines 15-18, p. 674 lines 14-17, p. 872 lines 21-25.

4. The Student's IEP teams did not recommend that a functional behavior assessment be conducted to address the Student's sleepiness. Tr. p. 609 lines 14-17, Tr. p. 673 lines 12-18, p. 873 lines 17-22.

5. [EC] taught the Student during the 2008-2009 school year when the Student was in [number] grade. During the spring 2009 semester the Student fell asleep in class at least two or three times a week and [EC] estimates that the Student was asleep or inattentive approximately 20% of his day. Tr. p. 597 lines 1-9, p. 600 lines 10-13, p. 603 1-18

6. [EC] testified that in her opinion the Student was intentionally falling asleep and refusing to participate in class. [EC] testified that if the Student liked an assignment that they were working on in class the Student would stay awake. If he didn't, then he chose to close his eyes. Tr. p. 600 lines 5-8, 14-21.

7. [EC] had a conversation with the Student where she asked why he was refusing to participate or cooperate in class and his response was, "When it's fun I like it, and if not, I don't." [EC] testified that if the Student thought an assignment was fun he would do it. But if he didn't, he wouldn't. Tr. p. 600 line 22 through p. 601 line 1, p. 601 lines 15-24.

8. During the spring 2009 semester [CH] also observed that the Student was falling asleep during her direct reading instruction. [CH] testified that she does not recall if the Student was falling asleep everyday during the Spring Semester of 2009. The Student was falling asleep

on a regular enough basis that it made an impression upon [CH]. Tr. p. 669 lines 7-11, p. 669 line 25 through p. 670 line 7; SE 28.

9. The Student's IEP team discussed his sleeping in class in the January 20, 2009 IEP meeting. As part of the Student's IEP team, [EC] recommended interventions be implemented for the Student because of his behavior of inattention and sleeping in class. Interventions that were recommended for the Student when he was in [number] grade included speaking with his mother and moving the Student closer to the teacher at the front of the classroom. Tr. p. 607 line 22 through p. 608 line 1, p. 609 line 18 through p. 610 line 19.

10. [EC] testified that a verbal behavior intervention plan was created for the Student, though one was not written. Tr. p. 610 lines 14-19.

11. The Student's falling asleep in class continued during the 2009-2010 school year when the Student was in [number] grade. The Student continued to go to [CH] for direct instruction in reading. [CH] could not recall if the Student's sleeping was worse during that school year than it had been during the previous spring. The Student's sleeping was still significant enough that it caught [CH]'s attention during the 2009-2010 school year. Tr. p. 670 lines 12-23; SE 28, 38.

12. During the 2009-2010 school year, [LW] was the Student's [number] grade teacher. During the 2009-2010 school year while in [LW]'s classroom, the Student fell asleep approximately twice a week on average. Tr. p. 784 lines 22 through p. 785 line 1, p. 814 lines 12-17.

13. [LW] spoke with [CH] and [DC] about the Student's sleeping. [LW] also spoke with the Student's mother about it at the parent-teacher conference. Tr. p. 815 lines 3-9, p. 836 lines 13-17.

14. When [LW] spoke with the Student's mother about the Student's sleeping at the November 2009 parent-teacher conference, the mother indicated that he had a cold and was taking medicine before school and that was causing him to be drowsy. Tr. p. 815 lines 13-18, p. 842 lines 19-25.

15. The Student's mother also told [CH] that the Student was taking cough medicine and that's why he was sleepy. The Student's mother has also told [CH] that the Student was given one Benadryl and one Allegra every night. The Allegra was for his allergies and the Benadryl was to help him sleep, and that was what was making him sleepy. Tr. p. 749 lines 13-23.

16. In response to [CH] asking the Student why he is so sleepy, he has responded that he has stayed up late, they've been at his grandpa's late, they didn't get home until late, or sometimes he has said that he goes to sleep but wakes up. Most of the time the Student's response is that he goes to bed at seven or eight o'clock. [CH] testified that she believes the Student made these statements when he was in the [number] grade. Tr. p. 754 lines 3-19.

17. It seemed to [LW] that the Student's sleeping is a chosen response. If the Student was interested in a subject he usually did well on it and if it is a subject he is not interested in that would be about the time he would not finish his work or fall asleep. Tr. p. 844 line 22 through p. 845 line 9.

18. Positive interventions that [LW] used to address the Student's sleeping in class included speaking to him to try to rouse him, walking over to him and tapping him on the shoulder, allowing him to perform his work on a location in the classroom other than his desk, and allowing him to keep a bottle of water on his desk during the day. Tr. p. 835 lines 10-25.

19. After having heard that the Student's parents suggested that he be permitted to splash water on his face when he was sleepy, [LW] allowed him to do that also. The Student frequently splashed water on his face. These interventions seemed to help the Student somewhat but only for the short term. Tr. p. 836 lines 3-10.

20. During the 2010-2011 school year, during direct instruction in reading [CH] noticed the Student was asleep a lot but it was not everyday. Of the five hours a week that the Student was with [CH] she guessed that he was asleep approximately ninety percent of the time. Tr. p. 670 line 24 through p. 671 line 13.

21. [BL] was the Student's [number] grade teacher during the 2010-2011 school year. [BL] had a hard time keeping the Student awake. On average, the Student slept four days a week for approximately forty-five minutes to an hour a day. Tr. p. 852 line 23 through p. 853 line 2-6, p. 871 lines 9-17, p. 872 lines 3-11.

22. The Student's sleeping worsened toward the end of the 2010-2011 school year. Significantly, after the filing of due process, [BL] noticed that the Student slept a lot more in class and almost daily. One day when the Student was sleeping his fellow classmates tried to wake him up and the Student stated, "I don't have to." [BL] took the Student to the hallway and asked him why he said that and he responded that he did not know. Tr. p. 696 lines 24-25, p. 904 line 23 through p. 905 line 19; PE 55.

23. [BL]and [CH] would get together almost daily to discuss the Student's sleeping and positive interventions to address his sleeping in class. Tr. p. 887 line 25 through p. 888 line 11.

24. [CH] is familiar with the symptoms and signs associated with ADD. [CH] does not feel like it is the Student's ADD that is making him sleep. The Student is not just sitting at

the desk, getting bored and falling asleep. Rather, he comes straight into the classroom, puts his head down and goes to sleep. Tr. p. 695 lines 12-22, p.696 line 23 through p. 697 line 3.

25. When asked what time he went to sleep, the Student told [BL] he went to bed at 12:45 a.m. one time and at 2:00 a.m. another time. He also told her that even after going to bed, he could not sleep. When [BL] asked him about the sleeping, the Student would tell her, "I got to bed late." These conversations corresponded with dates that the Student was sleeping in class. Tr. p. 885 lines 11-22, p. 905 lines 7-22.

26. [BL] discussed the Student's sleeping with his mother. In those discussions, the Student's mother told [BL] that she was putting the Student to bed early. At one time she said she was putting him to bed at 7:00 p.m. Tr. p. 884 line 16 through p. 885 line 10.

27. [BL] had conversations with both the Student's IEP team and his mother regarding positive interventions to address his sleeping. The Student's mother suggested letting him get up and wash his face and letting him go to the restroom. Tr. p. 872 lines 21-25, p. 887 lines 3-13.

28. Specific interventions that [BL] used beginning in the fall of 2010 to address the Student's sleeping included allowing him to stand while he was doing his assignments. At one point when the sleeping was at its worst, he would stand up and do a problem, sit down and do a problem, stand up and do a problem. That worked pretty well for a little while. Other interventions [BL] implemented to address the Student's sleeping included allowing him to go wash his face with water and go walk up and down the hall a couple of times. He also brought wet paper towels back into the classroom to put on his neck and allowed to have a bottle of water at his desk. Tr. p. 903 lines 10-18, p. 903 line 19 through p. 904 line 2, p. 912 lines 12-21.

29. Another intervention to address the Student's sleeping included allowing him to utilize other furniture in the classroom. Other direct interventions that [BL] constantly used to keep the Student awake included standing beside him with her hand on his shoulder. For most of the year she also had the Student at the front of the class by her desk. Tr. p. 909 lines 1 through p. 910 line 12.

30. [BL] implemented several positive interventions to try to keep the Student on task. If the Student got his agenda signed all week, he got candy at the end of the week. If the Student got his work done and stayed awake, then he would get rewarded at the end of the week. [BL] would also allow the Student extra privileges if he got his math done. If he completed his assignment, [BL] would let the Student play a learning game on the computer, which he really liked. [BL] also praised the Student as a positive intervention. These interventions did not really appear to work. Tr. p. 887 lines 14-24, p. 904 lines 3-16.

31. Other positive interventions that [BL] utilized in an attempt to keep the Student on task included candy, stickers, participating in the end of the month classroom parties, putting marbles in a jar when he read his book, and having a party at the end of the nine weeks, along with everything else that she's already discussed. Tr. p. 912 lines 9-21.

32. Another intervention that [BL] tried during the Student's [number] grade year included using the tri-cut folder which allowed him to physically stand up and bring her the folder after completing four or five problems. It was [JF]'s suggestion to try the tri-cut folder during the January 13, 2011 meeting. [BL] implemented the tri-cut folder as soon as she returned to her room that day. This was the only intervention that [BL] had not been utilizing since the Fall of 2010. Tr. p. 888 line 12 through p. 889 line 12, p. 912 lines 12-21.

33. Another intervention discussed at and implemented after the January 13, 2011 meeting was that the Student's mother would make sure she reviewed and signed the Student's agenda every night and send it back to school the next day. Everyday [BL] wrote in the Student's agenda instead of having him do it and indicated everything that the Student needed to get done that day so the mother could review and sign it. [CH] wrote in the Student's agenda as well. Tr. p. 889 line 16 through p. 890 line 9.

34. None of the behavior interventions that [BL] utilized for the Student really worked. On days that the Student was going to sleep, that is just what he was going to do no matter what [BL] did. Tr. p. 910 lines 13-19.

35. [CH] spoke with the Student's mother numerous times from when the Student was in [number] grade through [number] grade if she knew any medical reason as to why the Student was sleeping in class. [CH] has had discussions with the Student's mother several times regarding the Student staying up late. The Student's mother always responds that she puts him to bed at 7 or 8 p.m. Tr. p. 696 lines 4-8, p. 749 lines 8-12, p. 754 line 20 through p. 755 line 1.

36. Over the years, [DC] received reports from the Student's teachers regarding the Student's sleeping in class. The Student's teachers and [DC] tried doing all kinds of things to keep the Student awake in class. [DC] testified that it seemed like they would try something different and it would work for little while then they would have to go back to square one and try something else. Tr. p. 949 lines 4-20.

37. [LW] had reported to [DC] that during [number] grade the Student was taking cough medicine or some other kind of cold medicine that was contributing to his sleepiness. [BL] and [CH] also talked to [DC] about the Student sleeping and that the Student was taking Benadryl for his allergies during [number] grade. [DC] did not feel like an evaluation of the

Student's sleeping needed to be done if medication was causing him to be sleepy. Tr. p.949 line 21 through p. 950 line 11.

38. At the January 13, 2011 meeting, there was discussion that the Student might need to be checked by a sleep specialist. The Student's IEP team discussed the Student's sleepiness at the January 13, 2011 meeting and recommended to the Student's mother and [JF], who was present at the meeting at request of the Student's mother, that the Student go to a doctor and see if there is a medical reason for his sleepiness. Tr. p. 672 lines 2-6, p. 984, lines 8-17, p. 1012, line 24 through p. 1013, line 4.

39. During the January 13, 2011 meeting, [CH] voiced a concern that she was worried about the Student's sleeping and the staff's inability to keep him awake. The Student's teachers thought the Student could do his work if he could stay awake. But, the Student's mother said that he had been tested and that she did not know why he was sleeping. Tr. p. 873 lines 12-16, p. 907 lines 14 through p. 908 line 1, p. 908 lines 5-12.

40. At the January 13, 2011 IEP team meeting, the Student's mother stated that the Student's physician had indicated that the Student had no medical condition that was causing him to sleep in class. Tr. p. 547 line 23 through p. 548 line 3.

41. The team noted on the Student's January 20, 2011 reevaluation documents that behavior is not a problem for this Student but he is very sleepy in class and wants to sleep a lot. The Student's sleeping was a concern in that it was a problem when it came to getting his work done and paying attention in class. Tr. p. 876 line 18 through p. 877 line 3, SE 58 p.134.

42. The Student's mother acknowledges that the Student has had problems sleeping in class since [number] grade and each year at the IEP team meeting the District teachers and [CH] have talked to her about the problems that this is causing. These conversations have been

consistent every year and District personnel have also called her on the phone and talked to her about the sleeping. The Student's mother testified that District personnel might have asked her for suggestions but she does not know. Tr. p. 1025, line 11 through p. 1026, line 2.

43. The Student's mother and [JF] discussed the Student's propensity to sleep in class during [JF]'s evaluation of the Student in late December 2010/early January 2011. [JF] and the Student's mother discussed the fact that teachers had concerns that the Student was sleeping in class. Furthermore, the Student's mother told [JF] that there was no medical basis for the Student's sleeping in class as the Student's physician had already evaluated him. Tr. p. 513 line 8 through p. 514 line 1; SE 77.

44. As part of her job at the [name] County Health Department, [JF] assists clients with outside resources, including resources broader than speech language services. With respect to the Student, [JF] only recommended that the parent request the School District to further evaluate the Student; she did not recommend any other outside resources to the parent. Tr. p. 512 line 19 through p. 513 line 7.

45. The Student's parent did not discuss obtaining a referral for a sleep disorder assessment with [JF] until after the January 13, 2011 meeting. It was not until less than thirty (30) days prior to the beginning of the due process hearing that [JF] recommended to the parent that the parent look into other reasons, aside from a medical reason, as to why the Student was sleeping in class. Specifically, [JF] suggested that the parent seek further assessment for sleep disorders and provided the names of a facility in [name of town], Arkansas and [name of town], Oklahoma. Tr. p. 514 line 5 through p. 515 line 4, p. 545 line 25 through p. 547 line 2.

46. Prior to January 13, 2011, Petitioner had taken the Student to his local family doctor specifically for the sleep issue. The doctor told her that the Student may be run down and

tired. Petitioner testified that prior to the January 13, 2011 IEP team meeting it had never occurred to her to have the Student checked by a specialist. Tr. p. 984, lines 21-24, p. 985, lines 1-10.

47. Petitioner testified that she was looking to the School District to assist her in figuring out what to do about the Student and that she's been trying to work with the School District. Tr. p. 985, lines 13-16.

48. After giving consent to the District to obtain the Student's medical records from [name] County Health Department on January 20, 2011 for the Student's reevaluation, the Student's mother wrote a document withdrawing that consent which states, "I do not want [name] County Health Department to release any information to [name] School," which she signed and dated February 8, 2011. The document contains the Student's mother's handwriting and signature. The document was created with the help of [JF]. Tr. p. 540 line 12 through p. 541 line 10, p. 1008, line 10 through p. 1009, line 14, p. 1010, lines 8-20, SE 78, p. 15.

49. The Petitioner filed her initial due process complaint on February 28, 2008 on the advice of [JF]. Tr. p. 1014 lines 20-23, p. 1018, lines 5-14; *Due Process Complaint Notice* filed herein.

50. The Student's mother also discussed the fact that the Student slept a lot during the school day with the Student's mental health therapist, [PE], in May or June 2011. [PE] testified that the Student's mother told him that the Student typically went to sleep between eight and ten o'clock at night and received eight hours of sleep. [PE] testified that the Student and his mother also told him that the Student falls asleep at home as well and that the sleeping is not strictly related to the behavior in a school setting. The Student's sleeping behavior factored into [PE]'s

diagnosis of the Student with ADHD Predominantly Inattentive. Tr. p. 60 line 23 through p. 61 lines 3-15, p. 61 line 23 through p. 62 line 13.

51. [PE] testified that interventions appropriate in the Student's classroom setting would be redirection, reinforcement, and graduating consequences. Tr. p. 88 line 25 through p. 89 line 9.

52. The Student has demonstrated that even though he may appear to be asleep and inattentive in the classroom, he is actually paying attention and able to give a correct answer to questions posed to the class. Tr. p. 263 line 21 through p. 254 line 10, p. 895 line 11 through p. 896 line 9; SE 82 p.4.

53. The Student admits that he sleeps a lot at school but thinks he learns at school. He testified that he goes to bed at eight o'clock and yet he still falls asleep in class. His mom then started making his bedtime seven o'clock in the evening, and he still falls asleep in class. The Student testified that when he goes to bed at seven or eight o'clock at night, he does actually go to sleep rather than playing in his room. The Student testified that he talks in his sleep, and tosses and turns. Tr. p. 395 lines 5-21, p. 396 lines 1-6.

54. The Student testified that he used to take little tablet pills before going to school that were suppose to help him stay awake. The Student testified that little pills that help him stay awake and alert were suggested to him by Dr. [name]. The Student could not remember the name of the pill. The Student testified that the pills are around at the stores and [name] is his main doctor. Tr. p. 399 lines 11-18, p. 400 lines 4-10.

55. The Student further testified that before he goes to bed he always takes allergy pills because his allergies are very bad and that the pills help him go to sleep too. The Student believes the pill that he takes at nights for his allergies is Benadryl. The Student testified that the

only medication he takes is the allergy pills. Tr. p. 399 lines 11-18, p. 403 lines 19-21, p. 416 lines 11-17.

56. The Student testified that he does not know what would help him stay awake in school. Tr. p. 429 lines 6-8.

57. The Student testified that he is getting some F's and some A's on his report card. The Student acknowledged that on his last report card he had a lot of F's and believes that he is getting some of those F's because he is not turning in his work. The Student testified that he does not know what he could do to turn in more work so he didn't get F's. Tr. p. 429 lines 22 through p. 430 line 24.

58. The Student testified that the only thing that he needs in the classroom on a daily basis that would help him do better in class is to stay awake. The Student testified that if he were not sleepy during the school day he could get A's in subjects except spelling and math. Tr. p. 423 lines 8-15, p. 430 lines 18-24.

59. [BG] conducted a functional behavior assessment on the Student dated May 20, 2011, indicating the only behavior of concern was the Student's sleepiness. The team was unable to come to a conclusion on the assessment and felt that medical information related to the Student's sleeping was required. SE 83.

60. The Student underwent a sleep study on June 2, 2011 at [name] Hospital of [name of town] by Dr. [name]. Dr. [name] indicates that the Student suffers from symptoms suggestive of a sleep-disordered breathing, snores loudly, and that his tonsils are very large. Dr. [name] also recommended that the Student undergo a follow-up evaluation for a diagnostic polysomnogram. The Student's mother testified that the Student had another evaluation performed on June 12, 2011 and that she has received the results of that evaluation. To date, however, those findings

have not been shared with the District. Tr. p. 1000 line 7 through p. 1001 line 1; Parent Exhibit (PE) 55.

61. An occupational therapy evaluation was conducted on the Student by The [name] Center, Inc. on May 6, 2011 which concluded that direct occupational therapy services are not recommended at this time. There was a recommendation to allow the Student to use oral stimulants (gum and candy), and that hand fidgets and/or a disco seat be used to try to keep his attention during class. The Student was provided gum during his OCCT testing at the end of the 2010-2011 school year in May 2011. The gum helped keep the Student alert for a little while, but not long term. SE 81; Tr. 167 line 17 through p. 169 line 6.

62. There are no assistive technologies that can assist with the Student's sleeping and inability to stay awake. Tr. p. 265 lines 1-8, p. 268 lines 14-18.

### **Conclusions of Law**

1. The Petitioners claims arising before February 28, 2009 are barred by the IDEA two-year statute of limitations.

2. The standard the District is to be held to is not "negligence," it is whether a failure to conduct a functional behavior assessment deprived the student of a free appropriate public education. 20 U.S.C.A. §§ 1401(9), 1412(a)(1), 1414(b).

3. Petitioner's claim that the District should have conducted a functional behavior assessment for the Student is an alleged IDEA procedural violation. *Edwin K. v. Jackson*, 2002 WL 1433722, \*13, 37 IDELR 63, 12 (N.D. Ill. July 2, 2002), *see Rowley*, 458 U.S. at 206. However, "[p]rocedural flaws do not automatically require a finding of a denial of a FAPE." *Edwin K. v. Jackson*, 2002 WL 1433722 \*14, 37 IDELR 63, 13.

4. "In all matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate education only if the procedural inadequacies (i) impeded the child's right to a free appropriate public education; (ii) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or (iii) caused a deprivation of educational benefits." 20 U.S.C. § 1415(f)(3)(E)(ii); *O'Toole v. Olathe District Schools Unified School District No. 233*, 144 F.3d 692, 707 (10<sup>th</sup> Cir. 1998) (quoting *Roland M. v. Concord School Committee*, 910 F.2d 983, 994 (1<sup>st</sup> Cir. 1990)).

5. There are two instances when a behavior intervention plan is possibly warranted; 1) when the school imposes certain disciplinary sanctions on a disabled child, 20 U.S.C. 1415(k)(1), and 2) when a disabled student exhibits behavior that impedes the learning of himself or others. 20 U.S.C. § 1414(d)(3)(B)(i).

6. When a student's behavior impedes his own education, the IEP team is to consider the use of positive behavioral interventions. "In the case of a child whose behavior impedes the child's learning or that of others, [the IEP team shall] consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." 20 U.S.C. § 1414(d)(3)(B)(i).

7. (a) Development of IEP.
- (1) General. In developing each child's IEP, the IEP Team must consider –
    - (i) The strengths of the child;
    - (ii) The concerns of the parents for enhancing the education of their child;
    - (iii) The results of the initial or most recent evaluation of the child; and

- (iv) The academic, developmental, and functional needs of the child.
- (2) Consideration of special factors. The IEP Team must –
  - (i) In the case of a child whose behavior impedes the child's learning or that of others, **consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior;**

34 C.F.R. § 300.324(a) (emphasis supplied).

8. A written behavior intervention plan is not statutorily necessary. *See* 20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a), *Edwin K. v. Jackson*, 2002 WL 1433722 \*14, 37 IDELR 63, 13. The mere absence of a behavior intervention plan is not evidence that a school district did not “consider” strategies to address the student’s behavior, which is all the statute requires. 20 U.S.C. § 1414(d)(3)(B)(i), *J.K. ex rel. Kraft v. Metropolitan Sch. Dist.*, 2005 WL 2406046 \*19 (N.D. Ind. Sept. 27, 2005)

9. When an IEP team considers and implements positive behavioral interventions, strategies, and supports, rather than ignoring the behavior, a written behavior intervention plan is not necessary. *J.K. ex rel. Kraft v. Metropolitan Sch. Dist.*, 2005 WL 2406046 \*18-19.

10. The Petitioner has failed to prove by a preponderance of credible evidence that since February 28, 2009 to present the District failed to consider the use of positive behavioral interventions and supports to address the Student’s sleeping. *Id.* at \*19.

11. The Petitioner failed to prove by a preponderance of credible evidence that the absence of a functional behavior assessment or behavior intervention plan 1) impeded the Student’s right to a free appropriate public education, 2) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the Student, or 3) caused a deprivation of educational benefits.

12. The credible testimony and evidence presented at hearing establishes that the specific interventions and strategies that the District implemented to address the Student's in-class sleeping served the same purpose as a behavior intervention plan.

13. The credible testimony and evidence presented at hearing demonstrates that the Student's IEP teams, which includes the Student's mother, have consistently considered and implemented numerous positive behavior interventions to address the Student's sleeping in class. Tr. p. 696 lines 23-24, p. 835 lines 10-25, p. 836 lines 3-10, p. 887 lines 14-24, p. 888 line 12 through p. 889 line 12, p. 903 line 10 through p. 904 line 16, p. 909 lines 1 through p. 910 line 12, p. 949 lines 4-20, p. 1025 line 11 through p. 1026 line 2.

## **VI. SUMMARY OF DECISION**

The Hearing Officer Finds that:

1. The District provided the Student with a free and appropriate public education (FAPE) in the least restrictive environment during the applicable time period that is before this Hearing Officer for review. To this end, the District fully and properly considered extended school year services during all IEP team meetings that are properly before this Hearing Officer. The Student's IEPs were appropriate and conferred a meaningful educational benefit. Petitioner has failed to meet her burden in establishing that the child regressed and was in need of end of school year services. The District's failure to strictly adhere to each and every component of the Student's IEPs was a trivial omission, at worst, and it did not result in the denial of FAPE. Petitioner substantially and meaningfully participated as part of the decision making group at all IEP team meetings.

2. The District complied with all IDEA evaluation and re-evaluation requirements.

3. Petitioner has failed to meet her burden of proof (beyond a preponderance of the evidence) as to each and every claim she has brought to hearing before this Hearing Officer. Petitioner is granted no relief.

4. Moreover, several of Petitioner's claims have unnecessarily prolonged this litigation and caused the District to incur substantial and unnecessary legal expenses. These are identified under the Conclusions of Law sections herein.

## **VII. CONCLUDING STATEMENTS**

The Hearing Officer's findings and conclusions [are] not intended to parrot those submitted by the District. However, the similarities of the entered findings and conclusions to those requested by the District are a function of the evidence presented at Hearing by Parent that was unresponsive of the claims made and remedies requested by Parent in light of governing law.

While the Parent has this Hearing Officer's sincere sympathies for her frustrations in attempting to ensure that her child receives what she perceives to be the desired public education for her child, the evidence presented in no manner supports the claims presented or the relief requested.

Petitioner's request for relief is denied in full.

## **VIII. NOTICE OF RIGHT TO APPEAL**

Unless appealed, this decision is binding upon both parties. Either party may appeal this decision by filing a written request with Malissa Cook, Special Education Section, State Department of Education, 2500 North Lincoln Boulevard, Oklahoma City, Oklahoma, 73105, within thirty days of the receipt of this decision.

August 19, 2011

//signature  
Catherine Welsh

## APPENDIX 1 – WITNESS LIST

### **For the Petitioner/Parent:**

[PE] Counselor, [ ] Psychological Services, [ ], Oklahoma

[BG], School Psychologist, [ ] County Special Education Co-Op,

[SO], speech-language pathologist, University of [name]

[MP], speech language therapy assistant, [ ] Public Schools (formerly speech-language pathologist)

[BB], speech-language pathologist, [ ] County Special Education Co-Op

[ML], Student

[JF], speech-language pathologist, [ ] County Health Department

[EC], teacher,.

[CH], special education teacher,

[LW], teacher.

[BL], teacher.

[DC] Special Education Director

Parent of M.L. and Petitioner herein

### **For the Respondent/District:**

None.

## APPENDIX 2 – ADMITTED AND NON-ADMITTED EXHIBIT LIST

### ADMITTED EXHIBITS

#### For the Petitioner/Parent (See Attached Exhibit 2-A):

**Volume 1: Exhibits 1-55:** See attached Witness and Exhibit List, Appendix A-1, as well as Exhibit information as to Exhibit 54 and 55, below, which were presented at Hearing.

**Exhibit 50:** Exhibit 50 is the same as District's Exhibit 84, only page one of the Exhibit is admitted into evidence.

**Exhibit 54:** Examination Record, Tamatha Hold, O.D., dated June 8, 2011

**Exhibit 55:** Sleep Study performed by Dr. Arturo Meade, MD, Healthsouth Rehabilitation Hospital of Fort Smith, dated and signed June 7, 2011

#### For the Respondent/District (See Attached Exhibit 2-B):

**Volume 1: Exhibits 1-71**

**Volume 2: Exhibits 72-74, 77-86, and 89-110 (75, 76, 87, 88, and 110 are blank exhibits and not admitted into evidence).**

**Exhibit 84:** Exhibit 84 is the same as Parent's Exhibit 50, only page one of the Exhibit is admitted into evidence.

### NON-ADMITTED EXHIBITS

#### For the Petitioner/Parent:

**Exhibit 29:** not admitted into evidence.

**Exhibit 51:** not admitted into evidence

**CERTIFICATE OF MAILING**

I hereby certify that on August 19, 2011, I e-mailed and mailed, via certified United States mail, return receipt requested, correct postage thereto pre-paid and affixed, a true, correct, and exact copy of the above and foregoing Order, to:

**VIA CERTIFIED MAIL 7007 3020 0436 6629**

**RETURN RECEIPT REQUESTED**

Parent Attoreny

**VIA CERTIFIED MAIL 7007 3020 0000 0435 6636**

**RETURN RECEIPT REQUESTED**

School District Attorney

**VIA CERTIFIED MAIL 7007 3020 0000 0435 6681**

**RETURN RECEIPT REQUESTED**

Special Education Resolution Center

//Signature  
Catherine Welsh