
UTAH STATE BOARD OF EDUCATION
BEFORE THE DUE PROCESS HEARING OFFICER

<p>████████████████████ ████████████████████</p> <p style="text-align:center">Petitioners,</p> <p>vs.</p> <p>MOUNTAIN WEST MONTESSORI ACADEMY,</p> <p style="text-align:center">Respondent.</p>	<p style="text-align:center">DECISION AND ORDER</p> <p>Hearing Request #1819-10</p> <p>(Hearing Officer Wallace J. Calder)</p>
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APPEARANCES

Mark D. Adamson, UTAH IEP ASSOCIATES, appeared on behalf of Petitioners ██████████ ██████████ a student, by and through ██████ parents, ████████████████████ (“Petitioners”). Lisa Arbogast, KIRTON McCONKIE, appeared on behalf of Respondent Mountain West Montessori Academy (“Respondent”). This matter was assigned to the undersigned Due Process Hearing Officer, Wallace J. Calder (“Hearing Officer”).

PROCEDURAL HISTORY

The student, ████████████████████ (the “Student”) is a ██████████ boy who has been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), and was identified in the Student’s IEP under the disability classification of Other Health Impairment (OHI). Petitioners submitted a written Request for Due Process Hearing to the Utah State Board of Education (“USBE”) dated April 26, 2019, which was received and entered of record on April 26, 2019. Petitioners allege violations of the Individuals With Disabilities Education Act, 20 U.S.C.A. §1400 et seq. (“IDEA”), violations of *Section 504 of the Rehabilitation Act of 1973* and the *Americans With Disabilities Act*.

Respondent filed its Answer to Complaint on May 6, 2019, which denied Petitioners’ allegations of child find violations generally, and specifically alleged that the Student made

progress in school through the positive behavior intervention services (PBIS) and Response to Interventions (RTI) processes provided by respondent, and that Respondent developed and implemented an appropriate IEP for the Student until the Petitioners withdrew the Student from school in December, 2018. Respondent did not object to the sufficiency of Petitioners' Complaint.

Prior to May 24, 2019, Respondent timely convened one or more resolution meetings with the Petitioners, which did not result in the resolution of any of Petitioners' issues.

On May 24, 2019, prior to the end of the Resolution Period, the Hearing Officer convened a pre-hearing telephonic conference call with the Petitioners and Respondent and their respective attorneys. At the beginning of the conference call the attorney for Petitioners indicated that Petitioners desired to amend their Complaint in order to correct some misstatements therein. The Hearing Officer granted Petitioners' Motion For Leave to File an Amended Complaint pursuant to 34 CFR §300.508(d)(3)(ii) and Utah State Board of Education Special Education Rules (USBE SER) IV.J.5(b)(2). The Hearing Officer's Order Regarding Petitioners Motion for Leave to File an Amended Complaint, filed on May 24, 2019, granted Petitioners leave to file an amended complaint and stated that the timelines for the resolution meeting and the time period to resolve the complaint would begin again with filing of the amended due process complaint, pursuant to 34 CFR §300.508(d)(4) and USBE SER IV.J.5(c). Petitioners filed their Amended Complaint on May 27, 2019, and Respondent filed its Answer to Petitioner's Amended Complaint on June 6, 2019.

Following the end of the second Resolution Period, a telephonic pre-hearing conference was held on June 26, 2019. During the pre-hearing conference, and at all times during this proceeding, the Petitioners and Respondent were represented by their respective counsel of record. The Petitioners' Complaint and the Respondent's objections were discussed and reviewed, and the Hearing Officer discussed and identified with counsel the issues for the hearing. Petitioners identified and submitted four issues for hearing. A location for the hearing and the dates of August 1-3, 2019, were agreed upon by the parties. Petitioners requested that the hearing be closed and that witnesses be excluded from the hearing room. A date for the exchange of witness lists and exhibits was set. Various other procedural matters were discussed and explained at length by the Hearing Officer including the burden of proof, order of presentation of evidence, opening and closing statements, post-hearing briefs and the parties allowed to be present in the

hearing room. The parties requested leave to submit post-hearing briefs. The Hearing Officer granted the parties leave to file post-hearing briefs until 2 days following counsel's receipt of the electronic transcript record of the hearing. The Hearing Officer further noted that the stay-put rule set forth in 34 CFR § 300.518 was not applicable in view of the fact that the Petitioners had removed the Student from school four months prior to the filing of their due process complaint.

During the June 26, 2019, pre-hearing conference the Petitioners and Respondent moved the Hearing Officer to extend the 45 day deadline, and the Hearing Officer granted a 10 day extension until August 23, 2019. On July 1, 2019, the Petitioners' counsel informed the parties that the Petitioners would be traveling out of the country on the date scheduled for the hearing and requested that the Hearing be re-scheduled. The parties eventually agreed to the hearing taking place on August 21-22, 2019. The Petitioners and Respondent requested that the 45 day timeline be extended again to accommodate the new hearing dates, which was extended by the Hearing Officer to September 12, 2019.

On July █, 2019, counsel for the Petitioners notified all parties that one of the Petitioners, the Student's father, had died in a tragic accident the day before. During a conference call with the attorneys for the Petitioners and Respondent, the Petitioners requested the hearing dates be vacated and a continuance of the hearing granted. Due to the accidental death of the father and the family's need for time to take care of the exigent personal circumstances surrounding his death, the Hearing Officer immediately vacated the hearing dates and granted the Petitioners' request for two weeks to determine what the Petitioners intended to do going forward. On August 17, 2019, Petitioners' counsel informed the parties that Petitioners would proceed forward with the hearing and requested a hearing in late September or October. The Respondent indicated they were only available the first and second weeks of September.

After an exchange of many emails over many days, the Hearing Officer informed both parties that in view of the many previous delays, the later dates suggested by the Petitioners were not timely and indicated that the hearing would need to be conducted sooner or a withdrawal or dismissal, and re-filing, of the due process complaint would need to occur. The parties eventually agreed to hold the hearing on September 5-6, 2019. On August 26, 2018, the Hearing Officer notified all parties by email that the hearing dates were set for September 5-6, 2019, and ordered the parties to exchange documents and witness lists no later than August 28, 2019, which was the 5 business day rule deadline required by 34 CFR §300.512(a)(3) and USBE SER IV.N.1(c). The

Hearing Officer filed his Pre-Hearing Conference Order on August 28, 2019, confirming all of the previously identified hearing dates and deadlines, and specifically gave the parties until 11:59 PM on August 28, 2019, to exchange documents and witness lists. The Respondent provided its proposed documents and witness list to the Hearing Officer and Respondent's attorney on August 28, 2019, but counsel for the Petitioners did not file Petitioners' proposed documents and witness list until the morning of August 29, 2019.

Subsequent to the late exchange of Petitioners' documents and witness list, a Motion to Exclude Petitioners' Discovery Documents and Witness List was filed with the Hearing Officer by Respondent. Petitioners filed an objection to Respondent's motion. On September 4, 2019, the Hearing Officer filed an order granting Respondent's Motion to Exclude Petitioner's Discovery Documents and Witness List. Following receipt of this order Petitioners filed a motion requesting the Hearing Officer to reconsider the previous order regarding Respondent's motion to exclude. Respondent filed an objection to Petitioner's motion for reconsideration. Following a lengthy and detailed set of email conversations between all parties and the Hearing Officer, the parties eventually entered into several agreements, detailed below, which made Petitioner's motion for reconsideration moot, and the Hearing Officer denied Petitioners' motion for reconsideration.

In order to resolve the Petitioner's untimely submission of its proposed exhibits and witness list for the hearing, Petitioner requested an extension of time in order to reschedule the hearing dates. Following a lengthy email discussion with the parties to find hearing dates that were appropriate and timely, it was eventually agreed by Petitioners and Respondent, and ordered by the Hearing Officer, that the dates for the hearing would be re-scheduled to begin on Friday, September 6, 2019, and conclude on Monday, September 9, 2019. This extension allowed for the timely admission of Petitioners' documentation and also allowed Petitioner to call witnesses to testify at the hearing. The Hearing Officer also granted Petitioners' request for an extension of the 45 day hearing deadline until October 4, 2019.

The Hearing Officer's Pre-Hearing Conference Order allowed counsel for the parties to file post-hearing briefs. The briefs were due no later than two days following counsel's receipt of an electronic copy of the hearing transcript. Respondent's brief was timely filed. Petitioner's brief was timely filed, but counsel for Petitioners immediately notified the Hearing Officer that Petitioners' brief was not complete and requested additional time to include legal citations and a

closing argument. Petitioners' counsel filed a motion for leave to amend its closing brief. Petitioners' counsel stated that he suffers from a disability protected under *Section 504 of the Rehabilitation Act* and the *Americans With Disabilities Act* and requested an accommodation to allow counsel to properly complete Petitioner's Brief. The Hearing Officer's Order Granting Petitioners' Motion for Leave to Amend Closing Brief states as follows: "While the Hearing Officer is unaware of any legal citations indicating that the protections provided under *Section 504 of the Rehabilitation Act of 1973* or the *Americans With Disabilities Act* could excuse an attorney's failure to comply with a filing deadline set forth in the order of a judicial officer, the Hearing Officer will extend the filing deadline in the interest of justice and in order to not cause a disadvantage to the Student in this matter." Petitioners' counsel did file an amended closing brief.

Extensions of the due process hearing timeline have been granted at the request of one or both of the parties pursuant to 34 CFR §§ 300.510(c) and 300.515(c), and USBE SER IV.R.2.

JURISDICTION: SUBJECT MATTER

The Respondent argues that the Hearing Officer does not have jurisdiction to hear claims alleged by Petitioners in their Complaint brought under *Section 504 of the Rehabilitation Act of 1973* or the *Americans With Disabilities Act*. Once a subject-matter jurisdiction challenge is made, the responding party has the burden to establish jurisdiction. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992). In this action, the burdens rest, therefore, with the Petitioners. Petitioners have failed to establish such jurisdiction. Therefore, all non-IDEA claims and requests for relief are dismissed for lack of subject matter jurisdiction. Unless otherwise found, jurisdiction properly lies over the parties and over the subject-matter pursuant to 34 CFR § 300.507(a). Therefore, all claims presented by Petitioners under the IDEA are hearable and are reserved for decision by the Hearing Officer.

THE HEARING

On September 6 and September 9, 2019, an impartial due process hearing was conducted at the offices of the Utah State Office of Education, Salt Lake City, Utah, in this matter. The hearing was held in accordance with the procedural requirements of the IDEA and its implementing regulations found at 34 CFR §§ 300.507-515, and the Utah State Board of Education Special Education Rules IV.I-P, (October, 2016). Petitioners called two witnesses, including Petitioner

and one extra witness, and submitted 21 exhibits containing 250 pages. Respondent called four witnesses including school staff and one expert witness, and submitted 19 exhibits containing 58 pages. The hearing transcript is in two volumes totaling 577 pages.

BURDEN OF PROOF

Petitioners, as the party challenging the Respondent's identification, determination or implementation of special education and related services, has the burden of proof, by a preponderance of the evidence, for all issues raised in this matter. *Schaffer v. Weast*, 546 US 49; 126 S Ct 528; 163 L Ed 2d 387 (2005). The Tenth Circuit Court of Appeals has held that "the burden of proof in such a challenge rests with the party claiming a deficiency in the school district's efforts." *Thompson R2-J School Dist. v. Luke.*, 540 F.3d 1143, 1148 (10th Cir. 2008). The Hearing Officer informed Petitioners at the pre-hearing conference that Petitioners would have the burden of proof and the duty to present evidence first at the hearing.

ISSUES

The following issues were presented to the Hearing Officer for decision:

I. Procedural Issues for Hearing:

- (a) Whether the Respondent violated the child find provisions of the IDEA within the statutory jurisdiction period of Petitioners' due process Complaint, which was filed on April 26, 2019?

II. Substantive Issue for Hearing:

- (a) Whether the Respondent failed to provide the Student with a Free Appropriate Public Education (FAPE) during the time the Student attended the School by:
 - (1) failing to provide the Student with behavioral supports in order to allow the Student to access the general education curriculum;
 - (2) failing to develop an appropriate Individualized Education Program (IEP) that was reasonably calculated to provide the Student with a FAPE; and
 - (3) removing the Student from school due to behavior which was a manifestation of the Student's disability?

FINDINGS OF FACT

After considering all the evidence in the form of oral testimony and admitted exhibits, as well as the oral and written arguments of the parties' and counsel, the Hearing Officer's Findings of Fact are as follows:

1. The Student is a ■-year-old boy, and at the times in question in this matter the Student lived with the Petitioners in ■■■■■■■■■■, Utah. Petitioners are the Student's parents. (HO Exhibits, 23, 25.)
2. The Mother testified that the Student was her first child and had a "really difficult birth" including "head injuries." (Testimony of Mother, Tr. Vol. I, p. 18.) However, in a Psychoeducational & Autism Diagnostic Evaluation of the Student obtained by Petitioners in February, 2018 (the "Psychoeducational Evaluation"), the evaluator stated that the medical records provided by the Petitioners indicated that the Student had a normal birth at full gestational age with APGAR scores typical, indicating good health and normal reflex, appearance and respiration. The Student did not require neonatal intensive care unit evaluation or treatment. The Student also met motor and language developmental milestones at the appropriate times and there were no concerns about the acquisition of more complex language or motor coordination. (R2, p.1-2.) No other medical records of the Student were admitted into evidence at the hearing.
3. The Mother testified that prior to starting kindergarten the Student exhibited "really demanding and active behaviors." (Testimony of Mother, Tr. Vol. I, p. 19.)
4. The Mother testified that the Student was enrolled in three different schools during kindergarten and first grade. Petitioners pulled the Student out of the first school (public) because the teacher did not have "her heart into her work" and was not "in a place where she wanted to deal with the little boy who had behavioral issues." Petitioners enrolled the Student in a charter school for the remainder of kindergarten. Petitioners enrolled the Student in a new charter school for first grade. (Testimony of Mother, Tr. Vol. I, pp. 20-21.)
5. The Psychoeducational Evaluation indicates that the Student attended four different schools during kindergarten and first grade. (R2, p. 169.)
6. The Student was enrolled by Petitioners in an elementary school operated by Respondent ("the School") in August, 2016, at the beginning of second grade, and attended the School

for the 2016/2017 school year, the 2017/2018 school year, and from August 13, 2018, until December 7, 2018 of the 2018/2019 school year (fourth grade). The School is a state-chartered public school, and is a school of choice where enrollment is through an enrollment lottery. (HO Exhibits. 23, 25; Respondent's Exhibit, R1; Testimony of Principal, Tr. Vol. II, pp. 14-15.)

7. Petitioners chose the School after investigating the Montessori method of teaching used by the School because they thought it would be a better fit for the very active way the Student interacts with the world. Petitioners wanted the Student to have experimental learning opportunities and they chose the School because they thought it would be a nice fit because it had flexibility. (Testimony of Mother, Tr. Vol. I, pp. 21, 39; Cross Examination of Mother, Tr. Vol. I, p. 271.)
8. The School's Principal explained the foundational concepts of the Montessori method of teaching as: follow the child, freedom within limits, grace and courtesy, independence, observation, and practicing unconditional, positive regard for students. She further explained that students are given freedom within limits in the classroom, including freedom of movement in and out of the classroom. The goal in Montessori is to become independent. In Montessori there is a school-wide general education curriculum for students to learn lessons on inclusion, self-regulation, calming, and solving conflicts. Every classroom has two adult teachers to allow group and individual instruction. For elementary classes, the lower classrooms are made up of first, second and third grade students and the upper classrooms are made up of fourth, fifth and sixth graders. Due to this class structure, the transition between third grade and fourth grade is very challenging for most students. (Testimony of Principal, Tr. Vol. II, pp. 8-22.)
9. The School does use a formal Response to Intervention (RtI) process in the general curriculum "with an RtI team and teachers on the look out for possible students with disabilities. Intervention is our first and very broad go-to when we think that a student is lagging. And then if interventions are not working, that would necessitate a further evaluation and possibly special education referral, which could come from a teacher or any staff member, once RTI has been tried, or from a parent. (Testimony of Principal, Tr. Vol. II, p. 24.)
10. The School has a room called "the Meadow" (or otherwise referred to as the behavior

support room) with a teacher trained as a registered behavior technician who is also MAT certified, who is also trained in de-escalation techniques. This room is a place "that teachers can send the student to complete work there or students can self-select to go to her room for a break, a reset, or to work in a less-distracting environment because there are fewer children in there." Approximately 40 to 50 percent of students have been to the Meadow at least once. According to school records the Student spent approximately 1.9% of his time in second grade, and approximately 3% of his time in third grade, in the behavior support room. (Testimony of Principal, Tr. Vol. II, pp. 26-27.)

11. The Student had a very good relationship with the second grade head teacher and that teacher "was able to really help him kind of keep himself within the classroom environment, in a mostly positive manner, despite all the pretty extreme behaviors he had." At the Winter break the head teacher had to leave the school due to health reasons. The Student did not get along very well with the new head teacher. (Testimony of Mother, Tr. Vol. I, pp. 21, 39; Cross Examination of Mother, Tr. Vol. I, p. 271.)
12. The record reflects the many emails and texts, sometimes daily, that were exchanged between school staff and Petitioners regarding the Student's behaviors at school. (Petitioner's Exhibits, P5, 6, 7, 8 and 9.)
13. In February, 2017, the Student's teacher initiated a meeting with Petitioners to brainstorm ways to help the Student be more successful. The teacher and Petitioner talked about reward systems (tickets) to motivate the Student. (Testimony of Mother, Tr. Vol. I, p. 57.)
14. In March, 2017, the Student's teacher informed Petitioners that they could speak with the Student's doctor regarding the Student's behaviors, and the teacher provided Petitioner's with behavior data and an evaluation form to fill out and provide to the doctor. The Student's doctor prescribed an ADHD medication for the Student. (Testimony of Mother, Tr. Vol. I, pp. 49-51.)
15. After the Student began taking the ADHD medication (Vyvanse) on April 2, 2017, the Student's behavior improved. (Testimony of Mother, Tr. Vol. I, pp. 50, 63, 172.)
16. After being directed to see the Student's doctor in March, 2017, and seeing the improvement in behavior caused by the medication, the parent testified as to her thoughts as follows: "I felt a lot of the responsibility for his behavior in the classroom because I felt like it was up to me and his teacher to solve all the problems. And what I'm disappointed

about is that as a professional teacher and a professional administration, they didn't come to me and say, 'Look he is exhibiting these behaviors in the classroom that are really severe. He needs to be looked at because we have programs and protocols in place for this type of behavior.' None of that was addressed. None of that was given to me. None of that was in place. . . . And as a mom, I'm not a professional. I didn't go to school to be a psychologist. I didn't go to school to be a teacher. I wasn't working in the school. I didn't have an administration degree. That is not my role. That is why I feel like I was not guided very well in the beginning. " (Testimony of Mother, Tr. Vol. I, pp. 52-53.)

17. On April 20, 2017, Petitioners informed the School that they had begun to rotate the Student's medication because after the Student came home from school and the medication wore off the Student's behaviors were severe and impactful to Petitioners' family life "and the things we needed to do." The Mother further indicated that "the side effects were pretty pronounced within our family dynamics and hard on us." (Testimony of Mother, Tr. Vol. I, pp. 66, 176.) Petitioner explained this as follows: "so I, at the time, was alternating between one, two or three days, where I would give him medication consistently and then take a day off, then do one, two or three – – and I kind of played around with how many days on. I started with one on, one off. Then two on, one off. Then three on, then one off, as we kind of progressed through the medication cycle." The Mother further testified that she gave the Student supplements on the "off days." The Mother further testified that the Student had a hard time falling asleep and wouldn't eat when on the medication and then at the end of the day he would get really hungry and eat everything he could. The Mother further testified that she did not experience any positives (when the Student was on his medication), other than positive feedback from school, because the time that the medication was effective was when he was at school. (Testimony of Mother, Tr. Vol. I, pp. 176, 177.)

18. The School's Behavior Support Room Log for April and May, 2017, regarding the Student, indicates that the Student was in the Behavior Support Room on 15 occasions. On 12 of those occasions the log indicates that the Student chose to work in the room. On three occasions, April 20, April 28 and May 18, 2017, the Student appeared to be in the room due to negative behaviors in the regular classroom. (Testimony of Mother, Tr. Vol. I, p. 173; Petitioners Exhibit, P2.)

19. On May 24, 2017, the teacher sent a text message to the Mother indicating that the Student had a hard day and asking if the Student was off his medication. The Mother replied that he had not taken his medication that morning. (Testimony of Mother, Tr. Vol. I, pp. 174-5.)
20. The school Principal testified that during the Student's second and third grade years the School had a more informal RtI process. The School does not have any RtI data for the Student. (Cross Examination of Principal, Tr. Vol. II, p. 92-93.)
21. The School Principal testified that a student with ADHD does not have to have a private medical diagnosis in order to receive specialized instruction. "The process would be that if a student is struggling academically or behaviorally or socially, they would enter into and RTI process. There would be interventions put in place. If interventions are successful, great. If interventions are unsuccessful, that more information would be needed and a referral to special education would occur, to take more data and evaluation, which could include any and all evaluations that are deemed necessary by the IEP team or RTI team, whatever the case may be. And then those evaluations would be conducted to determine eligibility." (Cross Examination of Principal, Tr. Vol. II, p. 114-116.)
22. The Student's third grade teacher testified that the beginning-of-the-year assessments show that the Student was above grade level in math and on grade level for reading and all of the third grade groups that he was in and that she definitely did not believe he needed to be referred for a special education evaluation. (Testimony of Third Grade Teacher, Tr. Vol. II, p. 205.)
23. During the Student's third grade year, the third grade teacher developed an individualized work plan as an intervention for the Student. (Testimony of Third Grade Teacher, Tr. Vol. II, p. 224.)
24. On August 22, 2017, at the beginning of the Student's third grade year, the Student's third grade teacher responded to an email from the Mother asking what the teacher thought the level of effectiveness was with the Student's medication in the Montessori method? The Teacher responded as follows: "Thanks for asking. Yes, it would benefit all of us, especially [the Student], if he had a consistent use of his meds. The ups and downs for him are taxing. Being successful one day, being redirected often the next. Success and good feelings, to lots of frowns and pushing of negative buttons. I really feel a consistency during every day would help him so much. Please consider this, as you make

your decision. I would enjoy talking with you more about it, if you would like."
(Testimony of Mother, Tr. Vol. I, pp. 175-176, 178; Petitioners Exhibit P6.)

25. On August 30, 2017, the teacher again responded to an email from the Mother and indicated that on the Student's "on days" he is "focused and productive and actually turning into one of my leaders, which is so very awesome. The off days are still a great struggle for him, the class and the teachers. . . . I really think it is in [the Student's] best interest for a successful school year, that he take his medication daily I know you feel it is not the best for your family interactions, but he is with us for a full eight hours daily, and we really see significant highs and lows. . . . I do think getting him on consistent intake now, while we are setting up the structure for the year, will be so advantageous for him." (Testimony of Mother, Tr. Vol. I, pp. 180-181; Petitioners' Exhibit, P6.)
26. Petitioners' counsel asked the Mother whether "setting up the structure for the year" was referring to the development of an IEP, and the Mother responded as follows: "No, because at this point, there was no IEP in place." (Testimony of Mother, Tr. Vol. I, pp. 181, 183; Petitioners' Exhibit, P6.)
27. The Mother further testified that in September, 2017, she had a conversation with the Assistant Principal in the hallway at the school and asked: "What is the next step in getting him support? Can we start working on an IEP? And she smiled at me and said, 'We can't do any IEP until there is a formal diagnosis.'" (Testimony of Mother, Tr. Vol. I, p. 183.)
28. Petitioners began attempting to schedule a psychoeducational evaluation for the Student in late September, 2017. The Psychoeducational Evaluation was eventually conducted on January 10, and February 9, 2018, by a Pediatric Neuropsychologist and a Pediatric Psychologist. (Testimony of Mother, Tr. Vol. I, p. 192; Respondent's Exhibit, R2.)
29. On February 5, 2018, Respondent sent an email to Petitioner indicating that the School had received the psychoeducational portion of the Psychoeducational Evaluation, but also stated that Respondent had been informed by the evaluators that additional autism testing was not completed. Respondent informed Petitioners that the School administrators and special ed team "would like to meet with you after the autism testing is completed. Our goal will be to identify how best to support the academic and social, emotional success of [the Student]. . . . How does this sound? If this works for you, please let us know when you are ready to meet." (Testimony of Mother, Tr. Vol. I, p. 192; Petitioners' Exhibit, P7.)

30. The School's Principal testified that she believed that the Student made progress during his third grade year in the School's general education RtI process. She did not believe that the Student was a student with a disability who needed special education services. (Testimony of Principal, Tr. Vol. II, pp. 35-38.)
31. The behavior support room teacher, testified that she did not think the Student needed to be referred for a special education evaluation. She saw him progressing academically, "and with the positive behavior intervention supports that we were doing, he was progressing at that level too." The Student was also making progress with his ability to self-regulate. The Student did not miss any of his education when he was in the behavior support room because he would be called back to the classroom for that lesson. (Testimony of Behavior Support Room Teacher, Tr. Vol. II, p. 261, 265, 266.)
32. On February 27, 2018, the School sent an email to Petitioners indicating that the Student's behavior seemed to be worsening. (Testimony of Mother, Tr. Vol. I, p. 197; Petitioners' Exhibit, P7.)
33. The autism testing portion of the evaluation was not completed until March 1, 2018, and the entire evaluation report was transmitted to the School on March 2, 2018. (Testimony of Mother, Tr. Vol. I, p. 192-3; Respondent's Exhibit, R2.)
34. The Psychoeducational Evaluation provides, in relevant part, as follows:
 - a. Reason for Referral: the Student was referred to determine current cognitive and neurobehavioral functioning in the context of attention and behavioral challenges, to serve as a baseline for which to measure any future changes in cognitive functioning and to rule out a diagnosis of Autism Spectrum Disorder (ASD).
 - b. Family History: the report indicates that the maternal family history is significant for anxiety, ASD and intellectual disability, and the paternal family history is significant for ADHD and anxiety.
 - c. Developmental History: previously discussed.
 - d. Psychosocial History: no challenges with language, fixated interest, or stereotype repetitive behaviors were reported, although the Student did not always use language effectively and became rapidly frustrated when he did not get what he wanted. At times he would be excited to show parents his skills, but he infrequently involved parents interactively. The Student enjoys pretending to make bombs out of bottles and

- yarn. He appears happy when he is playing outside, running around and being physically active. The Student isn't often flexible for the purpose of the relationship and has a hard time transitioning between routines. The parent has felt that the Student has been more mechanical and disconnected than his siblings with reduced empathy.
- e. Academic History: the Student was in the third grade and earning average grades. There were no challenges acquiring pre-academic concepts or sequential information, although some inconsistencies in learning and mastering material appeared related to distractibility and attentional challenges. Teachers have consistently reported challenges with attention, distractibility, self-regulation, silliness, and refusal to comply with demands.
 - f. Psychological/Psychiatric History: the Student was diagnosed with ADHD by his pediatrician in April, 2017, and prescribed Vyvanse, which has improved behavioral regulation and focus. Teachers report that when he has a regular dose of his medication he is successful in school.
 - g. Medical History: the Student has had no major accidents or injuries and parents denied any history of head injury or concussion.
 - h. Behavior Observations: on the first day of testing the Student was not on his medication. He was constantly moving, vocalizing and making awkward faces and was completely distracted with the toys in the waiting room. On the day of the autism diagnostic assessment the Student was administered his medication at the outset of testing. The difference in the Student's behavior was quite noticeable, such that he became more self regulated and able to maintain a linear train of thought that facilitated better discussion.
 - i. Neurocognitive Assessment:
 - i. Attention: on both assessment days the Student demonstrated impairments and attention, distractibility, and self-regulation. Overall, attention, self-regulation, and distractibility represent significant challenges for the Student when unmedicated, although all abilities improved as a result of medication.
 - ii. Intellectual: on the WISC-V the Student obtained a Full-Scale IQ Score of 105, a Verbal Comprehension Index of 98, a Visual Spatial Index of 119, and a Fluid

Reasoning Index of 112. Scores indicated average to high average core reasoning and problem-solving skills with a particular strength in nonverbal reasoning ability. The Student's working memory was 107 and his processing speed, or rapid and efficient access to his knowledge base, was 105. Overall, the Student demonstrated appropriate core reasoning ability as well as cognitive efficiency within the clinical environment, although his ability to access and demonstrate his strengths across contexts will depend on fluctuating ADHD symptoms and anxiety.

- iii. Academic: the KTEA-3 indicated that academic skills were consistent with his intellectual capacity; there was no indication of a learning disorder. Letter-word recognition and reading comprehension were average, math conceptual understanding was high average, although math computation was low average but was weakened by his impulsivity, distractibility, and challenges complying with testing demands. Written expression was mildly impaired, while spelling skills were average. The Student had challenges communicating his ideas in writing at a developmentally appropriate level which appeared to be the result of fine motor challenges, effort aversion, challenges tracking and self-monitoring and organization, all common writing challenges in children with ADHD.
- iv. Neurobehavioral Assessment: the BASC-3, parent report, revealed at risk attention problems, with clinically significant hyperactivity, aggression, conduct problems, depression, atypicality and withdrawal. Teacher report revealed at risk hyperactivity, aggression, depression, attention and learning problems, with clinically significant conduct problems and atypicality.
 1. Social-Emotional Skills: Student was tested to rule out a diagnosis of ASD. Overall, the Student's score approximated the cutoff for ASD, although he does not meet criteria for the disorder historically or currently. Instead, his social dysfunction was more reflective of the combined effects of his moderate to severe ADHD and Unspecified Anxiety Disorder. The Student certainly demonstrated excessive interest in aggressive topics, like fighting, hitting, kicking, and shooting guns. With high levels of environmental structure, strong behavioral programming, and ongoing treatment of his

ADHD and anxiety it is very hopeful that the Student will be successful, as he has a solid neurocognitive foundation from which to work.

- v. DSM-5 Diagnostic Impressions (ICD-10):
 - 1. Attention Deficit Hyperactivity Disorder, Combined Type (F90.2); and
 - 2. Unspecified Anxiety Disorder (F41.9).
- j. Recommendations: the report included 23 pages of recommendations, including 27 separately numbered and very detailed recommendations in all areas, including a list of Academic Interventions provided as a resource to teachers and parents to be incorporated into academic or therapeutic curriculums as appropriate. These included:
 - i. The Student would benefit from a course of Occupational Therapy to address fine motor challenges that are impacting writing.
 - ii. The Student would most benefit from an academic environment that provides a high level of structure, such as a behavior unit within the public school system.
 - iii. Academic Interventions: Potential ideas for his behavior intervention plan which include:
 - 1. accommodations and a self-evaluation form;
 - 2. planned ignoring;
 - 3. cue cards;
 - 4. positive and pro-social experiences at school;
 - 5. considering the Student compliant if he is tolerating being in a room without disruption;
 - 6. rotating academic work and other forms of active engagement;
 - 7. sanitize the room for any potentially dangerous items that could be used as weapons;
 - 8. a safety plan; and
 - 9. positive interactions and building cohesiveness.
 - iv. Actively learning relaxation strategies and mindfulness techniques to use in moments of stress or reactivity will be paramount.
 - v. De-escalation techniques for reactivity:
 - 1. Select a consistent place to be used for calming and relaxation;

- 2. Maintain a collection of items used for calming in the relaxation space;
- 3. Act quickly when the student begins to emotionally escalate and after de-escalating ask if he is ready to process what happened;
- vi. Teach emotional awareness and communication of emotions.
- vii. Focus on self-regulation and mindfulness.
- viii. Social interventions.
- ix. Strategies for improving attention to task and attention to detail in homework.
- x. Encourage the student to verbalize thinking by talking, writing or drawing the steps he used to solve the problem.
- xi. Working memory interventions.
- xii. Optimizing conceptualization and study skills.

(Respondent's Exhibit, R2.)

- 35. Following receipt of the complete report of the Psychoeducational Evaluation on March 2, 2018, School staff met on March 3, 2018, and agreed that the School "should assemble a team. We should see what additional testing might need to be done to determine eligibility." (Cross Examination of Principal, Tr. Vol. II, p. 118.)
- 36. The School's special education staff took the Student out of the classroom and gave the Student assessments in math, reading and language, and the student was on grade level in all areas. (Cross Examination of Third Grade Teacher, Tr. Vol. II, p. 237.)
- 37. On April 20, 2018, Respondent requested permission to evaluate the Student to determine whether the Student was a student with a disability and needed special education. Petitioners signed the Written Prior Notice and Consent for Evaluation and receipt of Procedural Safeguards on April 22, 2018. Respondent received the signed permission and receipt of Procedural Safeguards on April 23, 2018. (Petitioners' Exhibit, P14.)
- 38. Respondent provided a Notice of Meeting to Petitioners for review of evaluation data and to consider the Student's eligibility for special education, dated April 27, 2018. The meeting was scheduled for May 21, 2018. (Petitioners' Exhibit, P16.)
- 39. Respondent's eligibility determination team, including the Petitioners, met on May 21, 2018, and at that time determined that the Student was eligible for special education under the disability classification of Other Health Impairment (OHI). Documentation of the eligibility meeting and determination also included a reminder that Procedural Safeguards

had been provided. (Petitioners' Exhibit, P18.)

40. On May 21, 2018, one week before the end of the 2017/2018 school year, the Student's IEP team, including Petitioners, met to develop an initial IEP for the Student. (Petitioners' Exhibits, P9, P10; Respondents Exhibit R19.)

41. The Student's May 21, 2018, IEP provides, in relevant part, as follows:

- a. The IEP identifies the Student's primary eligibility as OHI.
- b. The IEP contains a description of the Student's Present Levels of Academic Achievement and Functional Performance (PLAAFP) as follows:
 - i. Student Strengths: It was reported that the Student enjoys being a leader and a helper in the classroom, and is particularly adept at supporting younger students. The Student is a fast learner and has academic skills at or above grade level for most subjects.
 - ii. Parental Concerns: The Student's mother was "most concerned about the Student's social skills and self-regulation, including building and maintaining friendships, staying on task, and taking responsibility for mistakes and wrong choices. [The Student's] family is pursuing a number of private services, and are committed to helping him be 'his best self'."
 - iii. Academic Performance:
 1. Assessment Tools: the IEP references the February, 2018, Psychoeducational Evaluation of the Student (described above). It was noted that the Student's academic skills are in the average to high average range and are consistent with his intellectual capacity. There was no indication of a learning disorder.
 2. Impact on functioning in general education in the following areas:
 - a. Reading: "[The Student's] reading skills are above grade-level. On 5/17/18 he read a late-4th-grade passage (Level R in Fountas and Pinnell Guided Reading Program) with 98% accuracy at a rate of 107 words per minute. Targets for this level are 97% accuracy and 108 words per minute. This text was just right or slightly easy for [the Student]. [The Student] has met or exceeded grade-level expectations for reading on the DIBLES assessments throughout 3rd grade. At this time, [the Student] does not need specialized instruction in reading."

- b. Written Language: "[The Student] is able to write paragraphs in response to a prompt, but tends to do as little work as he can get away with. . . . His writing skill varies with his interest in the subject." The Student usually uses complete sentences and appropriate capitalization and punctuation. The Student's teacher is concerned that the student rarely passes weekly spelling test with greater than 70%. The Student's teacher "reports that her greatest concern about [the Student's] written expression is his lack of stamina; he tends to write as little as possible." The teacher's second concern is his lack of written structure and that he generally fails to finish most writing assignments. The Student's penmanship is legible but immature.
- c. Mathematics: "[The Student's] math skill is at or above grade level. He especially enjoys working on the computer with the Cool Math program. [The Student] is able to read and write four-digit numbers, identify fractions, compare four-digit numbers, count coins, tell time on an analog clock, regroup in both addition and subtraction, write multiplication equations to match a picture, solve multiplication basic facts, and answer word problems of addition, subtraction, and multiplication. [The Student] has most addition and subtraction basic facts memorized; on 5/11/18 he correctly answered 25 of 25 mixed addition/subtraction facts in 1:17, a rate of about 17 per minute. At this time, [the Student] does not need specialized instruction in math.

iv. Cognitive:

1. Assessment tool: the IEP references the cognitive assessments administered in the Psychoeducational Evaluation. "Scores indicated average to high average core reasoning and problem-solving skills, with a particular strength in nonverbal reasoning ability. The Student's working memory (107) and processing speed (105) were in the high average range. Overall, the Student "demonstrated appropriate core reasoning ability as well as cognitive efficiency within the clinical environment, although his ability to access and demonstrate his strengths across contexts will depend on fluctuating ADHD

symptoms and anxiety.

v. Behavior:

1. Impact on functioning in general education: the Student has diagnoses of ADHD Combined Type and an Unspecified Anxiety Disorder. "Although medication has improved his ADHD and anxiety symptoms, [the Student] continues to have problems with impulse control, planning, mood regulation and multitasking." The Student tends to avoid difficult tasks, is prone to extreme reactions, noncompliance, "babyish" behavior or silliness when he feels anxious. The Student often has difficulty transitioning between activities, and responding flexibly to changes in routine. The Student uses the same workplan as his peers but needs support to remember to write down what work he has completed. The Student has a designated spot in the class near a window and away from peers who bother him. The teacher reports that the Student sometimes demonstrates negative behavior in response to praise for academic or behavioral successes. The Student can sometimes be motivated when the work appears as shown to him and may benefit from examples of finished essays or projects. The Student has been offered the use of sensory materials but the student disliked the materials. The Student's behavior and attentiveness did not seem to change when he was offered frequent short breaks, so this was discontinued.

vi. Fine Motor:

1. History: the Student was referred for an OT evaluation due to concerns with his ability to manage sensory activities and cope with the classroom environment.
2. Evaluation: the Student was evaluated through standardized testing and teacher interview. The Sensory Processing Measure (SPM) was administered and provides information in the following areas: Social Participation, Vision, Hearing, Touch, Taste and Smell, Body Awareness, Balance and Motion, and Planning and Ideas. The Student was in the Typical Range for hearing and body awareness, was in the Some Problems Range for social participation, vision, touch, balance, planning and ideas and

total score, and had no scores in the Definite Dysfunction Range. It was recommended that the Student may benefit from participating in an Occupational Therapy sensory strategies group

- c. Special Factors: the IEP indicates that the Student needs positive behavioral interventions and supports, and other strategies for the Student whose behavior impedes the Student's learning or that of others. The needed strategies are addressed in the IEP.
- d. Measurable Annual Goals were developed for the Student in the following areas of need:
 - i. Self-Regulation and Social Skills:
 - 1. 1A: Self-Regulation: "[The Student] will increase attentional self-regulation by identifying moments when he is distracted, and then demonstrate the use of attention-regulation skills to increase the amount of time spent on-task to 75% of a 15-minute observation during which a data point is recorded every 15 seconds, with one prompt or less per 15 minutes, by 5/20/2019. Examples of Attention-Regulation skills: Remind self of the goal and benefits of achieving it, set a timer for a brief interval and work for that whole interval before allowing self an attention break, write distracting thoughts on a list to think about later, use sensory materials or movement breaks to increase alertness or calm hyperactivity, recognize environmental elements contributing to distractions and change them, use strategies for listening comprehension during instructional times." This goal will be measured by behavior observations and reported quarterly to parents on a Progress Report.
 - 2. 1B: Social Skills: "During unstructured time (recess, free time, cafeteria), [the Student] will interact in play or conversation with one or more peers for at least 8 minutes of a 15-minute observation during which a data point is recorded every 15 seconds, with no more than 1 adult prompt by May 20, 2019. For this goal, interactions may include: conversation, imaginative play, active play, informal games (tag, chase), sports, and/or any other interactions typical of peers." This goal will be measured by behavior observations and reported quarterly to parents on a Progress Report.

3. 1C: Self-Regulation: "When given a verbal description of or watching a video of a scenario likely to cause anxiety or frustration, [the Student] will identify self-calming skills and/or self-advocacy skills appropriate to the situation, and describe or roll-play the use of that skill by May 20, 2019. Examples of Self-Calming Skills: take deep breaths, tell self everything will be okay, use a sensory strategy, decide if the problem is 'big' or 'little', take a brief break outside the classroom, get busy doing something else, remind self of good consequences of self-control. Examples of Self-Advocacy skills: ask for help, tell others what he is feeling, move away from someone bothering him, ask questions for clarification, request/remind teacher about needed accommodations, make a compromise, set a goal and make a plan." This goal will be measured by Social Skills group logs and reported quarterly to parents on a Progress Report.
 4. 1D: Self-Regulation: "Following a situation in which [the Student's] actions were problematic (i.e. hurtful to another, damaged/disordered materials in the environment, disrupted others, did not follow a rule/routine, etc.), regardless of whether those actions were intentional or unintentional, and at a time when he is called, [the Student] will acknowledge his actions which contributed to the problem, create a plan to 'restore' relationships or environment as applicable, and follow through with the plan, with prompting and support from adults, by May 20, 2019." This goal will be measured by teacher/counselor notes and reported quarterly to parents on a Progress Report.
- ii. Written Language:
1. 2A: Written Language: "Given an essay-prompt related to an informational or opinion topic, [the Student] will read a passage related to the topic (written on his independent reading level), and use a graphic organizer to compose a three-paragraph essay in response to the prompt, with support for spelling, with each paragraph including a topic sentence and 3 or more supporting sentences, referring to information from the reading passage, with 80% of sentences starting with a capital letter and ending with appropriate

punctuation, by 5/20/2019. For this goal, student may write by hand, keyboard, or use speech-to-text technology." This goal will be measured by work samples and reported quarterly to parents on a Progress Report.

2. 2B: Penmanship: "Given a printed model sentence of at least 35 letters, [the Student] will copy the sentence in legible lowercase cursive penmanship, with 75% of letters having appropriate orientation to the top and bottom lines, and 90% of letters demonstrated correct formation, by 5/20/2019." This goal will be measured by work samples and reported quarterly to parents on a Progress Report.

iii. Occupational Therapy:

1. 3A: Occupational Therapy: "[The Student] will identify and utilize sensory strategies to maintain attention and the quiet alert state for 30 minutes with less than three verbal cues to utilize a sensory strategy." This goal will be measured by OT records and reported quarterly to parents on a Progress Report.

e. The IEP provided for the following Special Education Services:

- i. Written Language in the Special Education classroom for 60 minutes per week;
- ii. Penmanship in the Special Education classroom for 30 minutes per week; and
- iii. Social Skills in the Special Education classroom for 30 minutes per week.

f. The IEP provided for the following Related Services:

- i. Counseling in the Special Education classrooms for 30 minutes per week; and
- ii. Occupational Therapy in the Special Education classroom for 30 minutes per week.

g. The IEP provided for the following Accommodations, Program Modifications, and supports and/or supplementary aids as follows:

- i. Reduce environmental distractions, provide preferential seating away from distractions to improve attention, daily;
- ii. Get student's attention before giving directions, cue to work and remain on task, check in frequently during work cycle, give reminders to write down completed work, daily;
- iii. Extended time for assignments/assessments, up to two times 'regular' time;

- shorten assignment if student still cannot complete work, as needed;
 - iv. Reduce assignment length as needed while maintaining grade-level content standards, emphasize quality over quantity, especially in written tasks, as needed;
 - v. Provide support and guidance during the writing process (outlining, revising, etc.), provide support for organization and spelling, as needed;
 - vi. Allow speech-to-text software or keyboarding in place of handwriting on longer assignments, as needed;
 - vii. Modified notes (i.e. recorded lectures, teacher-provided notes, fill-in-the-blank notes), daily;
 - viii. Allow movement breaks or sensory materials when anxious, overactive, fatigued or distracted, as needed; and
 - ix. Provide positive behavior supports, including use of tangible or activity rewards as appropriate, contact parent promptly if behavioral concerns arise, daily.
 - h. It was determined that the Student did not require Extended School Year services.
 - i. The IEP team agreed that the least restrictive environment for the Student is in the general education class with special education and related services, in the regular school setting.
 - j. The IEP was signed by the Petitioner (parent), LEA representative, the special education teacher, and the regular education teacher.
42. On May 21, 2018, Petitioner signed Written Prior Notice And Consent For Initial Placement In Special Education, which included another reminder that the Procedural Safeguards were provided to Petitioners. (Petitioners Exhibit, P19.)
43. Respondent conducted an Occupational Therapy (OT) evaluation, with a report dated May 24, 2018, recommending OT service for sensory strategies. (Petitioners' Exhibit, P15.)
44. The Written Prior Notice and Consent for Initial Placement in Special Education, dated May 21, 2018, clearly indicates that Petitioners gave written consent for the initial placement and that it was to begin immediately on May 21, 2018. (Petitioner's Exhibit, P19.)
45. The Student had 37 absences and 8 tardies during third grade at the School (the 2017/2018 school year). (Respondent's Exhibit, R3.)
46. Petitioner testified that Petitioners took the Student out of school during third grade for two

extended trips. Petitioner admitted that being absent from school a significant amount of time made it hard for the Student to assimilate into the School and learn how to get along with others. Petitioners took the Student out of school for the extended trips "to create consistency within the different activities that we also felt were important for his experience and education." (Cross Examination of Mother, Tr. Vol. I, pp. 273-274.)

47. The School provided Progress Reports for the Student during third grade (2017/2018 school year) for Language Arts and Mathematics on September 27, January 12, and May 28, 2018, which indicate that the Student was progressing well in Language Arts and Mathematics over his third grade year. The Student made consistent, and even above-grade level, progress on his reading from second grade through fourth grade, as monitored by the state-required reading assessment DIBELS. (Testimony of Principal, Tr. Vol. II, pp. 52-57; Testimony of Principal, Tr. Vol. II, pp. 59-61; Respondent's Exhibit, R9.)
48. On May 30, 2018, the School prepared Goal Progress Reports indicating the Student's progress on his IEP goals. The Goal Progress Report for each of the goals in the Student's IEP indicated only Emerging (<40%) progress due to the fact that the IEP had only been implemented for approximately one week and there was no measurable progress at that point. (Respondent's Exhibit, R19.)
49. Petitioner testified that the family had a great summer of 2018. Petitioner only gave the Student his medication occasionally. (Testimony of Mother, Tr. Vol. I, pp. 229.)
50. During the summer of 2018, the Student participated in the family's business, started in 2010, where the Student's father was an extreme reality [REDACTED] star [REDACTED] [REDACTED] [REDACTED] and where they did "science projects, do-it-yourself projects, life hacks and backyard-type science or garage science-type things." Some of the videos were: how to make a laser-assisted blow gun; what does dry ice do to a metal foundry; what does liquid nitrogen do to your face (the father threw liquid nitrogen into his own face); how to make a target explode with a sonic boom; how to make brass knuckles from bullet shells, and how to light a fire with your urine. The business exposed the Student "to a wide variety of things that typical kids don't get to see at a young age. It's also opened a lot of opportunities for travel and different ideas to be presented." The family went on an Alaska cruise at the beginning of the 2018/2019 school year.

School records indicate that the Student was absent from school from August 31 through September 7, 2018, a total of five school days. (Testimony of Mother, Tr. Vol. I, pp. 236-237; Respondent's Exhibits, R16; Cross Examination of Mother, Tr. Vol. I, pp. 268-271.)

51. At the beginning of the 2018/2019 school year (fourth grade) the Student's General Education Teacher, Occupational Therapist and Guidance Counselor signed a Documentation of Receipt of IEP Summary and Acknowledgment of Implementation Responsibilities, indicating that they had received a copy of the Student's IEP were aware of their responsibilities for implementing. (Respondent's Exhibit, R19.)
52. The Parent testified that at the beginning of the Student's fourth grade year she believed that the Student's teacher was a very poor fit for him the moment she met the Teacher. Petitioner noted "a severe downward spiral in his behaviors." At the start of the school year the Student would say things like "I hate school," "school is a waste of time," "I don't want to go to school," "I don't learn anything at school." (Testimony of Mother, Tr. Vol. I, pp. 229, 238.)
53. During the summer of 2018, the Student did not exhibit any feelings of depression, but when he started school "he would talk about depressing things, it would be, 'other kids don't like me,' 'I'm not good at school,' things like that." (Testimony of Mother, Tr. Vol. I, p. 239.)
54. Petitioner testified that during the Student's third and fourth grade years the Student was concerned about his father going to jail due to being charged with two second-degree felonies for possessing and exploding illegal and dangerous explosives in their backyard. The Student talked with school staff regarding his worries about his father going to jail. (Cross Examination of Mother, Tr. Vol. I, pp. 277-278.)
55. At the beginning of the 2018/2019 school year, School staff noted a significant difference in the Student's behavior from the previous school year. The Student's behaviors seem to be more external in nature, such as hiding, escaping, trying to escape, more aggression with peers and threats of self harm. (Testimony of Principal, Tr. Vol. II, p. 73-74.)
56. On October 1, 2018, the Assistant Principal of the School sent an email to Petitioner stating that a couple of students had reported that the Student said "I want to kill myself. I'm going to drink a whole gallon of gasoline and set myself on fire." The following day when

the Student's teacher spoke with him about what he said, he at first had no recollection of even saying it and then he said that his friends misunderstood him. The Student said he was talking about a stunt that he wanted to perform, to do things to make him famous. The Student went on to share his ideas about survival, guns, explosions, etc. On October 2, 2018, Petitioner sent an email to Respondent stating that she would "make sure he's not able to access gasoline or anything that could hurt him, as he has talked to me about stunts he wants to do, but these are for his future (he says) when he's in the military and has a YouTube channel." (Testimony of Mother, Tr. Vol. I, p.240; Petitioner's Exhibit, P6, pp. 81, 82.)

57. At the beginning of October, 2018, Petitioners informed the school that they would be changing the Student's medication schedule to Monday-Thursday, and later indicated they would be changing it to every other day. Following the change in medication School staff reported to the Petitioner's that the Student's negative behaviors were increasing. (Petitioner's Exhibit, P6, pp. 84, 85, 90.)

58. On October 23, 2019, the School prepared Goal Progress Reports indicating the Student's progress on his IEP goals for the first quarter of the 2018/2019 school year. The Goal Progress Reports for each of the goals in the Student's IEP provide as follows:

- a. 1A Goal: Self-Regulation: Struggling but making progress.
- b. 1B Goal: Social Skills: Progress (40-59%).
- c. 1C Goal: Self-Regulation: Progress (40-59%).
- d. 1D Goal: Self-Regulation: Progress (40-59%).
- e. 2A Goal: Written Language: Progress (40-59%); Making slow progress, but progressing.
- f. 3A Goal: Occupational Therapy: (Progress not reported on this form.)

(Respondent's Exhibit, R19.)

59. As part of progress monitoring of development of self regulation skills, Behavior Observation reports were completed for the Student on October 25 and 26, 2018. (Petitioners' Exhibit, P21.)

60. The School maintained a log for Social Skills groups during fourth grade including the Student, which include dates, topics of lessons, time of service and notes. (Respondent's Exhibits, R18.)

61. Counseling notes for IEP services received during the Student's fourth grade year provide the date, name of counseling activity, notes, start and end times and total time. (Respondent's Exhibits, R14.)
62. The School maintained a log for Writing class during the Student's fourth grade year, which included dates, times service, topics of lessons, and notes. (Respondent's Exhibits, R18.)
63. On November 1, 2018, Petitioner sent an email to Respondent. Petitioner stated that "[i]t's possible, there are some children who are not cut out for school. . . . [The Student] seems to be having a hard time, no matter what we all collectively try to help with. Our secondary concern is how his behavior is negatively affecting those around him and how that continues to create a negative experience for him as well. His father and I are considering taking him out of any kind of traditional school setting to work with his individual needs more closely. . . . It's really discouraging to continually get reports that he's not doing well, progressing, learning, or following rules. He seems to continually be disrupting, and manipulating, and despite our best efforts, he's not thriving or fitting in or stepping up the challenges of life at school. What do we do in this type of situation? What can you recommend?" (Petitioner's Exhibits, P6, p. 92.)
64. The School responded and proposed a meeting of the IEP team to discuss "current in class data and helpful insights that we would like to share with you in person." (Petitioner's Exhibits, P6, p. 92.)
65. The Student's IEP team met on November 6, 2018, to review documents and discuss the Student's behaviors. (Petitioner's Exhibits, P6, p. 92-94.)
66. At the November 6, 2018, IEP team meeting, the Student's father stated that he wanted to move to St. George and homeschool the Student, and to let the Student go explore, ride four wheelers and have life experiences, and he wasn't concerned about his academic experiences. Petitioner tearfully informed the IEP team that she could not have the Student at home because she could not handle him and manage him at home. ((Testimony of Behavior Support Room Teacher, Tr. Vol. II, pp. 285, 286; Cross Examination of Mother, Tr. Vol. I, p. 267-8.)
67. On November 11, 2018, Petitioner sent an email to Respondent to explain why the Student had not been in school the previous week. Petitioners had given the Student the choice to

go to school or work at home. The Student initially chose to work at home, but by Friday he wanted to go to school again. The Student thought that the Petitioner's requirements were too hard and strict. Petitioner stated they were planning for the Student to be back in school. Petitioner also informed the school that the Student had attempted to get one of Petitioner's guns and he told Petitioner he had planned to shoot himself because he doesn't like his life because "his brothers annoy him" and "he has to pay for everything." Petitioner pointed to two factors that she thought contributed to this situation which were: (1) that the Student had lost several items that he was required to pay to replace and had recently left his bike in the park; and (2) "the attention put on the last time he talked about suicide and seeing it's a 'real attention getter' from mom and at school." Petitioner explained that the Student is an opportunist and the seed was planted that this is an avenue to get attention. (Petitioner's Exhibits, P6, p. 102.)

68. On November 13, 2018, the School responded to Petitioner's email. School indicated that it was confusing to give the Student the choice to stay home or go to school and that if the Student attended the School there needed to be an expectation that the Student would attend school every day and complete his work so that he could learn. The School was also concerned about the second gun incident and asked if the Student was getting support from a therapist. Finally, the School pointed to one of the recommendations from the Psychoeducational Evaluation that stated that the Student "would benefit most from an academic environment that provides a high level structure. Due to his significant behavioral concerns, a behavior unit within a public school system is a potential good option. . . ." The Petitioner responded the same day indicating that she believed that (the recommendation for placement in a behavior unit within the public school system in the Psychoeducational Evaluation) "would be the best course of action for [the Student]." (Petitioner's Exhibits, P6, p. 103-4.)

69. The Student's IEP was amended on November 15, 2018, to add data to the PLAAFP regarding the number of times, and the reasons why, the Student visited the Behavior Support Room during the 2017/2018 school year. (Petitioner's Exhibit, P9.)

70. In an email to Petitioner from the Assistant Principal on November 15, 2018, the Petitioner was informed that the School had sent home a permission to test form so that the School could begin to develop a Functional Behavior Assessment (FUBA) and a Behavior

Intervention Plan (BIP). The school indicated that once the necessary forms and data was collected the IEP team would meet "to discuss the data and develop a new IEP, a FUBA/BIP." The School also agreed to discuss the Student's inappropriate computer use and to include strategies to deal with that in the BIP. (Petitioner's Exhibit, P6, p. 106.)

71. The last day the Student attended the School was December 7, 2018. (Respondent's Exhibits, R16.)
72. The Student's attendance records for fourth grade indicate 17 unexcused absences, and 4 excused, absences, and 7 tardies, from the beginning of school on August 13, 2018, until December 7, 2018, when Petitioners withdrew the Student from the School. (Respondent's Exhibits, R16.)
73. On December 13, 2018, Respondent reminded Petitioners that they had provided Respondent with permission to evaluate the Student in order to complete a FUBA and develop a BIP to address the Student's increased behavior challenges. Respondent also reminded Petitioners of the School's attendance policy and that the School would be required to report the Student as truant to the State which could also result in a report of educational neglect to the Division of Child and Family Services. Respondent requested that Petitioner's "either bring [the Student] to school, fill out paperwork letting the state know that you are homeschooling him, or provide evidence that he is enrolled at another school." (Respondent's Exhibits, R17.)
74. On December 14, 2018, Petitioners responded to the School's previous email and informed the School that the Student would no longer be attending the School and would be home-schooled. The Petitioner came into the school to fill out the paperwork to homeschool the Student. (Respondent's Exhibits, R17; Testimony of Principal, Tr. Vol. II, p. 82.)
75. The Principal testified that the Student and his brother reported that the Mother had used a Taser on them as a punishment, and the school was required to make a report of the statements to the Division of Child and Family Services. (Testimony of Principal, Tr. Vol. II, p. 83 .)
76. There are no school records or recollection by staff of the Student ever being suspended during the time he attended the School from the beginning of second grade until December of his fourth-grade year. (Testimony of School Principal, Tr. Vol. II, p. 37).

DISCUSSION

I.

GENERAL LEGAL STANDARDS

Students with disabilities who are protected by the IDEA are entitled to be appropriately identified, evaluated, placed, and have available to them a free appropriate public education (“FAPE”) that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 20 USC §1400(d); 34 CFR §300.1(a). The IDEA further provides that a party may present a complaint and request for due process hearing with respect to any matter relating to the identification, evaluation, educational placement, or provision of a FAPE to a disabled student. 20 USC §1415(b)(6).

The IDEA and its implementing regulations provide that in order to qualify as a “student with a disability” under the IDEA, a student must (1) meet the definition of one or more of the categories of disabilities which include: . . . a specific learning disability . . . , and (2) need special education and related services as a result of the student’s disability. CFR §300.8 (a)(1). A student is in need of special education and related services when the student requires those services in order to receive an educational benefit from the student’s educational program. *Marshall Joint Sch. Dist. No. 2 v. C.D.*, 54 IDELR 307 (7TH Cir. 2010); *Sebastian M. V. King Phillip Reg’l Sch. Dist.*, 59 IDELR 61 (1st Cir. 2012).

II.

JURISDICTION: STATUTE OF LIMITATIONS

A threshold issue in this matter involves the application of the IDEA’s two-year statute of limitations to Petitioner’s Complaint, which was filed on April 26, 2019. The IDEA, its implementing regulations, and the USBE SER provide, generally, that a parent must request a due process hearing within two years of the date the parent knew or should have known about the alleged action that forms the basis of the due process complaint. 20 USC § 1415; 34 CFR § 300.507(a)(2) and 300.511(e); and USBE SER IV.I.4 and IV.M.6. The limitations period was included as part of the 2004 IDEA amendments, and became effective as of July 1, 2005.

There are two exceptions to the two-year limitations period set forth in the federal regulations and state rules. They involve specific misrepresentations by the LEA and/or the

withholding of required information from the parent, where either of those circumstances prevented the parent from filing a request for a due process hearing. 20 U.S.C. § 1415(f)(3)(D); 34 CFR §§ 300.507(a)(2) and 300.511(f); and USBE SER IV.I.4 and IV.M.7. Therefore, unless an exception applies, Petitioners' claims would be limited to the two-year period described in the IDEA regulations and USBE SER.

The Federal regulations provide that the timeline for requesting a hearing does not apply to a parent if the parent was prevented from filing a due process complaint due to: (1) specific misrepresentations by the LEA that it had resolved the problem forming the basis of the due process complaint; or (2) the LEA's withholding of information from the parent that was required under this part to be provided to the parent. 34 CFR § 300.511(f). The USBE SER contain similar language providing that the two-year limitations period applies except if the parent was prevented from filing a due process complaint due to specific misrepresentations by the LEA that it had resolved the problem forming the basis of the due process complaint, or the LEA withheld information from the parent that was required under Part B of the IDEA to be provided to the parent. USBE SER IV.I.4. Also, USBE SER IV.M.6 is substantively identical the Federal regulation counterpart.

The two exceptions to the two-year limitations period were the subject of some discussion by the U.S. Department of Education. The Education Department declined to expand the list of exceptions, and also explained that it would not define the term misrepresentation stating that hearing officers would need to make decisions on a case-by-case basis as to whether parents should have known about alleged actions in order to request a due process hearing. (*See* Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed. Reg. 46706 [2006].)

In Petitioners' Amended Complaint it is clear that some of Petitioners' claims extend beyond the two year statute of limitations period. (Amended Complaint, Hearing Officer's Exhibit 23; Amended Answer, Hearing Officer's Exhibit 25.) Respondent has raised the statute of limitations as an affirmative defense to Petitioner's claims. (HO's Exhibits, 25.) During the initial pre-hearing conference call in this matter, and also at the beginning of the hearing, Petitioners moved the Hearing Officer for an order extending the two-year statute of limitations period back to August, 2016, when the Student first began attending the School. A ruling by the Hearing Officer on the statute of limitations question was deferred until the conclusion of the hearing in order to give Petitioners full opportunity to present evidence concerning the exceptions. Petitioners have

the burden of proving the existence of one or both of the exceptions to the two-year limitations period (see below).

The first question regarding the statute of limitations in this matter is when did the Petitioners know, or should have known, about the alleged action that forms the basis of the due process complaint. In analyzing this issue it is important to identify what the alleged action is that forms the basis of the Petitioner's due process complaint. The Petitioners' procedural issue is not implicated here because all of the actions involved in evaluating the Student, developing the Student's IEP, and implementing it, are all clearly within the two-year statute of limitations period. Therefore, the alleged action has to do with Petitioners' procedural claim involving child find. As described below, the action that forms the basis of a child find violation is the School's alleged refusal to timely refer the Student for a special education evaluation. Therefore, the question is when did the Petitioners know, or should have known, that the School refused to refer the Student for a special education evaluation? In other words, did the Petitioners know, or should have known, prior to April 26, 2017, that the School was refusing to refer the Student for a special education evaluation?

The Petitioners argue that the date on which their knowledge regarding the statute of limitations should be based is the date of the April 22, 2018, Prior Written Notice and Consent For Evaluation that Petitioner signed, because this is the first documented date when they were given a copy of the Procedural Safeguards. In effect, Petitioners argue that they had no knowledge about the alleged action which forms the basis of their Complaint until they received the Procedural Safeguards. Petitioners further argue that they were not provided with Prior Written Notice regarding Respondent's refusal to refer the Student for an evaluation at any time prior to April 22, 2018. However Petitioners' arguments are not persuasive on this issue because they speak only to Respondent's failure to provide notice to them rather than attempting to establish Petitioners' actual or imputed knowledge of Respondent's refusal to refer the Student for an evaluation. The actual issue is not whether Respondent failed to provide notice to Petitioners, it is whether Petitioners knew, or should have known, that Respondent refused to refer the Student for an evaluation.

The facts, found above, indicate at least three instances regarding Respondent's knowledge of Petitioners' refusal to refer the Student for evaluation. The earliest time is in April 2017, after the Student began taking medication prescribed by his pediatrician. The Petitioner testified that

she was upset that the School staff did not say to her: "Look he is exhibiting these behaviors in the classroom that are really severe. He needs to be looked at because we have programs and protocols in place for this type of behavior." Petitioner testified that: "None of that was addressed. None of that was given to me. None of that was in place." The second indication of Petitioner's knowledge took place in September, 2017. Petitioner testified that she had a conversation with the School's Assistant Principal and said: "What is the next step in getting him [the Student] support? Can we start working on an IEP?" The third time is, of course, when the Student was referred for a special education evaluation in April, 2018.

As described below, it is clear that the Respondent's child find duty is an ongoing, affirmative duty, rather than a one-time duty, to identify the Student and refer him for an evaluation. In view of the fact that the earliest date that Petitioner's knowledge regarding the Respondent's refusal to refer the Student can be identified from the record is in April, 2017, which is arguably within two years of the date of Petitioners' Complaint, it is concluded that Petitioners' request for a Due Process Hearing was timely filed under the IDEA regulations and USBE SER.

The second inquiry is whether Respondent made specific misrepresentations to Petitioners that it had resolved the problem forming the basis of the due process complaint; or withheld information from Petitioners that was required under this part to be provided to Petitioners. The record reflects that Petitioner has not proven any misrepresentations by Respondent, nor does there appear to be any information that was withheld from Petitioners, that would have acted to prevent Petitioners from filing a due process complaint in April, 2017. If the Petitioners had filed their complaint at that time, or at any other time up to the time they were provided procedural safeguards in April, 2018, such a complaint would have related back and included all of the time that the Student attended the School. Therefore, it is concluded that neither of the two exceptions to the running of statute of limitations applies in this matter. Petitioners have failed to prove by a preponderance of the evidence that the statute of limitations in this matter should be extended prior to April 26, 2017. Petitioners have not met their burden of proof on this issue. *Shaffer v. Weast*, 546 U.S. at 49, 62 (2005). Therefore, Petitioners' child find claim was timely filed, and relates back to April 26, 2017.

III.

PETITIONERS' PROCEDURAL ISSUE

An allegation of a denial of FAPE to a disabled student can be based on either substantive grounds or procedural violations of the IDEA. 20 USC §1415(f)(3)(E). *Hendrick Hudson Central School Dist v. Rowley*, 458 US 176; 102 S Ct 3034; 73 L Ed 2d 690 (1982); *Sytsema v. Academy School District No. 20*, 538 F.3d 1306 (10th Cir. 2008), 50 IDELR 213. “The IDEA also sought to maximize parental involvement in educational decisions affecting their disabled child by granting parents a number of procedural rights. For example, parents are entitled to: (1) examine all records relating to their child, 20 U.S.C. §1415(b)(1); (2) participate in the IEP preparation process, *id.*; (3) obtain an independent evaluation of their child, *id.* (4) receive notice before an amendment to an IEP is either proposed or refused, §1415(b)(3); (5) take membership in any group that makes decisions about the educational placement of their child, §1414(f); and (6) receive formal notice of their rights under the IDEA, §1415(d)(1).” *Ellenberg ex rel. S.E. v. New Mexico Military Institute*, 478 F.3d 1262 (10th Cir. 2007). The IDEA’s “procedural guarantees are not mere procedural hoops through which Congress wanted state and local educational agencies to jump. Rather, the formality of the Act’s procedures is itself a safeguard against arbitrary or erroneous decision making.” *Daniel R.R. v. State Bd. Of Edc.*, 874 F.2d 1036, 1041 (5th Cir. 1989) (internal quotation marks omitted).

However, proving a procedural violation is only a first step to obtaining relief. In *Sytsema*, the court held that an “IEP’s failure to clear all of the Act’s procedural hurdles does not necessarily entitle a student to relief for past failures by the school district.” *Sytsema*, 50 IDELR at 216; *quoting Garcia v. Bd. of Educ. of Albuquerque Pub. Schs.*, 520 F.3d 1116, 1125-26 & n.4 (10th Cir. 2008) (“[O]ur precedent hold[s] that procedural failures under IDEA amount to substantive failures only where the procedural inadequacy results in an effective denial of a FAPE.”); *quoting Urban ex rel. Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 726 (10th Cir. 1996) (holding that a procedural failure did not entitle a student to relief because that deficiency did not result in the denial of a FAPE).

Congress provided in the 2004 amendments to the IDEA that to find a denial of FAPE based on a procedural violation, the Hearing Officer must find that the procedural violation: (1) impeded the student's right to a FAPE, (2) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE to the student, or (3)

caused a deprivation of educational benefits. 20 USC §1415(f)(3)(E)(ii); 34 CFR §300.513(a)(2); UCA §53A-15-301(IV)(O)(2).

The IEP process provides that the parents and school personnel are equal partners in decision-making; the IEP team must consider the parents' concerns and information they provide regarding their child. (64 Fed. Reg. 12473 (Mar. 12, 1999).) The IDEA's requirement that parents participate in the IEP process ensures that the best interests of the child will be protected, and acknowledges that parents have a unique perspective on their child's needs, since they generally observe their child in a variety of situations. (*Amanda J.*, *supra*, 267 F.3d at 891.) A parent who has had an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way. (*Fuhrmann v. East Hanover Board of Education*, 993 F. 2d 1031,1036 (3rd Cir. 1993).) Stated another way, a parent has meaningfully participated in the development of an IEP when he/she is informed of his/her child's problems, attends the IEP meeting, expresses his/her disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools*, 315 F.3d 688, 693 (6th Cir. 2003); *Fuhrmann*, *supra*, 993 F.2d at 1036.)

A. Child Find.

Petitioner's first procedural issue is: Whether the Respondent violated the child find provisions of the IDEA within the statutory jurisdictional period of Petitioners' due process Complaint, which was filed on April 26, 2019? The period during which this issue must be analyzed is from April 26, 2017, to April 26, 2019. To prevail on this issue, Petitioners must not only establish a procedural violation by Respondent, but must also establish that such procedural violation substantively denied the Student a FAPE. *Sytsema*, 50 IDELR at 216; and *Urban*, 89 F.3d at 726.

Child Find is the affirmative, continuing obligation of local schools to identify, locate and evaluate all children with disabilities residing within the jurisdiction that either have, or are suspected of having, disabilities, and who are in need special education and related services. 34 CFR §300.111(a)(1)(I) ("child find"). A "child with a disability" is defined as a child evaluated and determined to be a child with one of the enumerated disabilities, including Other Health Impairment. See 34 CFR § 300.8(a)(9). To be qualified, the child must be in need of special education and related services because of the disability. *Id.*

The child find obligation is imposed on the school for a child suspected of a disability and

in need of special education, even though the child may advance from grade to grade. See 34 CFR § 300.111(c)(1). A disability is suspected when the school is put on notice that symptoms of the disability are displayed by the child. See *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1120 (9th Cir. 2016). Notice may come in the form of expressed parental concerns about a child's symptoms, expressed opinions by informed professionals, or less formal indicators, like the behaviors in and out of the classroom. *Id.* at 1121. The duty is triggered by a suspicion of disability, rather than actual knowledge of the underlying qualifying disability. See *Regional Sch. Dist. No. 9 v. Mr. and Mrs. M.*, 53 IDELR 8, 109 LRP 51058 (D.C. Conn. 2009). A "suspicion" requires a "difficult and sensitive" analysis. *Mr. I. v. Maine Sch. Admin. Dist. No. 55*, 480 F.3d 1, 4 (1st Cir. 2007)(quoting *Greenland Sch. Dist. v. Amy*, 358 F.3d 150, 162 (1st Cir. 2004).

The child find obligation matures, and the school may not delay an initial evaluation, when the School suspects a disability and the need for special education. *Memorandum to State Directors of Special Educ.*, 67 IDELR 272 (OSEP 2016). While school staff may believe that a student's disability is not severe enough to require special education, the idea provides that the child find requirement applies regardless of the severity of the disability. 34 CFR §300.111(a)(1)(i); *See also Letter to Breecher*, 18 IDELR 216 (OSEP 1991).

The IDEA provides that either a parent of a child or a public agency may initiate a request for an initial evaluation to determine if the child is a child with a disability. See 34 CFR § 300.301(b), USBE SER II.B. However, parents are not required to request an evaluation. *Robertson County Sch. Sys. v. King*, 24 IDELR 1036 (6th Cir. 1996). *See also D.G. v. Flour Bluff Indep. Sch. Dist.*, 59 IDELR 2 (5th Cir. 2012). The school district "bears the burden generally in identifying eligible students for the IDEA." *Cudjoe v. Ind. Sch. Dist. No. 12*, 297 F.3d 1058, 1066 (10th Cir. 2002). All children residing in the school's jurisdiction must be identified, located and evaluated. See 20 U.S.C. § 1412(a)(3)(A); 34 CFR § 300.111(a)(1). Public charter schools are responsible for child find for students enrolled in their own school. USBE SER II.A.3.

The LEA must conduct a full and individual evaluation to determine if the child is a child with a disability. See USBE SER II.D.1. The responsibility for the evaluation lies with the school. See *Wiesenberg v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 181 F. Supp. 2d 1307, 1310 (D. Utah 2002). Upon receipt of a request for an evaluation, the school must respond within a reasonable timeframe. The response may not be delayed due to the school's Response to Intervention (RtI) process. USBE SER II.B. However, a school may appropriately utilize a (RtI)

process prior to referring a student for an IDEA evaluation. *See, e.g. M.G. v. Williamson County Schs*, 71 IDELR 102 (6th Cir. 2018, *unpublished*). However,

A multi-tier system of supports, often referred to as RtI, means a comprehensive continuum of evidence-based, systemic practices to support a rapid response to a child's needs, with regular observation to facilitate data based instructional decision-making. OSEP supports State and local implementation of RtI strategies to ensure that children who are struggling academically and behaviorally are identified early and provided needed interventions in a timely and effective manner. Many LEAs and preschool programs have implemented successful RtI strategies, thus ensuring that children who do not respond to interventions and are potentially eligible for special education and related services are referred for evaluation, and those children who simply need intense short-term interventions are provided those interventions. *Memorandum to State Directors of Special Educ.*, 116 LRP 21359 (OSEP 04/29/16).

An LEA's failure to meet its child find obligation is a cognizable claim. *See Compton Unified Sch. Dist. v. Addison, et al.*, 598 F.3d 1181, 1183-84 (9th Cir. 2010). The failure of a school to meet its child find duty amounts to a procedural violation of the IDEA. *See Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1124 (9th Cir. 2016). The Fifth Circuit has recently affirmed that a finding of a child find violation turns on three inquiries: (1) the date the child find requirement triggered due to notice of a likely disability; (2) the date the child find duty was ultimately satisfied; and (3) the reasonableness of the delay between these two dates. *Spring Branch Indep. Sch. Dist. v. O.W. by Hannah W.*, 75 IDELR 29 (5th Cir. 2019), quoting *Krawietz*, 900 F.3d at 676. While the Tenth Circuit does not appear to have adopted the Fifth Circuit's child find test, it does appear to the Hearing Officer that it is an appropriate test with which to analyze Petitioner's child find complaint.

The facts set forth above clearly establish that as of April 26, 2017, the staff at the School were aware that the Student was taking Vyvanse, a medication prescribed for ADHD. School staff were also aware that the Student was exhibiting behaviors at school generally associated with ADHD and anxiety. Petitioners argue that this knowledge was clearly sufficient for the School to suspect that the Student was a student with a disability. Petitioners argue that Respondent was on notice, or at the very least suspected, that the Student was a student with a disability and should have been referred for a special education evaluation at the end of the Student's second grade-year or the beginning of the Student's third grade-year. Petitioner further argue that at the time that the

School received the Psychoeducational Evaluation on March 2, 2018, the Respondent clearly had a duty to refer to the Student for a special education evaluation.

In looking at the three components of the *Krawietz* test, the following is evident from the record: the Respondent's child find duty triggered on April 26, 2017, and was satisfied on April 22, 2018, approximately one year. The third prong of the test is whether the one year delay in initiating a special education referral was reasonable under the circumstances of this matter.

Respondent argues that the delay was reasonable because it responded to the Student's negative behaviors at school by implementing the School's RtI process. The School further argues that a referral to special education was unwarranted because the Student was responding to interventions and was at or above grade level in all academic areas. The Record does reflect that the Student was at or above grade level academically during third grade (2017/2018 school year) even though the Student was absent for 37 school days and tardy seven times. Respondent also argues that the Student was making progress behaviorally during the Student's third-grade no evidence to year. The record does reflect that the Student's behaviors were generally improving during the 2017/2018 school year. Respondent argues that it was not until the beginning of the Student's fourth grade-year (the 2018/2019 school year), after the Student's IEP was in place, that the Student's behaviors began to worsen and be more concerning. The record also clearly evidences the fact that the School staff and Petitioners were in constant communication over the course of the Student's education and the Petitioners were not prevented from participating in his education.

In *D.G. by B.G. v. Flour Bluff Indep. Sch. Dist.*, 112 LRP 28408 (5th Cir. 06/01/12, *unpublished*) a Texas district's failure to evaluate a high school student's need for IDEA services did not in itself entitle the student to compensatory education. The Court concluded that a district cannot be liable for a child find violation unless the student has a need for special education. The court held that the student with ADHD did not need specialized instruction during his ninth-grade year, and he was not entitled to relief for a Texas district's failure to evaluate. The key question is whether the School has reason to believe the student needs specialized instruction. In this case the fact that the student performed well academically for years after his ADHD diagnosis indicated that he did not need special education to receive FAPE. In determining that the district took prompt action in response to the parent's request for an IDEA evaluation at the end of the student's ninth-grade year, the 5th Circuit held that the district did not violate its child find

duty.

In *T.B. v. Prince George's County Board of Education*, 72 IDELR 171 (4th Cir. 2018), although a Maryland district violated the IDEA when it failed to evaluate a struggling high school student in a timely manner, it did not have to provide the student with compensatory education. The 4th Circuit held that the district violated the IDEA by denying the parents' repeated requests for a special education evaluation. However, the court rejected the notion that the student's poor performance stemmed from the district's child find violation. Instead, the majority attributed the student's academic struggles to his refusal to attend school. The Court affirmed a District Court ruling that the student's poor attendance at school made the district's procedural violation harmless. According to the student's teachers, the student performed well when he attended class and completed assignments. Moreover, the Court pointed out that the student failed to attend school even after the district found him eligible for IDEA services. "[The student] was, albeit belatedly, offered the academic services he sought, yet he chose not to take advantage of them." *Id.*

The two cases cited above are very similar to the facts of this matter. During the Student's third-grade year, prior to the development of his IEP, the Student performed very well academically. Moreover, the Petitioner's expert witness, and the Respondent's expert witness both testified that the Student's many absences from school likely contributed to the Student's negative behaviors at school. The facts clearly show that when the Student was in school he performed very well academically. Moreover, the facts indicate that the Student was making progress behaviorally when he was in school during third grade. The Hearing officer specifically concludes that during the Student's third-grade year up to March 2, 2018, the failure to refer the Student for a special education evaluation did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision making process regarding the provision of a FAPE to the student, or cause a deprivation of educational benefits.

One issue that remains more cloudy is whether the delay between the School's receipt of the Psychoeducational Evaluation provided by the parents on March 2, 2018, and the School's referral for a special education evaluation on April 22, 2018, was reasonable. Hearing Officer finds that the delay was not reasonable and does constitute a child find violation. However, the Hearing Officer concludes that the violation was harmless because the Student was making progress and, therefore was not denied a FAPE.

Therefore, Petitioner has failed to prove by a preponderance of the evidence that Respondent violated the child find provisions of the IDEA within the statutory jurisdiction period of Petitioners' due process Complaint, which was filed on April 26, 2019. Therefore, Petitioners have not met their burden of proof on this issue. *Shaffer v. Weast*, 546 U.S. at 49, 62 (2005).

IV.

PETITIONERS' SUBSTANTIVE ISSUES

Students with disabilities who are eligible under the IDEA are entitled to be appropriately identified, evaluated, placed, and have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 CFR §300.1(a); USBE SER II.A. The IDEA provides that a child must be assessed in all areas of suspected disability. 20 USC § 1414(b)(3)(B). However, school personnel are not charged with knowledge of disabilities that they have not been made aware of or that there are no indications of at the time the IEP is developed. *Tracy N. v. Dep't of Educ, Hawaii*, 715 F. Supp. 2d 1093, 1112-13 (D. Haw. 2010).

The IDEA and USBE SER also provide that "[a]t the beginning of each school year, each LEA must have an IEP in effect for each student with a disability within its jurisdiction." 34 CFR §300.323(a); USBE SER III.B.1. Each LEA must ensure that the IEP team reviews the student's IEP periodically, but not less than annually, to determine whether the annual goals for the student are being achieved, and revises the IEP to address any lack of expected progress toward the annual goals, the results of any reevaluation, and information about the student provided to, or by, the parents, and the student's anticipated needs. 34 CFR §300.324(b)(1); USBE SER III.I.4. Signatures on an IEP denote participation of IEP team members in the development of the IEP. USBE SER III.E.11.

Educating children in the least restrictive environment in which they can receive an appropriate education is one of the IDEA's most important substantive requirements. *Nebo Sch. Dist.*, 379 F.3d at 976 (quoting *Murray v. Montrose County Sch. Dist.*, 51 F.3d 921, 927 (10th Cir. 1995)). The IDEA federal regulations and the USBE SER provide that a district must ensure that to the maximum extent appropriate, students with disabilities are educated with similar-aged students who are nondisabled, and special classes, separate schooling, or other removal of students with disabilities from the regular educational environment occurs only if the nature or severity of

the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR §300.114(a)(2), and USBE SER III.P.1. A continuum of alternative placements must be available to meet the student's needs, including: instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. 34 CFR §300.115, and USBE SER III.Q.

In determining the educational placement of a child with a disability, a district must ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and is made in conformity with the LRE provisions of the regulations and rules. 34 CFR §300.116(a), and USBE SER III.R.1. A district shall ensure that a parent of a student with a disability is a member of any group that makes decisions on the educational placement of the parent's student. 34 CFR §300.327 and 300.501(c), and USBE SER III.S. In selecting the LRE, consideration must be given to any potential harmful effect on the child or on the quality of services that the child needs. 34 CFR §300.116(d), and USBE SER III.R.1(d). A child with a disability cannot be removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. 34 CFR § 300.116, and USBE SER III.R.1(e).

A child has received an educational benefit under IDEA if the evidence clearly shows that the child made progress on the educational goals that were individually formulated through the IEP process. *Thompson*, 540 F.3d at 1145. The legal standard for determining whether the child has made progress has been the subject of a good deal of litigation in the courts.

The U.S. Supreme Court has recently provided additional guidance and clarification with respect to the IDEA's FAPE standard. In *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S., 137 S. Ct. 988, 999 (2017), the Court held as follows: "To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." The Court further held as follows:

The "reasonably calculated" qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. The Act contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child's parents or guardians. *Id.*, at 1000. Deference is given to the expertise and exercise of judgment by the school authorities, with parents and school representatives to be

given the opportunity to fully air their opinions regarding how an IEP should progress. *Id.*, at 1001. Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. *Id.*, at 999 (*internal citations omitted*). Accordingly, for a child fully integrated in the regular classroom, an IEP typically should, as Rowley put it, be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Rowley*, at 203-204. "If that is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom." *Endrew*, 137 S. Ct. at 1001.

Although LEAs should strive to follow IEPs as closely as possible, the IDEA does not require perfect adherence to a child's IEP. Minor discrepancies between the services provided and the services called for by the IDEA are not enough to amount to a denial of FAPE. *Van Dun ex. rel. Van Dun v. Baker Sch. Dist. 5J*, 502 F. 3d 811, 821 (9th Cir. 2007); *I.Z.M. v. Rosemount-Apple Valley-Eagan Pub. Schs.*, 117 LRP 27963 (8th Cir. 07/14/17); *T.M. v. District of Columbia*, 64 IDELR 197 (D.D.C. 2014).

A. Petitioners' substantive issues are: Whether the Respondent failed to provide the Student with a Free Appropriate Public Education (FAPE) during the time the Student attended the School by:

- (1) failing to provide the Student with behavioral supports in order to allow the Student to access the general education curriculum;
- (2) failing to develop an appropriate Individualized Education Program (IEP) that as reasonably calculated to provide the Student with a FAPE; and
- (3) removing the Student from school due to behavior which was a manifestation of the Student's disability?

Petitioners' first substantive issue is whether Respondent failed to provide the Student with a FAPE by failing to provide the Student behavior supports in order to allow the Student to access the general education curriculum. The facts set forth above do not support Petitioners' claim that Respondent failed to provide behavior supports to the Student. The record reflects that the Student's IEP team incorporated many of the recommended behavior supports from the Psychoeducational Evaluation. One fact that stands out in the record is the number of the

Student's unexcused absences from school during his fourth-grade year (2018/2019). The record reflects that these absences were due to vacations, trips and other times Petitioners took the Student out of School. School staff testified that the Student was absent nearly half of the school days he was enrolled at the School during fourth grade. Petitioner's and Respondent's experts both testified that the number of absences experienced by the Student would likely have an impact on the Student's progress on his IEP goals.

The record reflects that the Student's negative behaviors began to escalate at the beginning of fourth grade. Petitioners argue that this was due to Respondent failing to have a BIP in place for the Student. Respondent argues that the Student's exciting home life, the fact that the Student stated he hated school, the Student's concern over whether his father would go to jail, and other home-life related issues are more implicated in the Student's increasingly negative behaviors. However, the record reflects that in November, 2018, shortly after the Student's behaviors began to significantly escalate, the School met with Petitioners and initiated the process of conducting a FUBA, developing a BIP and revising the Student's IEP. The School initially amended the Student's IEP on November 6, 2018, to update the PLAAFP regarding the Student's behaviors and provided forms to the Petitioners to fill out for the FUBA. However, Petitioner's did not return the forms for the FUBA to the School. During the last week of November and the first week of December, 2018, Petitioners took the Student out of school for a trip. Petitioners removed the Student from the School on December 7, 2018. On December 23, 2018, the School contacted the Petitioner's to remind them about the states compulsory attendance laws and the fact that they would be required to report Petitioners to DCFS if the student did not return to school, be officially enrolled in homeschool or transfer to another school. Petitioners immediately filled out forms at the School to homeschool the Student. Based upon the foregoing, Petitioners have not established by a preponderance of the evidence that Respondent failed to provide the Student with behavioral supports in order to allow the Student to access the general education curriculum. Therefore, Petitioners have not met their burden of proof on this issue. *Shaffer v. Weast*, 546 U.S. at 49, 62 (2005).

The second substantive issue identified by Petitioners is whether Respondent failed to provide the Student with a FAPE by failing to develop an appropriate IEP for the Student that was reasonably calculated to provide the Student with a FAPE. As identified above, Respondent did comply with all of the IDEA and USBE SER procedures for developing an IEP for the Student.

The issue is whether the IEP was reasonably calculated to enable the Student to achieve passing marks and advance from grade to grade. *Endrew*, 137 S. Ct. at 1001. This question was posed to Petitioner's expert witness and to Respondent's expert witness. After reviewing Student's IEP, Progress Reports and supporting data, Respondent's expert witness stated that, in her opinion, the IEP was reasonably calculated to confer an educational benefit on the Student. (Testimony of Respondent's Expert, Tr. Vol. II, pp. 150-152, 187-188.) In response to questions by Petitioners' counsel and the Hearing Officer, the opinion of Petitioners' expert witness was that "the goals and targets are generally appropriate. I think, you know, my concern maybe is more and how some of those are measured and how do we track progress related to those. But the goals and behaviors of interest, generally, seem to correspond with the behaviors observed." (Testimony of Petitioners' Expert, Tr. Vol. I, p. 126-7, 142.) Based upon the foregoing, Petitioners have not established by a preponderance of the evidence that Respondent failed to develop an appropriate IEP for the Student that was reasonably calculated to provide the Student with a FAPE. Therefore, Petitioners have not met their burden of proof on this issue. *Shaffer v. Weast*, 546 U.S. at 49, 62 (2005).

The final substantive issue raised by Petitioner's Complaint is whether Respondent failed to provide the Student with a FAPE by removing the Student from school due to behavior which was a manifestation of the Student's disability. As exhaustively discussed in the record, this issue relates to the number of times that the Student went to, or was sent to, the School's Behavior Support Room. Petitioner argues that the times in question, which were many, would have to be considered disciplinary removals due to the Student's negative behaviors. Respondent argues that going to the Behavior Support Room is not a punitive removal or based only on a student's negative behaviors but can be self-selected by students and is used to self-regulate and reset. It is available to all students at the School. Regardless of whether attendance in the Behavior Support Room is considered a removal or punitive in nature, the facts related to this issue establish that the Student's time in the room was usually very short and total amount of time spent by the Student in the Behavior Support Room was approximately one and one half days during third grade and approximately two days during fourth grade. (Testimony of Respondent's Expert, Tr. Vol. II, pp. 144, 162.) Clearly, the amount of time the Student spent in the Behavior Support Room does not come close to equaling 10 school days, which would trigger a violation of the IDEA and state rules regarding disciplinary removals and require a manifestation determination. USBE SER V.D.1. Based upon the foregoing, Petitioners have not established by a preponderance of the evidence that

Respondent removed the Student from school due to behavior which was a manifestation of the Student's disability. Therefore, Petitioners have not met their burden of proof on this issue. *Shaffer v. Weast*, 546 U.S. at 49, 62 (2005).

V.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and analysis of issues and the Hearing Officer's own legal research, the Hearing Officer now enter the following Conclusions of Law:

1. Petitioners did not meet their burden of proof that the IDEA Statute of Limitations should be extended for more than two years prior to the filing of Petitioners' Request for Due Process Hearing. *Shaffer v. Weast*, 546 U.S. 49, 61 (2005).

2. Petitioners did not meet their burden of proof that Respondent failed to provide the Student with a FAPE by violating the child find provisions of the IDEA within the statutory jurisdiction period of Petitioners' due process Complaint, which was filed on April 26, 2019. *Shaffer v. Weast*, 546 U.S. 49, 61 (2005).

3. Petitioners did not meet their burden of proof that Respondent failed to provide the Student with a FAPE by failing to provide the Student with behavioral supports in order to allow the Student to access the general education curriculum. *Shaffer v. Weast*, 546 U.S. 49, 61 (2005).

4. Petitioners did not meet their burden of proof that Respondent failed to provide the Student with a FAPE by failing to develop an appropriate IEP for the Student that was reasonably calculated to provide the Student with a FAPE. *Shaffer v. Weast*, 546 U.S. 49, 61 (2005).

5. Petitioners did not meet their burden of proof that Respondent failed to provide the Student with a FAPE by removing the Student from school due to behavior which was a manifestation of the Student's disability. *Shaffer v. Weast*, 546 U.S. 49, 61 (2005).

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law it is hereby ORDERED as follows:

1. It is ORDERED that Petitioners' requests for relief under Procedural Issue No. 1 is hereby DENIED.

2. It is ORDERED that Petitioners' request for relief under Substantive Issues Nos.

2(a), 2(b) and 2(c) are hereby DENIED.

All other relief not specifically ordered herein is DENIED.

Dated this 4th day of October, 2019.

/s/ Wallace J. Calder

Wallace J. Calder
Hearing Officer