



OFFICE OF ADMINISTRATIVE HEARINGS
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
STATE OF HAWAII

In the Matter of

STUDENT, by and through Parents,

 Petitioners,
 vs.

DEPARTMENT OF EDUCATION,
STATE OF HAWAII,

 Respondent.

DOE-SY1617-041

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND DECISION

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DECISION**

I. INTRODUCTION

On January 18, 2017, the Department of Education, State of Hawai'i ("Respondent" or "DOE") received a Request for a Due Process Hearing ("Request") under Hawai'i Administrative Rules ("HAR") Title 8, Chapter 60 from Student, by and through Parents, (collectively referred to as "Petitioners").

On February 3, 2017, the parties participated in a Resolution Session. The Request was not resolved at that time.

A pre-hearing conference was held on February 23, 2017, before Hearings Officer Rowena A. Somerville, with Kirstin Hamman, Esq. representing Petitioners; and Gregg M. Ushiroda, Esq. representing Respondent. Ms. Hamman participated via telephone conference. The due process hearing was scheduled for May 22 through 25, 2017. At the pre-hearing conference, Respondent's counsel orally requested an extension of the 45-day time limit in which a final decision is due from April 4, 2017 to May 18, 2017, and from May 19, 2017 to July 3, 2017. Petitioners had no objection.

On February 27, 2017, Respondent's counsel submitted a Declaration to the undersigned Hearings Officer to extend the 45-day period in which a decision is due under HAR §8-60-69, from April 4, 2017 to May 18, 2017, and from May 19, 2017 to July 3, 2017. The extension was granted on March 7, 2017.

On March 28, 2017, Petitioners filed a Motion for Summary Judgment ("Motion").¹ Petitioners sought summary judgment in their Request. On April 17, 2017, Respondent filed its Memorandum in Opposition, and on April 21, 2017, Respondents filed the original declarations. On April 24, 2017, a hearing on the Motion was held before the Hearings Officer. Respondents were represented by Mr. Ushiroda; Petitioners were represented by Ms. Hamman and Parent 1. Ms. Hamman and Parent 1 participated via telephone. Petitioners' Motion for Summary Judgment was denied on April 28, 2017. The Hearings Officer found that there were genuine issues of material fact, and Petitioners had not met their burden.

On May 12, 2017, Respondents filed their Witness and Exhibit list and Exhibits.

On May 15, 2017, Respondents filed its Opening Brief, and Petitioners filed their Witness and Exhibit list.

On May 22, 2017, Petitioners filed its Opening Brief.

On May 22, 2016, the hearing was commenced at ___ by the undersigned Hearings Officer. Petitioners were represented by Ms. Hamman; Parent 1 and Parent 3 were present. Respondent was represented by Mr. Ushiroda; the Department of Education ("DOE") District Educational Specialist ("DES") was present on behalf of Respondent.

At the start of the hearing, Ms. Hamman notified the Parties that she did not receive Respondent's Witness and Exhibit list and Exhibits until May 17, 2017. The Pre-Hearing Order filed on February 24, 2017 stated:

Pursuant to HAR §§8-60-66(a)(3) and 8-60-66(b), all evaluations and recommendations that the parties intend to use at the hearing; opening briefs; witness and exhibit lists; and all exhibits shall be exchanged between the parties and filed with the Office of Administrative Hearings, no later than 4:30 p.m., May 15, 2017 (*five business days prior to the convening of the hearing on May 22, 2017*). ¶4. Any party that fails to comply with the provisions of HAR §§8-60-66(a)(3) and 8-60-66(b), may be barred from introducing the contested exhibits, evaluations, or recommendations at the hearing without the consent of the other party pursuant to HAR §§8-60-66(a)(3). ¶5. (emphasis in original).

¹ The caption on the Motion reads, "Motion for Summary Judgment." The title of the Motion reads, "Motion to Dismiss or in the Alternative for Summary Judgment." Petitioners requested "Summary Judgment on page 8 of the Motion.

Respondent did not have a delivery receipt for the exhibits. Ms. Hamman stipulated to Respondent's exhibits 1 through 5, 6, with the exceptions of pages 35 through 43, 7 through 10, 15, 17, 19, 26, and the portion of audio in exhibit 29 that pertained to Student. TR 9:1-13

On May 31, 2016, Mr. Ushiroda submitted a Declaration to extend the 45-day period in which a decision is due pursuant to HAR §8-60-69, from July 4, 2017 to August 7, 2017, so that the transcript could be prepared and the post-hearing briefs filed. Respondent's counsel had no objection to the request for extension. The extension was granted on June 2, 2017.

Having reviewed and considered the evidence and arguments presented, together with the entire record of this proceeding, the Hearings Officer renders the following findings of fact, conclusions of law and decision.

II. ISSUES PRESENTED

In their January 18, 2017 Request, Petitioners allege procedural and substantive violations of the Individuals with Disabilities Education Act ("IDEA"). Specifically, Petitioners allege that the DOE denied Student a free appropriate public education ("FAPE"). Petitioners raise the following issues:

- A. The DOE failed to find Student eligible for IDEA services at the October 5, 2016 Eligibility meeting;
- B. The DOE failed to consider the private evaluation of Speech Language Pathologist ("Private SLP 1");
- C. The DOE retaliated against Student, as Student no longer receives occupational ("OT") services; and
- D. The Functional Behavioral Assessment ("FBA") was conducted, but the DOE failed to develop a Behavioral Intervention Plan ("BIP").²

Petitioners request the following relief:

- A. Find Student eligible for SPED and related services under the IDEA;
- B. Order Respondent to develop an Individualized Education Program ("IEP") with specifically designed instruction;
- C. Order education and training for DOE's representatives, specifically Student's IEP team on the IDEA, eligibility, and child find issues
- D. Reimbursement for out-of-pocket expenses for private services; and
- E. Compensatory education.

After Petitioners rested their case, Respondent made an oral “Motion for a Decision on the Hearing.” The Hearings officer granted Respondent’s Motion on Petitioners’ claim that the DOE retaliated against Student, as Student no longer receives OT services (Issue “C”), as there was no evidence of retaliation presented in Petitioners’ case in chief. Issue “C” was dismissed. TR 256:11-16

III. FINDINGS OF FACT

1. Student was born on _____. Pet. Exh. 1 at 001.
2. At the time of the hearing, Student was in the ____ grade at the Home School. TR 51:14-17.
3. Student has been diagnosed with _____. Student also has sensory issues. TR 51:18-20.
4. Student was first diagnosed with language delays after the first birthday, because Student’s speaking was not age appropriate. Student received a speech evaluation and started weekly speech and language therapy (“SLT”). TR 51:21 – 52:18.
5. Student’s teacher raised concerns, and had Student receive occupational therapy and speech and language evaluations. Student received weekly occupational therapy and SLT. In ____ grade, Student also received special education (“SPED”) services in the classroom. TR 52:20 – 53:24.
6. In January through February 2012, the DOE conducted a Speech Language Evaluation, a Social Family Assessment, an Academic Assessment, a Psychoeducational Evaluation, and a Behavioral Observation of Student. Pet. Exhs. 13-19.
7. Student’s March 7, 2012 IEP provided Student with 360 minutes of SPED services per quarter. The supplementary aids and services included: provide clear and concise directions; prompt and redirect as needed; allow for movement break; regulation plan; and occupational therapy (“OT”) consultation. Pet. Exh. 26 at 205.
8. When Student attended ____ grade, the Home School determined that Student no longer required services. TR 54:2-7.
9. Parent 1 testified that Student struggled in the ____ grade. The Home School notified Parent 1 that Student had behavioral problems and was distractible at school. Student was impulsive, did not speak clearly, bothered other students, interfered with classwork, and

² “BIP” is synonymous with “BSP.”

took a longer amount of time to complete assignments. At the time, Student did not have an Individualized Education Program or accommodations provided in Section 504 of the Rehabilitation Act of 1973 (“504 Plan”). TR 54:12 – 25; TR 56:3-12.

10. On September 3, 2014, the prior Home School emailed the DOE OT to discuss Student’s sensory needs. The prior Home School stated that Student “has some sensory needs and we could use your expertise to get Student on some sensory schedule/diet.” Pet. Exh. 22 at 149.

11. On September 9, 2014, the DOE OT emailed the General Education Teacher 2 and the SSC to meet the next day to discuss Student’s sensory needs. DOE OT stated that Student “stands out as seeking additional sensory input—taking the long way around to do a simple task such as placing a paper in the trash, putting Student’s glue bottle away, walking around the room 2-3 times farther than what Student’s peers might have taken. Student also said things that didn’t make sense in response to what was happening and I imagine it was puzzling, maybe even off putting to someone in the class. That is, Student made comments unrelated to the current topic. So, in these cases I would recommend that [Student] learn activities that expend energy that are not as obvious as walking around the classroom. I could see teaching [Student] isometric exercises and yoga/Tai Chi poses (push hand, chair push-ups, self-pressing at biceps or thighs, for example) would be of benefit to Student. Student might also need to be taught some social rules (like a social story).” Pet. Exh. 22 at 148.

12. On October 29, 2014, the Home School held a Section 504 eligibility meeting. Pet. Exh. 20.

13. The Prior Written Notice (“PWN”) dated October 29, 2014 stated that the eligibility team determined that there was sufficient information to move towards 504 eligibility determination. No updated formalized testing was needed. Pet. Exh. 21 at 141.

14. After the eligibility determination, the Home School conducted a 504 meeting the same day. The Present Level of Performance (“PLEP”) section stated that Student was at grade level in reading, writing and math. The needs section stated Student “does display unique sensory needs that can interfere with Student’s learning.” The educational team determined that a 504 Plan was appropriate to document needed classroom accommodations. Student needed movement breaks, access to sensory activities, and visuals. Pet. Exh. 20 at 123-124.

15. The 504 Plan provided the following accommodations: 1) movement breaks (within Student’s own personal space) access to sensory room as needed; when appropriate provide deep pressure; 2) providing visual schedule of routines; 3) re-direction/repeating

instruction as needed; 4) instructional pacing (break up instruction to smaller parts); and 5) monitor Student to ensure Student starts and continues Student's assignments. Pet. Exh. 20 at 124; TR 63:12-21.

16. The PWN dated October 29, 2014 stated that Student "needs a 504 plan to document specific classroom accommodations due to Student's sensory needs." Pet. Exh. 21 at 140.

17. Parent 1 continued to have concerns about Student in the ___ grade year. Student was frustrated and seemed to regress. Homework was increasingly frustrating and it took Student a long time to complete it. Parent 1 was concerned that Student was not receiving appropriate support and started seeking independent evaluations over the summer months. TR 55:6-11; TR 65:18-24.

18. On May 26, 2015, the General Education Teacher 2 completed the Behavior Assessment System for Children, Second Edition ("BASC-2"). The General Education Teacher 2 had known Student for ten months. General Education Teacher 2 scored Student as "never" on the following statements:

- Analyzes the nature of a problem before starting to solve it
- Is able to describe feelings accurately
- Has trouble getting information when needed
- Quickly joins group activities
- Is good at getting people to work together
- Makes suggestions without offending others
- Is usually chosen as a leader
- Shows interest in others' ideas

Student scored "always" on the following statements:

- Bothers other children when they are working
- Acts without thinking
- Is unclear when presenting ideas
- Does strange things
- Has poor self-control
- Seems unaware of others
- Disrupts the schoolwork of other children

- Acts strangely³

Pet. Exh. 12 at 066-067

19. On May 26, 2015, the General Education Teacher 2 completed the _____ form. Student scored “very frequently” on the following questions:

- Uses language that was immature for Student’s age
- Has social problems with children of the same age
- Repeats certain words or phrases out of context
- Repeat or echo what others said
- Becomes distracted
- Fails to complete tasks
- Asks questions that were off-topic
- Interrupt or intrude on others

Pet. Exh. 12 at 068-069.

20. On May 26, 2015, the General Education Teacher 2 completed the Sensory Profile Teacher Questionnaire. Student scored “almost always” on the following statements:

- Hums, whistles, sings, or makes other noises throughout the day
- Comes too close into other people’s personal space when talking
- Touches people and objects to the point of irritating them
- Is inefficient in doing things (e.g. wastes time, moves slowly, makes tasks more complicated)

Pet. Exh. 12 at 070-073.

21. The private Neuropsychologist evaluated Student on May 27 and 28, 2015 and on June 2, 2015. Student was referred for an evaluation due to socialization problems in the academic setting. Parents reported that Student experienced disabilities that wax and wane. Student was previously evaluated by the DOE, but the results were inconclusive. Pet. Exh. 8 at 034.

22. The private Neuropsychologist conducted an interview with Parent and Student. Parents completed the Symptom Survey Portion of the Child Neuropsychological History Questionnaire. Teacher completed the School Report Questionnaire. Student completed the Assessments..

³ Student scored “never” and “always” on other statements that were not included on these lists.

23. The teacher responses to the School Report Questionnaire indicated that Student “struggles with comprehending spoken grade-level words...Student is often distracted by movement and noise and is often confused by large group activities. Student often daydreams, fiddles, or is slow to respond. Student requires extra explanations, and Student rarely assumes responsibility for Student’s own work. Student is often restless, wiggly, out of seat without permission, and disrupts or disturbs other children. Student has difficulty getting Student’s work done on time and sometimes struggles with talking excessively. One of Student’s biggest challenges is Student’s tendency to invade the personal space of other classmates. Student sits very close to them and often touches them on the arms and legs.” Pet. Exh. 8 at 035.

24. The private Neuropsychologist noted that Student’s weaknesses in language production and language processing are contributing to Student’s social challenges. These weaknesses were possibly contributing to Student’s anxiety in social situations where Student may have difficulty expressing Student’s needs to a stranger. Pet. Exh. 8 at 036.

25. A report stated that Student often makes noises that Student cannot control, repetitive clapping, and Student experiences actions repeatedly. Student has bad thoughts, bad words, or silly ideas that frequently occur throughout the day, but Student feels most times Student is able to prevent them from actually happening. Student’s actions increase when Student is anxious. Student told the private Neuropsychologist and Student’s verbal responses did not bother Student; however, Student’s responses to the assessments indicated that the problems impacted Student’s self-esteem. Student indicated that Student doesn’t always feel proud about the things Student does and is unhappy with Student’s body. Pet. Exh. 8 at 036-037.

26. Student was administered an assessment. The results were minimally into the significant range for symptoms of attention and impulsivity. Error analysis revealed that Student’s primary errors were in difficulty adjusting Student’s responses to the changes in speed. Pet. Exh. 8 at 038.

27. Student’s performance on the assessment indicated that Student was far more able to attend and accurately respond to non-verbal attention tests. Student was considerably weaker on verbal attention tasks, primarily due to difficulty with impulse control over verbal output. This finding suggested that what appears to be an attention issue, and may well be related to a disability. Further weaknesses in language production itself could further impact Student’s performance. *Ibid.*

28. The private Neuropsychologist found that Student met the criteria for a disability. These symptoms further compounded Student’s social difficulties. It was highly likely that

Student's invasion of personal space was another form, which Student has little ability to control. Another "major impact" of the disability was the toll it can take on one's ability to focus and concentrate. The repetitive nature of the acts was often quite distracting to the individuals themselves, particularly if they were attempting to control the acts, or if they were attempting to complete work while suffering from the repetitive interruption of the acts. Acts interrupted Student's focus and Student's ability to remember to follow through on tasks Student was instructed to complete, as such, what appears to be a memory issue might really be an attention issue. Pet. Exh. 8 at 039-040.

29. The private Neuropsychologist made the following recommendations: 1) updated speech and language testing, as well as identifying appropriate support services; 2) behavioral interventions for management of actions; 3) allow Student to keep Student's hands busy during group or circle time to distract Student from other behaviors; 4) ongoing school or private therapy to address self-esteem issues that are impacted by Student's disability; and 5) provide Student with the option to step outside of the classroom to allow for release of a buildup of actions. Pet. Exh. 8 at 040.

30. With respect to Student's secondary problems with attention and impulsivity, the private Neuropsychologist recommended the following: 1) provide Student with a written outline of instructions for tasks so that when Student loses focus, Student can use the written instructions to re-orient to the task at hand; 2) break work into smaller parts and intersperse short, structured breaks to help maintain focus and support task completion; and 3) where possible, consider assigning less work, as long as Student demonstrates and understanding of the new material. Pet. Exh. 8 at 041.

31. On July 8, 2015, Private SLP 2 conducted a speech therapy evaluation of Student. Parent 1 had requested the evaluation because Parent 1 noticed that Student was having difficulty at school, and the private Neuropsychologist recommended it. Private SLP 2 evaluated Student two times at Private SLP 2's office. Student could not complete the evaluation in one session because Student exhibited distractibility. Pet. Exh. 7.

32. Private SLP 2 administered the Clinical Evaluation of Language Fundamentals, third edition ("CELF-3"), receptive one-word picture vocabulary test, and pragmatic check list. Student's scores indicated that Student's receptive language skills were in the lower end of average and Student's expressive skills were slightly below the low end of average. Pet. Exh. 7.

33. Private SLP 2 stated, "[b]ased on the above testing, [Student] is demonstrating language skills in the lower average (receptive and vocabulary) to slightly below average

(expressive language). Although Student's social pragmatic skills were adequate during testing, I can see how in a group setting Student would have difficulty because of Student's lower language skills." Private SLP 2 recommended that Student receive speech services to address Student's language skills – expressive, receptive and social. Based on the possible problems one can display (use of inappropriate language, auditory processing, attention difficulty, social skills deficits) an individual and a group session would be appropriate. Private SLP 2 recommended "[s]killed speech therapy to address: communication, cognition, swallowing, education to caregivers and to create/modify home program." Pet. Exh. 7 at 031.

34. On July 20, 2015, Parent 1 wrote the SSC about Student's diagnosis and attached the private Neuropsychologist's and Private SLP 2's reports. Parent 1 also attached materials to be shared with the General Education Teacher 3 and the DOE Psychologist. Parent 1 stated that Student displayed disinhibition, oppositional behavior, immaturity, sensory integration issues, attentional difficulties, and impulsivity. Parent 1 was concerned about the impact those behaviors would have on Student's educational performance and social emotional well-being. Parent 1 described Student's challenges and proposed interventions:

- Deficit in expressive, receptive, and social language skills. Intervention: Resume speech/language therapy with individual and group settings;
- Anxiety. Interventions: Explain to class/others that Student cannot control Student's behavior. At times, Student may try to suppress or hold in Student's disability which can create a great deal of stress. Provide a place where Student can relax, free of stress;
- Impulsivity and distractibility: Interventions: Preferential seating, an aide during class lecture to help with redirection and guidance, written outline of instructions for tasks, and testing accommodations which include a private room and extended time. Student has difficulty following multi-step directions. Provide small bit of information and a time, using wait time to allow Student to complete each request;
- Verbal behavior. Intervention: Ignore the behaviors. Identify and recognize triggers (increased stress, excitability, watching television and computer monitors) and try to eliminate them; and
- Social skills deficits. Intervention: Continue social group weekly.

Pet. Exh. 22 at 150-151.

35. On July 29, 2015, the Home School issued a PWN, stating that the DOE would conduct an initial evaluation for determination of Student's eligibility under the IDEA and Chapter 60, because Student had "ongoing social challenges in the classroom due to the personal space of others and weaknesses in appropriate interchange with peers." Student would be given cognitive and speech/language assessments and an OT evaluation. They would also conduct a classroom observation. The team did not request a behavioral assessment. Pet. Exh. 21 at 142.

36. The General Education Teacher 3 created a list of concerns, supports and services, and goals for Student. The areas of concerns were: speech and conversations; behavior management of behaviors and their triggers (computer screen); initiating getting into groups; and Student was easily distracted. The supports and services listed were: social group observation with behavior interventions; problem solving observation; verbal disability observation; written instructions; selected assignments; breaks to step outside the classroom; preferential seating; EA for redirection; books at home; and voice lift. General Education Teacher 3's goal stated that General Education Teacher 3 would review the observational data in two weeks. Pet. Exh. 5.

37. Student would take movement breaks outside of the classroom one to two times per hour in the __ grade. Student would walk around the building two times and return to the classroom when Student was ready. Classroom instruction would continue while Student was taking Student's movement breaks. Pet. Exh. 26 at 224.

38. The DOE SLP conducted a Speech-Language Evaluation of Student. DOE SLP tested Student on July 31, August 4, 14, and 19, 2015. DOE SLP reviewed Student's records, the private Neuropsychologist's report, and Private SLP 2's report. Pet. Exh. 11.

39. The DOE SLP administered the assessment to assess Student's overall receptive and expressive language skills. Student's score of 87 in the Oral Expression scales fell within the average range. Student's score of 91 in the Listening Comprehension scales also fell within the average range. Pet. Exh. 11 at 062-063.

40. The assessment was administered to assess Student's language-based critical thinking skills. Student's test score was "considered to be the most representative measure of Student's critical thinking and reasoning skills." Student's score of 87 fell within the low average range when compared to same aged peers. Student had difficulty with sequencing, negative questions, and problem solving. Pet. Exh. 11 at 063-064.

41. The DOE SLP administered the assessment. DOE SLP did not administer the writing portion of the assessment. Student received a scaled score of 6. The DOE SLP wrote that "Student's weakness in understanding spoken paragraphs on the assessment measure

suggests that [Student] requires added visuals and hand-on learning techniques, for example, pictures, printed text acting out new vocabulary or scenes in a story and extra time to formulate verbal and possible written responses. Pet. Exh. 11 at 064-065.

42. The DOE SLP testified that when a student scores below average in the assessment, it indicates that the student may not maintain or sustain attention while just listening to an oral story read aloud, and that they may need visual aids. DOE SLP recommended Student have visual aids. TR 681:10-21.

43. The DOE SLP determined, “[a]t this time, no further speech and language testing appears to be warranted. It is recommended that [Student’s] current supports and modifications developed at the beginning of the school year be continued.” Pet. Exh. 11 at 065.

44. On August 7, 2015, the DOE Psychologist submitted a cognitive evaluation report on Student.⁴ The evaluation lasted one hour and ten minutes. Student was referred for the evaluation for the following purposes: 1) to determine Student’s cognitive ability levels; 2) to determine if specific information processing deficiencies are present; 3) to help determine eligibility for SPED programs; and 4) to provide information to Parents and teachers. The DOE Psychologist reviewed the private Neuropsychologist’s report dated June 2, 2015 and the Private SLP 2’s report dated July 8, 2015. Pet. Exh. 12 at 055.

45. The “Educational History” section of the DOE Psychologist’s report stated, “[t]here is no history of prior special education evaluations or services being provided.”⁵ Pet. Exh. 6 at 028.

46. The DOE Psychologist utilized the assessment. The DOE Psychologist collected input from the teacher and Parent, and reviewed Student’s records. Pet. Exh. 11 at 056.

47. The assessment was individually administered as a measure of general intellectual functioning or aptitude. Student’s verbal comprehension index standard score of 81 was within the below average range. Development of skills in this area are more heavily influenced by direct instruction and are strongly related to reading success, language development, lexical knowledge, and listening ability. Student scored average or above average the other subtests. Pet. Exh. 11 at 060.

⁴ The Report states that Student is in ____ grade. At the date of testing, Student was in the ____ grade. Pet. Exh. 11 at 055.

⁵ Student received SPED services in ____ through ____ grade. TR 52:20 – 53:24.

48. The DOE Psychologist found that the following tasks were likely to be more of a challenge for Student based on Student's verbal comprehension index score: 1) vocabulary acquisition; 2) comprehending language or understanding what others are saying; 3) fact-based informational questions; 4) using prior knowledge to support learning; and 5) finding the right words to use/say. Pet. Exh. 11 at 059.

49. The DOE Psychologist made the following recommendations: 1) work on vocabulary building; 2) include supportive modalities to increase understanding of language used; 3) embed instruction within a meaningful context; 4) increasing listening ability through game-like format; 5) capitalize on opportunities to define words within instruction; and 6) develop vocabulary through naturalistic extension of language. Pet. Exh. 11 at 060.

50. On August 11, 2015, the DOE OT observed Student in the classroom for twenty minutes while Student was seated on the carpet. Throughout the story, Student watched the book while constantly changing and shifting positions. Pet. Exh. 10 at 052.

51. The DOE OT noted that Student occasionally missed oral directions, and seldom missed written or demonstrated directions. Student was only occasionally distracted by a noisy environment. Student frequently did not watch instruction, but followed through with the activities. Student occasionally hummed or made noises, seemed oblivious within an active environment, and had trouble keeping Student's materials organized for use during the day. When Student sought movement, Student would frequently fidget and shift positions. Pet. Exh. 10 at 53.

52. The DOE OT stated that Student would benefit from developing a regulation plan where Student can get Student's proprioceptive needs worked out in a variety of ways throughout the day. DOE OT recommended the regulation plan: 1) use gross motor equipment; 2) climbing rock wall, trees; 3) carrying/putting canned groceries away on high shelves; 4) watering the garden with large can; 5) isometric exercises; 6) wall push-ups; and 7) deep pressure given to shoulders/back in casual passing by the adults. Pet. Exh. 10 at 053-054.

53. On August 12, 2015, the private OT evaluated Student because of concerns with Student's gross motor skills, body awareness, motor planning skills, and social-relatedness skills. Student was evaluated at private OT's clinic and in Student's classroom. Pet. Exh. 9 at 42.

54. The private OT observed Student in the classroom for three hours. Private OT observed Student while the class was participated in a partner science project on the floor. Student rested Student's head on Student's arm and yawned, lying in a prone position on Student's stomach. Student was "tuned out" to the teacher, and Student did not answer any of

the call and response questions or group clapping the teacher initiated to gain the Student's attention. Student crawled away and looked into a trash bin. Student did not visually reference the teacher during any lessons that took place on the floor. *Id.* at 43.

55. The private OT noted that in a busy classroom where the learning revolves around a Power Point on the overhead and fast-paced instructions, Student's ability to sustain attention was a concern. Student was easily distracted by background stimuli. Student can lose attention when directions become too overwhelming, complex, or unstructured. The private OT found that Student had the capacity for sustained attention with appropriate supports. *Ibid.*

56. In the classroom Student had poor responsivity with Student's partner and did not initiate or respond to Student's partner until Student had an adult redirect Student to the task at hand. Student demonstrated stronger reciprocity and initiation when performing tabletop work. *Ibid.*

57. Student has increased sensitivity in visual and auditory systems. Student registers background visual and auditory stimuli that are typically filtered out. Student could register these stimuli as "bigger, from mildly irritating to overwhelming or even painful." The private OT stated that this increased sensitivity; "is particularly important to note as many lesson plans in [Student's] classroom utilize the overhead screen. In order for [Student] to visually attend to this screen, Student must filter out background visual stimuli such as two banners, a flag, writing on the white board next to the screen, the light of the screen, and any classmates between Student and the screen. Using cognitive resources to filter these out requires extra effort and may result in inattention and/or overwhelm." *Id.* at 049.

58. It takes Student longer to process and respond to multi-step auditory information, which means in a fast paced learning environment, Student will have difficulty keeping pace. The private OT observed Student missing many instructions and steps during each lesson. Student is likely to be tired and overwhelmed by the end of the school day. *Ibid.*

59. At school, Student was observed to seek pressure touch sensations such as pushing Student's fingers on Student's mouth or touching others. Student poked Student's neighbor with Student's pencil and repeatedly grabbed and squeezed the gummy worm to be used in the science project. Student had difficulty maintaining a static position, and shifted position every one to two minutes when on the floor for group work. *Ibid.*

60. The private OT's report determined that in the classroom Student would benefit from: 1) extra time to generate a new idea or process; 2) therapeutic activities and supports to improve ideation; 3) breaking multi-step tasks into manageable chunks; 4) consistent predictable

schedule; 5) visual supports; preferential seating; 6) visually simple worksheets; 7) covering parts of the worksheets which Student does not need to reference; 8) highlighting; 9) reduce visual clutter in Student's area; 10) self-regulation strategies; and 11) verbal instruction at a slower pace to allow for increased processing and response time. *Id.* at 048-051.

61. The private OT's report concluded that Student had several OT needs that were educationally related that could be addressed by school based OT including: 1) creating a sensory regulation plan to include movement breaks throughout the day; 2) sensory supports for optimal learning; 3) seating supports for optimal posture and attention for learning; 4) pencil grip and excessive pressure on finger joints; 5) handwriting accommodations such as keyboarding or oral expression; 6) the "ALERT Program" which teaches self-regulation skills; and 7) test taking, activity, and homework accommodations. Pet. Exh. 9 at 051.

62. The private OT also recommended Student have an assessment of pragmatic social skills, such as the SCERTS assessment in the school setting. *Ibid.*

63. The DOE OT did not think a sensory regulation plan was necessary, because Student had shown growth. TR 651:9-12.

64. Parent 1 observed Student two times in the ___ grade classroom. Parent 1 noticed that most of the instruction took place on the carpet, and Student was very fidgety and easily distracted. Student never referenced the teacher visually. Student would receive movement breaks outside of the classroom while instruction was on-going. When Student would re-enter the classroom, Student was not able to complete the task and needed help from the educational assistant to complete tasks. TR 66:5-23.

65. Student received visual handouts, deep pressure to Student's back and shoulders, and Student attended social group sessions weekly. The other students did not receive handouts. TR 67:1-19.

66. Parent 1 testified that Student was not able to complete homework assignments because Student did not learn about it in school. The General Education Teacher 3 explained that the homework was a reflection of what the students learned that day. The General Education Teacher 3 provided Parent 1 with an extra set of textbooks so that Parent 1 could reteach Student the material. Student especially struggled with writing assignments. TR 68:19 – 69:10.

67. In Student's ___ grade year, Parent 1 requested an Eligibility Meeting because the private evaluations recommended Student receive services from the Home School. TR 69:19 – 70:4.

68. On August 31, 2015, the Home School held an eligibility meeting. Parent 1, Parent 1's Advocate, Principal, SSC, DOE SLP, Psychologist, BHS, OT, General Education Teacher 3 and SPED teachers participated. Pet. Exh. 26 at 223.

69. Parent 1 shared the private evaluations with the Eligibility Team. The team determined that even though Student had a disability, it did not affect Student's education. Student was meeting grade-level expectations. TR 70:1-20.

70. The Eligibility team discussed whether Student met Eligibility Category 1 criteria. Student met the criteria, due to Student's diagnosis. Student also met other criteria, because Student's difficulty with invading the personal space of peers may result from Student's impulse control issues related to the disability. Ultimately, the Eligibility team found that Student's diagnosis, "does not adversely affect Student's educational performance. [Student] is able to perform at grade level, based on work samples, class assessments, OT, Cognitive, Speech/Lang. evals, observations, [and] teacher input." They further noted that Student did not need specialized instruction because Student was at grade level. Pet. Exh. 26 at 223.

71. On September 3, 2015, the Home School issued a PWN, stating that Student did not meet the criteria for IDEA. Student was diagnosed and met two criteria under Eligibility Category 1; however, the assessments, Student's work, and observations showed that Student did not need specialized instructions or accommodations under the IDEA. The DOE decided to update Student's 504 Plan instead. *Ibid.*

72. On October 16, 2015, Petitioners filed a Request for Due Process Hearing in DOE SY-1516-028. Pet. Exh. 26.

73. On November 5, 2015, the Home School conducted a 504 meeting. Pet. Exh. 20 at 126.

74. The needs section of the PLEPs stated that Student meets the criteria for the disability according to the private Neuropsychologist's report. "[a] 504 plan is appropriate to document classroom accommodations to support Student at school. Student needs movement breaks, access to sensory activities, and visuals. [Student] benefits from counseling to support Student in identifying Student's feelings, expressing feelings such as (anxiety, frustration, etc.) and managing them appropriately." Student was at grade level in reading, writing, and math. *Ibid.*

75. Student received the following accommodations: 1) sensory regulations: lean against wall, deep pressure, wall push-ups, isometric exercise, walk around right outside of class; 2) sensory regulations: seat cushion, Velcro under the table, sugarless gum, stadium seat, hand

fidgets; 3) check-ins by the teacher or an educational assistant to ensure task/assignment completion; 4) preferential seating; 5) breaking work into smaller parts and intersperse short structured breaks to help maintain focus and support task completion; 6) provide written instructions, visual handouts and visual daily schedule for tasks to help Student to reorient ___self when Student loses focus; and 7) limiting computer use. Student also received 270 minutes of counseling per quarter and teacher consultation. Teacher consultation consisted of data collection for the week and provided to Parent. Pet. Exh. 20 at 126-127.

76. On November 6, 2015, the Home School issued a PWN stating the “[t]eam decided to add specific sensory regulations and accommodations to help [Student] in Student’s educational setting.” Pet. Exh. 21 at 145.

77. The private Educational Psychologist testified as an expert in the field of educational psychology. The private Educational Psychologist is licensed as an educational psychologist and school psychologist in another state and as a marriage and family therapist. TR 184:5 - 185:24.

78. On February 3, 2016, the private Educational Psychologist submitted a Psycho-Educational Assessment of Student. Parent 1 had requested an Independent Educational Evaluation (“IEE”) to assist Student’s educational functioning and placement needs. Parent 1 did not agree with the DOE’s evaluations, and Parent 1 was concerned that they did not conduct a comprehensive assessment of Student in all areas of suspected disability or provide Student with individualized specialized academic instruction from qualified special education personnel as required, based on Student’s individual exceptional learning needs. Pet. Exh. 6 at 011.

79. Parent 1 reported the following to the private Educational Psychologist, “[Student] has serious problems with Student’s behavior and sensory deficits. They adversely impact Student’s learning and social interactions with Student’s peers. Student was diagnosed with disability and the District was responsible to assess Student but didn’t. I think there are other educational disabilities that the District has not assessed. I want to make sure Student gets the educational services and placement Student needs so Student can progress in school and get the support Student needs to become an independent adult. I requested an independent psychoeducational evaluation because I wanted an objective assessment of Student educational functioning and Student’s service and placement needs.” Pet. Exh. 6 at 012-013.

80. At the time of the referral, it was reported that Student had significant behavioral concerns and delays in academic performance. The General Education Teacher 3 stated that Student was “somewhat below grade level” in reading and writing, and Student was behaving

“somewhat less appropriately.” The General Education Teacher 3 reported concerns with Student’s “social behavior and self-awareness,” and the Student “experienced problems concentrating, sitting still, fidgeting, being impulsive and loud.” Pet. Exh. 6 at 011-012.

81. The private Educational Psychologist observed Student’s behavior and conducted an interview with Parent 1. The private Educational Psychologist also conducted the following 11 tests: ___Pet. Exh. 6 at 012.

82. The private Educational Psychologist noted that Student’s spontaneous verbal communication was difficult to understand due to speaking in a lower volume at a fast rate. Student was able to engage in two-way social conversation; however, Student’s vocalization was often mumbled with rapid, inarticulate speech. Student demonstrated symptoms which included mumbling, verbal disability, impulsivity, lack of concentration, short attention span, blurting out answers, distractibility, wiggling in Student’s chair, leg shaking, and the need for frequent physical movement. “Student’s behavioral presentation was characteristic of symptom associated with disability. Pet. Exh. 6 at 015 -016.

83. The General Education Teacher 3 completed the assessment. General Education Teacher 3 rated Student’s problems at the 91st percentile. General Education Teacher 3’s ratings of Student’s behaviors indicated the following were “very true or often true”: makes noises in class; can’t concentrate, can’t pay attention for long; can’t sit still, restless or hyperactive; fidgets; impulsive or acts without thinking; and usually loud.” Pet. Exh. 6 at 020-021.

84. The private Educational Psychologist noted that the General Education Teacher 3’s description of Student’s behavioral difficulties were similar to the General Education Teacher 2’s concerns. On the assessment, the General Education Teacher 2 rated the following behavioral concerns as “always”: bothers other children while they are working; acts without thinking; is unclear when presenting ideas; does strange things; has poor self-control; seems unaware of others; disrupts school work of other students; and acts strangely. General Education Teacher 2 rated the following behaviors as “often”: short attention span; refuses to join group activities; seems out of touch with reality; is easily distracted; babbles to self; acts out of control; is chosen last by other children for games; and annoys others on purpose. Pet. Exh. 6 at 022.

85. The assessment was completed by Parent 1 and the General Education Teacher 3. Student’s behavioral symptoms were in the high to very elevated range, 90th to 99th percentile when compared to students of similar age and grade level placement. Individuals with disability obtained this score 69% of the time. The private Educational Psychologist stated, “[b]ased on this metric, a classification of disability is indicated.” Pet. Exh. 6 at 022-023.

86. Parent 1 completed the assessment. This scale measures Student's adaptive behavior across multiple areas of functioning. Student's overall adaptive behavior function was in the below average range of functioning (SS-87, 19th percentile). Particular areas of concern were Student's communication and social scores. Pet. Exh. 023-024.

87. Parent 1 also completed the assessment. This scale examines areas of behavior that are associated with disability. The results of Parent 1's ratings of Student's behavior indicated that Student demonstrated mild to moderate symptoms. The private Educational Psychologist considered the private Psychologist's diagnosis and determined that the behavioral symptoms described on the assessment were more likely associated with a disability profile than other disability. Pet. Exh. 6 at 023-024.

88. The private Educational Psychologist stated that Student demonstrates "significant behavioral, sensory-integration/regulation and oral language challenges that affect Student's educational performance. Behavioral difficulties include significant symptoms of ___ as well as verbal and behaviors." Multiple serious behavioral concerns had been documented by Student's current teacher and the General Education Teacher 2. Pet. Exh. 6 at 024.

89. The private Educational Psychologist testified that educational performance does not only include reading, writing, and math. Educational performance also includes social, emotional, leisure, prevocational, and vocational skills. TR 242:22 – 243:10.

90. The private Educational Psychologist determined that Student met the eligibility criteria for SPED in the areas of Eligibility Category 2 and Eligibility Category 1.⁶ Pet. Exh. 6 at 025.

91. The private Educational Psychologist recommended: OT; IEEs in the areas of FBA and Speech and Language functioning; a BSP supervised by a professional; a 1:1 paraprofessional to assist with Student's behavioral needs; an educational evaluation in the area of Assistance Technology; and a medical evaluation to determine if Student is a candidate for medication to address Student's behavioral issues. Pet. Exh. 6 at 026.

92. The private Educational Psychologist stated that Student should increase the following skills for Student's IEP goals: oral-language; sensory-integration; sensory-regulation; time on task; ability to stay in seat in classroom; ability to remain in group during a group lesson, remain within assigned classroom area, work independently on a class task/activity, listen to and comply with adult directions, interact in a positive social manner with peers, keep hands to self

⁶ This is synonymous with "Eligibility Category 1."

and respect others' physical space, and verbalize Student's mood and choose an adaptive coping response to deal with the mood. Pet. Exh. 6 at 026-027.

93. The private Educational Psychologist recommended that Student be placed in a general education program with specialized academic instruction provided by a qualified SPED teacher. Student's BSP should be developed and supervised by a professional with regular consultation with the classroom teacher and IEP team. Pet. Exh. 6 at 027.

94. The private Educational Psychologist recommended the following services and supports: a quiet and calming environment; constant repetition; visual schedules and reminders; few distractions; routine and consistency; visual aids to help with transitions; "remember it's not Student's fault and Student is doing the best Student can at this time"; check daily comprehension; "remember Student's ability to retain information and what Student can remember can change every day"; and re-teaching. *Ibid.*

95. No educational evaluation in the area of Assistance Technology was conducted by the DOE. TR 73:9-11.

96. On March 12, 2016, Private SLP 1 evaluated Student. Student was referred by Parent 1 to obtain a formal speech and language assessment to determine current speech and language skills based on the private Educational Psychologist's recommendation. Pet. Exh. 26 at 230.

97. Private SLP 1 administered the assessment to Student at Student's home. The testing lasted two hours and 15 minutes. Student received four to six sensory/movement breaks throughout the assessment. *Ibid.*

98. Student scored average in the receptive language, expressive language, and language context indexes. The language content index was in the low average range due to Student's below average score in assessment. The assessment evaluates Student's ability to sustain attention and focus while listening to spoken paragraphs, create meaning from oral narratives and text, answer questions about the content of the information given, and use critical thinking strategies for interpreting beyond the given information. Student demonstrated difficulty with understanding the main idea, recalling event sequences, making predictions, and understanding social content. *Ibid.*

99. Student scored significantly below average in the structured writing subtest. A scaled score of 8 to 12 is considered to be average; Student had a scaled score of one. This subtest evaluates Student's ability to use situational information given by a story title, and introductory sentence, and an incomplete sentence to create and write a thematic, structured

narrative. Student demonstrated difficulty writing logical, complete sentences. Student had difficulty maintaining a provided topic and writing sentences with structure and organization. Sentences were characterized by incomplete thoughts, run-on sentences, and shifts in thought without appropriate written support (e.g. "...they would get anything like her are all of them: a book of math problems, a ball with math or a records book of who is good at math problems."). *Id.* at 230-231.

100. Private SLP 1 determined that Student scored below average in the areas of assessment and difficulty with writing skills and organization had a strong potential to negatively affect Student's academic performance. "Understanding orally presented stories and descriptions of actions, events, or opinions is required for creating meaning and learning from instructional materials across academic settings." Student's writing score was significantly below average. *Id.* at 231; TR 73:12 – 74:7.

101. Private SLP 1 recommended Student receive speech and language services to maintain and expand on Student's receptive language skills in the academic setting. Private SLP 1 also provided other recommendations to help Student work within the classroom and writing assignments. Student's State Science Assessment score for the ___ grade year totaled 299. This score placed Student in the "approaches proficiency" category. The score also reflected that Student did not meet State standards. Pet. Exh. 27 at 264 268-269.

102. On the ___ grade assessment, Student scored 2443 in the English Language Arts and Literacy test; Student scored 2408 in ___ grade.⁷ Student did not meet the State standard; Student's score was 30 points below meeting the state standard. On the Math test, Student's score increased from 2448 in the ___ grade to 2458 in the ___ grade. Student had met the State standard in the ___ grade, but did not meet State standards in the ____. Neither scores showed a 10% growth rate. Pet. Exh. 27 at 267 -269.

103. Student received "developing proficiency ("DP")" scores for language arts in ___ and ___ grades. By the end of ___ grade, Student received "meeting proficiency ("MP")" or "meeting with excellence ("ME")" scores in all subjects. Student received an ME in the area of writing in the ___ grade. TR 140:14 – 142:18.

104. At the FBA meeting, Parent 1 and Parent 3 explained that Student's improvement was based on all of the outside help they were providing Student. Student was seeing a SLP, OT, and receiving private tutoring. Additionally, Parent 1 had to help Student with Student's

homework with the second set of textbooks that the General Education Teacher 3 gave Parent 1. Pet. Exh. 34 at 25:38 – 26:48.

105. On June 27, 2016, the Hearings Officer issued a Decision in favor of Petitioners in DOE SY 1516-028. The Hearings Officer concluded that Petitioners had met their burden and showed the DOE procedurally and substantively violated the IDEA, thereby denying Student a FAPE. The Hearing Officer found and concluded that the evaluations and assessment conducted by the private Neuropsychologist, private OT, Private SLP 2, private Educational Psychologists, and Private SLP 1 were appropriate. The Hearings Officer also strongly recommended that the Home School conduct, at a minimum, a assessment and Functional Behavior Assessment (“FBA”), prior to the next eligibility meeting. Pet. Exh. 26 at 259, 261.

106. On July 29, 2016, the Home School conducted a Student Services Support Team (“SST”) meeting. Parent 1, Parent 2, DOE Principal, SLP, BHS, School Psychologist, SSC, General Education Teacher 4 and SPED teacher participated. Resp. Exh. 2.

107. The PWN dated July 29, 2016 stated that Student would have a behavioral assessment and a classroom observation. The SST requested Student have speech/language, OT, academic, and cognitive evaluations. Parents declined, because Student “has been tested a lot this year and wants to use the current evaluations.” The SST agreed to use the current evaluations. *Ibid.*; TR 75:18 – 76:11.

108. The Private Professional testified as an expert in the field of methodology. TR 30:20-23.

109. Methodology is a scientific field of study looks at environmental variables that contribute to behavioral responses. TR 31:4-12.

110. The Private Professional testified that the ASSESSMENT is the starting point in the FBA process, and that there would be data to analyze. TR 40:11-14.

111. On August 5, 2016, shortly after the beginning of the 2016-2017 school year, the DOE conducted an assessment using the assessment. The assessment consisted of three pages. Parent 1, DOE OT, School Psychologist, School Counselor, SLP, BHS, and the General Education Teacher 4 participated. The Clinical Psychologist and General Education Teacher 3 did not participate.⁸ Pet. Exh. 28.

⁷ The General Education Teacher 4 testified that in order to have “growth,” the Student’s score must improve by 10%. TR 502:15-18.

⁸ The General Education Teacher 3 did not participate. Student had only been in ___ grade for a week.

112. The assessment consisted of twenty questions. These are a sampling of the questions/answers:

Questions to Inform the Design of a Functional Analysis

- ***To Develop objective definitions of observable problem behaviors:***

What are the problem behaviors? What do they look like?

Overly active, invading space of others, wiggly, rolling around floor, pacing around, walking in circles, frequent change in position, fidgeting, invading space of others (ie. touching, poking others), verbal (changes in volume of Student's voice/high, low tone; repeat words or phrases over and over until you stop Student; loud, slow exhale.

- ***To determine which problem behavior(s) will be targeted in the functional analysis:***

What are the top three most concerning problem behaviors?

Invading other's space, impulsivity, verbal sounds (when too much screen time especially games; stress is a big trigger, also when excited. Puts fingers and things in Student's mouth. Does not always recognize when Student's body needs something. Having movement breaks helps Student to refocus; easily distracted, not paying attention, looking around instead of visually referencing the teacher, staring/daydreaming while instruction is taking place, in ___ grade, Student was fidgeting with objects during Parent 1's observation, easily distracted.

- ***To determine the antecedent conditions that may be incorporated into the functional analysis test conditions:***

Do the problem behaviors reliably occur during particular activities?

Per Parent 1, during floor-based instruction, Student would become overly active and wiggly, too close to others, pokes Student's neighbors, roll around, crawling on the carpet.

What seems to trigger the problem behavior?

During carpet time; too much sound, Student covers ears; too much visual, Student won't look – overstimulated or understimulated.

- ***To determine the test condition(s) that should be conducted and the specific type(s) of consequences they may be incorporated into the test conditions:***

How do you and others react or respond to the problem behavior?

Quietly redirect and find out what Student needs (ie. Movement breaks, verbal prompts, proximity, hand on shoulder), deep pressure.

What do you and others do to distract Student from engaging in the problem behavior?

Teacher states expectations, accommodate Student (give Student physical space), quietly redirect Student, if putting something in Student's mouth, Parent 1 gives Student something appropriate; if visually stimulated, Parent 1 removes Student from the trigger, change environment.

- ***To assist in developing a hunch as to why problem behavior is occurring and to assist in determining the test condition(s) to be conducted:***

What do you think Student is trying to communicate with Student's problem behavior, if anything?

Sensory needs and self-regulation.

Do you think this problem behavior is a form of self-stimulation? If so, what gives that impression?

Yes, sometimes. When understimulated, Student tries to stim.

Why do you think Student is engaging in the problem behavior?

Sensory seeking/regulation.

Pet. Exh. 28 at 276-278.

113. Prior to the Eligibility meeting, Parent 1 conducted a classroom observation of Student during the beginning of Student's __ grade school year. The General Education Teacher 4 announced to the class that Parent 1 was present. Parent 1 was concerned that the announcement made Student uncomfortable, because Student and the other students took notice of Parent 1. Parent 1 observed Student to be extra fidgety during carpet time, and Student performed better in the smaller groups. TR 76:152 – 78:15; TR 128:23 – 129:5.

114. The General Education Teacher 4 testified as an expert in the field of general education for the elementary school level. General Education Teacher 4 testified that General Education Teacher 4 is "highly qualified." TR 333:20-21; TR 335:1-4.

115. The General Education Teacher 4 testified that General Education Teacher 4 lets the class know when they have visitors, because General Education Teacher 4 has other students

with “unique mental health needs, and some of their triggers is not knowing what’s going on.” TR 357:3-15.

116. The General Education Teacher 4 reported to the DOE Clinical Psychologist that “[Student] reported to General Education Teacher 4 that Parent 1’s observation of Student in the classroom made Student nervous, and that ‘[S]tudent was ‘off’ in Student’s focus and performance during Parent 1’s observation.” Parent 1 also testified that Student told Parent 1 that “Parent 1 makes Student nervous.” Pet. Exh. 28 at 287; TR 357:23 – 359:8.

117. The General Education Teacher 4 did not announce the DOE Clinical Psychologist’s presence the two times DOE Clinical Psychologist observed the class, because DOE Clinical Psychologist wanted to be a “fly on the wall.” DOE Clinical Psychologist testified that it is important that the students not know why DOE Clinical Psychologist’s there to minimize the impact of DOE Clinical Psychologist’s presence on the class. DOE Clinical Psychologist stated, “if I am unobtrusive, then I’m more likely to see what normally goes on in the classroom. “TR 597:18

118. The General Education Teacher 4 did not announce the DOE OT’s presence when DOE OT conducted an observation of Student. TR 658:12-19.

119. At the end of September 2016, the DOE OT conducted an informal observation of Student in ___ grade classroom during a writing assignment. Student worked independently and was able to transition to small group activities on the floor. Student responded appropriately with Student’s peers and DOE OT did not see any problematic behaviors. DOE OT testified that the General Education Teacher 4 was effectively utilizing the strategies in Student’s 504 Plan. The observation lasted approximately 45 minutes. TR 644:2 – 646:18; TR 659:17-20.

120. On October 4, 2016, Student took the math assessment. The grade equivalent was ___, putting Student above the ___ grade level. The test time was 26 minutes, 39 seconds. Pet. Exh. 27 at 275.

121. On October 5, 2016, Student took the reading assessment. Student’s scaled score placed Student at grade-level; however Student’s “instructional reading level” was below grade level. It stated Student “would be best served by instructional materials prepared at the ___ grade level.” The test time was 13 minutes, 20 seconds. Pet. Exh. 27 at 274.

122. The DOE Clinical Psychologist testified as an expert in the fields of clinical psychology and special education. TR 527:16-23.

123. The DOE Clinical Psychologist’s report dated October 5, 2016 stated that Student “was referred for a psychological assessment by Student’s school team in order to further

understand Student's emotional presentation and inform educational and psychotherapeutic interventions." Pet. Exh. 28 at 282.

124. The DOE Clinical Psychologist conducted a psychological evaluation of Student. DOE Clinical Psychologist interviewed Parent 1 two times at their residence, and DOE Clinical Psychologist observed Student on two occasions, at Student's home and school. DOE Clinical Psychologist consulted with the BHS, reviewed Student's educational file and private evaluations. DOE Clinical Psychologist interviewed the ___ and ___ grade teachers, and had them complete questionnaires. The General Education Teacher 4 completed the teacher form of the Connors Comprehensive Behavior Rating Scales ("CBRS"), and Parent 1, Parent 2, and the General Education Teacher 4 completed the parent and teacher forms of the Comprehensive Executive Function Inventory ("CEFI"). Pet. Exh. 28 at 282-283; TR 552:3 – 556:17.

125. The DOE Clinical Psychologist observed Student to be engaging, responsive, easily understood, and "happy-go-lucky." Student did not exhibit any behaviors during the observations. TR 568:1-23.

126. The assessment determines Student's executive function. The assessment is similar to the other assessment that the private Educational Psychologist used. The assessment assesses planning, organization, inhibition, task completion, and initiation. Parent 1, Parent 2, and the General Education Teacher 4 were provided with the assessment report. According to Parent 1's Feedback Report, Student scored in the "low average" range and was ranked in the 10th percentile. Pet. Exh. 28 at 294; TR 556:18 – 559:25.

127. Student scored in the "well below average" range on the "working memory" scale, placing Student in the 2nd percentile based on Parent 1's Feedback Report. Student's ratings indicated that Student "has difficulty keeping information in mind that is important for knowing what to do and how to do it, including remembering important things, instructions, and steps." Parent 2's Feedback Report placed Student in the "low average" range. In stark contrast, the General Education Teacher 4's Feedback form stated "Student can keep information in Student's mind and remember important things, instructions, and steps." Pet. Exh. 28 at 286-287, 296.

128. The DOE Clinical Psychologist also had the ___ and ___ grade teachers complete a 59-item "Questionnaire Addressing the Hearings Officer's Concerns." The DOE Clinical Psychologist used the Questionnaire as an information-gathering tool, not as a standardized assessment. DOE Clinical Psychologist created the Questionnaire based on problematic behaviors that had been identified by the General Education Teacher 2 in the prior

due process hearing; however, DOE Clinical Psychologist did not have the General Education Teacher 2 answer the Questionnaire, and DOE Clinical Psychologist did not interview General Education Teacher 2. Instead, DOE Clinical Psychologist interviewed the General Education Teacher 4 after General Education Teacher 4 completed the Questionnaire. Parent 1 was never shown or given the Questionnaire. Resp. Exh. 5 at 27; TR 562:6 – 565:9; TR 592:9-17; TR 594:16-24.

129. The DOE Clinical Psychologist testified that DOE Clinical Psychologist created the Questionnaire to address the Hearings Officer's concerns, because DOE Clinical Psychologist thought the case would result in continued litigation. TR 596:23 – 597:3.

130. The DOE Clinical Psychologist testified that the ___ grade teachers “did not have effective behavioral management classroom strategies; therefore, they had more problems with behaviors in their classroom...the ratings were skewed.” TR 592:20 – 593:8.

131. The DOE Clinical Psychologist found, consistent with the private Neuropsychologist's report, Student continues to meet the diagnostic criteria for the neurological condition. DOE Clinical Psychologist also found, consistent with the private Educational Psychologist's report, Student continues to meet the diagnostic criteria for disability. Pet. Exh. 28 at 289.

132. The private Educational Psychologist testified that, even though the DOE Clinical Psychologist's report was seven months after Private Educational Psychologist, Student continued to have over 40 problem behaviors which are related to Student's documented educational disabilities. TR 199:5-14.

133. The DOE Clinical Psychologist determined that Student was eligible for supports under Section 504. DOE Clinical Psychologist stated that the “team should discuss whether or not [Student] is eligible for special education. The school team should discuss accommodations that might assist [Student] in the classroom (e.g., use of fidgets, swivel chair, movement breaks, etc.)” The DOE Clinical Psychologist did not believe Student needed counseling services. Pet. Exh. 28 at 289; TR 575:16 – 576-11.

134. The DOE Clinical Psychologist stated in DOE Clinical Psychologist's report, “[w]hen I encounter a case like [Student's], a child with a thick educational file and extensive assessment that is significantly out of proportion to the severity of the problems that Student is exhibiting, this points to an adversarial relationship between parent and school. [Parent 1] did not trust or find the DOE evaluations to be adequate and sought private evaluations of Student, which is Parent 1's right. Nevertheless, this trust deficit and the overpathologizing of the child

can, over time, adversely affect a student because the adults in Student's life are not on the same page and the message that is sent to the child. Whether Student was referred in the — grade due to the classroom teacher's difficulties with behavioral management, it appears that over time [Student's] school-related behaviors have significantly diminished according to successive teacher reports." Pet. Exh. 28 at 288.

135. The DOE Clinical Psychologist stated that Parents are very supportive of Student and have "consulted with various professionals for strategies to use in the home to manage Student's distractibility. They should continue to access resources within and outside of the DOE as needed." The DOE Clinical Psychologist agreed with the private Educational Psychologist's recommendation that Student should have a psychiatric consult to determine if a medication regimen is appropriate. Pet. Exh. 28 at 290.

136. On October 5, 2016, the DOE conducted an FBA meeting with the SST. Parent 1, Parent 3, DOE Clinical Psychologist, School Psychologist, SLP, OT, BHS, General Education Teacher 4, and the SPED teacher participated. The DOE Clinical Psychologist ran the meeting, even though DOE Clinical Psychologist did not participate in the assessment. Resp. Exh. 7.

137. The General Education Teacher 4 expressed General Education Teacher 4's concerns about Student leaning into the space of other students, and Student's blurting out. Pet. Exh. 34; TR 459:9-18.

138. The DOE Clinical Psychologist testified that the only "salient" behavior that was impacting Student's learning was Student's invading other students' personal space. DOE Clinical Psychologist did not agree with Parent 1 and Parent 3 that this was could be disability related or a sensory issue. Parent 1 asked if there was anything they could do to help with Student's sensory issues, and the DOE Clinical Psychologist stated that it was a "terminology issue." Pet. Exh. 34 at 10:20-21:40.

139. Parent 1 testified that during the assessment meeting on August 5, 2016, the SST, as a team, decided that Student was sensory-seeking and trying to regulate. However, during the formal FBA meeting (two months later), the team told Parent 1 that Student was not sensory seeking, and Student's behaviors were an internal function from Student's disability. When Parent 1 questioned this, the DOE Clinical Psychologist explained that there were only two functions that would serve behaviors – avoiding and attention seeking. DOE Clinical Psychologist stated that they were completing an FBA because the Hearings Officer had ordered them to do one. Pet. Exh. 34 at 14:39 – 22:00; TR 86:6 - 87:9.

140. Parent 1 stated that stress was a trigger for Student's disability. Parent 1 stated that the team should find out what triggers Student's stress. Parent 1 tried to incorporate the private OT's recommendations, but the DOE Clinical Psychologist said it would not be an FBA, it would be a "regulation plan." Pet. Exh. 34 at 38:30 – 40:00; 51:00-53:50.

141. The Private Professional testified that an adequate FBA must have data. If you only conduct an interview, or if the assessment that was used does not include data, it would be considered a "partial assessment." If the FBA is incomplete, the information provided to the BSP would also be incomplete. TR 38:1 – 40:18.

142. The DOE Clinical Psychologist testified that data collection is a very important part of the FBA process. TR 607:16 – 22.

143. The General Education Teacher 4 testified that General Education Teacher 4 has been "extensively trained through model schools how to collect data" relating to the FBA process. General Education Teacher 4 was trained on "[h]ow to use the assessment as a measurement tool specifically and also how to create a list of behaviors that you have concerns with and then tally mark them over eight weeks time to show increase, decrease, how often, so you can get very specific when the behaviors that you have a problem with are occurring." Data collection is part of the FBA process. TR 464:24 – 467:9.

144. The DOE SPED teacher testified as an expert in the fields of special education and general education in the elementary school level. TR 260:24 – 261:3.

145. The SPED teacher testified that the FBA team would determine during the FBA process what triggers the behaviors; however, SPED teacher did not collect any data on specific behaviors. SPED teacher had collected data on other students that had IEPs. TR 315:2-24; TR 325:24 – 326:23.

146. The SST created a three-page FBA. The target behavior identified was, "leaning into others/invading other's space (ie. touching, poking others)." The setting event was "stress," and the trigger was, "proximity to peers during unstructured time." The FBA stated that the behavior was related to internal stimuli, there is no external function, and attention seeking has been ruled out. The proactive strategies were: 1) cue Student to be aware of personal boundaries; 2) allow use of squeeze balls during group or circle time to keep Student's hands busy and redirect from the behaviors involving personal space; 3) cross legs during carpet time; and 4) scheduled movement breaks (includes stretches). The reactive strategies were: 1) prompt Student to respect personal space/boundary using verbal or non-verbal cue as needed; 2) cue

Student to shift Student's body; 3) allow movement breaks as needed; and 4) corrective feedback/reflections. Pet. Exh. 28 at 279-281.

147. Parent 1 did not agree that this was an appropriate FBA. Parent 1 disagreed with the SST and said that Student had behavior that occurred because of its sensory consequences. Pet. Exh. 34; TR 87:10 – 89:19.

148. The General Education Teacher 4 testified that Student's behaviors were a result of Student's disabilities. Student did not exhibit the behaviors to avoid work or be defiant. General Education Teacher 4 did not believe Student's behaviors warranted a BSP, because Student's behaviors did not interfere with Student's learning, friendships, completing school work, and academic and social growth. TR 418:1 – 420:19.

149. The DOE Clinical Psychologist did not believe that Student's behaviors rose to the level where a BSP was required. Student was not trying to gain or avoid something through Student's behaviors. Student's behaviors were managed by normal classroom interventions and the 504 Plan. TR 570:5-14; TR 573:17 – 574:2.

150. The SPED teacher testified that there were no motives behind Student's behaviors. Student's invading other children's personal space and "wiggleness" was part of Student's sensory seeking behavior. Based on SPED teacher's observations and discussion with the team, the SPED teacher did not believe Student's behaviors necessitated a BSP. Student's behaviors did not impede Student's access to education. However, the SPED teacher also testified that when SPED teacher observed Student in the classroom exhibiting behaviors, SPED teacher did not observe the environmental circumstances surrounding those behaviors, because SPED teacher was "too busy teaching or helping other students." TR 278:2 – 279:20; TR 315:25 – 316:6.

151. The private professional testified that the purpose of the FBA is to determine the function or the reason for the problem behavior. TR 38:22-24.

152. In the field of methodology, there are two categories of behaviors – operant behaviors and respondent behaviors. Operant behaviors are learned behaviors in the environment. Respondent behaviors are unlearned behaviors that are internal, such as blinking, sneezing or coughing. An FBA determines whether a behavior is externally or internally driven. TR 41: 24 – 42:11.

153. The Private Professional testified even if Student's behaviors were internally driven, it would be appropriate to develop a BSP; however, data would be necessary to determine whether a BSP was necessary or not. TR 44:2 – 45:17.

154. On October 5, 2017, an Eligibility meeting occurred immediately after the FBA meeting.⁹ Parent 1, Parent 3, Principal, DOE Clinical Psychologist, School Psychologist, SLP, OT, BHS, SSC, General Education Teacher 4 and SPED teachers participated. Resp. Exh. 8; TR 90:12-15.

155. The Eligibility Team reviewed Student's current educational performance, assessments, including Student's cognitive, speech, psychological, academic, emotional/behavioral, and OT assessments. They also reviewed Student's OT observation, statewide assessment results, Student's ___ and ___ grade educational performance, classroom work samples, and Student's social, academic and behavioral performance compared with Student's general education classmates. The team also considered Parent input, the decision in DOE SY1516-028, the discussions from FBA meeting, and teacher reports. Resp. Exh. 8 at 054-055.

156. The General Education Teacher 4 raised concerns about Student leaning into the space of others as well as blurting things out in class. TR 317:1-318:1.

157. Parent 1 stated Parent 1 was concerned about Student's distractibility, fidgeting, blurting out, and putting items in Student's mouth. Parent 1 did not want Student to miss instructional time while Student took movement breaks. TR 429:1-9.

158. Parent 1 also brought up Parent 1's concerns that Student was not meeting State standards. The General Education Teacher 4 responded that the standards were "nearly met," and General Education Teacher 4 was not concerned about Student's scores. TR 97:12 – 98.

159. Parent 1 also discussed Private SLP 1's report that showed Student was in the one percentile for writing. The team members explained to Parent 1 that the test was not an accurate reflection of Student's performance, and Student was functioning at grade-level in the core subjects, including writing. TR 426:19-22; TR 581:13 – 582:6.

160. The DOE SLP shared with the team that when DOE SLP evaluated Student, DOE SLP did not complete a comprehensive writing evaluation, because it was not an area of suspected disability. The DOE SLP wanted to do another evaluation, but Parent 1 did not consent. TR 428:2-22.

161. The General Education Teacher 4 testified that General Education Teacher 4 would not refer Student for a speech-language evaluation. TR 455:14 – 456:14.

⁹ The meeting date Resp. Exh. 8 at 049-050 incorrectly stated "10/7/16."

162. Parent 1 discussed the Hearings Officer's decision in DOE SY1516-028 stating that Student was receiving specialized instruction. Parent 1 wanted Student to be found eligible for SPED services. The SPED teacher disagreed with the Hearings Officer decision and her definition of "specially designed instruction." TR 295:22-25; TR 429:22 – 430:1.

163. The SPED teacher testified that "specially designed instruction" is when "you alter, adapt, change the content, methodology, or delivery of the instruction to students whose disabilities adversely affect their educational performance." TR 261:19-23.

164. The SPED teacher testified that an "accommodation" does not change the content, methodology or delivery of the instruction. An accommodation "provides equal access to the general education of that student." Section 504 plans provide accommodations for students. TR 263:10 -264:21.

165. The General Education Teacher 4 testified that Student does not receive specially designed instruction. Student receives the same content and curriculum as Student's non-disabled peers. TR 337:5-20.

166. The SPED teacher testified that SPED teacher did not provide Student with specially designed instruction. SPED teacher testified that Student received accommodations, not modifications to the instruction. TR 266:13-20; TR 299:2 – 304:7.

167. The SPED teacher testified that Student's social engagement is "very typical of children without disabilities. Student gets along well with peers. Student's peers like Student. Student was voted team captain for basketball..." TR 268:18-25.

168. The Eligibility team determined that Student did not qualify for services under the IDEA OHD category. Student met the first prong of the criteria, because Student has a disability; however, unlike the prior eligibility meeting on August 31, 2015, the team determined Student no longer met the other criteria. Instead, the team determined that Student's medical conditions do not result in a decreased capacity to perform school activities and do not affect Student's educational performance in the classroom. The team determined that Student did not require specially designed instruction. The team also considered Eligibility Category 3 as a possible eligibility category, but Student did not "have a profile that would suggest that disability." Resp. Exh. 8.

169. Based on Private SLP 1's report, Parent 1 enrolled Student in private tutoring for writing. Student has attended private tutoring from October 2016, once a week for one hour. Student completes a writing assignment each session. Student also is assigned homework which

Student completes over the weekend. Each session costs \$67.71. Parent 1 has seen Student's writing progress through the tutoring sessions. TR 74:14-19; TR 101:3 – 102:11; TR 119:17-25.

170. During the first week of November 2017, the General Education Teacher 4 held parent/teacher conferences for the students. TR 342:3 – 343:19.

171. Parent 1 testified that Parent 1 did not receive notice of Student's Parent/Teacher conferences. TR 115:2-22.

172. The General Education Teacher 4 received Parent 1's email that Parent 1 did not receive notice of Student's Parent/Teacher conference. General Education Teacher 4 followed up with the person who sent the notices via email to make sure Home School had the correct address. General Education Teacher 4 testified that the notice was sent, delivered, and received. Parent 1 emailed the General Education Teacher 4 when Parent 1 discovered Parent 1 had missed the Parent/Teacher conference. The General Education Teacher 4 emailed Parent 1 to reschedule and provided Parent 1 with two times. Parent 1 was not available to attend on those dates. The General Education Teacher 4 did not offer any other dates. TR 342:8 – 343:16; TR 474:19 – 476:15.

173. Parent 1 testified that the General Education Teacher 4 does not communicate with Parent 1 about Student's progress. TR 95:16-25.

174. The General Education Teacher 4 had a parent/teacher conference with Parent 2. General Education Teacher 4 told Parent 2 that Student could do grade-level work and is making consistent gains every month. Student's skills were more developed than what Private SLP 1's report stated. TR 343:20 – 345:20.

175. On November 9, 2016, the Home School conducted Student's 504 Plan annual review meeting. Parent 1, Parent 3, Principal, School Counselor, BHS, SSC, and General Education Teacher 4 were present. Parent 2, DOE OT, and Clinical Psychologist were not present. Resp. Exh. 9 at 58; TR 433:7-15; TR 457:6-23.

176. The PLEP section stated that Student "is at grade level in reading, writing and math. [Student] is able to write in complete sentences using correct grammar, syntax, and spelling. Student is able to write fiction and non-fiction at grade level. Per teachers report, it appears that Student is able to sustain attention well enough to understand and complete assignments. Per [the DOE Clinical Psychologist's] report dated 10/04/16, [Student] is able to produce quality work when given adequate movement activity. [Student] is also able to engage and maintain focus on topics of interest." Pet. Exh. 31 at 334.

177. The Needs section stated that Student “exhibits issues with distractibility, attention, and inhibitory control in unstructured situations. Inattention manifests behaviorally as wandering off task, having difficulty sustaining focus, needing directions repeated, and is not due to defiance or lack of cooperation.” The General Education Teacher 4 testified that Student’s needs came from Parents. *Ibid.*

178. The 504 Plan stated Student needs, as accommodations to support Student at school included: movement breaks; access to sensory activities; visuals; to recognize Student’s boundary and others; to work on keeping Student’s hands, feet and body to __self; to identify express and manage feelings using strategies learned; counseling to support Student in identifying and expressing feelings such as (anxiety, frustration, etc.) and managing them appropriately. *Ibid.*

179. The 504 Plan also states, “[p]er Student’s teacher, there is no needs in the classroom for [Student] in the area of speech and language, and Student is actually progressing in this area...At this time, classroom teacher sees [Student] successfully fulfilling writing assignments and assessments.” *Ibid.*

180. Prior to the meeting, Parent 1 was provided with a draft 504 Plan that was developed by the SSC and the General Education Teacher 4. Parent 1 raised concerns at the annual meeting, because several accommodations that were listed in Student’s prior 504 Plan were no longer included in the draft plan. These accommodations were recommended by the private evaluators. After Parent 1 raised concerns, the team included the accommodations that were in the original 504 Plan and new accommodations as well:

	NOVEMBER 5, 2015 504 PLAN	NOVEMBER 9, 2016 DRAFT 504 PLAN	NOVEMBER 9, 2016 FINAL 504 PLAN
1.	<u>Sensory Regulations:</u> Student will choose which sensory accommodation will work for Student: lean against wall, deep pressure given to shoulder and back, wall push-ups, isometric exercise (push hands, bilateral bicep press, calf press), walk around right outside of class.	<u>Sensory Regulation:</u> To meet Student’s unique learning needs, Student will be allowed movement breaks and use of a wobble chair. Student does best when allowed to move around, extra time to process, and make noises (level one loudness) when doing writing, reading comprehension, and working on math.	<u>Sensory Regulation:</u> To meet Student’s learning needs, student will be allowed movement breaks and use of a wobble chair. Student does best when allowed to move around, extra time to process, and make noises (<i>verbal disabilities</i>) when doing writing, reading comprehension, and working on math.
2.	<u>Sensory Regulations:</u> Student	<i>Wobble Chair accommodation</i>	<i>Student is currently doing</i>

	will choose which sensory accommodation will work for Student: seat cushion, Velcro under the table, sugarless gum, stadium seat, hand fidgets.	<i>listed in #1.</i>	<i>isometric and flexibility exercises daily – up to twice a day (brain gym, yoga, squats, lunges, wall-leans, cross-overs) – to assist with Student’s sensory regulation. Student will be allowed to chew gum or a pencil topper to assist with Student’s oral sensory needs.</i>
3.	Check-in by the teacher or an EA to ensure task/assignment completion.	<i>Check-in by teacher listed in #6.</i>	<i>Check-ins by the teacher or EA/other designated adult to ensure task/assignment completion.</i>
4.	<u>Preferential seating</u> : Student will be able to choose 2-3 different places in the classroom to sit for Student’s learning needs (to be predetermined by teacher and Student).	<u>Preferential Seating</u> : Student will be able to choose between two seating areas in the classroom. Student does best when grouped with academically and socially high functioning peers.	<i>Same as draft.</i>
5.	Breaking work into smaller parts and intersperse short, structured breaks to help maintain focus and support task completion.	<i>Not included.</i>	<i>Chunking assignments (breaking work into smaller step-by step segments), provide extra time, and allowing for short breaks as needed to complete assignments.</i>
6.	Provide written instructions, visual handouts (near point), and visual daily schedule for tasks to help Student to reorient ___self when Student loses focus.	<u>Visual Aides</u> : Student will be given the daily schedule and assignment expectations in the form of written instructions for tasks on the white board with a check-in by teacher.	<u>Visual Aides</u> : Student will be given a <i>visual</i> daily schedule, written instructions, and <i>visual handouts (near point)</i> to help Student to reorient ___self when Student loses focus.
7.	Limiting computer use to research, ___, ___, ___, ___ and State Assessments.	<i>Not included.</i>	<i>Limiting computer use such as research on topics related to education, __, __, __, and State Assessments.</i>
8.		Student will be provided the option of a quiet learning space to learn at times when Student is processing writing, reading comprehension, and working on story problems.	<i>Same as draft.</i>
			<i>Repeat directions and ensure understanding.</i>
	Student will participate in	Student will participate in state-	Student will participate in

state-wide assessments with the following accommodations:) Tested in small group. State-wide testing will be limited to 30 minutes a day.	wide assessments. No accommodations are necessary.	state-wide assessments. No accommodations are necessary. <i>Student will be given only 45 minutes per day of testing plus time to check answers/responses during Student's participation in State Assessments.</i>
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Pet. Exh. 20 at 126-127; Pet. Exh. 31; TR 108:11 – 144:5.

181. The General Education Teacher 4 testified that Parent 1 requested limiting computer use and having only 45 minutes per day of testing. General Education Teacher 4 hypothesized that Student might get higher test scores if Student did not have time constraints. The General Education Teacher 4 was not aware that in the previous 504 Plan, Student's testing was limited to 30 minutes per day and Parent 1 had requested the additional time. TR 440:13 – 442:4; TR 449: 20 – 451:6.

182. Parent 1 was concerned that Student was not receiving services that had been recommended by the private evaluators, specifically SLP and OT. TR 90:21 – 91:4.

183. The private Educational Psychologist testified that the accommodations provided in Student's 504 Plan, such as chunking instruction and providing sensory breaks, constitute specialized academic instruction. TR 207:4-21.

184. The DOE did not develop a formal sensory regulation plan. TR 311:4-18.

185. The General Education Teacher 4 takes Student to the sensory room in the morning to “get out Student's extra energy” to address Student's particular sensory needs. TR 506:16 – 507:21

186. The General Education Teacher 4 stated that Student's writing skills were at grade level. Resp. Exh. 22, 23, 24, and 25; TR 102:24 – 103:2.

187. Parent 1 testified that Student's ___ grade homework does not reflect what was taught during the school day; rather, it consists of a ___ assignment on the computer. There are no writing assignments or projects as there were in ___ grade. TR 91:8 – 92:13

IV. CONCLUSIONS OF LAW

A. Burden of Proof

The Supreme Court held in *Schaffer* that “[t]he 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, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). “The Court concluded that the burden of persuasion lies where it usually falls, upon the party seeking relief.” *Id.* at 535; *see also Stringer v. St. James R–I Sch. Dist.*, 446 F.3d 799, 803 (8th Cir.2006) (following *Schaffer* in context of claim that IEP was not being implemented). Neither *Schaffer* nor the text of the IDEA supports imposing a different burden in IEP implementation cases than in formulation cases.

B. IDEA Requirements

The Code of Federal Regulations (“CFR”) section 300-101 and the Hawai'i Administrative Rules (“HAR”), Title 8, Chapter 60, requires that Respondents make available to students with a disability an offer of FAPE that emphasizes special education and related services designed to meet their unique needs.

In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the Court set out a two-part test for determining whether Respondent offered a FAPE: 1) whether there has been compliance with the procedural requirements of the IDEA; and 2) whether the IEP is reasonably calculated to enable the student to receive educational benefits. *Rowley* 458 U.S. at 206-207. Respondent is not required to “maximize the potential” of each student; rather, Respondent is required to provide a “basic floor of opportunity” consisting of access to specialized instruction and related services which are individually designed to provide “some educational benefit.” *Rowley* 458 U.S. at 200.

However, the United States Supreme Court recently determined in *Andrew F. v. Douglas County School Dist.*, 137 S.Ct. 988 (2017) that the educational benefit must be more than *de minimus*. The Court held that the IDEA “requires an educational program reasonably calculated to enable a child to make progress appropriate in the light of the child’s circumstances.” *Andrew* 137 S.Ct. at 1001. Similarly, the Hawaii District Court held that the IEP must be tailored to the unique needs of the child and reasonably designed to produce benefits that are “significantly more than *de minimus*, and gauged in relation to the potential of the child at issue.” *Blake C. ex rel Tina F. v. Hawaii Dep't of Educ.*, 593 F.Supp.2d 1199, 1206 (D. Haw. 2009).

Under the IDEA, procedural flaws do not automatically require a finding of a denial of a FAPE. However, procedural inadequacies that result in the loss of educational opportunity or seriously infringe on the parents’ opportunity to participate in the IEP formulation process clearly result in the denial of a FAPE. *W.G. v. Board of Trustees of Target Range School District*, 960 F.2d 1479 (9th Cir. 1992).

An individual who is eligible for services under the IDEA may also qualify for assistance under Rehabilitation Act of 1973 (“Section 504”). The DOE must comply with both statutes.

Section 504 prohibits discrimination on the basis of a handicap in a variety of programs and activities receiving federal aid. 29 U.S.C. §794(a). Both Section 504 and the IDEA have been interpreted as requiring states to provide a FAPE to qualified handicapped persons, but only the IDEA requires development of an IEP. 20 U.S.C. §1401(a)(20). 34 C.F.R. §104.33 requires recipients of federal funds to “provide a free appropriate public education [FAPE] to each qualified handicapped person.” The U.S. DOE regulations define “appropriate education” as, “regular or special education and related aids and services that (i) are designed to meet the individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of [34 C.F.R.] §§104.34, 104.35, and 104.36.”

The mechanism for ensuring a FAPE under the IDEA is through the development of a detailed, individualized instruction plan known as an Individualized Education Program (“IEP”) for each child. 20 U.S.C. §§ 1401(9), 1401(14), and 1414(d). The IEP is a written statement, prepared at a meeting of qualified representatives of the local educational agency, the child’s teacher, parent(s), and where appropriate, the child. The IEP contains, in part, a statement of the present levels of the child’s educational performance (“PLEP”), a statement of the child’s annual goals and short-term objectives, and a statement of specific educational services to be provided for the child. 20 U.S.C. § 1401(19). The IEP is reviewed and, if appropriate, revised, at least once each year. 20 U.S.C. § 1414(d). The IEP is, in effect, a “comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs.” *Burlington v. Dep’t of Educ. Of the Commonwealth of Massachusetts*, 471 U.S. 359, 368, 105 S.Ct. 1996, 2002 (1985).

An IEP adequately provides a FAPE if it is reasonably calculated to provide a child with a meaningful educational benefit at the time it was developed. *J.W. by J.E.W. and J.A.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 449 (9th Cir. 2010). It must be tailored to the unique needs of the child and reasonably designed to produce benefits that are “significantly more than de minimus, and gauged in relation to the potential of the child at issue.” *Blake C. ex rel Tina F. v. Hawaii Dep’t of Educ.*, 593 F.Supp.2d 1199, 1206 (D. Haw. 2009). An IEP must be evaluated prospectively as of the time it was created. Retrospective evidence that materially alters the IEP is not permissible. *R.E. v. New York City Dep’t of Educ.*, 694 F.3d 167 (2012).

C. Whether the DOE failed to find Student Eligible for IDEA Services.

Petitioners argue that the DOE failed to find Student eligible under the IDEA at their October 5, 2016 eligibility meeting. Petitioners allege that the eligibility team did not consider the Hearings Officer's decision in DOE-SY1516-028 that found Student was receiving specially designed instruction. Petitioners disagreed with the decision and asserted that Student was not receiving specially designed instruction; rather, Student was receiving "accommodations" in the 504 Plan. This issue requires a two-step analysis. First, whether the DOE appropriately assessed Student in all suspected areas of disability? Second, whether the DOE appropriately determined Student not eligible under the IDEA?

1. Whether the DOE assessed Student in all suspected areas of disability.

The IDEA requires an initial evaluation as the necessary first step in determining whether a student is eligible for special education services and in developing an appropriate special education program and placement. 34 C.F.R. §300.8(a). The evaluation procedures require a school district to: 1) use a variety of assessment tools to gather relevant functional, developmental and academic information about the child, including information from the parent; 2) not use any single measure or assessment as the sole criterion for determining eligibility or an appropriate educational program; and 3) use technically sound instruments to determine factors such as cognitive, behavioral, physical and developmental factors which contribute to the disability determination. C.F.R. § 300.304(b)(1-3).

In addition, the "other evaluation procedures" require that the evaluation: 1) be valid and reliable; 2) be administered by trained personnel in accordance with the instructions provided for the assessments; 3) assess the child in all areas related to the suspected disability; 4) be sufficiently comprehensive to identify all of the child's special education and related service needs; and 5) contain tools and strategies that provides the relevant information that directly assists in determining the educational needs of the child. 34 C.F.R. §§ 300.304(c)(1)(iii-iv), (2), (4), (6), (7).

Once an evaluation or reevaluation is completed, a group of qualified school district professionals and the child's parents determine whether the Student is a "child with a disability" and their educational needs. 34 C.F.R. § 300.306(a). In making such a determination, the district is required to "draw upon information from a variety of sources," including those required to be part of the assessments, and assure all such information is "documented and carefully considered." 34 C.F.R. § 300.306 (c)(1). A public agency must also ensure that a reevaluation of each child with a disability is conducted if the public agency determines that the educational

needs or related services, including improved academic achievement and functional performance, of the child warrant a reevaluation. 34 C.F.R. 300.303(a)(1); 20 U.S.C. 1414(a)(2).

On June 27, 2016, the Hearings Officer issued a Decision in favor of Petitioners in DOE SY 1516-028. The Hearings Officer concluded that Petitioners met their burden and showed the DOE procedurally and substantively violated the IDEA, thereby denying Student a FAPE. The Hearing Officer found and concluded that the evaluations and assessment conducted by the private Neuropsychologist, private OT, Private SLP 2, private Educational Psychologists, and Private SLP 1 were appropriate. The Hearings Officer also strongly recommended that the Home School conduct, at a minimum, a Behavior Assessment and an assessment and FBA, prior to the next eligibility meeting.

In response to the Decision, on July 29, 2016, the Home School conducted a SST meeting. Parent 1, Parent 2, DOE Principal, SLP, BHS, School Psychologist, SSC, General Education Teacher 4 and SPED teacher participated. The PWN dated July 29, 2016 stated that Student would have a behavioral assessment and a classroom observation would be conducted. The SST requested Student have speech/language, OT, academic, and cognitive evaluations. Parents declined, because Student “has been tested a lot this year and wants to use the current evaluations.” The SST agreed to use the current evaluations.

At the end of September 2016, the DOE OT conducted an informal observation for approximately 45 minutes of Student in the ___ grade classroom during a writing assignment. Student worked independently and was able to transition to small group activities on the floor. Student responded appropriately with Student’s peers and DOE OT did not see any problematic behaviors. DOE OT testified that the General Education Teacher 4 was effectively utilizing the strategies in Student’s 504 Plan. The observation lasted approximately 45 minutes.

The DOE Clinical Psychologist’s report dated October 5, 2016 stated that Student “was referred for a psychological assessment by Student’s school team in order to further understand Student’s emotional presentation and inform educational and psychotherapeutic interventions.” The DOE Clinical Psychologist conducted a psychological evaluation of Student. DOE Clinical Psychologist consulted with the BHS, reviewed Student’s educational file and private evaluations. DOE Clinical Psychologist interviewed Parent 1 two times at their residence, and DOE Clinical Psychologist observed Student on two occasions at both Student’s home and school. Student was observed to be engaging, responsive, easily understood, and “happy-go-lucky.” Student did not exhibit any disability during the observations.

DOE Clinical Psychologist also interviewed the teachers and had them complete questionnaires. The General Education Teacher 4 completed the teacher form of the assessment, and Parent 1, Parent 2, and the General Education Teacher 4 completed the parent and teacher forms of the assessment. The assessment determines Student's executive function. The assessment is similar to the assessment that the private Educational Psychologist used. The assessment assesses planning, organization, inhibition, task completion, and initiation.

The DOE Clinical Psychologist also had the teachers complete a 59-item "Questionnaire Addressing the Hearings Officer's Concerns." The DOE Clinical Psychologist used the Questionnaire as an information-gathering tool, not as a standardized assessment. DOE Clinical Psychologist created the Questionnaire based on problematic behaviors that had been identified by the General Education Teacher 2 in the prior due process hearing; however, DOE Clinical Psychologist did not have the General Education Teacher 2 answer the Questionnaire, and DOE Clinical Psychologist did not interview General Education Teacher 2. The DOE Clinical Psychologist testified that the teachers "did not have effective behavioral management classroom strategies; therefore, they had more problems with behaviors in their classroom...the ratings were skewed." Instead, DOE Clinical Psychologist interviewed the General Education Teacher 4 after General Education Teacher 4 completed the Questionnaire. Parent 1 was never shown or given the Questionnaire. The DOE Clinical Psychologist created the Questionnaire to address the Hearings Officer's concerns in the DOE SY 1516-028 Decision, because DOE Clinical Psychologist thought the case would result in continued litigation.

The DOE Clinical Psychologist found, consistent with the private Neuropsychologist's report, Student continues to meet the diagnostic criteria for the neurological condition. DOE Clinical Psychologist also found, consistent with the private Educational Psychologist's report, Student continues to meet the diagnostic criteria. The DOE Clinical Psychologist determined that Student was eligible for supports under Section 504. DOE Clinical Psychologist stated that the "team should discuss whether or not [Student] is eligible for special education. The school team should discuss accommodations that might assist [Student] in the classroom (e.g., use of fidgets, swivel chair, movement breaks, etc.)" The DOE Clinical Psychologist did not believe Student needed counseling service; however, DOE Clinical Psychologist agreed with the private Educational Psychologist's recommendation that Student should have a psychiatric consult to determine if a medication regimen is appropriate.

The Hearings Officer finds that the DOE assessed Student in all areas of suspected disability.

2. Whether the DOE appropriately determined Student not eligible under the IDEA.

As stated *supra*, once an evaluation or reevaluation is completed, a group of qualified school district professionals and the child's parents determine whether the Student is a “child with a disability” and their educational needs. 34 C.F.R. § 300.306(a). In making such a determination, the district is required to “draw upon information from a variety of sources,” including those required to be part of the assessments, and assure all such information is “documented and carefully considered.” 34 C.F.R. § 300.306 (c)(1). “To qualify under IDEA, a child must satisfy three criteria: (i) he must suffer from one or more of the categories of impairments delineated in the IDEA, (ii) his impairment must adversely affect his educational performance, and (iii) his qualified impairment must require special education and related services.” *Citing Capistrano Unified School Dis. V. Wartenberg*, 59 F.3d 884, 899 (9th Cir. 1995).

On October 5, 2016, the DOE conducted an Eligibility meeting. Parent 1, Parent 3, Principal, DOE Clinical Psychologist, School Psychologist, SLP, OT, BHS, SSC, General Education Teacher 4, and the SPED teacher participated. The Eligibility Team reviewed Student’s current educational performance, assessments, including Student’s cognitive, speech, psychological, academic, emotional/behavioral, and OT assessments. They also reviewed the OT observation, statewide assessment results, the ___ and ___ grade educational performance, classroom work samples, and Student’s social, academic and behavioral performance compared with Student’s general education classmates. The team also considered Parent input, the decision in DOE SY1516-028, the FBA meeting, and teacher reports.

Parent 1 wanted Student to be found eligible for SPED services. Parent 1 stated Parent 1 was concerned about Student’s distractibility, fidgeting, blurting out, and putting items in Student’s mouth. Parent 1 did not want Student to miss instructional time while Student took movement breaks. The General Education Teacher 4 raised concerns about Student leaning into the space of others as well as blurting things out in class. Parent 1 also brought up Parent 1’s concerns that Student was not meeting State standards. The teacher responded that the standards were “nearly met,” and General Education Teacher 4 was not concerned about Student’s scores. Parent 1 discussed the Decision in DOE SY1516-028 stating that the Hearings Officer determined Student was receiving specialized instruction.

The SPED teacher disagreed with the decision. The SPED teacher testified that “specially designed instruction” is when “you alter, adapt, change the content, methodology, or

delivery of the instruction to students whose disabilities adversely affect their educational performance. The SPED teacher did not provide Student with specially designed instruction. The SPED teacher testified that an “accommodation” does not change the content, methodology or delivery of the instruction. An accommodation “provides equal access to the general education of that student.” Section 504 plans provide accommodations for students. The General Education Teacher 4 testified that Student does not receive specially designed instruction. Student receives the same content, curriculum as the non-disabled peers. General Education Teacher 4 testified that Student received accommodations, not modifications to the instruction.

The Eligibility team again determined that Student did not qualify for services under the IDEA Eligibility Category 1. Student met the first prong of the criteria, because Student has a disability; however, unlike the August 31, 2015 eligibility meeting where Student met criteria, this team determined that Student’s medical conditions did not show “student’s limited strength or heightened alertness to environmental stimuli results in the inability to maintain awareness, vigilance, mindfulness, or attentiveness resulting in a decreased capacity to perform school activities” or that Student’s negative behaviors “may be caused by environmental stimuli or an internal ability to maintain focus.” Also, the team found that Student’s behaviors do not result in a decreased capacity to perform school activities and do not adversely affect Student’s educational performance in the classroom. The team also considered Eligibility Category 3 as a possible eligibility category, but Student did not “have a profile that would suggest an Eligibility Category 3.” Ultimately, the team determined that Student did not find Student qualified for SPED services under the IDEA, because Student’s health impairment did not adversely affect Student’s educational performance.

The private Educational Psychologist stated that Student demonstrates “significant behavioral, sensory-integration/regulation and oral language challenges that affect Student’s educational performance. Behavioral difficulties include significant symptoms of disability as well as verbal and behaviors. Multiple serious behavioral concerns had been documented by Student’s current teacher and the General Education Teacher 2. At the time of the referral, it was reported that Student had significant behavioral concerns and delays in academic performance. The General Education Teacher 3 stated that Student was “somewhat below grade level” in reading and writing, and Student was behaving “somewhat less appropriately.” The General Education Teacher 3 reported concerns with Student’s “social behavior and self-awareness,” and the Student “experienced problems concentrating, sitting still, fidgeting, being impulsive and

loud.” The private Educational Psychologist determined that Student met the eligibility criteria for SPED in the areas of Eligibility Category 2 and Eligibility Category 1.

The private Neuropsychologist found that a “major impact” of Disability was the toll it can take on one’s ability to focus and concentrate. The repetitive nature of the disability was often quite distracting to the individuals themselves, particularly if they were attempting to control the disability, or if they were attempting to complete work while suffering from the repetitive interruption of the disability. Disability interrupted Student’s focus and Student’s ability to remember to follow through on tasks Student was instructed to complete, as such, what appears to be a memory issue might really be an attention issue. With respect to Student’s problems with attention and impulsivity, the private Neuropsychologist recommended the following: 1) provide Student with a written outline of instructions for tasks so that when Student loses focus, Student can use the written instructions to re-orient to the task at hand; 2) break work into smaller parts and intersperse short, structured breaks to help maintain focus and support task completion; and 3) where possible, consider assigning less work, as long as Student demonstrates and understanding of the new material.

The private OT stated that Student had several OT needs that were educationally related that could be addressed by school based OT including: 1) creating a sensory regulation plan to include movement breaks throughout the day; 2) sensory supports for optimal learning; 3) seating supports for optimal posture and attention for learning; 4) pencil grip and excessive pressure on finger joints; 5) handwriting accommodations such as keyboarding or oral expression; 6) the “ALERT Program” which teaches self-regulation skills; and 7) test taking, activity, and homework accommodations. The private OT also recommended Student have an assessment of pragmatic social skills, such as the assessment in the school setting. The private OT stated that in the classroom Student would benefit from: 1) extra time to generate a new idea or process; 2) therapeutic activities and supports to improve ideation; 3) breaking multi-step tasks into manageable chunks; 4) consistent predictable schedule; 5) visual supports; preferential seating; 6) visually simple worksheets; 7) covering parts of the worksheets which Student does not need to reference; 8) highlighting; 9) reduce visual clutter in Student’s area; 10) self-regulation strategies; and 11) verbal instruction at a slower pace to allow for increased processing and response time.

The DOE OT stated that Student would benefit from developing a regulation plan where Student can get Student’s proprioceptive needs worked out in a variety of ways throughout the day. DOE OT recommended the regulation plan: 1) use gross motor equipment; 2) climbing

rock wall, trees; 3) carrying/putting canned groceries away on high shelves; 4) watering the garden with large can; 5) isometric exercises; 6) wall push-ups; and 7) deep pressure given to shoulders/back in casual passing by the adults.

Private SLP 2 stated, “[b]ased on the above testing, [Student] is demonstrating language skills in the lower average (receptive and vocabulary) to slightly below average (expressive language). Although Student’s social pragmatic skills were adequate during testing, I can see how in a group setting Student would have difficulty because of Student’s lower language skills.” SLP 2 recommended that Student receive speech services to address Student’s language skills – expressive, receptive and social. Based on the possible problems one with Disability can display (use of inappropriate language, auditory processing, attention difficulty, social skills deficits) an individual and a group session would be appropriate. Private SLP 2 recommended “[s]killed speech therapy to address: communication, cognition, swallowing, education to care givers and to create/modify home program.” Student also has several OT needs and a unique sensory profile that predisposes Student to notice and become easily distracted by background stimuli and adversely affects Student’s educational performance.

The DOE Clinical Psychologist determined that Student was eligible for supports under Section 504. DOE Clinical Psychologist stated that the “team should discuss whether or not [Student] is eligible for special education. The school team should discuss accommodations that might assist [Student] in the classroom (e.g., use of fidgets, swivel chair, movement breaks, etc.)” The DOE Clinical Psychologist did not believe Student needed counseling services. The DOE Clinical Psychologist noted that Parents are very supportive of Student and have “consulted with various professionals for strategies to use in the home to manage Student’s distractibility and disability. They should continue to access resources within and outside of the DOE as needed.” The DOE Clinical Psychologist agreed with the private Educational Psychologist’s recommendation that Student should have a psychiatric consult to determine if a medication regimen is appropriate.

The reports from private Neuropsychologist, Private SLP 2, private Educational Psychologist, private OT, DOE OT, and DOE Clinical Psychologist consistently prove that “student’s limited strength or heightened alertness to environmental stimuli results in the inability to maintain awareness, vigilance, mindfulness, or attentiveness resulting in a decreased capacity to perform school activities.” Petitioners have clearly shown that Student’s negative behaviors “may be caused by environmental stimuli or an internal ability to maintain focus.”

Respondent further argues that Petitioners have not presented evidence that Student's disability adversely affects Student's educational performance, the last prong in the disability category criteria. Respondent relies on U.S. District Court, State of Hawaii Judge H. Gillmor's definition of "adversely affects." *Ashli C. v. State of Hawaii, Dept. of Educ.*, 2007 WL 247761. In *Ashli*, Judge Gillmor stated that whether a "student's disability 'adversely affects' his 'educational performance' refers to the student's ability to perform in a regular classroom designed for non-handicapped students. If a student is able to learn and perform in the regular classroom taking into account his particular learning style without specially designed instruction, the fact that his health impairment may have a minimal adverse affect does not render him eligible for special education services...Where a student...is able to learn and function at an average level in the regular classroom and experiences only a slight impact on his educational performance, it cannot be said that the student is harmed." *Ashli* at *9.

Neither the IDEA nor the federal or state regulations define the term "adversely affects the student's educational performance." The First Circuit also addressed the definition of "adversely" in *Mr. I. ex rel. L.I. v. Maine School Admin. Dist. No. 55*, 480 F.3d 1, 16 (1st Cir. 2007). The Court stated:

"[w]e think it considerably more likely that federal regulators used 'adverse' in its ordinary sense, namely 'against.'" *Black's Law Dictionary* 58 (8th ed. 2004); *see also Webster's Third New International Dictionary of the English Language (Unabridged)* 31 (1993) (giving primary definition of 'adverse' as 'acting against or in a contrary direction'). In this way, the regulation sensibly demands that a disability cannot qualify a child for IDEA benefits unless it has a negative effect on educational performance; no effect, or a positive one, will not do. The regulation does not, however, put any quantitative limit, 'significant' or otherwise on the disability."

Interestingly, in footnote 14 of *Mr. I.*, the First Circuit stated that Judge Gillmor, in the *Ashli* case, used the "secondary definition of 'adverse' from a different dictionary¹⁰ – 'causing harm' – to interpret the 'adversely affects' requirement, concluding that, when a student 'experiences only a slight impact on his educational performance, it cannot be said that the student is harmed.'" The court continued, "[i]n fact, however, the student is still 'harmed' – if only slightly – so the court's conclusion **does not follow the definition it cites**. As a result, *Ashli & Gordon C.* does not persuasively address the absence of any qualitative limitation in the regulatory language. (*emphasis added*) *Ibid.* The court ultimately ruled that "any negative impact, regardless of

¹⁰ "At the time HAR §8-56-25's was enacted, Merriam Webster's Collegiate Dictionary defined 'adverse' as: 1) acting against or in a contrary direction; 2) opposed to one's interests or causing harm; or 3) opposite in position. *Merriam Webster's Collegiate Dictionary*, (10th ed. Principal copyright 1993, updated through 2002)." *Ashli* at *9.

degree, qualifies as an ‘adverse effect’ under the relevant federal and state regulations defining the disabilities listed in §1401(3)(A)(i).” *Id.* at 17.

Similarly, in *Corchado v. Bd. of Educ. Rochester City School Dist.*, Mother sought to have her son qualify for IDEA services under the “Other Health Impairment” category because he suffered from: 1) receptive and expressive language disorder; 2) articulation disorder; 3) seizure disorder; 4) significant processing deficits; 5) developmental reading disorder; and 6) developmental coordination disorder. 86 F.Supp.2d 168, 171 (2000). The Educational District concluded that, “[a]lthough he presents with a seizure disorder and is diagnosed with ADHD, it does not appear to negatively impact on his academic performance in the classroom.” Mother appealed this eligibility decision, and the Hearings Officer found that, “[t]he district properly contends that, whatever student’s difficulties, if student is able to achieve satisfactorily academically, his problems do not rise to a level satisfying the definitional standards in the regulations. While student has a number of problems, the evidence in the record shows he is achieving satisfactorily in school. He is achieving at an average level at his current grade level in regular education.” *Id.* at 176. Mother appealed the decision to federal court seeking judicial review of the state’s administrative proceedings. The Court in stated:

“[t]he IHO’s reasoning, in effect, precludes a child whose academic achievement can be described as ‘satisfactory’ from being able to demonstrate that documented disabilities adversely affected the student’s academic performance. This should not and cannot be the litmus test for eligibility under the IDEA. The fact that a child, despite a disability, receives some educational benefit from regular classroom instruction should not disqualify him from eligibility for special education benefits if the disabilities are demonstrated to ‘adversely affect *the child’s* educational performance.’”

(*emphasis is original*) *Ibid.* The Court found that “denying him special education benefits because he is able to pass from grade to grade despite documented impairments that adversely affect his educational performance is wrong.” The Court found student to be eligible for SPED under the OHI category. *Ibid.*

As stated *supra*, the reports from private Neuropsychologist, Private SLP 2, private OT, and private Educational Psychologist consistently prove that Student’s diagnosis adversely affect Student’s academic performance. Instead, Respondents rely on the observations of the General Education Teacher 4 and the information the General Education Teacher 4 provided to the DOE Clinical Psychologist and DOE OT. Respondents completely disregard Petitioners’ expert witnesses and the concerns of Student’s teachers.

For example the DOE Clinical Psychologist provided assessment Feedback Report to Parent 1, Parent 2, and the General Education Teacher 4. The assessment determines Student's executive function. Parent 1's Feedback Report Student scored in the "well below average" range on the "working memory" scale, placing Student in the 2nd percentile. Student's ratings, according to Parent 1's feedback, indicated that Student "has difficulty keeping information in mind that is important for knowing what to do and how to do it, including remembering important things, instructions, and steps." Parent 2's Feedback Report placed Student in the "low average" range. In contrast, the General Education Teacher 4's Feedback form stated "Student can keep information in Student's mind and remember important things, instructions, and steps."

Private SLP 2 evaluated Student two times at Private SLP 2's office. Student could not complete the evaluation in one session because Student exhibited distractibility. Student's scores indicated that Student's receptive language skills were in the lower end of average and Student's expressive skills were slightly below the low end of average. Private SLP 2 stated, "[b]ased on the above testing, [Student] is demonstrating language skills in the lower average (receptive and vocabulary) to slightly below average (expressive language). Private SLP 2 recommended that Student receive speech services to address Student's language skills – expressive, receptive and social. Based on the possible problems one with Disability can display (use of inappropriate language, auditory processing, attention difficulty, social skills deficits) an individual and a group session would be appropriate. Private SLP 2 recommended "[s]killed speech therapy to address: communication, cognition, swallowing, education to care givers and to create/modify home program."

The DOE SLP conducted a Speech-Language Evaluation of Student. Student's score of 87 in the Oral Expression scales fell within the average range. Student's score of 91 in the Listening Comprehension scales also fell within the average range. Student's language-based critical thinking skills' score of 87 fell within the low average range when compared to same aged peers. Student had difficulty with sequencing, negative questions, and problem solving.

The DOE SLP also found that "Student's weakness in understanding spoken paragraphs on the assessment measure suggests that [Student] requires added visuals and hand-on learning techniques, for example, pictures, printed text acting out new vocabulary or scenes in a story and extra time to formulate verbal and possible written responses. The DOE SLP testified that when a student scores below average in the assessment, it indicates that the student may not maintain or sustain attention while just listening to an oral story read aloud, and that they may need visual aids. DOE SLP recommended Student have visual aids. DOE SLP recommended that

[Student's] current supports and modifications developed at the beginning of the school year be continued.”

Both the private Neuropsychologist and private SLPs recommended Student have speech/language services. Student had difficulty in group settings because of Student's language skills. Student's scores indicated that Student's receptive language skills were in the lower end of average and Student's expressive skills were slightly below the low end of average. Private Neuropsychologist recommended that Student receive speech services to address Student's language skills – expressive, receptive and social. Based on the possible problems one with Disability can display private Neuropsychologist stated that an individual and a group session would be appropriate. The private Neuropsychologist recommended that Student have updated speech and language testing, as well as identifying appropriate support services to help with Student's verbal skills.

The DOE Psychologist made the following recommendations: 1) work on vocabulary building; 2) include supportive modalities to increase understanding of language used; 3) embed instruction within a meaningful context; 4) increasing listening ability through game-like format; 5) capitalize on opportunities to define words within instruction; and 6) develop vocabulary through naturalistic extension of language.

What is most concerning is that the DOE Clinical Psychologist's view of Parent 1 was clearly biased and DOE Clinical Psychologist minimized the General Education Teacher 2's concerns about Student's behaviors. This calls into question the validity of DOE Clinical Psychologist's report and findings. DOE Clinical Psychologist stated in DOE Clinical Psychologist's report, “[w]hen I encounter a case like [Student's], a child with a thick educational file and extensive assessment that is significantly out of proportion to the severity of the problems that Student is exhibiting, this points to an adversarial relationship between parent and school. [Parent 1] did not trust of find the DOE evaluations to be adequate and sought private evaluations of child, which is Parent's right. Nevertheless, this trust deficit and the overpathologizing of the child can, over time, adversely affect a student because the adults in Student's life are not on the same page and the message that is sent to the child. Whether Student was referred in the __ grade due to the classroom teacher's difficulties with behavioral management, it appears that over time [Student's] school-related behaviors have significantly diminished according to successive teacher reports.”

First, Student has not had “extensive assessment” and Parent 1 did not seek private evaluations because Parent 1 did not trust the DOE's evaluations; Parent 1 wanted a

comprehensive picture of Student. Parent 1 had Student assessed by the private Neuropsychologist on May 27, 2015, because Student was exhibiting a disability and Parent 1 was concerned. This concern was obviously well-founded, because the General Education Teacher 2 had the same concerns at the same time. On May 26, 2015, the General Education Teacher 2 was given the assessments to complete, without Parent 1's knowledge. Based on the private Neuropsychologist's recommendations and diagnosis, Parent 1 had Student assessed by Private SLP 2 and the private OT. The DOE then conducted cognitive, speech/language, and OT assessments. Parent 1 sought an IEE with the private Educational Psychologist, and the DOE concurred. The private Educational Psychologist diagnosed Student with Disability recommended Student have further speech/language assessment; Parent 1 then contacted Private SLP 1. The only reports Parent 1 obtained after the DOE evaluations were the private Educational Psychologist and Private SLP 1. In fact, it was the DOE that wanted further assessments in speech/language, OT, academic, and cognitive, and the SST meeting in July 2016, but Parent 1 refused because Student had already been extensively tested.

Next, the DOE Clinical Psychologist claims that there is a "trust deficit" and accused Parent 1 of "overpathologizing" Student. As previously stated, Parent 1 sought treatment for Student's disability, and eventually discovered Student's disability. Parent 1 was not "overpathologizing" Student; Parent 1 was following the recommendations of **experts**. Parent 1's efforts and concerns were completely reasonable. To cast Parent 1's actions in a negative light, shows that the DOE Clinical Psychologist was biased against Parent 1. How else would DOE Clinical Psychologist come to a conclusion that there was a "trust deficit?" Why else would DOE Clinical Psychologist create a Questionnaire in preparation for litigation?

The DOE Clinical Psychologist even disparaged the General Education Teacher 2, stating that Student was referred, "due to the classroom teacher's difficulties with behavioral management." The record shows this is simply not true. The General Education Teacher 2's concerns turned out to be well-founded and verified by experts, not a result of General Education Teacher 2's management. That is presumable why DOE Clinical Psychologist did not have the General Education Teacher 2 complete the Questionnaire. DOE Clinical Psychologist wanted to make sure the results aligned with a successful litigation plan.

Lastly, the DOE Clinical Psychologist stated, "it appears that over time [Student's] school-related behaviors have significantly diminished according to successive teacher reports." In February 2016, it was reported that Student had significant behavioral concerns and delays in academic performance. The General Education Teacher 3 stated that Student was "somewhat

below grade level” in reading and writing, and Student was behaving “somewhat less appropriately.” The General Education Teacher 3 reported concerns with Student’s “social behavior and self-awareness,” and the Student “experienced problems concentrating, sitting still, fidgeting, being impulsive and loud.” General Education Teacher 3 rated Student’s problems with hyperactivity and impulsivity at the 91st percentile. Likewise, the General Education Teacher 3’s assessment scores were similar to the General Education Teacher 2, and the assessment scores were similar to Parent 1.

Student’s State Assessment score placed Student in the “approaches proficiency” category. The score also reflected that Student did not meet State standards by one point Student’s English Language Arts/Literacy score for the ___grade year was “lower than the average score of peers in the school, similar to that of peers in the complex area, and similar to that of peers statewide.” Student did not meet State standards. On the Math test, Student’s score increased in the ___grade from the ___ grade. Student had met the State standard in the ___ grade, but did **not** meet the State standard in the next grade. The General Education Teacher 4 testified that in order to have “growth,” the Student’s score must improve by 10%. Neither scores showed a 10% growth rate.

Student received ___ scores for language arts in ___ and ___ grades. Even though the General Education Teacher 3 had significant concerns about Student in February 2016, by the end of ___ grade, Student miraculously received ___scores in all subjects. Student received an _____ in the ___ grade. At the FBA meeting, Parent 1 and Parent 3 explained that Student’s improvement was based on all of the outside help they were providing Student. Student was seeing a SLP, OT, and receiving private tutoring. Additionally, Parent 1 had to help Student with Student’s homework with the second set of textbooks that the General Education Teacher 3 gave Parent 1. The General Education Teacher 3 was aware of all of the outside help Student was receiving to keep up with Student’s grade. It is truly unclear how the DOE Clinical Psychologist could state that “over time [Student’s] school-related behaviors have significantly diminished according to successive teacher reports,” when Student’s report was dated October 5, 2016, and Student had only been in the ___ grade for one quarter. DOE Clinical Psychologist obviously relied solely on the General Education Teacher 4’s observations.

Student’s needs were documented by several experts. Despite the consistent findings of the experts, the DOE determined that Student’s disability did not adversely affect Student’s educational performance and Student was not in need of, or receiving, specially designed instruction. It is clear from the testimony of the witnesses that Student had a need for

specifically designed instruction. Student did not have proper supports and Student's educational performance was adversely impacted, as evidenced by Student's failure to meet state standards. Further, Student's weekly private tutoring for Student's writing deficits have allowed Student to make gains in this area.

As previously stated, Respondent asserts that Student does not need, and is not receiving specially designed instruction. Special education is "specially designed instruction...to meet the unique needs of a child with a disability." 34 C.F.R. §300.39(a)(1), *see also* H.A.R. §8-60-2. Specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction to address the unique needs of the child that result from the child's disability; and 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. 34. C.F.R. §300.39(b)(3), *see also* H.A.R. §8-60-2.

The DOE had previously addressed the concerns that the private Neuropsychologist and Private SLP 2 had, by having Student attend the social skills group program in the ___ grade. The social skills group conducted by the DOE SLP and SPED teacher in the ___ grade. The General Education Teacher 2 referred Student to the group because Student had difficulties with personal space and personal boundaries that might impact Student's relationship with peers and adults. Student attended the group two times a week for approximately 30 minutes. The group consisted of ___ students and they worked on social learning, social courtesies, and what to say in certain situations. They would identify feelings, to understand their own feelings and those of others. Student engaged in appropriate conversation during the group session and was very sociable. Unfortunately, the social skills group was discontinued in the ___ grade, because the General Education Teacher 3 observed that Student wasn't making the best of the situation.

Interestingly, in *Mr. I., supra.*, student's neuropsychologist and SLP recommended the student receive social skills and pragmatic-language instruction. *Mr. I.* 480 F.3d at 20. The District argued that these services amounted to "related service" not "special education." However, the Court disagree and stated that "extra instructional offerings such as social-skills and pragmatic-language instruction are 'specially designed instruction' to ensure [LI]s 'access...to the general curriculum.'" *Id.* (quoting 34 C.F.R. §300.39(b)(3)). Given this reasoning, the DOE was providing Student "special education" through the use of social skills group sessions.

Petitioners rely on *Yankton School District v. Schramm*, 93 F.3d 1369 (8th Cir. 1996) for the proposition that even though Student was at grade level, Student needed specially designed

instruction and related services. In *Yankton*, the student was a disabled child under the IDEA because the orthopedic impairment caused by her cerebral palsy required “special education and related services.” Student’s unique needs included slowness and fatigue when writing and stiffness and lack of dexterity in her right hand. To meet her needs, the teachers shortened or modified the length and nature of her writing assignments, provided her with copies of their notes, and taught her how to type using only her left hand and the first finger of her right hand. “None of this individualized instruction would have been necessary but for her orthopedic impairment.” *Id. at 1374*. The District also provided related services to address her slowness in walking and lack of hand strength. The District exited Student from SPED services in ninth grade and did not create a new IEP in tenth grade.

In *Yankton*, The District argued that Student was only eligible for SPED in her last IEP because her disability affected her performance in physical education (“P.E.”). Once the student exited ninth grade, the District was no longer required to provide her with P.E., and her need for SPED services ended. Student had excellent grades and she was not disabled within the meaning of the IDEA, because her impairment did not “adversely affect her educational performance.” Student could receive an “adequate education without IDEA services despite her handicap.” The court noted that the student’s continued eligibility under IDEA did not rest just on the presence of an orthopedic impairment. “Her eligibility continues because that impairment requires specifically designed instruction in the classroom and mobility assistance and other related services that help her to benefit from that education.” *Id. at 1375*. The court found that even though the student received services such a physical therapy, extra textbooks, mobility assistance between classes, modified writing assignments, and a modified chemistry lab station as part of a 504 Plan, those services constituted “specially designed instruction” under the IDEA. The Court found that the District remained obligated to cooperate in fashioning an IEP.

Prior to the meeting, Parent 1 was provided with a draft 504 Plan that was developed by the SSC and the General Education Teacher 4. Parent 1 raised concerns at the annual meeting, because several accommodations that were listed in Student’s prior 504 Plan were no longer included in the draft plan. These accommodations were recommended by the private evaluators. After Parent 1 raised concerns, the team included the accommodations that were in the original 504 Plan and new accommodations as well:

NOVEMBER 5, 2015 504 PLAN	NOVEMBER 9, 2016 DRAFT 504 PLAN	NOVEMBER 9, 2016 FINAL 504 PLAN
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1.	<u>Sensory Regulations</u> : Student will choose which sensory accommodation will work for Student: lean against wall, deep pressure given to shoulder and back, wall push-ups, isometric exercise (push hands, bilateral bicep press, calf press), walk around right outside of class.	<u>Sensory Regulation</u> : To meet Student's unique learning needs, Student will be allowed movement breaks and use of a wobble chair. Student does best when allowed to move around, extra time to process, and make noises (level one loudness) when doing writing, reading comprehension, and working on math.	<u>Sensory Regulation</u> : To meet Student's learning needs, student will be allowed movement breaks and use of a wobble chair. Student does best when allowed to move around, extra time to process, and make noises (<i>verbal disability</i>) when doing writing, reading comprehension, and working on math.
2.	<u>Sensory Regulations</u> : Student will choose which sensory accommodation will work for Student: seat cushion, Velcro under the table, sugarless gum, stadium seat, hand fidgets.	<i>Wobble Chair accommodation listed in #1.</i>	<i>Student is currently doing isometric and flexibility exercises daily – up to twice a day (brain gym, yoga, squats, lunges, wall-leans, cross-overs) – to assist with Student's sensory regulation. Student will be allowed to chew gum or a pencil topper to assist with Student's oral sensory needs.</i>
3.	Check-in by the teacher or an EA to ensure task/assignment completion.	<i>Check-in by teacher listed in #6.</i>	<i>Check-ins by the teacher or EA/other designated adult to ensure task/assignment completion.</i>
4.	<u>Preferential seating</u> : Student will be able to choose 2-3 different places in the classroom to sit for Student's learning needs (to be predetermined by teacher and Student).	<u>Preferential Seating</u> : Student will be able to choose between two seating areas in the classroom. Student does best when grouped with academically and socially high functioning peers.	<i>Same as draft.</i>
5.	Breaking work into smaller parts and intersperse short, structured breaks to help maintain focus and support task completion.	<i>Not included.</i>	<i>Chunking assignments (breaking work into smaller step-by step segments), provide extra time, and allowing for short breaks as needed to complete assignments.</i>
6.	Provide written instructions, visual handouts (near point), and visual daily schedule for tasks to help Student to reorient ___self when Student loses focus.	<u>Visual Aides</u> : Student will be given the daily schedule and assignment expectations in the form of written instructions for tasks on the white board with a check-in by teacher.	<u>Visual Aides</u> : Student will be given a <i>visual</i> daily schedule, written instructions, and <i>visual handouts (near point)</i> to help Student to reorient ___self when Student loses focus.

7.	Limiting computer use to research, programs and State Assessments.	<i>Not included.</i>	<i>Limiting computer use such as research on topics related to education, programs, writing assignments, and State Assessments.</i>
8.		Student will be provided the option of a quiet learning space to learn at times when Student is processing writing, reading comprehension, and working on story problems.	<i>Same as draft.</i>
			<i>Repeat directions and ensure understanding.</i>
	Student will participate in state-wide assessments with the following accommodations: ____: Tested in small group. State-wide testing will be limited to 30 minutes a day.	Student will participate in state-wide assessments. No accommodations are necessary.	Student will participate in state-wide assessments. No accommodations are necessary. <i>Student will be given only 45 minutes per day of testing plus time to check answers/responses during Student's participation in State Assessments.</i>

In the DOE SY 1516-028 Decision, the Hearings Officer found that Student was receiving specially designed instruction through Student's 504 Plan, because the methodology and delivery of instruction addressed Student's unique needs resulting from Student's diagnosis. H.A.R. §8-56-2. Specifically, the previous 504 Plan provided Student with sensory regulations strategies and supports, check-ins by the teacher or an educational assistant to ensure task/assignment completion, preferential seating, breaking work into smaller parts, interspersing short structured breaks to help maintain focus and support task completion, written instructions, visual handouts and visual daily schedule for tasks to help Student to reorient ___self when Student loses focus, and limiting computer use. The Hearings Officer found that Student was receiving specially designed instruction, because the delivery of instruction addressed Student's unique needs resulting from Student's diagnosis. H.A.R. §8-56-2. Without this type of instruction, Student's educational performance would be adversely impacted.

As noted in the above-chart, Student's 504 Plan remained essentially the same. Consistent with the DOE SY 1516-028 Decision, the Hearings Officer again finds that Student was receiving specially designed instruction, because the delivery of instruction addressed Student's unique needs resulting from Student's diagnosis. H.A.R. §8-56-2. Without this instruction, and the additional help from Parents, Student's educational performance would be

even more adversely impacted. Student was receiving specially designed instruction, because the methodology and delivery of instruction addressed Student's unique needs resulting from Student's diagnosis. H.A.R. §8-56-2.

The Hearings Officer finds that Student was receiving specially designed instruction, because the methodology and delivery of instruction addressed Student's unique needs resulting from Student's diagnosis. H.A.R. §8-56-2. Without the specially designed instruction, Student's educational performance would have been more adversely impacted.

The Hearings Officer finds that the DOE procedurally violated the IDEA, because the eligibility team did not carefully consider all information. The Hearings Officer further finds that this procedural violation resulted in the loss of educational opportunity. These violations resulted in the denial of a FAPE.

D. Whether the DOE Failed to Consider the Private Evaluation of SLP 1

Petitioners allege that Respondent failed to consider the private evaluation of Private SLP 1, that documented Student's difficulty with writing. Petitioners claim that Parent 1 is paying out-of-pocket for private tutoring in writing because of this failure.

On March 12, 2016, Private SLP 1 evaluated Student. Student was referred by Parent 1 to obtain a formal speech and language assessment to determine current speech and language skills based on the private Educational Psychologist's recommendation. Private SLP 1 administered the assessment to Student at Student's home. The testing lasted two hours and 15 minutes. Student received four to six sensory/movement breaks throughout the assessment. Student scored average in the receptive language, expressive language, and language context indexes. The language content index was in the low average range due to Student's below average score in _____. The _____ evaluates Student's ability to sustain attention and focus while listening to spoken paragraphs, create meaning from oral narratives and text, answer questions about the content of the information given, and use critical thinking strategies for interpreting beyond the given information. Student demonstrated difficulty with understanding the main idea, recalling event sequences, making predictions, and understanding social content.

Student scored significantly below average in the structured writing subtest. A scaled score of 8 to 12 is considered to be average; Student had a scaled score of one. This subtest evaluates Student's ability to use situational information given by a story title, and introductory sentence, and an incomplete sentence to create and write a thematic, structured narrative. Student

demonstrated difficulty writing logical, complete sentences. Student had difficulty maintaining a provided topic and writing sentences with structure and organization. Sentences were characterized by incomplete thoughts, run-on sentences, and shifts in thought without appropriate written support (e.g. "...they would get anything like her are all of them: a book of math problems, a ball with math or a records book of who is good at math problems.").

Private SLP 1 determined that Student's deficits in the areas of ___ and difficulty with Student's writing skills and organization had a strong potential to negatively affect Student's academic performance. "Understanding orally presented stories and descriptions of actions, events, or opinions is required for creating meaning and learning from instructional materials across academic settings." Private SLP 1 recommended Student receive speech and language support to maintain and expand on Student's receptive language skills in the academic setting.

Private SLP 1's findings and recommendations are similar to those of Private SLP 2. Private SLP 2 found that Student's scores indicated that Student's receptive language skills were in the lower end of average and Student's expressive skills were slightly below the low end of average. Private SLP 2 stated, "[b]ased on the above testing, [Student] is demonstrating language skills in the lower average (receptive and vocabulary) to slightly below average (expressive language). Although Student's social pragmatic skills were adequate during testing, I can see how in a group setting Student would have difficulty because of Student's lower language skills." Private SLP 2 recommended that Student receive speech services to address Student's language skills – expressive, receptive and social. Based on the possible problems one with disability can display (use of inappropriate language, auditory processing, attention difficulty, social skills deficits) an individual and a group session would be appropriate. Private SLP 2 recommended "[s]killed speech therapy to address: communication, cognition, swallowing, education to care givers and to create/modify home program."

On November 9, 2016, the DOE conducted an Eligibility meeting. Parent 1, Parent 3, Principal, DOE Clinical Psychologist, School Psychologist, SLP, OT, BHS, SSC, General Education Teacher 4, and the SPED teacher participated. The Eligibility Team reviewed Student's current educational performance, assessments, including Student's cognitive, speech, psychological, academic, emotional/behavioral, and OT assessments. They also reviewed Student's OT observation, statewide assessment results, Student's ___ and _____ grade educational performance, classroom work samples, and Student's social, academic and behavioral performance compared with Student's general education classmates. The team also

considered Parent input, the decision in DOE SY1516-028, the FBA meeting, and teacher reports.

Parent 1 also discussed Private SLP 1's report that showed Student was in the one percentile for writing. The team members explained to Parent 1 that the test was not an accurate reflection of Student's performance, and Student was functioning at grade-level in the core subjects, including writing. Parent 1 also brought up concerns that Student was not meeting State standards. The General Education Teacher 4 responded that the standards were "nearly met," and General Education Teacher 4 was not concerned about Student's scores.

As stated *supra*, once an evaluation or reevaluation is completed, a group of qualified school district professionals and the child's parents determine whether the Student is a "child with a disability" and their educational needs. 34 C.F.R. § 300.306(a). In making such a determination, the district is required to "draw upon information from a variety of sources," including those required to be part of the assessments, and assure all such information is "documented and carefully considered." 34 C.F.R. § 300.306 (c)(1).

From the record and testimony, it cannot be said that Private SLP 1's report was "carefully considered." The DOE SLP came to the same conclusion as Private SLP 1 regarding Student's difficulties with _____. Rather than drawing similarities with the reports, the team members explained to Parent 1 that Private SLP 1's test was not an accurate reflection of Student's performance, because Student was functioning at grade-level in the core subjects, including writing. The General Education Teacher 4 further testified that General Education Teacher 4 would not refer Student for a speech-language evaluation. Admittedly, the General Education Teacher 4 is **not** a SLP.

Additionally, Private SLP 1's findings, were consistent with the findings and recommendations of the Private SLP 2, private Neuropsychologist, private OT, and private Educational Psychologist.

The Hearings Officer finds that the eligibility team did not carefully consider Private SLP 1's report at the November 9, 2016 eligibility meeting. Hearings Officer finds that the DOE procedurally violated the IDEA, because the eligibility team did not carefully consider all information. This failure seriously infringed on the Parents' opportunity to participate in the eligibility process and resulted in the denial of a FAPE.

E. Whether the DOE Failed to Develop a Behavioral Intervention Plan.

Petitioners assert that the DOE failed to develop a Behavioral Intervention Plan (“BIP”) for Student, despite Student’s documented needs. Respondents contend that the DOE conducted an ___ and FBA and determined that Student did not require a BSP because: 1) the behaviors in question did not interfere with or adversely impact Student’s ability to access Student’s education; 2) Student’s behaviors were being effectively managed by the General Education Teacher 4; and 3) the FBA indicated that Student did not evidence function-based behaviors that adversely affected Student’s educational performance.

The IDEA requires that, in developing an IEP for “a child whose behavior impedes the child’s learning,” **the IEP team must** “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). The general purpose of a FBA/BSP is to provide the IEP team with additional information, analysis, and strategies for dealing with problem behaviors, especially when they interfere with a child’s education. *Doe v. Regional School Unit No. 21*, 2012 WL 7653507 (D. Me. July 31, 2012) *report and recommendation adopted in part, rejected in part*, No. 2:11-CV-025-DBH, 2013 WL 793755 (D. Me. Mar. 4, 2013). The court in *Doe* held, “we do not know whether the Student would have experienced a greater degree of success in his educational program if he had had the benefit of a BIP developed in accordance with the IDEA law and rules. This is the sort of procedural defect that, in a case like this one, could compromise the Student’s right to an appropriate education, and is therefore a violation of the IDEA.” *Record at 998-1000*.

On August 5, 2016, the DOE conducted an assessment. The assessment consisted of three pages. Parent 1, DOE OT, School Psychologist, School Counselor, DOE SLP, BHS, and the General Education Teacher 4 participated (even though General Education Teacher 4 had only been Student’s teacher for one week). The DOE Clinical Psychologist and General Education Teacher 3 did not participate. The assessment consisted of twenty questions. These are the questions/answers from select questions:

Questions to Inform the Design of a Functional Analysis

- ***To Develop objective definitions of observable problem behaviors:***

What are the problem behaviors? What do they look like?

Overly active, invading space of others, wiggly, rolling around floor, pacing around, walking in circles, frequent change in position, fidgeting, invading space of others (ie. touching, poking others), verbal disability (changes in volume of

Student's voice/high, low tone; grunting, hooting, repeat words or phrases over and over until you stop Student; loud, slow exhale.

- ***To determine which problem behavior(s) will be targeted in the functional analysis:***

What are the top three most concerning problem behaviors?

Invading other's space, impulsivity, verbal disability (when too much screen time especially games; stress is a big trigger, also when excited. Puts fingers and things in Student's mouth. Does not always recognize when Student's body needs something. Having movement breaks helps Student to refocus; easily distracted, not paying attention, looking around instead of visually referencing the teacher, staring/daydreaming while instruction is taking place, in __ grade, Student was fidgeting with objects during Parent 1's observation, easily distracted.

- ***To determine the antecedent conditions that may be incorporated into the functional analysis test conditions:***

Do the problem behaviors reliably occur during particular activities?

Per Parent 1, during floor-based instruction, Student would become overly active and wiggly, too close to others, pokes Student's neighbors, roll around, crawling on the carpet.

What seems to trigger the problem behavior?

During carpet time; too much sound, Student covers ears; too much visual, Student won't look – overstimulated or understimulated.

- ***To determine the test condition(s) that should be conducted and the specific type(s) of consequences they may be incorporated into the test conditions:***

How do you and other react or respond to the problem behavior?

Quietly redirect and find out what Student needs (ie. Movement breaks, verbal prompts, proximity, hand on shoulder), deep pressure.

What do you and others do to distract Student from engaging in the problem behavior?

Teacher states expectations, accommodate Student (give Student physical space), quietly redirect Student, if putting something in Student's mouth, Parent 1 gives

Student something appropriate; if visually stimulated, Parent 1 removes Student from the trigger, change environment.

- ***To assist in developing a hunch as to why problem behavior is occurring and to assist in determining the test condition(s) to be conducted:***

What do you think Student is trying to communicate with Student's problem behavior, if anything?

Sensory needs and self-regulation.

Do you think this problem behavior is a form of self-stimulation? If so, what gives that impression?

Yes, sometimes. When understimulated, Student tries to stim.

Why do you think Student is engaging in the problem behavior?

Sensory seeking/regulation.

On October 5, 2016, the DOE conducted an FBA meeting with the SST. Parent 1, Parent 3, DOE Clinical Psychologist, School Psychologist, SLP, OT, BHS, General Education Teacher 4, and the SPED teacher participated. The DOE Clinical Psychologist ran the meeting, even though DOE Clinical Psychologist did not participate in the assessment. The General Education Teacher 4 expressed General Education Teacher 4's concerns about Student leaning into the space of other students, and Student's blurting out.

Parent 1 testified that during the assessment, the SST, as a team, decided that Student was sensory-seeking and trying to regulate. This is confirmed by the assessment in evidence and the audio-recording of the meeting. However, during the formal FBA meeting, the team told Parent 1 that Student was not sensory seeking, and Student's behaviors were an internal function from Student's diagnosis. When Parent 1 questioned this, the DOE Clinical Psychologist explained that there were only two functions that would serve behaviors – avoiding and attention seeking. DOE Clinical Psychologist stated that they were completing an FBA because the Hearings Officer had ordered them to do one.

The DOE Clinical Psychologist stated that the only "salient" behavior that was impacting Student's learning was Student's invading other students' personal space. DOE Clinical Psychologist did not agree with Parent 1 and Parent 3 that this was or could be disability related or a sensory issue. Parent 1 asked if there was anything they could do to help with Student's sensory issues, and the DOE Clinical Psychologist stated that it was a "terminology issue."

Parent 1 stated that stress was a trigger for Student's disability. Parent 1 stated that the team should find out what triggers Student's stress. Parent 1 tried to incorporate the private OT's recommendations, but the DOE Clinical Psychologist said it would not be an FBA, it would be a "regulation plan."

The Private Professional testified if Student's behaviors were internally driven, it **would** be appropriate to develop a BSP; however, data would be necessary to determine whether a BSP was necessary or not. Data collection is part of the FBA process. The General Education Teacher 4 testified that General Education Teacher 4 has been "extensively trained through model schools how to collect data" relating to the FBA process. General Education Teacher 4 was trained on "[h]ow to use the __ as a measurement tool specifically and also how to create a list of behaviors that you have concerns with and then tally mark them over eight weeks time to show increase, decrease, how often, so you can get very specific when the behaviors that you have a problem with are occurring." The DOE Clinical Psychologist testified that data collection is a very important part of the FBA process. The SPED teacher also testified that the FBA team would determine during the FBA process what triggers the behaviors; however, SPED teacher did not collect any data on specific behaviors. SPED teacher had collected data on other students that had IEPs. No data was collected or presented at the FBA meeting.

The SST created a three-page FBA. The target behavior identified was, "leaning into others/invading other's space (ie. touching, poking others)." The setting event was "stress," and the trigger was, "proximity to peers during unstructured time." The FBA stated that the behavior was related to internal stimuli; there is no external function, and attention seeking has been ruled out. The proactive strategies were: 1) cue Student to be aware of personal boundaries; 2) allow use of squeeze balls during group or circle time to keep Student's hands busy and redirect from the behaviors involving personal space; 3) cross legs during carpet time; and 4) scheduled movement breaks (includes stretches). The reactive strategies were: 1) prompt Student to respect personal space/boundary using verbal or non-verbal cue as needed; 2) cue Student to shift Student's body; 3) allow movement breaks as needed; and 4) corrective feedback/reflections.

Parent 1 did not agree that this was an appropriate FBA. Parent 1 disagreed with the SST and said that Student had behaviors that occurred because of its sensory consequences. The General Education Teacher 4 testified that Student's behaviors were a result of Student's diagnosis. Student did not exhibit the behaviors to avoid work or be defiant. General Education Teacher 4 did not believe Student's behaviors warranted a BSP, because Student's behaviors did

not interfere with Student's learning, friendships, completing school work, and academic and social growth.

Likewise, the DOE Clinical Psychologist did not believe that Student's behaviors rose to the level where a BSP was required. Student was not trying to gain or avoid something through Student's behaviors. Student's behaviors were managed by normal classroom interventions and the 504 Plan. The SPED teacher also testified that there were no motives behind Student's behaviors. Student's invading other children's personal space and "wiggleness" was part of Student's sensory seeking behavior. Based on SPED teacher observations and discussion with the team, the SPED teacher did not believe Student's behaviors necessitated a BSP. Student's behaviors did not impede Student's access to education. However, the SPED teacher also testified that when SPED teacher observed Student in the classroom exhibiting behaviors, SPED teacher did not observe the environmental circumstances surrounding those behaviors, because SPED teacher was "too busy teaching or helping other students."

Several courts have addressed cases where FBAs are conducted. The court in *R.E.* stated, "[t]he failure to conduct an **adequate** FBA is a serious procedural violation because it may prevent the [IEP team] from obtaining necessary information about student's behaviors, leading to their being addressed in the IEP inadequately or not at all...The entire purpose of an FBA is to ensure that the IEP's drafters have sufficient information about the student's behaviors to craft a plan that will appropriately address those behaviors." (*emphasis added*) *R.E.* 694 F.3d at 190.

In *A.C ex. Rel. M.C. v. Bd. of Educ. of Chappaqua Cent. Sch. Dist.*, 553 F.3d 165, 172 (2nd Cir. 2009), the court concluded that the failure to conduct an FBA did not make an IEP legally inadequate because the IEP noted: 1) the student's attention problems; 2) the student's need for a personal aide to help the student focus during class; and 3) the student's need for psychiatric and psychological services. Similarly in *R.E.*, 694 F.3d at 192-195, the court considered the effect of an FBA/BSP omission for three separate students. The court found that an FBA/BSP omission did not deny Student a FAPE where: 1) the IEP team reviewed documents regarding the student's behavior; and 2) the IEP provided strategies to address those behaviors, "including the use of a 1:1 aide to help him focus."

It is clear from listening to the audio-recording, that the FBA team followed the DOE Clinical Psychologist's lead, and completely disregarded Student's sensory issues. The team collected **no** data, even though the DOE Clinical Psychologist, General Education Teacher 4, and SPED teachers knew it was a necessary component of the FBA process. Instead, the team pre-

determined, from the start of the meeting, that the only problem behavior was Student's leaning into other student's space. They refused to consider that Student's sensory issues were impacting Student's learning and Student's behavior in class.

As stated *supra*, the United States Supreme Court recently determined in *Endrew F. v. Douglas County School Dist.*, the Court held that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in the light of the child's circumstances." *Endrew* 137 S.Ct. at 1001. The Hearings Officer finds that the DOE procedurally violated the IDEA, because the eligibility team did not request and carefully consider all information. The Hearings Officer further finds that this procedural violation resulted in the loss of educational opportunity and the failure to conduct an adequate FBA and a BIP. This failure seriously infringed on the Parents' opportunity to participate in the formulation process and resulted in the denial of a FAPE.

F. Whether Petitioners Are Entitled to Relief.

Once a Hearings Officer holds that public placement of learning disabled child violated IDEA, they are authorized to grant appropriate relief. Equitable considerations are incorporated in fashioning relief, and Hearings Officer must consider all relevant factors, including appropriate and reasonable level of reimbursement that should be required.

The Hearings Officer has determined that Petitioners have shown that the failure to find Student eligible for SPED services, properly consider Private SLP 1's report, and failure to develop a BIP resulted in procedural and substantive violations of FAPE. Petitioners request the following relief: 1) find Student eligible for SPED and related services under the IDEA and develop an IEP with specifically designed instruction; 2) Order Respondent to develop and IEP with specifically designed instruction; 3) Order education and training for DOE's representatives, specifically Student's IEP team on the IDEA, eligibility, and child find issues; 4) Reimbursement for out-of-pocket expenses for private services; and 5) Compensatory Education.

1. Student is eligible under the IDEA

Petitioners have requested that the Hearings Officer find Student eligible for SPED services. Pursuant to *D.C. et al v. Dept. of Educ. State of Hawaii*, 46 IDELR 6, 106 LRP 38386 (2006), the Hawaii U.S. District Court remanded the case back to the Hearings Officer after finding that he had failed to make a determination on Student's eligibility for SPED services.

Considering the record in this case, the Hearings Officer finds Student to be eligible for SPED services under the

Eligibility Category 1 and orders the DOE to develop an IEP for the 2017-2018 school year forthwith.

2. Order Respondent to develop and IEP with specifically designed instruction

So ordered, *see supra*, Section F.1.

3. Order education and training for DOE's representatives, specifically Student's IEP team on the IDEA, eligibility, and child find issues

Petitioners have not presented evidence that this relief is required or necessary. It is hereby denied.

4. Reimbursement for Private services

Petitioners' have also requested reimbursement for private services. Petitioners have not presented any evidence or invoices that they are entitled to this. Reimbursement is denied.

5. Compensatory Education

Compensatory education is an equitable remedy that attempts to account for the educational deficit caused by a deprivation of educational services that a student should have received in the first place. *R.P. ex rel. C.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 1125 (9th Cir. 2011). It seeks to "place disabled children in the same position they would have occupied but for the school district's violation of IDEA." *Id.* (quoting *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005)). Courts and Hearings Officers may award compensatory educational services at their discretion, often in the form of prospective injunctive relief. *Reid ex rel. Reid*, 401 F.3d at 523.

The inquiry as to an appropriate compensatory education remedy must be fact-specific and reasonably calculated to provide the educational benefits that would have accrued from special education services that should have been provided to the child in the first place. *Id.* at 524. An appropriate compensatory education award must be designed to ensure that a student is appropriately educated within the meaning of the IDEA. *Park ex rel. Park v. Anaheim Union*

High Sch. Dist., 464 F.3d 1025, 1033 (9th Cir. 2006.) There is no need to provide a day-for-day compensation for time missed. *Id.*

Although Petitioners have requested compensatory education, they have not indicated what type or amount of compensatory education they are seeking. Their post-hearing brief and reply brief are silent on the subject. As a general proposition, it is not appropriate for a Petitioner represented by counsel to expect a Hearings Officer to develop a compensatory education program on their own. There was no particularly specified evidence that Student currently needs compensatory education services, and the Hearings Officer declines to make such an award.

V. DECISION

Based upon the above-stated findings of fact and conclusions of law, the Hearings Officer concludes that Petitioners have met their burden and have shown procedural and substantive violations of the IDEA, thereby denying Student a FAPE.

Student is eligible for SPED services under Eligibility Category 1 and orders the DOE to develop an IEP for the 2017-2018 school year forthwith.

Education and training for DOE's representatives, specifically Student's IEP team on the IDEA, eligibility, and child find issues; Reimbursement for private services, and Compensatory Education is denied.

Petitioners shall be deemed the prevailing party in this matter.

RIGHT TO APPEAL

The parties have the right to appeal this decision to a court of competent jurisdiction within thirty (30) days after receipt of this decision.

DATED: Honolulu, Hawai'i, _____.

ROWENA A. SOMERVILLE
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs

Unofficial Hearing Decision