



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 09536-17

AGENCY DKT. NO. 2017 26342

J.A. ON BEHALF OF R.A.,

Petitioner,

v.

CLIFTON BOARD OF EDUCATION,

Respondent.

Bradley R. Flynn, Esq., for petitioner (Montgomery Law, attorneys)

Jessika Kleen, Esq., for respondent (Machado Law Group, attorneys)

BEFORE **MARGARET M. MONACO, ALJ:**

Record Closed: September 27, 2019

Decided: November 18, 2019

STATEMENT OF THE CASE

This matter arises under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, et seq., and the implementing federal and state regulations. J.A., the mother of R.A. (hereinafter Ms. A.), asserts that the Clifton Board of Education (the District) violated its child-find obligations and failed to provide R.A. a free appropriate public education (FAPE).

PROCEDURAL HISTORY

On June 1, 2017, Ms. A. on behalf of R.A. filed a request for due process, which details various behaviors and other difficulties that R.A. is alleged to have experienced during his kindergarten 2016–17 school year and asserts that the District failed to meet its child-find obligations. Specifically, petitioner asserts that the “District never provided Parent with an invitation to evaluate R.A. nor did it convene an evaluation meeting,” and, “because the District failed to complete . . . evaluations, R.A. has not received the much-needed supports.” Petitioner’s “Prayer for Relief” seeks an independent learning evaluation, an independent neuropsychological evaluation, an independent psychiatric evaluation, a functional behavior assessment, a speech evaluation, and a social assessment, with all such evaluations to be conducted by an evaluator selected by the parent at the District’s expense. Petitioner further requests that “[a]n IEP meeting [be] convened utilizing the information from the independent evaluations to determine the appropriate program and placement for R.A.,” and compensatory education. Petitioner’s request for due process was transmitted to the Office of Administrative Law for a hearing, and the District filed its Answer to the due-process request on or about July 20, 2017. Prior to the hearing, petitioner filed a request for emergent relief on or about January 23, 2018, which petitioner ultimately withdrew.

The hearing commenced on March 20, 2018, and continued on March 23 and 26, and July 31, 2018, and March 1, 2019. On or about June 19, 2018, the District filed a motion in limine to bar the evaluation report and testimony of petitioner’s proposed expert witness, Janice Kingsbury. By order dated July 27, 2018, the undersigned denied the District’s motion to bar all testimony by Ms. Kingsbury and to exclude her entire report, provided that the District would not be precluded from objecting to the testimony or the report to the extent it does not address the child-find issue and/or advancing arguments as to the weight that should be afforded to the testimony. Petitioner later filed a “motion for sanctions,” requesting that certain adverse inferences be drawn against the District based on its alleged spoliation of evidence, which was denied for the reasons stated on the record on March 1, 2019, provided that petitioner would not be precluded from renewing arguments in her post-hearing submissions regarding the alleged spoliation of evidence, the adverse inferences that should result, and/or the weight that should be

afforded to the testimony of the District's witness. Subsequently, the parties submitted Stipulations of Fact and post-hearing submissions in support of their respective positions, along with transcripts of the hearing. Oral summations were entertained on September 27, 2019, on which date the record closed.

FACTUAL DISCUSSION

At the hearing, the District presented R.A.'s kindergarten teacher (Kristin Seyka), the principal at R.A.'s school (Nancy Latzoni), and the District's learning disabilities teacher consultant (Yelena Vayner). Ms. A. testified on her own behalf and offered testimony by her husband and R.A.'s father (Mr. A.), the school counselor (Anarosa Duarte), and Janice Kingsbury. The general sequence of events and many of the facts are largely undisputed. Based upon a review of the testimony and the documentary evidence presented, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following pertinent **FACTS**.

At the time of the petition, R.A. was six years of age. R.A. was in Kristin Seyka's (Seyka) kindergarten class from September 2016 until April 2017. Seyka has been employed by the District as a kindergarten teacher for eight years and previously served as a fifth-grade teacher for eight years with another school district.

Nancy Latzoni (Latzoni) has been the principal at the elementary school that R.A. attended for approximately nine years and holds master's degrees in business administration and in administration and supervision. She has worked in the District for twenty-four years: four years as a science teacher at a middle school; eight years as the science supervisor; and the remaining twelve years as an elementary principal.

Yelena Vayner (Vayner) has been employed by the District as a learning disabilities teacher consultant (LDTC) for three years and previously worked as a special-education teacher for eight years. She holds a bachelor's degree in education and a master's degree in learning disabilities, and is a doctoral student at Caldwell University, studying leadership in education with concentration in special education. (See J-25.)

Anarosa Duarte is a school counselor for the District. She worked at the school that R.A. attended for five years and is currently a school counselor at another District school.

On September 23, 2016, Ms. A. sent an e-mail to Seyka in which she “apologize[d] on [R.A.’s] behalf for his bad-behavior today.” (J-23 at 416–17.) She advised that the parents will talk to R.A. about his behavior; “[I]ike most 5 year old boys, [R.A.] sometimes forgets what is acceptable and unacceptable behavior and needs reminders”; “I know you mentioned that he was rolling around on the floor today and that earlier in the week he was standing on chairs,” which the parents will address; and “[i]f there is anything else you feel we should address please let us know.” Seyka responded to the parent’s e-mail on September 24, 2016. (J-23 at 416.) In the e-mail, Seyka stated, “[p]lease don’t apologize. [R.A.] is a wonderful little boy who makes me smile & laugh every day w/his impressions and joke-telling!” She also advised, “[w]e can go over all your concerns and questions” at a conference “so please don’t worry about a thing,” and “I know [R.A.] is going to have a wonderful & successful school year.”

On September 28, 2016, the parents were sent an “Orange Note,” which is signed by Seyka and principal Latzoni. (J-7.) The Note informed the parents that R.A. “received a verbal warning in recess for kicking his patrols out of anger (for not receiving a sticker)” and requested that the parents “[p]lease talk to your child about this inappropriate behavior so we can continue to work together as a team for your child’s success.” The patrols are fifth-grade students. Ms. A. sent correspondence to Seyka the next day, apologizing for R.A.’s “outburst” and advising that the parents spoke to R.A. about his actions and R.A. wrote the girls an apology note. (J-8.)

School counselor Duarte conducts a Lunch Bunch program, which she explained is a way for her to build relationships with and get to know the students. The teachers pick two students. Duarte has lunch and does an activity with them (e.g., plays board games) on two occasions. She described that it is an “informal setting” and she does not do counseling. The Lunch Bunch group may include students who need extra emotional support, honor-roll students, or students who are new to the District. Seyka recommended R.A. for the program.

On October 20, 2016, Ms. A. e-mailed Duarte thanking her for the invitation to have R.A. join her Lunch Bunch group that week and advising that R.A. shared how much he enjoyed meeting with her and said, "I LOVE Ms. Duarte." (J-2 at 25.) She requested information and feedback on R.A.'s time with her and what services she offers the students as a school counselor. Duarte responded to the e-mail the next day. (Ibid.) Duarte advised that she enjoyed her time with R.A. and from what she gathered "he is vocal, funny, and knows his primary/secondary colors!" She explained that Lunch Bunch "is an informal group" which meets twice, during which she has lunch and plays an activity with the students. She further advised that, "[b]esides Lunch Bunch, some of the things [she does] are character education lessons, conduct formal counseling groups, and run the Intervention & Referral Services [I&RS] committee which targets students who have behavior and academic difficulties."

On October 29, 2016, Ms. A. sent an e-mail to Seyka in which she stated, among other things, that R.A. "tells me the whole class, except for two girls were on detention the other day because they were all interrupting." (J-2 at 27.) She also inquired, "[h]ow is [R.A.] doing lately . . . [a]cademically and otherwise"; whether there was "anything you feel he needs to improve on?"; "[w]hat do you see as his strengths?"; "[w]hat can we do to support you in our combined endeavour [sic] to educate our child?"; and "[h]ow can we help otherwise?"

Seyka explained that "detention" means five minutes by the wall. She responded to Ms. A.'s e-mail later that day (J-2 at 28), stating in pertinent part:

Yes, not sure where all the crazy energy came from on Friday, they needed a little time to think.

Academically, [R.A.] is doing a great job so far. We are going to start working on numbers 6–10 and we will begin learning about adjectives. We've started using the computer & [R.A.] has been on Raz-Kids for reading & our program called Successmaker, for math practice.

My only suggestion would be for [R.A.] to bring in any books that he may be interested in reading. He is doing really well

w/all our “trick words” and would probably benefit from whatever he likes to read. If you are able to send in another one of the pencils he was using, that would be great. The grip that I have him using is not working as well for him. I have no big concerns w/[R.A.] academically. The only area we are still working on, is trying his best to stay in his seat while we are working.

Ms. A. sent an e-mail to Seyka the next day on October 30, 2019 (J-2 at 28), which states in pertinent part:

Thank you so much, you answered all my questions. I’ll be sure to send in a few books for [R.A.], he loves to read.

I was going to ask you, have you noticed when or why he starts to fidget or has difficulty sitting? Is it that he has finished his work and is waiting or is it during the activity? I’m trying to understand what the cause is so that I can help him.

He also loves to do worksheets and puzzles like word find and mazes. I wonder if that would help him fidget less if he could work on something he enjoys while he waits for the next activity? At home, he is often engaged for long periods of time, if he is able to draw or do a puzzle. Just a suggestion.

Seyka responded by e-mail later that day (J-2 at 29.) She advised that “[t]he fidgeting is somewhat random”; R.A. “likes to wrap his legs @ the legs of the chair & move it back & forth while doing his work”; and “[h]e also stretches out across the table while working.” Seyka indicated that “[m]aybe this is just the most comfortable position for him . . . not sure”; “[i]t is not after he completes his work”; and “[w]e’ll keep working on it.”

Ms. A. sent another e-mail to Seyka on October 30, 2019 (J-2 at 29), in which she indicated that she knew “what [Seyka was] talking about” and that R.A. has “difficulty sitting at the table at home”; “[h]e prefers to work and draw laying across the floor”; “[s]itting for dinner is tough for him too”; and Ms. A. “often find[s] him planking across the chair or hanging upside down from the chair,” which she “think[s] [is] just normal boy stuff,” and she “constantly correct[s] him and remind[s] him . . . but it’s still a challenge for him” to properly sit at the table. She noted that R.A. sits for two hours at church, and stated,

“I don’t know why he can manage that but he can’t manage to sit through dinner or through class. Go figure, right.”

In November 2016, Seyka issued a “Beginning of the Year Kindergarten Checkup” for each of her kindergarten students, including R.A., which addresses “how [the] child is progressing at this point in school.” (P-18.) Seyka informed the parents that R.A. “knows all of the target areas, including recognition of the alphabet and the initial sounds,” and “[h]e is also knowledgeable with his numerals and name.” She further advised that, “[a]lthough [R.A.] knows the classroom rules, at times, he chooses not to follow them [and] [h]e also does not listen and respond appropriately to my directions and instructions in class.” Seyka stated that “[s]ince your child cannot follow directions and instructions to complete his academics, he may fall behind in Kindergarten [and that] [i]t is important to be a good listener and follow my directions so he can be successful.”

On November 18, 2016, Ms. A. sent an e-mail to Duarte. (J-2 at 25.) In the e-mail Ms. A. requested “a meeting to discuss some challenges [R.A.] is experiencing,” noting that “it could be a telephone meeting, nothing formal,” and that she “just need[ed] some guidance to help him as he is still getting used to the formal school setting.” Ms. A. and Duarte had a telephone conference sometime after November 18, 2016, and before November 29, 2016. On November 29, 2016, Duarte sent an e-mail to Ms. A. indicating that she was sending home that day “some self-monitoring checklists that we discussed over the phone.” (J-2 at 26.) She noted that Ms. A. “mentioned that [R.A.] has a difficult time with making mistakes [and] [t]here is a book called Beautiful Oops which focuses on how to change something negative into something positive and that with every mistake something beautiful can come out of it,” and Duarte “included some activities that [Ms. A.] can do with R.A. in connection with that book.” Duarte further stated, “[p]lease let me know if there is anything else I can do.” On December 2, 2016, Ms. A. sent an e-mail to Duarte thanking her for the resources she sent and advising that she was “going to give all the information a look over and start implementing them to see if it helps.” (J-2 at 26.)

On December 7, 2016, Seyka held a conference with R.A.’s parents. (See J-23 at 428.)

On January 9, 2017, Ms. A. sent an e-mail to Seyka (J-23 at 434), which states in pertinent part:

Wanted to give you a heads up that we have a little bit of a rough start this morning. [R.A.] would not eat his breakfast, therefore, he may be a little sad, mad or cranky. I packed an extra snack in case he needs it and some chocolate milk . . . in case he's not feeling well. I'm hoping to prevent future mornings like today by giving him a little tough love.

Seyka responded by e-mail that day and advised that R.A. "let me know what happened when we got into the classroom"; Seyka "will let him know he can have his snack whenever he is hungry"; and R.A. "is a little sad, but I'm sure he will be ok." (Ibid.)

On February 1, 2017, Ms. A. sent an e-mail to Seyka "to touch base with [Seyka] to follow up on [R.A.]" (J-23 at 435.) The e-mail notes that "[t]he last time we talked at our parent conference we had discussed some of his difficulties," and Ms. A. had "been meaning to ask [Seyka] but [Ms. A. is] always running at pick up time and there isn't a chance to talk." Ms. A. inquired how R.A. was doing, whether there had been any improvement, and whether there were "things he is still struggling with." Seyka responded by e-mail the next day and informed Ms. A. that R.A. "is def[initely] trying very hard to stay in his seat and listen"; "[h]e is very aware now, of what he's doing and what he's not supposed to do"; and "[h]e is still struggling at times, but is putting in lots of positive effort." (Ibid.)

On February 7, 2017, Ms. A. sent an e-mail to Seyka stating that R.A. "vaguely mentioned . . . yesterday that he got in trouble for kicking your desk," which he mentioned "was a mistake." (J-23 at 436.) She also advised that R.A. "did say he got put on time out," and she "was just wondering if everything is still going OK." Seyka responded by e-mail that day and informed Ms. A. that R.A. "was actually put in time out for getting out of his seat and running around the room"; R.A. "did kick the desk"; "he was pretending to be Mario or Luigi—lol"; "[i]t was an accident"; and "[h]e's still working on his behavior, so all is good!" (Ibid.)

A Report Card for R.A. was issued for the period of September 2016 to the beginning of February 2017. (J-17.) The Report Card rates the student on a scale of 1 to 4; 1 (consistently independent), 2 (becoming independent), 3 (with help), and 4 (not able at this time). Seyka rated R.A. as 1 or “consistently independent” in all of the various areas relating to reading, writing, listening, speaking, viewing, mathematics, science, and social studies. Regarding social development and learning behaviors, R.A. was rated as consistently independent in areas of follows classroom/school rules; shares willingly; works neatly and carefully; works cooperatively in a small group; cleans up properly; and knows address/telephone number. He was rated a 2, or becoming independent, in the areas of listens and follows directions; works without disturbing others; demonstrates ability to maintain focus; and stays on task when working independently. He received no 3 or 4 ratings. Seyka did not express any concerns about R.A.’s behavior, and her comments state: R.A. “is doing wonderful work in Kindergarten! He is friendly, helpful and very intuitive. He makes me smile every day! Keep up the great work, [R.A.]!”

On March 1, 2017, Ms. A. sent an e-mail to Seyka advising that she had to cancel their appointment scheduled for that day. (J-23 at 437.) Ms. A. indicated that her reason for wanting to meet with Seyka was “to check in to see how [R.A.] was doing academically, socially, and behavior wise,” and that she also “had a couple of questions regarding his recent report card” and “wanted to go over his academic progress.” She further advised that she had been “getting a lot of the test[s]” and was “happy to see that he is doing well,” but was not sure if she “received all of them because sometimes he brings home his folder and tells me he lost certain things that were in them.” Ms. A. requested R.A.’s record of graded assignments or tests so that she could keep his academic folder at home. Ms. A. stated that R.A. is “a very bright child, but with that comes a series of challenges,” and that “[r]ecently he stated that he doesn’t want to be smart anymore” and she felt “compelled to keep a close eye on his performance and to also help him understand that being smart isn’t a bad thing.” Seyka responded by e-mail that day and advised that she was available to meet the following Monday or Tuesday and believed that she was also available on Wednesday or Thursday, but “figured [Ms. A.] would prefer the beginning of the week.” (*Ibid.*) Seyka never met with Ms. A. because she never got back to Seyka with dates.

On March 8, 2017, Ms. A. sent an e-mail to Seyka stating that she was “not sure if [R.A.] is still having trouble staying in his seat” and requesting Seyka to let her know if he is. She further stated that she “would be more than willing [to] purchase something for him if it helps,” and included with her e-mail information consisting of pictures of various stools with a company that advertises them as “Active Learning Furniture.” (J-23 at 440–43.) Seyka responded by e-mail that day thanking Ms. A. for the information and advising that R.A. “still has a fidgety side, but he is trying his best.” (J-23 at 440.)

On the Saturday after the last school day before spring break, April 8, 2017, the A. family sent an e-mail to Seyka stating that R.A. relayed that another kindergarten student, whom he identified, “punched him in the stomach and kicked him because he was mad” during recess and Ms. A. “noticed a bunch of bruises on [R.A.’s] his legs and torso.” (J-4 at 52.) In the e-mail, Ms. A. indicated that she was “very worried especially because as [she] mentioned to [Seyka] on Friday, [R.A.] seems very anxious lately especially when [Ms. A.] pick[s] him up from school,” and “now [Ms. A. is] wondering if it has to do with [the identified student].” Seyka responded to the e-mail on April 10, 2017. (J-4 at 52.) In the e-mail Seyka indicated that R.A. did not mention anything to her and she did not recall the patrols mentioning anything to her because she would have gotten in touch with Ms. A. immediately and spoken to the identified student about his behavior, and that the issue will be addressed as soon as they returned from spring break.

On April 11, 2017, the A. family sent an e-mail to Seyka thanking her for her “quick reply” and relaying that during a play date Ms. A. was told that R.A. is being “picked on at school.” (J-4 at 53.) Ms. A. stated in the e-mail that she “had suspected it, especially lately, because [R.A.] seems so anxious,” and “[b]etween you and I [sic] he’s having some trouble holding [his] pee and poop and comes home almost daily with soiled pants,” and Ms. A. “can’t help but wonder if this is somehow related.” Ms. A. inquired whether she could meet with Seyka on Monday and indicated that she would also like to meet with the principal.

A meeting was held the day that school resumed from spring break, Monday, April 17, 2017. Principal Latzoni, Seyka, Ms. A., and Mr. A. attended the meeting. R.A. did not attend school that day. On April 17, 2017, the A. family sent an e-mail to Latzoni with

a copy to Seyka thanking them for taking the time to meet with the parents that day “to discuss [their] concerns with regards to [R.A.’s] safety while in school.” (J-4 at 57.) In the e-mail, Ms. A. noted that R.A. “seem[ed] very anxiously lately” when she picked him up from school.

An investigation regarding the alleged incident was instituted the next day, April 18, 2017, which was conducted by counselor Duarte. R.A. attended school that day. The outcome of the investigation was that the incident was not deemed be an HIB incident. (See J-3.) Ms. A. met with Latzoni and Duarte at the end of the school day on April 18, 2019, concerning the investigation. Mr. A. later joined the meeting with Latzoni. The A. family sent an e-mail to Latzoni regarding the April 18, 2017, meeting in which they referred to R.A. stating that R.A. thought he was a “bad boy” and felt like a “bad person” when he met with Duarte regarding the alleged incident, and that Ms. A. had mentioned to Latzoni, Seyka and Duarte on separate occasions that R.A. “suffers from anxiety.” (J-4 at 67; J-23 at 456–57.) Several other e-mails were sent regarding the investigation and the alleged incident. (See e.g., J-4 at 63, 65, 71, 77–79.) R.T. did not return to school after April 18, 2017, and until March 2018.

On June 1, 2017, Ms. A. filed the within due-process petition. She also filed a motion for emergent relief, which was later withdrawn. (See J-14.)

The parties stipulated that the parties met for a settlement conference relating to the instant dispute on July 13, 2017 with the Honorable Barry E. Moscowitz, ALJ, and, as a result of the conference, the parties entered into an agreement relating to District evaluations and independent evaluations of R.A. to determine eligibility under the IDEA, the terms of which are set forth in a letter from Jessika Kleen, Esq., to Bradley Flynn, Esq., dated July 20, 2017. (J-27; see J-14.) The Agreement provides that the District would conduct an educational evaluation and social assessment and that the parent would provide the following outside evaluations/assessments, which the parent stated had already been completed, to the District for consideration: neuropsychological; ADOS; psychiatric; neurological; occupational therapy; physical therapy; and speech-language. (ibid.) A neuropsychological evaluation report was provided to the District Child Study Team (CST) for consideration, but no other evaluation reports were produced. (J-27.)

On July 25, 2017, the District performed a social assessment of R.A. (See J-15.) On July 26, 2017, the District performed an educational evaluation of R.A. (See J-16.) The parties stipulated that an eligibility meeting was held on September 20, 2017, wherein R.A. was found ineligible for special education and related services (See J-18; J-19), and that petitioner did not file a due-process petition challenging the eligibility determination and did not amend the instant Petition to challenge the eligibility determination or allege facts relating to the eligibility determination. (J-27.)

The record includes “progress notes” by a psychiatrist, Jessica Halpern (P-4), who did not testify at the hearing. The progress notes reflect that R.A. was seen by Dr. Halpern on January 27, 2017, and later seen on April 28, 2017, when he was no longer attending school. According to the progress notes, Dr. Halpern diagnosed R.A. with unspecified anxiety disorder and stated that R.A. “does not fully meet [the] criteria for ADHD by parent report.” (P-4 at 2, 5.) The record also includes a letter dated May 4, 2017, from a licensed professional counselor, Joanna Buset, who also did not testify at the hearing. (P-5 at 1.) According to that letter, Ms. Buset was “currently working” with R.A., who “presents with moderate anxiety & depression,” which she attributed to a conflict between his above-average intelligence and his developmental age.

After Ms. A. filed for due process, Michelle Humm, who did not testify at the hearing, conducted a neuropsychological evaluation of R.A. on July 7 and 14, 2017. (J-12.) According to her report, Ms. Humm diagnosed R.A. with adjustment disorder with mixed anxiety and mood difficulties; attention deficit/hyperactivity disorder (ADHD)—combined presentation; and social pragmatic communication disorder—provisional. (Id. at 119.) Subsequently, on December 16, 2017, Janice Kingsbury conducted a psychological evaluation of R.A. (P-9.)

The Testimony

Apart from the evidence that forms the foundation of the above findings of fact, a summary of other pertinent testimony follows.

Kristin Seyka

Seyka described R.A. as “very sweet” and “extremely happy.” She testified that R.A. is “very bright” and liked to share the information he knew with his peers. He had a “very good sense of humor” and enjoyed sharing his jokes with the class. R.A. was “very talkative” and loved to tell stories. He also enjoyed showing off his moves from “Mario and Luigi” (i.e., do a little kick and a little move), which Seyka stated is “definitely” normal for a five-year-old, and the other children would follow and try to do his moves. Seyka described that R.A. interacted “very well” with his peers and he was “very friendly” with everyone in the class. Seyka testified that R.A. “really enjoyed school,” he “absolutely” had no academic struggles, and Seyka did not have concerns about R.A.’s behavior during the school year.

Regarding the reference in Ms. A.’s September 23, 2016, e-mail to R.A. rolling on the floor and standing on chairs (J-23 at 416), Seyka testified that in her experience as a kindergarten teacher all those things are very normal and typical behavior, particularly in September, noting that five-year-olds do not have any idea what a classroom should look like and where they are to be seated.

Regarding the September 28, 2016, “Orange Note” (J-7), Seyka explained that an Orange Note is to just let the parents know that something happened and the school does not want it to occur on a regular basis. She noted that R.A. was a five-year-old boy who was just coming into school and did not quite know the rules of the playground or the classroom. Seyka just needed to speak with him, R.A. was sorry, and there was no further problem. After the September 28, 2016, incident, there were no other incidents with R.A. and Seyka did not ever advise Ms. A. that R.A. was acting inappropriately or complain about his behavior.

Regarding Seyka’s October 29, 2016, response to Ms. A.’s e-mail (J-2 at 28), Seyka did not identify any concerns, and R.A.’s described behavior was not concerning, problematic, or interfering with his ability to learn. Regarding Seyka’s statement that “the only area we are still working on is trying his best to stay in his seat while we are working,” Seyka denied that she was having trouble keeping R.A. in his seat. She testified that

R.A. was “just like every other five-year-old” and wanted to move around like a typical five-year-old. Seyka communicated this information in response to Ms. A.’s request for information and it was not a concern to Seyka.

Regarding Seyka’s October 30, 2016, response to Ms. A.’s e-mail (J-23 at 426) in which she indicated that R.A.’s fidgeting is somewhat random, Seyka explained her idea of fidgeting. She stated that fidgeting is just a five-year-old needing to move around the room. Seyka described that the kindergarten setting is much more structured than preschool. In kindergarten the children are still learning how to remain in their seats and they tend to move about the room. They will stand while they are doing their work, they will frequently drop their pencils and they may chew on their sleeves, pencils, or other objects. To Seyka, “fidgeting is just a normal five-year-old activity that occurs in kindergarten.” Seyka did not have a problem with R.A. stretching out across the table while working. She noted that R.A. got his work done and this never impacted R.A.’s academics or his social behavior. The only thing she suggested was for Ms. A. to send things in that he might enjoy doing after he was done with his work.

Regarding her December 2016 parent/teacher conference, Seyka testified that the parents requested to meet with her, and R.A.’s behavior was not part of her decision to hold the conference. The purpose of the conference was to go over R.A.’s academics, and Seyka informed the parents that R.A. was doing really well. Seyka did not recall any concerns regarding R.A.’s behavior being discussed or the parents bringing any concerns to her attention. She did not hold another conference with R.A.’s parents and did not hold a parent/teacher conference on December 13, 2016, as stated in the due-process petition. (See J-9 at ¶ 21.)

Regarding the November 2016 Beginning of the Year Kindergarten Checkup (P-18), Seyka testified that she guessed that she had concerns about R.A.’s behavior at this time, but noted that through every other document with which she communicated with Ms. A., there was never any indication that R.A. was going to, or did, fall behind. At no point did Seyka believe that R.A.’s behavior was impacting his ability to learn or his ability to socialize, and she never reported in a report card or other writing that R.A.’s behavior was causing him to fall behind. Had Seyka believed that R.A.’s behavior was impacting

his ability to learn or his ability to be social, she would have contacted the parents and immediately referred it to Intervention and Referral Services (I&RS).

Regarding Ms. A.'s January 9, 2017, e-mail regarding R.A. not eating breakfast (J-23 at 434), Ms. A. never informed Seyka that R.A. had lost interest in eating and Seyka did not interpret this e-mail to indicate that he had lost interest in eating. Seyka testified that it is very typical for a five-year-old not to want to eat, and she did not receive any other e-mails regarding R.A.'s eating habits.

Regarding Seyka's response to Ms. A.'s February 1, 2017, e-mail (J-23 at 435), Seyka explained that her reference to "struggling at times" referred to R.A. staying in his seat. She testified that this was "absolutely" typical of a kindergartner and there was nothing about R.A.'s behavior that was not typical.

Regarding Seyka's response to Ms. A.'s February 7, 2017, e-mail (J-23 at 436), Seyka explained that timeout is the "think-about-it" chair where students are to think about their behavior. She explained that the e-mail should have included "not" in the phrase, "but I was upset with him," noting that she was not upset with R.A., she wrote "LOL" and then she wrote, "It was an accident." There were no other incidents where R.A. kicked Seyka's desk, and she considered this incident typical of a five-year-old child.

Regarding R.A.'s report card (J-17), Seyka testified that R.A. was consistently "Independent," which is the highest level and is "very rare as far as a first report card for a kindergartner." R.A. was average to high average in all areas, including social development and behavior.

Regarding Seyka's response to Ms. A.'s March 8, 2017, e-mail (J-23 at 440), Seyka agreed that she stated that R.A. "still has a fidgety side" and reiterated her definition of fidgety, which for a kindergarten student includes "just tons of movement" and is "very typical." With her e-mail, Ms. A. had provided Seyka with the Active Learning Furniture information. Seyka did not believe that R.A. needed any of the items.

Regarding the April 8, 2017, e-mail from the A. family (J-4 at 52), this was the first time Seyka had heard that R.A. was being bullied, that any earlier incidents had occurred, or that R.A. seems anxious.

Regarding the April 11, 2017, e-mail from the A. family (J-4 at 53) and their statement that R.A. was having “some trouble holding [his] pee and poop and comes home almost daily with soiled pants,” this was the first time that Seyka learned of this information. Seyka never saw R.A. holding his “pee or poop” and did not observe him having atypical toileting issues. She never observed R.A. with soiled pants in school and R.A. was never incontinent at school as far as she was aware.

Prior to the April e-mail, it was never reported to Seyka that R.A. was suffering from anxiety and she never observed signs of anxiety in R.A. It was never reported to Seyka that R.A. had expressed suicidal ideations and she did not ever hear him express suicidal ideations. She was never told that R.A. was experiencing mental-health issues or low self-esteem and she never saw any signs of R.A. experiencing mental-health issues or low self-esteem. Seyka was never advised that R.A. was experiencing nightmares or had signs of school phobia and she never observed him show signs of school phobia. She also never observed signs of depression, ADHD, oppositional defiant disorder, or losing interest in eating. Seyka never heard R.A. state, “I hate myself,” and the parents never advised her that R.A. said that he hates himself. She did not observe signs of R.A. having headaches or stomachaches and never observed him biting his nails. Seyka testified that it is not unusual for a child to bite on their sleeve or a pencil, and if she did see R.A. chewing or gnawing on his clothes it was not often or common, and she did not find that behavior significant. She was never advised that the parents bought a chew necklace for R.A.; she never saw R.A. wearing a chew necklace; and she did not believe that R.A. needed a chew necklace. Seyka was never told that the parents had taken R.A. for a physical-therapy (PT) evaluation, an occupational-therapy (OT) evaluation, or a psychiatric evaluation or that the parents had consulted with a nutritionist regarding R.A.’s eating. Seyka was never told that R.A. had “dove” into the pavement at recess, she never witnessed R.A. diving into the pavement at recess, and she never reported to the parent that she saw R.A. dive into the pavement at recess. She never observed signs that R.A. was being bullied and was not told that first-grade students had

shoved R.A. at recess in the fall or the spring. Seyka also denied that she ever told the parent that she needed a classroom aide or that she was overwhelmed.

Seyka testified that the parents never informed her that they believed that R.A. needed specialized instruction, special education, or special accommodations. Seyka “absolutely” did not believe that R.A. should have been referred to the CST for evaluation during the 2016–2017 school year. She never saw any evidence that R.A. needed special education or special accommodations. R.A. never had any issues academically. He was functioning above average academically and functioning average to above average socially.

Nancy Latzoni

Latzoni testified that as principal she interacts with the students in the hallway and does “lunch duty” daily. She described R.A. as “very intelligent,” “well liked,” and “happy.” R.A. “could have a conversation about anything” and he interacted appropriately with his peers. They would sit at the lunch table, everyone liked each other, and there were no complaints regarding R.A.’s interaction with peers.

Latzoni received one report from the staff that R.A. was acting inappropriately. Latzoni instituted the orange-slip system, which she explained “just is a courtesy for the parents to send a note home to say” that something happened and please make sure it does not continue. At the beginning of the school year, R.A. received an orange slip for kicking the safety patrol. Except for this one incident, Latzoni did not receive any other report of inappropriate behavior regarding R.A. from any teacher or student. Latzoni noted that on average approximately thirty to thirty-five orange reports are sent home to kindergarten families and it is a “pretty common” occurrence.

Between September 2016 and the parents’ e-mail in April 2017, Latzoni was not advised that R.A. suffered from anxiety or depression and she did not observe any signs that he had anxiety or depression. She was not told that R.A. suffered from ADHD, oppositional defiant behavior, or suicidal ideation and never observed any signs that he suffered from these conditions. Latzoni did not observe signs of R.A. biting his fingernails

or experiencing headaches or stomachaches and was not told that he was biting his fingernails or suffering from headaches or stomachaches. She was never advised that R.A. was experiencing signs of school phobia or stated that he hates himself, and she did not observe signs of school phobia or hear R.A. state that he hates himself. The parents never informed her that R.A. was experiencing nightmares or had destructive behavior. She was not told that R.A. was losing interest in eating and never observed him having issues with eating. Latzoni was not informed that R.A. was being treated by a psychiatrist or that he went for a psychiatric evaluation and she was never given a copy of a psychiatric evaluation report. She was never advised that he was taken for a PT or OT evaluation and never received a copy of a PT or OT evaluation report. Latzoni sent only the one orange slip to the parents. She never observed R.A. diving into the pavement and did not report that he dived into the pavement. Latzoni never observed signs of R.A. being bullied. Prior to the parents' April 8, 2017, e-mail, the parents did not inform her that R.A. was bullied on prior occasions or that first-graders had jumped him at recess.

Latzoni testified that the parents never informed her that they believed that R.A. needed specialized instruction or special accommodations. Latzoni "absolutely" did not believe that R.A. should have been referred for a CST evaluation at any time while he was in school. She also did not believe that R.A. should have been referred for a 504 evaluation. Latzoni did not observe any evidence that R.A. needed special education or required special accommodations. She "absolutely" did not believe that R.A.'s behavior at any time affected his ability to learn or his ability to act socially appropriate with his peers.

Yelena Vayner

Vayner, an LDTC employed by the District, was qualified as an expert in special education, in eligibility under the IDEA, and in developing programs for students under the IDEA. Vayner conducted an educational evaluation of R.A. on July 26, 2017, and prepared a report. (J-16.) As part of her evaluation, Vayner spoke to Seyka and reviewed R.A.'s classwork to see how R.A. was performing in the classroom. (See J-1 at 1-3, 6-7.) The work samples indicated that R.A. could write and spell and that "he was doing very well in class." A report regarding R.A.'s reading ability indicated that R.A. was

“performing above average in class” and “demonstrated a significant amount of growth since the beginning of the year” (i.e., 62 percent growth). (J-1 at 7.) A Literacy Screening Form, which measures a child’s literacy skills in several different areas of fluency, phonics, and letter naming, demonstrated that R.A. scored “very well” and “he was meeting expectations in literacy.” (J-6.) R.A.’s Report Card (J-17), showed that R.A. was “making appropriate progress.” He was “proficient in all specialty areas” and he was “consistently independent across . . . most areas in the classroom.”

Regarding her educational assessment, Vayner testified that “[o]verall, R.A. scored an average range on [her] assessment, with some relative strengths and weaknesses, but overall, he was average.” She explained “relative weakness” to mean, “[w]hen considering a full profile of a student, it’s a skill that’s lower compared to other assessed skills.” It does not mean that the student has a disability or indicate that the student needs any type of specialized instruction. It also does “not necessarily” indicate “on its own” that the student needs any type of accommodation.

Vayner reported that “[t]oward the end of the evaluation, [R.A.] became more distracted and asked the examiner if he can leave several times,” and during the evaluation R.A. “was observed to move around in his chair and required some redirection to focus on the task at hand.” Vayner testified that R.A. “sometimes” needed redirection to focus, but “he was very easily re-focused.” He “sometimes, not often,” moved around in his seat, “but he was easily redirected and he followed all of [her] directions.” Vayner found that R.A. was “somewhat” fidgeting during her evaluation, but stated that “it didn’t impact his ability to perform on [her] evaluation.”

Vayner reviewed a BASC-3 Teacher Rating Scale completed by Seyka, which she explained measures behavior and emotions. (See J-13.) In the comment section of the form, Seyka reported that R.A. is “happy,” enjoys being with his friends, and “socialized nicely with his friends and peers.” (Id. at 123.) Seyka did not report any behavioral or emotional concerns. Vayner also spoke to Seyka about R.A.’s time in her classroom. Seyka informed her that R.A. was doing well in the classroom, and he was happy and liked by his peers. Seyka did not inform her of any behavioral concerns and Vayner did not see any documentation of any such concerns. Vayner documented in her report that,

according to Seyka, R.A. “does not display any maladaptive behaviors in the classroom.” Seyka did not report any emotional concerns to her regarding R.A. and Seyka never came to her during the kindergarten school year with any such concerns. Vayner testified that R.A. was performing fine in the classroom, he was getting along with his peers, he was socially appropriate, and he was making appropriate progress across the board.

In connection with her evaluation, Vayner had not seen the November 2016 Beginning of the Year Kindergarten Checkup or the September 28, 2016, verbal warning about kicking the patrol. She was not aware that R.A. had told his parent that he no longer wanted to be smart, that the parent had shared this information with Seyka, and that the parent advised Seyka in an e-mail that R.A. was anxious. Seyka did not report to her that the parent stated in an e-mail that R.A. was having some trouble “holding his pee and poop.” Vayner noted that Seyka did not report that it was happening in school, which would lead Vayner to conclude that Seyka did not see it in school. She also noted that part of the evaluation includes a social evaluation during which the parents are interviewed and can report their concerns.

Anarosa Duarte

Duarte met R.A. in October 2016. He was in her Lunch Bunch group. During Duarte’s interaction with R.A. in Lunch Bunch, he was “very verbal, very vocal [and] smart.”

Duarte had one telephone conversation with Ms. A. in November 2016. Ms. A. had reached out to her “because she wanted some guidance.” Duarte could not recall the specifics of the conversation, but what she “got from the conversation was that [R.A.] was having a hard time adjusting to kindergarten.” She informed Ms. A. that she would send home some resources. Duarte sent Ms. A. some self-monitoring checklists and e-mailed her the name of the book (“Beautiful Oops”), along with activities in connection with the book. During the telephone conversation, Duarte also offered I&RS as a resource and explained I&RS to Ms. A. (e.g., what I&RS is, what it does, how an action plan is created). Ms. A. declined I&RS and informed Duarte that it was not necessary to put R.A. in the program, that she would like to try out the other resources at home, and that she

would reach out to Duarte if she needed anything or needed Duarte's assistance. Ms. A. did not ever reach out to Duarte, so Duarte "thought there were no concerns." Duarte noted that written information regarding I&RS and 504 services, including Duarte's contact information, is located in the main office by the sign-in sheet.

Duarte testified that when she returned to work on the Tuesday after spring break, April 18, 2017, she asked R.A., "How was Spring Break?" and R.A. replied that it was not good, he was punished, and he was not allowed to play video games because he wet his pants at home. This was the first time that Duarte heard about that issue. Duarte was not concerned when R.A. relayed this information, stating that it seems typical and sometimes a five-year-old child wets his/her pants. Duarte met with Ms. A. on that day and described that it "was about the HIB investigation" and "not about any particular general concerns." Duarte did not take notes at that meeting. On that day, Latzoni also shared with Duarte the parents' April 8 and 11, 2017, e-mails. Prior to seeing the e-mails, Duarte was not aware of Ms. A. reaching out to the school or Seyka regarding R.A.'s emotional concerns; that R.A. had stated that he did not want to be smart anymore; or that R.A. presented with anxiety. Duarte did not know that R.A. had anxiety and Ms. A. did not mention that R.A. had anxiety in the e-mail interactions with her. Regarding the parents' e-mail to Seyka stating that R.A. was "having some trouble holding his pee and poop and comes home almost daily with soiled pants," before that day Duarte had never heard of anything about it and had never seen it. Duarte testified that it would seem concerning that R.A. was coming home almost daily with soiled pants, but she had spoken to Seyka, who said that it was not happening. She noted that Seyka is very good in letting her know about things going on in her classroom, and if a child was coming home soiled, wetting their pants daily, Seyka definitely would have let Duarte and Latzoni know so that they could intervene and find out what was going on. The nurse also had not heard anything about it.

Duarte testified that she takes notes of her telephone conversations with parents. She described that they are "not really" detailed notes, but "just the premise of what we spoke about." If a parent told her that a student had anxiety, she would jot it down and inform the principal about it. Duarte took notes of her one telephone conversation with Ms. A. She did not possess those notes. When Duarte moved schools she shredded all

the stuff from the prior school in September 2017. She provided District counsel with her e-mails regarding R.A. and did not believe that she provided her handwritten notes of the telephone conversation with the parent. When asked whether she was aware that the parent was in due process with the District, Duarte asked Mr. Flynn to “explain due process.” Duarte testified that she was not aware that the parent was in a special-education lawsuit with the District when she shredded the documents; she “thought everything was done” and “had no idea this was still going on.” She had met with Ms. Kleen in May 2017. At that point, she “was aware that there was something going on,” but was not aware that there was a lawsuit or it was going to go to trial. After she moved to a different school, Duarte did not hear about R.A. again and she went on maternity leave.

Duarte was not aware that R.A. had kicked a school patrol at recess. She testified that as a counselor she is not aware of many disciplinary things that happen in the school and tries to stay away from that information. Seyka did not report any behavioral concerns with R.A. to Duarte. She never heard that R.A. had dove into the pavement at recess. Duarte had not previously seen the November 2016 Beginning of the Year Kindergarten Checkup. She agreed that Seyka stated in the document that R.A. “may fall behind in Kindergarten.” Duarte testified that if Seyka felt that R.A. was, in fact, going to fall behind or be retained, she would have referred him to I&RS and had that conversation with Duarte and Ms. A.

Duarte testified that at no time during the 2016–2017 school year did she believe that R.A. should have been referred to the CST. R.A. was doing well in school. At no time during the school year did she believe that R.A. was falling behind academically. Duarte never observed R.A. acting inappropriately in school or acting inappropriately with his peers, and Duarte always believed that his behavior was typical for a five-year-old in a kindergarten class. No one from the District reached out to her to discuss emotional issues or inappropriate behavior regarding R.A. Other than the one telephone conversation, Ms. A. never contacted her regarding R.A. acting inappropriately or to discuss emotional issues.

Ms. A.

Ms. A. testified that during R.T.'s kindergarten year he began demonstrating symptoms of anxiety and self-injurious behavior. R.A. started chewing on his nails and different parts of his body. Ms. A. observed bite marks on his forearms on a couple of occasions. R.A. expressed a desire "to punch himself in anger." According to Ms. A., R.A. exhibited self-injurious behaviors at school; she received an "orange note" from the principal advising that R.A. had dived into the pavement at school during recess, which she believed occurred in the fall. During the 2016–17 school year, R.A. also presented with suicidal ideations. R.A. began to say alarming things, such as, "I don't want to live anymore," "I want to die," "I don't want to be smart," "I don't like myself," and "I'm not a good person." The parents brought this issue to the attention of R.A.'s pediatrician. Shortly after R.A. started kindergarten, he began to exhibit fidgeting behavior. R.A. would lie across the two arms of a seat like a board, he chews things, he taps things, and he incessantly hums. Ms. A. testified that R.A. has attention issues, which presented at school during kindergarten. He has the ability to focus intently on things that are of interest to him, but "has incredible difficulty doing" "things that are not necessarily relevant to his day," such as getting dressed in the morning and eating breakfast, and he is "very easily distracted and side-tracked." He loses his socks and pants and forgets to eat. R.A. needs a lot of redirection and reminders.

Ms. A. reviewed the various e-mails and expressed her concerns about R.A.'s education and behavior in school. On September 23, 2016, she e-mailed Seyka about R.A.'s bad behavior that day, which apparently involved R.A. not following rules, and Seyka's advice that R.A. was rolling around on the floor and standing on chairs. Ms. A. e-mailed Seyka on September 29, 2016, after the parents received an orange slip because R.A. had kicked the patrols. Ms. A. described that she had daily conversations with Seyka about R.A.'s behavior when she picked him up from school. Seyka's advice regarding problems was "fairly frequent" during the first few weeks of school. The type of behaviors Seyka conveyed included rolling around on the floor, standing on chairs, lying across tables, running around the room, being disruptive to the other children, and failing to take turns and raise his hand appropriately. Seyka also informed Ms. A. that she was

carrying R.A.'s lunch box and book bag when Ms. A. picked R.A. up from school because he would lose, drop or forget them.

On October 29, 2016, Ms. A. e-mailed Seyka, which referenced that the class had gotten detention and inquired how R.A. was doing academically and otherwise. At the time, Ms. A. was concerned about R.A.'s academics and behavior. Seyka's response that day indicated that academically R.A. was doing very well, but that he was having trouble with his pencil grip and remaining in his seat. Ms. A. described that R.A. had difficulty sitting in a seat for more than a few minutes. On October 30, 2016, Ms. A. e-mailed Seyka regarding R.A.'s fidgeting and whether Seyka noticed a specific pattern. Ms. A. testified that she "was trying to establish a pattern for [herself], as to why [R.A.] was now developing these things that had not really been a problem before." In a prior conversation, Seyka had told her that "they were working on things that [R.A.] was already proficient in," and "she suggested that [Ms. A.] send things in to occupy his time, perhaps that would help." According to Ms. A., "[w]e were trying to find a way for his disruptive behaviors to become less disruptive, at this point[,] [a]nd we were specifically talking about fidgeting." Regarding Seyka's e-mail response indicating that the fidgeting was somewhat random and that R.A. would wrap his legs around the chair and move it back and forth while doing work and also stretch across the table, Ms. A. testified that they had previously talked about those things; they were still happening; Ms. A. was trying to find a solution; and she "didn't want [her] kid to be the one who was getting those notes home or . . . chastised by his teacher." She described that R.A. "tended to react very badly when he would hear that the teacher had spoken of his behaviors," and "[t]he reason that these emails started happening too was because those end of the day conversations would make [R.A.] very sad." Ms. A. asked Seyka "if we could just stop talking about it in front of him and if we could just put it in an email form," and "[t]hat's why we moved to e-mails." On October 30, 2016, Ms. A. sent another e-mail to Seyka describing R.A.'s behavior at home and at church.

Regarding Ms. A.'s October 20, 2016, e-mail to Duarte, Ms. A. testified that she was just requesting information. She requested information from Duarte regarding the Lunch Bunch group and what services she provided for students. Ms. A. requested information about support services because she "had already begun to have some

concerns about [R.A.'s] time at school.” R.A. had started resisting going to school; he had started saying things that were uncharacteristic for him; he never wanted to talk about what was going on at school; the parents had received the orange note; and R.A.'s demeanor was starting to cause concern. Ms. A. “was trying to feel the ice” and “was just kind of getting a feel for where [she] would go to for help” if his behaviors continued.

Regarding Ms. A.'s November 2016 telephone conversation with Duarte, Ms. A. testified that she requested a conference with Duarte because at this point several things had happened. R.A. had received two notes about behaviors concerning diving into asphalt and kicking the patrols. Within this period, Seyka had informed her that first-graders had “pinned [R.A.] to the ground” during recess, which upset R.A. “tremendously.” R.A. had started giving Ms. A. trouble about going to school and started self-injurious behaviors. Ms. A. had also received “rather frequent complaints about [R.A.] fidgeting and surfing on tables and not being able to . . . control himself and his behavior.” Ms. A. described that “within a month enough things had happened that [she] now felt like [she] should probably talk to Ms. Duarte [a]nd see if any of those services could help us.” According to Ms. A., she informed Duarte during the telephone conversation that R.A. “seems to be displaying some school anxiety,” that he “does not want to go to school in the morning,” and that he was “behaving out of character.” Duarte mentioned “some kind of intervention and referral,” and Ms. A. told Duarte that “[i]t kind of scared [her].” Ms. A. described “remember[ing] intervention services from school as being something . . . for like kids who are out of control”; “that’s not what [Ms. A.] was trying to say”; and she “was trying to ask for things that we could put in place preemptively to prevent any of those problems.” Duarte then offered to send her some resources, and Ms. A. said, “Yes. That’s what I’m asking for.” Duarte provided resources to Ms. A. (i.e., a book to help R.A. process mistakes, and checklists). Duarte did not send Ms. A. an invitation for an evaluation and planning meeting, an I&RS form, or literature regarding evaluations, and she did not explain I&RS or evaluations.

Ms. A. continued to have concerns about R.A.'s behavior in December 2016. During the parent/teacher conference, which Ms. A. believed was in December 2016, the parents and Seyka discussed “some of the challenges [R.A.] was having in the classroom at that time, which were all in the emails,” that R.A. “was struggling,” and how R.A. “would

place his body on the furniture.” They discussed his academics, and Seyka indicated that “she had absolutely no concern about him academically.”

Regarding Ms. A.’s January 9, 2017, e-mail concerning R.A. not eating breakfast, Ms. A. testified that R.A. had previously given her a hard time with eating, and this behavior had progressively worsened after R.A. started school. He would often come home with a full lunch box. According to Ms. A., she mentioned to Seyka that R.A. was bringing all his lunch home. Ms. A. had concerns about R.A.’s emotional state in January 2017. R.A. started complaining about stomachaches and headaches. He was having bad dreams and “mood swings.” R.A. “continued to come home daily with a very somber and sad disposition” and he was “sad all the time.” The parents took R.A. to a psychiatrist, Dr. Halpern, on January 27, 2017. (See P-4.)

Seyka’s response to Ms. A.’s February 1, 2017, e-mail noted that R.A. was still having a difficult time staying in his seat. A few days later, R.A. kicked Seyka’s desk and was put on time out.

Ms. A. continued to have concerns about R.A.’s education in March 2017. R.A. relayed that children were pushing, pulling, kicking, and teasing him during recess. R.A. had difficulty remembering to bring home homework assignments and had poor organizational skills. In her March 1, 2017, e-mail, Ms. A. asked Seyka if she could provide certain documents. Ms. A. made this request because it was difficult for Ms. A. to get correspondence from school since R.A. would lose it. She also informed Seyka in that e-mail that R.A. had started saying that he did not want to be smart anymore. Ms. A. believed that around this time R.A. started seeing a therapist, Joanna Buset.

Ms. A. testified that around March 2017 she would smell feces on several occasions when she picked R.A. up from school, and upon investigation she would find that he had soiled his pants. According to Ms. A., this happened regularly while he was at school and at least two to three times a week. Ms. A. was concerned, noting that R.A. had been toilet-trained since he was two or three. Around this time, R.A. was also chewing and biting holes through his shirts at school. Ms. A. would often find his shirts

“soaking with saliva.” On one occasion when she picked him up from school there “was a gigantic U of saliva” from his collar “down to his navel.”

In her April 8, 2017, e-mail to Seyka, Ms. A. reported her concerns regarding a classmate punching and kicking R.A., and that, as she had mentioned on Friday, R.A. seemed very anxious lately, especially when she picked him up from school. In her April 11, 2017, e-mail to Seyka, Ms. A. reiterated that R.A. seemed anxious lately and reported that he was having trouble with holding his bowel movements and coming home with soiled pants. Ms. A. had not informed Seyka about the soiling issue before her April 11, 2017, e-mail.

During the 2016–17 school year, the District did not offer to evaluate R.A. or provide any supports to R.A. During that year, Ms. A. had no academic concerns regarding R.A.

Ms. A. testified that during R.A.’s kindergarten year she took him to Kid Clan, which she described as an occupational-therapy type of facility. She took him to Kid Clan after the school year began, which she stated might have been in November or December 2016. Kid Clan did an initial assessment of R.A. and found that he needed further evaluation. R.A. did not treat at that facility because it did not accept the family’s insurance. During the school year, Ms. A. also took R.A. to a nutritionist to address his eating issues. R.A. later underwent a neuropsychological evaluation in July 2017, which diagnosed R.A. with adjustment disorder with mixed anxiety and mood difficulties, ADHD, and social pragmatic communication disorder.

Regarding the allegations in paragraph 23 of her June 2017 due-process petition, which states, “Because the District failed to evaluate R.A., Parent took R.A. to Kid Clan to have him assessed for his inability to sit still [and] [a]t this point, the evaluator suspected that R.A. might have possible sensory and auditory processing disorders,” Ms. A. testified that Kid Clan did an “initial evaluation” or a “preliminary assessment” and she did not receive a report or any paperwork. Regarding the allegations in paragraph 24 of her due-process petition, which states, “In January, Parent took R.A. for physical therapy and occupational therapy evaluations, to see if he had additional sensory needs,” Ms. A.

described that Kid Clan did a “pre-evaluation” for PT and OT therapy. She received PT and OT evaluations from another facility probably after the due process was filed and in the summer of 2017. Regarding the allegations in paragraph 25 of her due-process petition concerning the parent bringing R.A. to a psychiatrist around January 2017 and reference to “Psychiatric evaluation reports,” Ms. A. testified that “[i]t wasn’t an evaluation, it was [an] appointment, at which time a doctor spoke to [R.A.]” She also testified, “I don’t know what it was exactly. . . . [H]e was taken to an appointment with a psychiatrist who evaluated him as you would at any doctor’s office.” At that point R.A. had an “initial evaluation with the psychiatrist.” Ms. A. testified that she “wasn’t given an evaluation right away”; they discussed treatment options; and they made an appointment for a follow-up visit. As to whether Ms. A. brought R.A.’s visits to the psychiatrist or therapist to the District’s attention, she stated that at that time “we were dealing with it as a family.” She could not locate an e-mail in the hearing documents that reflected that she produced a PT evaluation, an OT evaluation, or a psychiatric evaluation to the District between September 2016 and June 2017, and stated that she “wasn’t aware that reports had to be submitted” and she did not “remember when they were . . . submitted” and “through what medium.” Regarding the allegations in paragraph 15 of her due-process petition which states, “On or about November 22, Ms. Duarte-Penna informed Parent that the District would form an evaluation team; presumably, to begin the initial evaluation process per the District’s child find obligations,” Ms. A. could not locate an e-mail in the hearing documents regarding the evaluation that she alleged the District offered to conduct.

During Ms. A.’s second day of testimony, Ms. A. testified that she mentioned to Seyka and Duarte that R.A. was experiencing self-injurious behaviors. She told Duarte via e-mail and she also had a telephone phone conversation with her. According to Ms. A., she “had in several instances via e-mail” told the District that R.A. had experienced self-injurious behaviors, and “they had informed [her] that he had experienced self-injurious behaviors via a note they sent home about him diving into the asphalt so they were aware of it.” Ms. A. stated that “the parts that [she] notified the teacher and the counselor about were that [R.A.] had been chewing and [the] soiling of the pants, the emotional and the withdrawing,” and “there were several instances when [she] told them that he was suffering from anxiety disorder.”

During Ms. A.'s second day of testimony, Ms. A. also testified that during her November 2016 telephone conversation with Duarte, they talked about R.A.'s anxiety and Ms. A. "expressed some of [her] more serious concerns such as the soiling of the pants" and R.A. "not wanting to go to school." Ms. A. informed Duarte that R.A. was "having bad dreams and headaches and certain other things he was experiencing." Ms. A. also "believe[d] [she] even mentioned . . . that [R.A.] had mentioned he didn't want to live anymore, [and] he didn't want to be smart anymore." According to Ms. A., Duarte indicated that R.A. "could be referred to, like, the Child Study Team." Ms. A. "asked her not to do that because [she] was nervous, [she] didn't know what condition we were talking about, . . . [she] didn't know what that entailed and [she] didn't want to have him labeled." Ms. A. further described that Duarte said, "Well, if you would like we can form a Child Study Team and have him evaluated" and Ms. A. replied, "No, no . . . maybe you're right" and "[m]aybe it is developmental, let's just give him a little bit more time." Duarte had also offered Ms. A. some behavioral charts and suggested a book, and Ms. A. said, "Let me try that . . . and see if it helps." Ms. A. testified that Duarte "never followed up with [her] and the issues kept coming so [Ms. A.] just started addressing his teacher directly." According to Ms. A., Duarte also "said she would follow up with the classroom teacher and try to observe him." Ms. A. did not remember ever hearing back from Duarte, but she did hear from Seyka, "who assured [her] that academically [R.A.] was doing fine and that he'd outgrow the rest."

Janice Kingsbury

Kingsbury is employed by The Learning Well, L.L.C., and performed a psychological evaluation of R.A. on December 16, 2017. She prepared a report regarding that evaluation (P-9) and was qualified as an expert in special education and in educational psychology. In connection with her evaluation, Kingsbury administered the Woodcock Johnson IV Tests of Cognitive Abilities, interviewed the parent, and reviewed the July 2017 neuropsychological evaluation report. According to that report, the neuropsychologist diagnosed R.A. with adjustment disorder with mixed anxiety and mood difficulties, ADHD with combined presentation, and social pragmatic communication disorder, provisional.

Kingsbury explained that R.A.'s diagnosis is a combined type of ADHD, meaning that he has both the inattentive and hyperactivity components. Children with ADHD are falling out their chair, dropping pencils, constantly looking around the room, and very distractible. They usually cannot sustain attention, it is difficult for them to finish and initiate tasks and they are difficult to manage in school. Kingsbury testified that, in order to be diagnosed with ADHD, the individual must have a history of those type of symptoms for a marked period of time.

Kingsbury described that her office is free from distractions and R.A.'s parents were in another room during her testing. Within ten minutes of being with R.A., he was dropping pencils and erasers and "squirmy," and the skittles she uses to reward children were all over the floor. In Kingsbury's view, it seemed "pretty obvious" that R.A. is hyperactive, which she stated "isn't a new behavior," but how R.A. "is wired." Kingsbury's testing revealed that R.A. had a compromised processing speed and working memory. He also was not consistent in the testing, including on sub-tests that purportedly measure the same types of items. Kingsbury's observations and testing confirmed the neuropsychologist's diagnosis of ADHD. On her testing R.A. was weak in all the areas that she would expect if he had ADHD. Kingsbury described that working memory and processing speed are "the red flags that we look for," and "they are almost always compromised with an ADHD student." She noted that R.A.'s I.Q. had decreased substantially on her testing in December 2017 as compared to the evaluation in July 2017, which would "suggest that there were things going on" and that he was not "making gains at the same rate as his peers because the school loaded factors and the I.Q. have decreased." His number facility, working memory, and processing speed are low and dropped in her testing. Kingsbury testified that I.Q. scores can be impacted by the time a child is in school, and one hypothesis for the difference in the scores is that R.A. was not in school and had not been exposed to the same educational materials as other children.

During her evaluation, Kingsbury reviewed the BASC-3 dated July 15, 2017 (J-13), which was part of the neuropsychological evaluation and is an "informal measure" used to evaluate behaviors. She did not do the scoring but reviewed the interpretations in the neuropsychological report. The scoring can be in the "average" range, the "at-risk" range

“indicating a moderate level of impairment or an area that warrants continued monitoring,” or the “clinically significant” range “indicating a high level of maladjustment” (J-12 at 116), the latter of which Kingsbury stated suggests that “immediate intervention be undertaken.” According to the BASC-3, R.A. was “at risk” in the areas of hyperactivity, depression, and behavioral symptoms, including attention problems and atypicality. He was “clinically significant” in the area of internalizing problems, which included anxiety. Kingsbury acknowledged that R.A.’s “ADHD Probability” was “average” and that the scoring did not show a diagnosis of ADHD. She stated that the rating scale did reveal “a number of behaviors . . . to suggest that there’s some problems” and some symptoms of ADHD. Kingsbury described hyperactivity as “a red flag.” Although anxiety and depression are not necessarily symptoms of ADHD, these conditions are often seen in children with ADHD. R.A.’s social skills were also “at risk,” and children with ADHD often have problems with social skills. Mood swings, or “negative emotionality,” are also oftentimes seen with ADHD children.

According to Kingsbury, her review of the reports and the rating scales suggests that “these behaviors weren’t new” and “didn’t start recently,” and R.A.’s. “symptoms were prolonged and have occurred over a long period of time because [these] symptoms don’t suddenly develop.” Kingsbury acknowledged that the referenced rating scale consists of the parent’s reporting, and that the teacher’s rating was different (J-12 at 117), which she stated is not unusual because school is more structured and the demands that are placed on the student in school are usually more significant than in the home environment. Kingsbury agreed that in the teacher’s scale, no area was scored as “clinically significant; R.A.’s behaviors were “at risk” in the areas of hyperactivity, atypicality, withdrawal, and negative emotionality; and overall the scores fell in the “average” range.

Kingsbury could not state whether the diagnosed adjustment disorder or the provisional social pragmatic communication disorder likely would have been present during R.A.’s kindergarten year. She opined, with a “psychological probability,” that R.A.’s ADHD tendencies would have existed during his kindergarten year when he was in school. She testified that the ADHD most likely would have been there since birth, the symptoms typically manifest around preschool, and she could “pretty confidently say” that the ADHD was there. Kingsbury opined that during the kindergarten school year the

District should have “at a minimum” sent referral information to the I&RS committee. She testified that there were “enough behaviors . . . to warrant concerns about whether or not he was performing to the best of his ability [or] whether he was interrupting the academic process of the other students in his class.” She opined that the District should have referred R.A. to the I&RS team when “the behaviors,” such as hyperactivity, “were first noticed.”

Kingsbury testified that if District staff observed that a child had a chew necklace or had chewed holes in their shirt, they would not refer the child to the CST. If it were a one-time event, the child would probably be sent to the guidance counselor. If it occurred regularly, at that point the child would be referred to the intervention committee. Kingsbury testified that if a parent informed the school that their child is sad, or the child said that he does not want to be smart anymore or is a bad boy, this would indicate “a child expressing distress.” She stated that it does not mean that it is a CST referral necessarily, but does mean that there are some concerns about the child that need to be addressed. The severity could range anywhere from severe depression to having a bad day, so a guidance-counselor referral is always an appropriate thing to do. If the behaviors continue, a referral minimally to the I&RS should occur. Kingsbury explained that schools look at the severity and the longevity of the behavior to determine the intervention. As an educator or a member of the CST, Kingsbury would have concerns if a student had issues with having accidents (i.e., soiling his pants) during the school day if it happened more than once or twice, and she would bring the issue to the nurse. She did not believe that it would go to the CST at that point. Rather, it is something that would first have to be investigated medically. If it happened often enough, she would think that the school “would want to bring it to [the] attention [of the I&RS] so that [it] could document some kind of interventions and also [it] might need a medical plan to accommodate the student.” Until it is investigated, it is unknown whether the issue would require a medical or 504 accommodation. In her experience, parents often do not understand how to request an evaluation or the process for getting help for their child. Kingsbury testified that if a parent reports concerns about a child’s behavior or emotional state to a guidance counselor, the first step would be to report it to the I&RS, and then it would be up to the I&RS committee to determine whether to make a CST evaluation referral. If a teacher

observes behavioral concerns in the classroom, the teacher is “obligated to report it under Child Find to identify any student with possibly a disability.”

Kingsbury explained that just having a disability, such as ADHD, in itself does not qualify a student for services or programming. The criteria is that the disability must interfere with the student’s progress in school or the progress of others. A child with ADHD who is having difficulties in school, socially, emotionally, and academically, who is not programmed, can regress or fall behind. Those children often have difficulties with reading, writing, and math. Kingsbury testified that everybody with ADHD does not need to be classified, but “there are those children, many of them, who they don’t have the coping skills, they don’t know strategies at that point when they are in elementary school, they don’t know to monitor their own behavior so they need that programming to learn those strategies.” She noted that the “ADHD is probably not going to go away but we can accommodate them, we can give them extra time, we can give them cues [or] we can break their work into smaller tasks to help level the playing field . . . so that they can keep up with their same-age peers and not fall behind.” Based on her observations and testing, Kingsbury would say that during the kindergarten school year R.A. is a child who would have needed those services based on his ADHD. He “definitely has all those ADHD symptoms.” He has a great deal of difficulty sustaining attention, he needs constant redirection, he cannot focus, and “he is very hyper.” When asked whether during the kindergarten year the District should have evaluated R.A., Kingsbury responded, “I think it was appropriate.” Kingsbury acknowledged that she did not observe R.A. in the school setting or review documentation regarding R.A.’s grades or academics in kindergarten. Her knowledge of R.A.’s performance in school was based on the parents’ reported concerns.

ANALYSIS OF THE EVIDENCE

In evaluating the evidence, it is necessary for me to assess and weigh the credibility of the witnesses. Credibility is the value that a finder of the facts gives to a witness’s testimony. It requires an overall assessment of the witness’s testimony in light of its rationality, internal consistency and the manner in which it “hangs together” with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). “Testimony

to be believed must not only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950). A trier of fact may reject testimony as "inherently incredible" and may also reject testimony when "it is inconsistent with other testimony or with common experience" or "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). It is further necessary to evaluate and weigh the expert testimony offered at the hearing. It is well settled that "[t]he weight to which an expert opinion is entitled can rise no higher than the facts and reasoning upon which that opinion is predicated." Johnson v. Salem Corp., 97 N.J. 78, 91 (1984) (citation omitted).

Preliminarily, I am unpersuaded by petitioner's argument that the undersigned should draw an adverse inference or give no weight to Duarte's testimony based on the District's alleged spoliation of evidence, specifically, Duarte's destruction of her notes. In this regard, counsel for petitioner sent a letter to the superintendent of schools dated June 1, 2017, which requested "any and all documents . . . that fall within the definition of pupil records [and/or] education records with respect to" R.A. (J-26.) Petitioner has failed to establish that Duarte's notes of her conversation with Ms. A. in November 2016 constitute "education records" as defined by the Family Educational Rights and Privacy Act or "student records" pursuant to N.J.A.C. 6A:32-7.3(a). See 20 U.S.C. § 1232g(a)(4)(B)(i) ("The term 'education records' does not include . . . records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute."); N.J.A.C. 6A:32-7.3(a) (mandated student records include the student's name, address, telephone number, date of birth, name of parent(s), gender, standardized assessment results, grades, attendance, classes attended, grade level completed, year completed, and years of attendance; record of daily attendance; descriptions of student progress according to the student evaluation system used in the school district; history and status of physical health compiled in accordance with State regulations, including results of any physical examinations given by qualified school district employees and immunizations; records pursuant to rules and regulations regarding the education of students with disabilities; and all other records required by N.J.A.C. 6A). No evidence suggests that Duarte's notes of her single telephone

conversation with Ms. A. had been shared with any other person or kept within the student's official file.

Additionally, even if the notes could be said to fall within counsel's June 1, 2017, document request, the circumstances militate against petitioner's requested relief. "The scope of the duty to preserve evidence is not boundless [and] [a] 'potential spoliator need do only what is reasonable under the circumstances.'" Hirsch v. Gen. Motors Corp., 266 N.J. Super. 222, 251 (Law. Div. 1993) (citation omitted). The evidence does not demonstrate that Duarte acted in bad faith, intentionally destroyed litigation material, or took unreasonable steps under the totality of the circumstances. The request for documents was sent to the superintendent a few weeks before the end of the school year. According to Duarte, she met with Board counsel regarding R.A. in May 2017, which was before the document request and before the due-process petition was filed; she was not aware that the matter was going to trial; and she believed that the issues involving R.A. were over when she shredded her personal notes in September 2017, as she was being transferred to a different school and going on maternity leave. Further, the materiality of the evidence is negligible and no prejudice to petitioner is apparent. Duarte testified that she does not take detailed notes but, instead, her notes reflect "just the premise" of the conversation. And, the record includes multiple e-mail exchanges between petitioner and District personnel that evidence the various topics and concerns discussed between the petitioner and the District. To the extent that petitioner alleges that Duarte also destroyed notes regarding the April 2017 HIB investigation, Duarte denied taking notes during her meeting with Ms. A., and any potential notes of her meeting with R.A. regarding the incident have no bearing on whether the District had knowledge of R.A.'s alleged need to be evaluated as of April 2017.

Turning to the evidence, I found Seyka, Latzoni, Vayner, and Duarte to be qualified, devoted professionals and credible witnesses. I found the testimony by the District employees to be detailed, persuasive, and consistent with other offered evidence. They articulated consistent accounts regarding R.A.'s performance and behavior at school, which is corroborated by the documentary evidence and was not impaired by counsel's thorough cross-examination. I further afford substantial weight to Seyka's testimony. In short, Seyka has been a kindergarten teacher for eight years and had the

opportunity to observe and assess R.A.'s daily classroom performance and behavior over a period of several months.

The record clearly demonstrates that Ms. A. is a devoted parent who is actively involved in R.A.'s academic, behavioral, and social performance. I further do not doubt her testimony describing parental concerns regarding emotional issues that R.A. may have been experiencing, such as self-injurious behavior and suicidal ideations. The documentation reflects that the parents took measures to address R.A.'s emotional needs by consulting a psychiatrist and commencing counseling. However, the pertinent inquiry must focus on what the District knew and when. Ms. A.'s many e-mails before April 8, 2017, are bereft of any reference to emotional issues. The only emotional issue disclosed in Ms. A.'s April 8, 2017, e-mail is that R.A. "seems very anxious lately especially when [Ms. A.] pick[s] him up from school," and the e-mail sets forth her own uncertainty as to whether R.A.'s anxious state had to do with the student who allegedly bullied him. The e-mail does not refer to any type of existing or ongoing anxiety disorder.

I further found Ms. A.'s testimony regarding various matters to be confusing, not responsive to questions, and irreconcilable with the testimony of the District employees, the documentary evidence, and Ms. A.'s own testimony, which casts doubt as to the reliability of her testimony and impaired the weight to be afforded to it. For example, Duarte testified that she offered I&RS to Ms. A. during their November 2016 telephone conversation, and Ms. A. similarly testified that Duarte mentioned "some kind of intervention and referral." However, during her second day of testimony, Ms. A. asserted that Duarte offered to "form a Child Study Team and have [R.A.] evaluated." She also had previously testified that during the school year the District did not offer to evaluate R.A. And, none of the many e-mails refer to any offered evaluation. Indeed, Ms. A. sent an e-mail to Duarte on December 2, 2016, after their telephone conversation in late November 2016 which simply thanked Duarte for the resources she sent and advised that she was "going to give all the information a look over and start implementing them to see if it helps." During her second day of testimony, Ms. A. also expanded the scope of her advice to Duarte to include, among other things, R.A. soiling his pants. However, Ms. A.'s earlier testimony described the soiling of R.A.'s pants as becoming an issue around

March 2017.¹ I place no weight on Ms. A.'s testimony that she received a note about R.A. diving into the pavement or suggestion that she informed Seyka or Latzoni of any emotional issues that R.A. was experiencing before the information contained in her April 2017 e-mails. This testimony is overborne by the testimony of both Seyka and Latzoni, no note regarding the "diving" incident was introduced, and I find it improbable that had these matters happened or been discussed they would not have been mentioned in Ms. A.'s many e-mails.

Although I found Kingsbury to be a credible and candid witness, I place limited weight on her conclusion regarding whether the District should have evaluated R.A. In weighing the competing testimony, I find that that scales tip in favor of the testimony of the District employees. Kingsbury met with R.A. on one occasion for an evaluation, in contrast to the daily dealings that Seyka had with R.A. in the school setting, coupled with the interactions that Latzoni and Duarte also had with R.A., from September 2016 to April 2017. Kingsbury's evaluation also took place in December 2017, or approximately eight months after R.A. stopped attending school. I found her testimony regarding what the District would have observed during R.A.'s kindergarten year to be speculative in nature and not supported by the documentary evidence. Indeed, Kingsbury candidly acknowledged that the results of her testing may have been impacted by R.A.'s absence from school, and her knowledge vis-à-vis R.A.'s performance in school was based simply on the parent's reporting. And, although Kingsbury testified that the District should have evaluated R.A. during the kindergarten year based on his ADHD, she previously testified that the District should have "at a minimum" simply sent referral information to the I&RS committee.

Based upon a review of the testimony and the documentary evidence presented, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following additional pertinent **FACTS** and accept as **FACT** the testimony set forth below:

¹ The due-process petition also appears to allege that this issue occurred around the April 2017 timeframe.

Based on her interactions with R.A. during his kindergarten year, Seyka found R.A. to be “extremely happy,” “very bright,” and “very talkative.” He had a good sense of humor; he interacted “very well” with his peers; he liked to share the information he knew with his peers; he was “very friendly” with everyone in the class; and he “really enjoyed school.”

Based on her interactions with R.A. during his kindergarten year, Latzoni found R.A. to be “very intelligent,” “well liked,” and “happy.” He interacted appropriately with his peers and there were no complaints regarding R.A.’s interaction with peers.

Based on her interactions with R.A. in the Lunch Bunch group during his kindergarten year, Duarte found R.A. to be “very verbal, very vocal [and] smart.”

During the kindergarten school year, R.A. engaged in certain behaviors in the classroom, such as rolling around on the floor, standing on chairs, failing to stay in his seat or listen, moving his chair back and forth and stretching across the table while working, fidgeting, and kicking the teacher’s desk “pretending to be Mario or Luigi.”

During the first month of school, R.A. received a verbal warning at recess because he had kicked the patrols for not receiving a sticker, which resulted in an orange note being sent to the parents. Except for this one incident, Latzoni did not receive any other report of inappropriate behavior regarding R.A. from any teacher or student and she did not send any other orange note to the parents.

During the school year, and with the exception of the above orange note and the November 2016 Beginning of the Year Kindergarten Checkup, Seyka did not contact Ms. A. regarding inappropriate behavior by R.A. and Seyka had no concerns regarding R.A.’s behavior. Seyka communicated information regarding R.A.’s behavior in response to Ms. A.’s inquiries. Seyka described that R.A. completed his work, and his behavior did not impact his academics or his ability to learn or socialize.

Seyka was never told that R.A. had “dove” into the pavement at recess. Seyka did not witness R.A. diving into the pavement at recess and did not report to the parent that

she saw R.A. dive into the pavement at recess. Latzoni also did not observe R.A. diving into the pavement and did not report that he dived into the pavement.

Duarte never observed R.A. acting inappropriately in school or acting inappropriately with his peers. During the school year, no one from the District reached out to her to discuss emotional issues or inappropriate behavior regarding R.A.

At Ms. A.'s request, Duarte and Ms. A. had a telephone conversation in November 2016. During this conversation, Duarte offered I&RS as a resource and explained these services to Ms. A. Ms. A. declined I&RS. Ms. A. did not contact Duarte after this conversation regarding R.A. acting inappropriately, to discuss emotional issues, or to discuss or request services for R.A.

R.A. met academic expectations during his kindergarten school year. Ms. A. had no concerns about R.A.'s academic performance. Vayner described that R.A.'s classwork showed that he was "doing very well in class." His reading scores demonstrated that R.A. was performing above average in class, and 62 percent growth since the beginning of the year. R.A.'s scores also showed that he was meeting expectations in literacy. Vayner described that R.A.'s report card showed that he was "making appropriate progress," he was "proficient in all specialty areas," and he was "consistently independent across . . . most areas in the classroom." R.A. also "[o]verall . . . scored an average range" on Vayner's educational assessment in July 2017. Similarly, Seyka described that R.A. had no academic struggles or issues; R.A. was performing average to high average in all areas, including academics, social development, and behavior, as shown in his report card; and R.A. was performing above average academically and functioning average to above average socially during the school year.

Prior to the parents' April 8, 2017, e-mail, the parents did not report to Seyka or Latzoni that R.A. seemed anxious or suffered from anxiety. Seyka and Latzoni never observed any signs that R.A. had anxiety.

Prior to the parents' April 8, 2017, e-mail, it was never reported to Seyka or Latzoni that R.A. was being bullied or that first-grade students had shoved or jumped R.A. at recess in the fall or the spring. Seyka and Latzoni never observed signs that R.A. was being bullied.

Prior to the parents' April 11, 2017, e-mail, Seyka had never heard that R.A. was having "some trouble holding [his] pee and poop and comes home almost daily with soiled pants." Seyka never observed R.A. holding his "pee or poop," having atypical toileting issues, or having soiled pants in school.

When Duarte returned to work after spring break on April 18, 2017, R.A. informed her that he was punished during the break because he wet his pants at home. This was the first time that Duarte had heard that R.A. wet his pants. On that day, Latzoni shared with Duarte the parents' April 8 and 11, 2017, e-mails. Prior to seeing the e-mails, Duarte did not know, and had not been informed by Ms. A., that R.A. had anxiety. She also had never heard that R.A. was "having some trouble holding his pee and poop and comes home almost daily with soiled pants," and Duarte never observed it. The nurse also had not heard anything about that issue.

During the meetings on April 17, 2017, and/or April 18, 2017, the parents informed District staff that R.A. suffered from anxiety.

Prior to April 2017, when R.A. stopped attending school, the parents did not inform Seyka that R.A. had expressed suicidal ideations; that R.A. was experiencing low self-esteem, nightmares, or signs of school phobia; that R.A. had lost interest in eating or said that he hates himself; or that the parents had bought a chew necklace for him. She also was not advised that the parents had taken R.A. for a PT evaluation, an OT evaluation, or a psychiatric evaluation, or that the parents had consulted with a nutritionist regarding R.A.'s eating.

Prior to April 2017, when R.A. stopped attending school, the parents did not inform Latzoni that R.A. suffered from depression, ADHD, oppositional defiant behavior, or suicidal ideations; that R.A. was experiencing school phobia, headaches, stomachaches,

or nightmares; that R.A. had destructive behavior; that R.A. had stated that he hates himself; or that R.A. was biting his fingernails or losing interest in eating. She also was not advised that R.A. was being treated by a psychiatrist or that he went for a psychiatric, a PT, or an OT evaluation. Latzoni was never given a copy of a psychiatric, a PT, or an OT evaluation report.

Seyka did not ever hear R.A. express suicidal ideations or state that he hates himself. Seyka never observed any signs of R.A. experiencing mental-health issues, low self-esteem, school phobia, depression, ADHD, or oppositional defiant disorder. She did not observe signs of R.A. losing interest in eating or having headaches or stomachaches. She never observed R.A. biting his nails or wearing a chew necklace. To the extent that she may have seen R.A. chewing or gnawing on his clothes, it was not often or common, and Seyka did not find the behavior significant.

Latzoni did not observe signs that R.A. suffered from depression, ADHD, oppositional defiant behavior, suicidal ideations, or school phobia. She did not observe signs that R.A. was biting his fingernails, suffering from headaches or stomachaches, or having issues with eating. Latzoni never heard R.A. state that he hates himself.

Prior to April 19, 2017, when R.A. stopped attending school, the parents did not provide the District with any documents from a psychiatrist, a counselor, or a nutritionist, or any documents relating to any evaluation of R.A.

The parents never informed Seyka or Latzoni that they believed that R.A. needed specialized instruction or special accommodations. Seyka and Latzoni did not observe any evidence that R.A. needed special education or required special accommodations. Duarte also did not observe evidence warranting a referral to the CST.

LEGAL DISCUSSION AND CONCLUSIONS

The IDEA provides federal funds to assist participating states in educating disabled children. Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 179–80 (1982). To qualify for this financial assistance, New Jersey must effectuate policies

and procedures to ensure that a free appropriate public education (FAPE) is available to all children with disabilities. 20 U.S.C § 1412(a)(1)(A). The responsibility to provide a FAPE rests with the local public school district. N.J.A.C. 6A:14-1.1(d). The District shoulders the burden of proving that a FAPE has been offered. N.J.S.A. 18A:46-1.1.

The foundation of petitioner's due-process petition is predicated on the requirement that local public school districts are charged with the duty of locating and identifying children in need of special education services, known as "child find." 20 U.S.C. § 1412(a)(3)(A) requires the State to effectuate policies and procedures designed to ensure that "[a]ll children with disabilities residing in the State, . . . regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located and evaluated" See also 34 C.F.R. § 300.111 (2019); N.J.A.C. 6A:14-3.3; N.J.A.C. 6A:14-1.2(b)(3).

A school district has a continuing obligation under the IDEA and § 504 to identify and evaluate students reasonably suspected of having a disability. P.P. v. W. Chester Area Sch. Dist., 585 F.3d 727, 738 (3d Cir. 2009). A child who is suspected of having a qualifying disability must be identified and evaluated "within a reasonable time after school officials are on notice of behavior that is likely to indicate a disability." W.B. v. Matula, 67 F.3d 484, 501 (3d Cir. 1995), abrogated on other grounds, A.W. v. Jersey City Pub. Schs., 486 F.3d 791 (3d Cir. 2007); see also Ridley Sch. Dist. v. M.R., 680 F.3d 260, 271 (3d Cir. 2012). A case-by-case approach is employed to assess whether the school district's response was reasonable in view of the information possessed by the district. M.R., 680 F.3d at 272. "A school's failure to comply with Child Find may constitute a procedural violation of the IDEA." D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 (3d Cir. 2012).

The case law interpreting this obligation has recognized that "Child Find does not demand that schools conduct a formal evaluation of every struggling student." D.K., 696 F.3d at 249. School districts "need not rush to judgment or immediately evaluate every student exhibiting below-average capabilities, especially at a time when young children are developing at different speeds and acclimating to the school environment." Id. at 252. A school district is also "not required to jump to the conclusion that [a student's]

misbehavior denote[s] a disability or disorder because hyperactivity, difficulty following instructions, and tantrums are not atypical during early primary school years.” Id. at 251. The courts have further recognized that “the IDEA is not an absolute liability statute and the ‘Child Find’ provision does not ensure that every child with a disability will be found.” J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 660 (S.D.N.Y. 2011) (quoting A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 225 (D. Conn. 2008)). And, the courts have recognized that where a disability is not clear, the parents have some obligation to bring their concerns to the school district’s attention. See, e.g., T.K. & A.K. ex rel. B.K. v. River Vale Bd. of Educ., EDS 1335-06, Final Decision (June 19, 2007), <http://njlaw.rutgers.edu/collections/oal/>.

Against this backdrop, the totality of the evidence does not support petitioner’s claim that the District violated its child-find obligation. Rather, the evidence demonstrates that, prior to R.A.’s removal from school, the District did not possess sufficient reason to suspect that R.A. was a child with a disability in need of special education or other accommodations. R.A. was new to the District and the structured environment of kindergarten. R.A.’s behaviors of which the District was aware, as detailed in the various e-mails and reiterated in petitioner’s brief, cannot be said to be unusual for a five-year-old kindergarten student. Although R.A. had a few incidents of immature or hyperactive behaviors, such as running in the class, not sitting in his seat, failing to listen to the teacher, or kicking the teacher’s desk, the District was “not required to jump to the conclusion that [R.A.’s] misbehavior denote[s] a disability or disorder because hyperactivity, difficulty following instructions,” and other behavior exhibited by R.A. “are not atypical during early primary school years.” D.K., 696 F.3d at 251. With the exception of the single incident when R.A. kicked the safety patrols, R.A. did not engage in any inappropriate behavior. Indeed, it appears that R.A.’s behavior improved as the year progressed. He received no orange notes after the September incident and he was rated as either independent or becoming independent in all areas of social development and learning behaviors on his report card.

Further, none of the school personnel who testified noted any behavioral, emotional, and/or social issues with R.A. Although R.A. may have been experiencing the mental-health issues detailed by Ms. A. (e.g., depression, self-injurious behavior, suicidal

ideations), R.A. did not exhibit any outward signs of these conditions in school that would raise a red flag that there may be reason to suspect that something internal was occurring warranting a CST referral. Whatever emotional problems R.A. was experiencing were not observed by anyone at school, nor did petitioner bring any of these issues to the attention of District personnel before April 2017. I am unpersuaded by petitioner's contention that Ms. A.'s March 1, 2017, e-mail to Seyka, which indicates in the course of the e-mail that "[r]ecently [R.A.] stated that he doesn't want to be smart anymore" and she felt "compelled to keep a close eye on his performance and to also help him understand that being smart isn't a bad thing," reasonably would have alerted a teacher to suspect that R.A. suffered from a disability and was in need of special education or other accommodations. The District personnel never observed R.A. soiling his pants as reported in Ms. A.'s April 11, 2017, e-mail. Additionally, shortly after the parents conveyed this information to the District, R.A. did not return to school after April 18, 2017, thereby preventing the District from following up or investigating the matter.

According to petitioner's own expert, a student who is soiling his pants would not trigger the need for a CST evaluation. Rather, Kingsbury would bring the issue to the nurse, the issue would need to be investigated medically, and a school may bring it to the attention of the I&RS if it happened often enough. Kingsbury also opined that a child expressing distress (e.g., the child said that he does not want to be smart anymore or is a bad boy) also does not necessarily mean that it is a CST referral; a guidance-counselor referral is appropriate, and a referral minimally to the I&RS should occur if the behaviors continue. Succinctly stated, notwithstanding the District's unawareness of R.A.'s emotional issues, and the absence of academic or social issues affecting R.A.'s progress, Duarte offered I&RS as a resource for R.A. in November 2016. Ms. A. declined these services and did not contact Duarte again despite Duarte's advice to Ms. A. to "[p]lease let [her] know if there is anything else [she] can do" and Ms. A.'s awareness that Duarte "conduct[ed] formal counseling groups" and ran the I&RS committee, "which targets students who have behavior and academic difficulties." (J-2 at 25, 26.) In other words, even if the District should have provided I&RS services for R.A. as suggested by the petitioner's expert, these services were offered by the District and rejected by petitioner.

The evidence further establishes that R.A. was making progress in kindergarten, and R.A. was academically and socially successful. A student is eligible for special education and related services only when the student has one or more of the disabilities defined in N.J.A.C. 6A:14-3.5(c)(1) through (14), “the disability adversely affects the student’s educational performance and the student is in need of special education and related services.” N.J.A.C. 6A:14-3.5(c). Simply put, the record is devoid of any evidence that R.A. suffered from a disability during kindergarten that adversely interfered with his educational performance and that R.A. required special education and related services or other accommodations.

Beyond this, even if the parent’s communications in April 2017 are considered an adequate basis to trigger the District’s child-find duty, there was no unwarranted delay in the evaluation of R.A. Rather, in accordance with the parties’ agreement, as memorialized in the letter by the District’s attorney dated July 20, 2017 (J-14), the District performed a social assessment and an education evaluation of R.A. in late July 2017, or approximately three months after the April communications. An eligibility meeting was later held on September 20, 2017, and R.A. was found to be ineligible for special education and related services. Plainly, this determination substantially undermines petitioner’s child-find claim.

Petitioner’s argument that the District failed to provide written notice as required by 34 C.F.R. § 300.9 (2019) and N.J.A.C. 6A:14-2.3 is without merit. Contrary to the assertions in petitioner’s brief, I do not find that Duarte represented to the parent that the District could get the CST together and evaluate R.A. Petitioner’s argument that the District was obligated to provide the parent with written notice for the I&RS is similarly misplaced. The District offered I&RS as a resource for R.A. in response to the telephone call from Ms. A. and not due to any observation by the District that would suggest that such services were necessary. Inasmuch as petitioner declined I&RS, and the District did not suspect that R.A. suffered from any disability, there is no requirement that the District provide any written notice.

Based on the foregoing, I **CONCLUDE** that the District did not violate its child-find obligation under state and federal law. I **CONCLUDE** that the District had no reasonable

basis for suspecting, from the information known to it, that R.A. had a disability and that R.A. needed special education and related services, or § 504 accommodations, as a result. I further **CONCLUDE** that there was no unwarranted delay in the District conducting the agreed-upon evaluations of R.A.

Petitioner's due-process petition seeks compensatory education "for the time R.A. was denied a FAPE and up and until the time R.A. is in an appropriate placement with appropriate supports and services in place." The Third Circuit has held that "[a] disabled student's right to compensatory education accrues when the school knows or should know that the student is receiving an inappropriate education." P.P., 585 F.3d at 739 (citations omitted). "The right to compensatory education arises not from the denial of an appropriate IEP, but from the denial of appropriate education." Ibid. In this regard, "[e]ntitlement to [compensatory education does] not flow directly from Districts' failure to locate, identify and evaluate a potentially eligible student but rather from the deprivation of an appropriate education to a student who is or was in fact disabled under the IDEA." G.D. v. Wissahickon Sch. Dist., 832 F. Supp. 2d 455, 467 (E. D. Pa 2011) (quoting M.A. ex rel. E.S. v. Newark Pub. Schs., No. 01-3389, 2009 U.S. Dist. LEXIS 114660, 2009 WL 4799291, at *15 (D.N.J. 2009)). Accordingly, "even where a district engages in 'egregious' delay prior to evaluating a child, if that child has not been denied an appropriate education during this period, the violation has been deemed purely procedural and a child is not entitled to compensatory education." G.D., 832 F. Supp. 2d at 468. I **CONCLUDE** that, because the District did not violate its child-find obligation, no evidence demonstrates that R.A. was deprived of an appropriate education, and R.A. was ultimately found not eligible for special education and related services, petitioner is not entitled to compensatory education.

Petitioner's due-process petition seeks various independent evaluations and "[a]n IEP meeting convened utilizing the information from the independent evaluations to determine the appropriate program and placement for R.A." It is undisputed that after the petition was filed the parties entered into an agreement regarding the evaluations that would be conducted and considered, and an eligibility meeting was held on September 20, 2017, wherein R.A. was found ineligible for special education and related services. Accordingly, I **CONCLUDE** that petitioner is not entitled to any additional evaluations.

Finally, petitioner's brief seeks reimbursement for the cost of Kingsbury's evaluation. Kingsbury conducted her evaluation in December 2017, after the petition was filed and after R.A. was found ineligible for special education and related services. There is no evidence that petitioner requested independent evaluations to challenge the District's evaluation. And, it is well established that the IDEA contains no provision for the recoupment of fees for services rendered by experts in IDEA actions. Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291 (2006). Accordingly, I **CONCLUDE** that petitioner is not entitled to reimbursement for costs associated with Kingsbury's evaluation.

ORDER

It is hereby **ORDERED** that the relief requested by petitioner be and hereby is **DENIED** and that the due-process petition be and hereby is **DISMISSED**.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2019) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C. § 1415(i)(2); 34 C.F.R. § 300.516 (2019). If the parent or adult student feels that this decision is not being fully implemented with respect to program or services, this concern should be communicated in writing to the Director, Office of Special Education Programs.

November 18, 2019
DATE



MARGARET M. MONACO, ALJ

Date Received at Agency _____

Date Mailed to Parties: _____

jb

APPENDIX

List of Witnesses

For Petitioner:

Kristin Seyka
Nancy Latzoni
Yelena Vayner

For Respondent:

Anarosa Duarte
Ms. A.
Mr. A.
Janice Kingsbury

List of Exhibits in Evidence

Joint:

J-1	Work Samples
J-2	Packet of e-mail correspondence
J-3	HIB information
J-4	Packet of e-mail correspondence
J-5	No exhibit admitted
J-6	Literacy Screening Form dated September 6, 2016
J-7	Correspondence to parents dated September 28, 2016
J-8	Letter from parents to Mrs. Seyka dated September 29, 2019
J-9	Due-Process Hearing Request
J-10	Answer to Due-Process Hearing Request
J-11	No exhibit admitted
J-12	Report of Neuropsychological Evaluation by Michelle S. Humm, Ph.D.; evaluation dates on July 7 and July 14, 2017
J-13	BASC-3 dated July 15, 2017

- J-14 Letter from Jessika Kleen, Esq., to Bradley Flynn, Esq., dated July 20, 2017
- J-15 Social Assessment; date of visit on July 25, 2017
- J-16 Educational Evaluation; date of evaluation on July 26, 2017
- J-17 Kindergarten Report Card
- J-18 Request for Parental Participation in a Meeting dated September 13, 2017
- J-19 Preschool Child Study Team Notification of Report(s) dated October 3, 2017; Eligibility Conference Report; and Written Notice dated September 20, 2017
- J-20 to J-22 No exhibits admitted
- J-23 Packet of e-mail correspondence
- J-24 No exhibit admitted
- J-25 Curriculum Vitae of Yelena Vayner
- J-26 Letter from Bradley R. Flynn, Esq., to Richard Tardalo dated June 1, 2017
- J-27 Stipulations of Fact

For Petitioner:

- P-1 to P-3 No exhibits admitted
- P-4 Progress Notes by Dr. Jessica N. Halpern on January 27 and April 28, 2017
- P-5 Letter from Joanna Buset, LPC dated May 4, 2017; letters from Angelico Soto-Pereira, M.D., dated September 15, November 13, and November 18, 2017, and February 20, 2018; Physician's Request for Home/Individual Instruction dated September 20, 2017; and lists of supportive accommodations requested by treating medical professionals and parents
- P-6 to P-7 No exhibit admitted
- P-8 Curriculum Vitae of Janice Kingsbury
- P-9 Psychological Evaluation by Janice Kingsbury dated December 27, 2017
- P-10 to P-17 No exhibits admitted

P-18 Beginning of the Year Kindergarten Checkup, November 2016

For Respondent:

None