

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 13660-18

AGENCY DKT. NO. 2019-28580

S.B. AND H.B. ON BEHALF OF G.B.,

Petitioners,

v.

EAST GREENWICH TOWNSHIP

BOARD OF EDUCATION,

Respondent.

Adam Wilson, Esq., appearing for petitioners, S.B. and H.B. o/b/o G.B. (Hinkle, Fingles, Prior & Fischer, attorneys)

Paul Kalac, Esq., appearing for respondent, East Greenwich Township Board of Education (Weiner Law Group, L.L.P., attorneys)

Record Closed: September 6, 2019

Decided: October 15, 2019

BEFORE **DOROTHY INCARVITO-GARRABRANT**, ALJ:

STATEMENT OF THE CASE

This case arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1401-1484(a). Petitioners, S.B. and H.B., on behalf of their minor son G.B., seek a classification of autistic, development of an Individualized Education Plan (IEP), and compensatory education, due to the alleged failure of the respondent, East Greenwich Township Board of Education, to provide a Free Appropriate Public Education (FAPE) to G.B. The respondent alleges that G.B. is ineligible for special education and

related services, because G.B. has not had the required evaluations, pursuant to N.J.A.C. 6A:14-3.4(f), and G.B.'s diagnosis of autistic spectrum disorder (ASD) has no impact on his academic performance, pursuant to N.J.A.C. 6A:14-3.5(c)(2). At issue is whether the respondent provided G.B. with a FAPE.

PROCEDURAL HISTORY

On September 4, 2018, the Commissioner transmitted the matter to the Office of Administrative Law as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The hearing was held on March 18, 2019, March 19, 2019, April 23, 2019, and May 6, 2019. The record remained open, to allow for the filing of post-hearing briefs on July 8, 2019. Additional hearing dates were scheduled for August 9, 2019, and September 4, 2019.

Subsequently, the parties obtained a thirty-day extension to August 9, 2019, for the filing of their post-hearing briefs. On August 9, 2019, petitioners requested an extension to file their post-hearing brief, which was consented to by respondent and granted. Both parties filed their briefs on August 12, 2019.

On the same date, respondent's counsel requested a conference call with opposing counsel and the undersigned Administrative Law Judge (ALJ) because respondent had become aware that the petitioners had moved out of respondent's district. On August 22, 2019, a status conference was held, during which respondent orally moved to dismiss this matter as moot. The undersigned ALJ ordered a briefing schedule relative to the motion. On August 27, 2019, respondent filed its brief in support of its motion to dismiss. On September 6, 2019, petitioners filed their brief in opposition to the motion. The record closed on September 6, 2019.

Exhibit P-14 which was a video of G.B.'s participation in his second grade Holiday Concert was **ORDERED** Sealed because other students were observed on the video.

Motions

Motions for Directed Verdict

At the end of its case in chief, respondent made two oral motions. First, respondent made a motion pursuant to Rule 4:40-1, Motion for Judgment at Trial, for a directed verdict in respondent's favor. Respondent argued that petitioners failed to make a prima facie case for the implementation of an IEP for the classification of autistic, pursuant to the special education laws and regulations of the State of New Jersey. Implementing an IEP herein would be a violation of N.J.A.C. 6A:14-3.4(f), which provides that an initial evaluation for classification shall consist of a multidisciplinary assessment, which must include two assessments by two child study team members, of all areas of the suspected disability and N.J.A.C. 5A:14-3.5(c)(2), which provides that a classification of autistic requires an assessment by a speech language specialist and a physician trained in neurodevelopmental assessment. Respondent argued that petitioners did not satisfy the requirements of either regulation. To support the position that petitioners had failed to meet these assessment requirements, respondent noted that as of March 19, 2019, it offered, as part of a comprehensive settlement proposal, to conduct initial evaluations of the student and not to contest petitioners' right to independent evaluations.

Petitioners opposed the motion for the following reasons. First, the motion was premature because petitioners had not had the opportunity to present their evidence in their case in chief. Second, it was the respondent's responsibility to obtain the evaluations. It was not the parents' responsibility. Third, the respondent's offer relative to completing the assessment were settlement discussions. Petitioners maintained it was inappropriate to use those discussions to support their motion and that respondent left out material parts of those discussions.

Petitioners then cross-moved for a directed verdict in their favor on the basis that Barbara Harris, respondent's school psychologist, testified that there were procedural violations in the initial evaluation plan, such that no reasons were given in writing as to why the initial evaluations were denied, and that the respondent's witness testified that

no student could possibly be eligible for an IEP if they are getting As and Bs in a class. The petitioners argued that that is not the law. In opposition, respondent argued that G.B. was excelling in his academics and had no maladaptive behaviors with adversely affected his education or interfered with his learning or the learning of others.

Respondent's motion was **DENIED**. There were sufficient facts and evidence presented to conclude that petitioners had established a prima facie case. At the end of respondent's case in chief, sufficient evidence had been presented that set forth contradictory facts, opinions, and conclusions about whether G.B. should have been determined eligible to receive special education and related services. The evidence presented at that juncture was not so one sided to permit a directed verdict. Petitioners' cross-motion was also **DENIED** as premature because there was insufficient evidence to grant the motion at that point in the hearing.

Motion to Dismiss for mootness

Respondent also made a motion to dismiss the matter as moot at the end of its case in chief, because the respondent had offered all of the relief to which the petitioners are legally entitled pursuant to 20 U.S.C. 1415(l)(3)(d) to resolve the 2018-2019 and 2019-2020 school years. The offer included a Section 504 plan and respondent alleged all of the accommodations that have been requested, and detailed by Dr. Tori Foster (Dr. Foster) of Nemours and Samantha Townsend (Townsend) of Beyond Communications. Respondent argued that by agreeing to provide all of the relief specifically sought in the petition, no controversy upon which this tribunal can rule existed. J.L. v. Harrison Township Bd. of Ed., 2015 U.S. Dist. LEXIS 112252. Respondent submitted that the case was moot. Oxford v. New Jersey State Board of Education, 68 N.J. 301 (1975). In response to questioning by this tribunal, respondent conceded that G.B. was not receiving all of the services that were mentioned in the ten-day letter.

Petitioners opposed the motion for several reasons. First, G.B. was not receiving all of the services that were mentioned in the ten day letter. Second, the respondent did not offer all of the rights and services that the parents were looking for in their petition. The ten-day letter did not include development of an IEP, other interventions,

compensatory education, and attorney's fees in an amount commensurate with the reasonable billing.

Respondent's motion was **DENIED**. There were sufficient material facts and issues in controversy, which required disposition.

Respondent's Second Motion to Dismiss for Mootness

Arguments

After the hearing had concluded and prior to submission of the parties' closing summations, respondent advised that petitioners had sold their home and moved out of the respondent's school district. A conference call was held on August 22, 2019, at which time, respondent moved orally for the instant matter to be dismissed, because it was moot. The undersigned ALJ set a briefing schedule for both parties relative to the motion. Respondent filed their brief in support of their motion to dismiss on August 29, 2019.

In support of its motion, respondent argued that petitioners' requested relief for the development of an IEP for G.B. is moot because petitioners moved out of the respondent's district and therefore, respondent is no longer responsible for providing educational services to G.B.. See, S.N. v. Old Bridget Twp. Bd. of Educ., 2006 U.S. Dist. LEXIS 83469 (D.N.J. Nov. 14, 2006; Board of Educ. v. Nathan R., 199 F.3d 377 (7th Cir. Nov. 12, 1999). Petitioners moved out of respondent's district on July 28, 2019. They now reside in a different county. Petitioners' new school district is responsible for providing educational services to G.B..

Additionally, respondent argued that G.B. is not entitled to compensatory education because petitioners moved out of respondent's district, and therefore, their request compensatory damages is also moot. Petitioners voluntarily left the district during pendency of this litigation. Respondent maintained that petitioners failed to adequately plead a claim for compensatory education. Also, petitioners did not arrange a school placement for G.B. at their own expense, during their period of dispute with respondent.

Respondent is unaware whether petitioners spent any money on Dr. Foster's psychological evaluation at Nemours in 2018.

Further, respondent argued that petitioners' claim for compensatory education is vague because it merely stated that respondent failed to provide appropriate educational services "for years." This generalization is insufficient to maintain a compensatory education claim. Respondent conceded that courts will permit a party to maintain a claim under the IDEA, when the claim is not dependent on whether the student has moved out of district. K.B. v. Haledon Bd. of Educ., 2009 U.S. Dist. LEXIS 55388, *13 (D.N.J. June 29, 2009). However, despite this, the claim for compensatory education becomes moot once the student voluntarily leaves the school district, if the parents had not expended their own money to place the child in an appropriate education placement.

Alternatively, respondent maintained that if the compensatory education claim is not moot, it still must fail because it is impossible for this tribunal to award compensatory education for an indeterminate amount of time, as petitioners have requested.

Finally, respondent alleged that "petitioners were consistently provided the opportunity to resolve the litigation in a reasonable and cost effective manner that provided G.B. with certain educational services over and above what the student previously received." Respondent maintained that "despite all efforts to the contrary, the petitioners relentlessly and voraciously insisted on G.B. receiving an IEP." ¹

For all of the above reasons, respondent requested that the matter be dismissed as moot.

In opposition, petitioners argued as follows. Petitioners' due process petition alleging that respondent failed to provide G.B. with a free, appropriate, public education

¹ In this regard, respondent's *ad hominem* comments about petitioners' actions in this matter, implying that the petitioners had not acted in good faith in maintaining their causes of action, positions, or in settlement discussions will not be addressed at length herein. Notwithstanding same, this tribunal found no evidence of bad faith on the part of petitioners. Similarly, this tribunal found no ill or inappropriate motive of petitioners in this matter. The facts that petitioners rejected an offer of a 504 plan, which included some of the recommended services, as respondent argued during this matter, and sought an IEP are insufficient to establish bad faith under the totality of circumstances presented herein.

included a request for the development of an IEP for G.B. and other compensatory education. Respondent's actions are contrary to the characterization alleged in their brief in support of the motion. Respondent continued to refuse to consider evaluating G.B. for special education services throughout months of extensive settlement negotiations, after the petitioner was filed.

Petitioners argue that compensatory education is an equitable remedy, which covers all of the remedies that petitioners have sought in this matter. Compensatory education is designed to compensate special education students for rights that have been denied to him by a school district. D.F. v. Collingswood Borough Bd. of Educ., 694 F.3d 488, at 497 (3d.Cir.2012). Compensatory Education can include reimbursement for expenses or establishment of an educational fund for the student. Id. at 498. Compensatory education does not have to be monetized.

When students relocate to a new district, a compensatory education award can require a school district to pay the student's new district or to contract with providers to provide, tutoring, counseling, or other support services. Id. at 499. A compensatory education award ought to be "reasonably calculated to provide the educational benefits that likely would have been accrued from special education services the school district should have supplied in the first place." Reid v. District of Columbia, 43 IDELR 32 (D.C. Cir. 2005.) Petitioners maintained that development of an IEP is itself a form of compensatory education.

Petitioners noted that respondent's argument rests on the S.N. case, which is an unpublished decision. The Third Circuit has resoundingly rejected the reasoning and conclusions of the court in S.N. In this matter, a compensatory education award is warranted to put G.B. in the position he would have been in had the respondent fulfilled its obligations to him.

Finally, petitioners argued that compensatory education claims are not moot when a student moves out of a district. An award of compensatory education services requires a district to pay expenses they should have paid all along. Sch. Comm. Of Burlington v. Dep't of Educ., 471 U.S. 359, at 370-71 (1986). In D.F., the Court found that a claim for

compensatory education is not rendered moot by a move out of district or state. Petitioners maintained that this is true, even if the student receives services in a new district.² To dismiss a valid compensatory education claim as moot because the parents of a student relocate to a new district would reward school districts who fail to provide FAPE to special education students. This would subvert the purpose of the IDEA.

Petitioners submit that G.B. is entitled to compensatory education for the deprivation of his rights.

Decision

For the following reasons, the respondent's motion to dismiss will be treated as a motion for summary decision. While N.J.A.C. 1:1-12.1 does not specifically limit the types of motions that may be made in administrative hearings, and a motion to dismiss is not otherwise precluded under the Uniform Administrative Procedure Rules, the more common method for resolving a case on the papers without a plenary hearing in administrative proceedings, is by a motion for summary decision under N.J.A.C. 1:1-12.5.

Pursuant to N.J.A.C. 1:1-12.5(b), summary decision may be "rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Further, "[w]hen a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." *Ibid.* This standard is substantially similar to that governing a civil motion under New Jersey Court Rule 4:46-2 for summary judgment. E.S. v. Div. of Med. Assistance & Health Servs., 412 N.J. Super. 340, 350 (App. Div. 2010); Contini v. Bd. of Educ. of Newark, 286 N.J. Super. 106, 121 (App. Div. 1995).

In Brill v. Guardian Life Insurance Co., 142 N.J. 520, 540 (1995), the New Jersey Supreme Court set forth the standard governing a motion for summary judgment:

² It is unknown whether G.B. is receiving special education and related services in his new school district.

[A] determination whether there exists a “genuine issue” of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The “judge’s function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.

An action is moot when it no longer presents a justiciable controversy because the issues raised have become academic. For reasons of judicial economy and restraint it is appropriate to refrain from decision-making when an issue presented is hypothetical, judgment cannot grant effective relief, or the parties do not have a concrete adversity of interest. Anderson v. Sills, 143 N.J. Super. 432, 437 (Ch. Div. 1976); Fox v. Twp. of E. Brunswick Bd. of Educ., EDU 10067-98, Initial Decision (March 19, 1999), aff’d, Comm’r (May 3, 1999) <<http://lawlibrary.rutgers.edu/oal/search.html>>; J.L. and K.D. o/b/o J.L. v. Harrison Twp. Bd. of Educ., EDS 13858-13, Final Decision (January 28, 2014) <<http://lawlibrary.rutgers.edu/oal/search.html>>.

In this matter, petitioners brought forth several claims in their due process complaint, including the development of an IEP and for an award of compensatory education. It is clear that compensatory education claims survive the relocation of a student to a new district. D.F. v. Collingswood Borough Bd. of Educ., 694 F.3d 488, at 497 (3d.Cir.2012). When students relocate to a new district, a compensatory education award can require a school district to pay the student’s new district or to contract with providers to provide, tutoring, counseling, or other support services. Id. at 499.

Respondent’s arguments that petitioners’ compensatory education claim is moot because the petitioners submitted no evidence of out-of-pocket expenses for which they seek reimbursement and because the time frame for which they seek compensatory education is too vague are without merit. Compensatory education is not limited to reimbursement for out-of-pocket expenses. Id. Additionally, G.B. attended respondent’s district for two years only. Therefore, their prayer for relief for compensatory education “for years” is a known time frame. It is not vague.

In this matter, although respondent can no longer be ordered to develop an IEP for G.B. due to his family's relocation to a new school district, it does not render petitioners' due process claims moot. The issue of whether G.B. was denied a FAPE by respondent's refusal to provide an IEP, evaluations, and special education and related services is still a justiciable issue and is integral to the issue of whether G.B. is entitled to compensatory education. The relief sought by the petitioners has neither been provided, nor agreed upon by the Board.

Based on the foregoing, I **CONCLUDE** that genuine issues of material fact exist. I further **CONCLUDE** that the issues presented in petitioners' due process petition are not moot. I hereby **ORDER** that respondent's motion to dismiss based on mootness is **DENIED**.

FACTUAL DISCUSSION

Testimony

For respondent

Margaret Sheldon (Sheldon), is employed by respondent as a second grade teacher. She has been employed by respondent for five years. She taught for seven years before that in another district. (R-1.) Her job duties include planning and implementing instruction for her students, maintaining order in the classroom, discussing issues with her colleagues, and recording data based on assessments.

Sheldon was G.B.'s second grade teacher for the 2018-2019 school year and has known him and his parents since September 2018. G.B. turned eight years old during the 2018-2019 school year. There were nineteen students in the class. It was a general education class. All curriculum subjects were taught in the classroom. The specials were taught outside the classroom. G.B. participated in the curriculum and specials. Instruction was completed using a variety of techniques and programs in large group and

small group instruction. G.B. participated in recess and eats lunch in the cafeteria. G.B.'s attendance was regular. As far as Sheldon knew, G.B. came to school willingly.

Sheldon reviewed G.B.'s progress reports and his first trimester report card. (R-3.) The Trimester One Progress Report, dated October 22, 2018, was issued during the mid-point of the first trimester of school. G.B. received all A grades. He received commendations including "has good work habits," "shows steady progress," and "takes pride in his work." G.B. received all A grades on his Trimester One Report Card, dated December 4, 2019. G.B. received commendations in his Trimester Two Progress Report, dated January 30, 2019, which included, "displays a positive attitude," "shows steady progress." G.B. received A and B grades. Sheldon indicated that G.B. demonstrated academic success in the classroom. G.B. was not provided with any special accommodations in order to achieve this level of success. Sheldon testified that there were no specific classes or grading for social skills. She further testified that there is a Character Education Program, i.e., being able to work together, but that there is neither any objective criteria for evaluation, nor a grade for same.

Sheldon testified that G.B. did not engage in any behaviors in the classroom, which interfered with the ability of other students to learn. Sheldon testified that G.B. did not demonstrate any significant behavioral deficits which interfered with his ability to learn in the classroom. Sheldon testified that she did not need to take any disciplinary actions against G.B. during the school year. (R-6.) Sheldon testified that life skills are being able to dress yourself, tie your shoes and feed yourself. G.B. had no deficits in these skills. Sheldon observed that G.B. had two students in the class who she considered to be his friends, and that he was friendly with a variety of students. Sheldon stated that G.B. was a social child, who exhibited no significant social deficits in her classroom.

Throughout her career, Sheldon has referred five or six students for Special Education. In these instances, it was "mostly because they're not performing at the grade level standards." She did not refer G.B. Sheldon did not have to communicate with petitioners about G.B.'s academic performance.

Sheldon communicated with petitioners about G.B.'s behavior. (P-10.) She reported an incident with G.B. that concerned her. At the end of a school day, during the second week of school, she permitted the students to play. Since the Chromebooks were already put away for the day, they were not utilizing them to play. Chromebooks is a favored activity for G.B.. On that day, G.B. started crying in front of the other students, because he could not use the Chromebook. No other student had difficulty transitioning to a different activity. Sheldon attempted to provide G.B. with other things he could do in the classroom. G.B. had difficulty coming up with alternatives to the Chromebook. As a result of this incident, Sheldon called G.B.'s mother to explain what happened and ask his mother to help him develop a list of alternate activities. He brought a list to school after the incident. Sheldon asked G.B.'s mother for the specific strategies they utilized at home to redirect him. However, they did not use the alternatives from the list because G.B. has happily participated in activities other than Chromebooks since that incident.

Sheldon also sent an email to the district's school counselor, Angelina Weston (Weston), about G.B. and the incident. (P-15.) Sheldon was looking for ideas she could use with G.B.. In that email, Sheldon wrote that "G. demonstrated a fixed mind set and couldn't adapt to choosing a new activity." Sheldon further wrote that "[o]nce he focuses on a task or activity that he wants to do, he's unable to refocus to another task or activity." Finally, Sheldon wrote as follows: "[t]his situation makes me feel very uneasy!!" [emphasis original.] Sheldon indicated that Weston would know what she was referring to by this statement. Sheldon testified that what made her feel very uneasy was that she "was feeling uncomfortable about the situation knowing that there was a lawsuit going on that makes me feel uncomfortable." [T1-94: 18-23.] Sheldon had been informed at the beginning of the year about the lawsuit.

Sheldon testified about an additional email she sent to Weston on October 28, 2018, in which she expressed that she had specific social concerns for G.B. She wrote that G.B. "works independently, doesn't really collaborate with a partner." (P-15.) Sheldon further wrote that G.B. "has rigid thinking, ideas come into his head and he can't move past them."

Sheldon testified that she sent an email, dated November 18, 2018, to Jennifer Clune (Clune), the respondent's Learning Consultant, who had been a Special Education Teacher during her career, asking for advice because G.B. was "really struggling with independent work, center work and chapter book." (P-15.) Sheldon wrote that she believed it was a time management issue. Sheldon wrote in the email that she asks, "him before Daily 5 centers begin what activities he is going to complete, which he works on (if I don't ask, he just goes on Epic) but then (sic) never seems to turn the work in-probably because he needs just a little more time to complete them but then never seems to complete them." (P-15.) Sheldon noted that when G.B. does finish his reading he does not take the time to stop and jot down the notes she requested. When he does jot down those notes, he writes the same things. (P-15.) Sheldon continued to write that "[t]here are also issues with organization." She further wrote as follows: "which I understand is a part of who he is." Sheldon testified that she wrote this because she was aware of his diagnosis. She stated that she has other second grade students who also have issues with time management and organization.

Sheldon also emailed Jessica Mahoney (Mahoney), the respondent's principal, about G.B. (P-15.) Sheldon referred to G.B. as her "special friend" and wanted to "talk to [her] about a situation" involving G.B. Sheldon indicated G.B. was one of a few students involved in a conversation about "poop," and she wrote to Mahoney because she thought it might involve the code of conduct.

Sheldon indicated that she filled out reports for the evaluation of G.B. which was completed by Samantha Townsend (Townsend) for Beyond Communications. Although she had not read Townsend's report, Sheldon indicated that she was not surprised that Townsend wrote that Sheldon's input for the evaluation revealed that G.B. struggles with attention, executive functioning, higher level language and rigidity. Sheldon testified that Townsend observed G.B. in the classroom. Sheldon testified that Townsend only observed G.B. during recess and lunch and not during instruction. In response to questioning about Townsend stating she observed G.B. in Sheldon's Written Expression class, Sheldon then testified that she could not exactly recall when Townsend observed G.B. in class, but that it was possible she observed the small group instruction or G.B. working independently.

Sheldon testified that G.B. does not engage in unusual vocalizations, when he is doing his work. Sheldon denied telling Townsend that G.B. had a habit of annoying students throughout the day by asking questions and continuously attempting to engage them in conversations. She stated that he talks to other students, but was not sure if it annoyed other students. Sheldon testified that she told Townsend that G.B. does not collaborate much and needs to be reminded to work together. Sheldon testified that P-6 is the form Sheldon filled out for Townsend's evaluation. On this form, Sheldon indicated that G.B. never engages in comforting others. Sheldon testified that G.B. does not often have difficulty waiting for his turn. However, at #51 on the form, Sheldon indicated that G.B. often has difficulty waiting his turn. (P-6 at #51.) Sheldon noted that G.B. never stands up for himself when being treated badly. Sheldon offered that the form said she could select "never" if she had not observed this behavior. Sheldon testified she had never seen G.B. teased, G.B. never gets distracted easily, never talks back to adults, and never uses odd physical gestures in interactions. G.B. always follows classroom rules.

Barbara Harris (Harris), testified for respondent, by whom she is employed as the school psychologist. Her duties include being the case manager for the Child Study Team, providing consultation to all of the general education and special education teachers, providing counseling services, and in-service training to teachers. Harris reviewed her resume. (R-13.) Harris has a Master's Degree in Psychology, a school psychology certification, and an educational specialist degree. Harris also supervises Rowan University students for their interim or practicum courses. She worked as an independent contractor for other school districts on their Intervention and Referral Services Team and provided psychological evaluations and counseling. For these positions she also attended IEP meetings.

She has been employed as the respondent's school psychologist since 2003, although she has been a school psychologist since 1997. Among other in-service trainings, she provides training for teachers about how to identify executive function issues in students because it impacts a student in academics, behavior, and other ways. It can impact their math skills and their reading functioning. It can impact their ability to pay attention and organizational skills.

Harris currently serves as the case manager for sixty students. She testified that she has served in this capacity for approximately 1,500 to 2,000 students. As the school psychologist she performs evaluations involving cognitive functioning, which relates to IQ, adaptive behaviors, which relates to the ability to use social skills, and social emotional functioning, which relates to social skills, behavior, executive functioning, and attention skills. She has performed approximately 2,000 psychological assessments and produced related reports, during her career.

She has attended more than 2,000 IEP meetings. She has attended IEP meetings in which testing was done and a student was determined ineligible for special education and related services. Harris was qualified and accepted as an expert in the field of school psychology and developments of IEPs, in this matter.

Harris reviewed a letter from petitioners, dated May 25, 2018, to respondent's child study team, of which she is a member. (P-3.) This was written at the end of G.B.'s first grade year, during which Jessica McCarthy (McCarthy) was his teacher. McCarthy did not refer G.B. to the child study team. This letter was a request for an IEP to address G.B.'s skill deficits. It enclosed a Nemours evaluation which was completed by Tory Foster, PhD. (J-1.) Harris testified that two evaluations are required an initial evaluation of a student suspected of having an educational disability. Harris believed there was another evaluation, which was submitted to the respondent for kindergarten.

Harris testified that a classroom observation is required for an initial evaluation. Harris has never approved a student eligible for special education and related services based upon a single private psychological evaluation. Students who have disabilities are not deemed automatically eligible for special education and an IEP. One example was a student with autism, who had not been found eligible for special education services. Instead, that student has been supported in the general education classroom through a 504 Plan or other accommodations.

When Harris reviewed the parents' correspondence she was unaware that G.B. had significant delays in making progress with his behavior, social skills, and other

functional life skills. The parents wrote as follows: “[e]ven though G.B. is doing well academically, his education is obviously not just about academic progress...” The letter further indicated that IEPs were to address academic and functional performance skills. Harris testified that G.B. has an IQ of 122, which is the 93 percentile, according to Nemours. Harris did not know if Dr. Foster had observed G.B. in the classroom or if she had spoken with McCarthy during the 2018 school year. G.B. was diagnosed with Autism Spectrum Disorder (ASD). Harris testified that the student has to have an evaluation by a speech and language pathologist and a neurodevelopmental evaluation in order for a student to be diagnosed with ASD, pursuant to the administrative code. Harris testified that at the Initial Evaluation Plan meeting no further evaluations were determined to be necessary because child study team “did not feel that those evaluations needed to be completed.” [T2- 54: 23-25, -55:1] That is why the additional evaluations were not completed. [T2-55:3-5.]

In reviewing the Nemours report, Harris indicated that the Weschler Intelligence Scale for Children Fifth Edition (WISC-V), an intelligence test which is administered to children who are six to sixteen years old, was administered to G.B.. Harris testified that the WISC-V is reliable. She has administered it numerous times. The WISC-V provides a full-scale IQ, which it breaks into five composites. They are verbal comprehension, fluid reasoning, working memory, and processing speed, which includes visual processing and the visual spatial index.

The Nemours report indicated in “Results,” that G.B.’s “social communication difficulties in engagement and repetitive play restricted interest have significantly impacted his social functioning, development of relationships and adaptive functioning.” (J-1.) Harris believed this conclusion was based on parent input and observation of G.B. during the testing situation. Harris read further from the Nemours report. It stated that G.B. had age appropriate academic skills. It additionally stated that “[t]hese vulnerabilities also seem to be affecting his educational functioning as G.B.’s teachers indicated difficulties with staying attention, limited responsiveness.” However, Harris testified that Dr. Foster did not observe G.B. in the classroom. Harris further read from the report. It stated as follows:

“[a]lthough he demonstrates age appropriate reasoning and achievement his overall functioning at school is likely to be adversely impacted by these symptoms, for example executive dysfunction, behavioral inflexibility, difficult with transitions, concerns with peer socialization.”

Harris testified that executive dysfunction is difficulties with memory, cognitive flexibility, or self-regulation skills. Behavioral inflexibility is difficulty with transitions, like stopping a task and starting a new one. Peer socialization includes a child playing by themselves, or not being able to play with another child. The affected child may play alongside another child. The child could have issues with sharing.

Harris reviewed the initial evaluation plan meeting report, dated June 12, 2018. (J-2.) There had been a referral packet that was sent to the teacher to gather information prior to the meeting. (R-7.) McCarthy entered the Fountas and Pinnell (F&P), levels and the date, 5/18 level Q, in the appropriate box. Q level shows that the student is on a level equivalent to the end of third grade to the beginning of fourth grade. His statewide assessment math score was 205 which was equivalent to fourth grade, approximately. G.B. achieved a Mastered, (M), grade in math with a Working Towards, (W), grade in organization.

In completing the referral packet, McCarthy indicated that she had no major behavioral issues with G.B. He had friends and was social. G.B. benefitted from schedules and routines. McCarthy had no major behavior or academic concerns, which needed to be addressed by the child study team. Harris, who participated in the initial evaluation plan meeting, indicated that no further assessments were needed. Harris testified that she agreed with this determination. Harris confirmed that the team discussed the differences between a 504 Plan and an IEP with the parents. They also discussed the accommodations which could have been provided to G.B. pursuant to a 504 Plan.

Harris testified that when it is determined that evaluations are not required, the child study team must provide the reasons for that determination pursuant to the administrative code. Harris testified that they are not listed in their determination. (J-2.)

She indicated it was below under “Other,” which is the section which discussed the 504 Plan versus IEP. The discussion of accommodations was to help G.B. be more successful. She suggested that it was because he does not have a significant disability that warrants special education however, she admitted it was not written there.

Although Harris participated in the meeting, she had not met with G.B., observed G.B. in the classroom, conducted any counseling sessions, or had any significant contact with him. She had reviewed Dr. Foster’s report, although it was not referenced in detail in the information provided for review. None of the specific interventions recommended by Dr. Foster were included in the plan. Harris acknowledged that McCarthy spoke about G.B.’s distractibility and sloppy work at the meeting. Harris could not recall if McCarthy spoke about G.B.’s difficulties understanding idioms. Harris could not recall a discussion about the April Bee Ball event, during which G.B. became frustrated and began to cry, because he felt the challenge was too hard. She did not recall any discussion of incidents in which G.B. broke down and began to cry. Harris indicated that the gym teacher relayed to the child study team that G.B. would get upset and act like he does not want to participate when things were not going his way or he was having a hard time with the game.

There were no written recommendations in the initial evaluation plan. Harris testified that an IEP could be developed for a student who only had social and emotional functioning and behavioral needs. However, she indicated that those needs would have to be significant and interfere with the student’s academics. She then testified that an IEP could not be developed without an academic impact. Harris then testified that “a student could be functioning at grade level but have significant needs in other areas that impact their educational functioning and they need special education services.” [T2-87:19-23.] Harris testified that educational function includes areas beyond grades. However, it does not include social skills or executive functioning.

Harris was aware Townsend recommended speech and language therapy for pragmatics. (J-3.) She was aware Townsend recommended specific social skill intervention and instruction. Harris agreed that G.B. should receive social skills intervention and instruction. Harris testified that he needed social skills intervention in

June of 2018. Harris testified that this is one of the services which was then recommended by respondent to the parents. Harris did not know if those services were being provided to G.B., but G.B. was receiving counseling from the guidance counselor.

Harris never conducted a structured observation of G.B. Harris testified that she accepted G.B.'s diagnosis of autism. She noted there was also an initial evaluation plan meeting at the end of kindergarten. No additional assessments were completed then either.

Angelina Weston (Weston), is employed by respondent in the position of school counselor for kindergarten, first, and second grade students. She has been employed full-time by respondent for nine years. She was employed by respondent on a part-time basis for approximately two years before being hired for a full-time position. (J-5.) Weston counsels about twenty different students each week, usually in small groups of no more than four students. Each session is approximately thirty to forty minutes.

Weston casually met G.B. when she visited his kindergarten classroom to teach character education and positive behavior programs. She did not provide counseling to G.B. in kindergarten or in his first grade year, 2017-2018. Weston provided counseling to G.B. during second grade. (J-4.)

Weston reviewed her counseling log. (J-4.) She testified that on June 12, 2018, she contacted G.B.'s parents to set up a 504 Plan eligibility meeting, because she had been notified by the Child Study Team that G.B. did not qualify for an IEP. Weston did not recall if the petitioners responded to her request. She received a placement request from G.B.'s parents regarding which teacher G.B. and his sister would be assigned to during the 2018-2019 school year.

Weston reviewed an email from Beth Godfrey (Godfrey), the child study team supervisor, dated October 29, 2018. (R-12.) This email was copied to Mahoney. This email related to how Weston begins and conducts counselling with all of her students. The counselling sessions are usually weekly and last thirty minutes. The first session relates to the goals for the student. The goals Weston listed were identifying what others

are feeling using physical and verbal cues, identifying words to help name his own feelings, identifying strategies to calm down strong emotions, and shifting topic appropriately. Weston indicated that updating the parents on a student's progress was usually individualized and depended on how often the parents wanted an update.

Weston first provided counselling to G.B. on January 4, 2019. (J-4.) A new member joined G.B.'s group on February 8, 2019. G.B.'s sessions were forty minutes long. In the beginning, G.B. worked on relationship building and whole body listening. G.B. did not complain about going to counseling. Weston testified that he was definitely engaged in the counselling sessions. Weston stated that the notations in her log did not reflect a mastery of the skills and goals she was addressing with G.B.

As part of counselling, G.B. was required to produce a journal of what he had learned. Its purpose was to serve as a resource to him in the future. Both Weston and G.B. wrote in the journal. G.B. recorded that he was friendly and outgoing. He was positive about himself. G.B. covered programming including books to learn flexible thought, understanding cues, positive thinking, and thinking about how others perceive you. G.B. interacted with the other student in the group.

During the school year, Weston spoke with Sheldon about what she observed in the classroom and what G.B. needed to work on for counselling goals. Weston indicated that Sheldon had no significant concerns. Sheldon did mention rigid thinking, which is not being able to think outside the box and not being able to see others' perspectives. It is focusing on what you are thinking and feeling, and not what others are. G.B. continued to work on flexible thinking and perspective during counselling.

Weston testified on cross-examination that she believed that when Sheldon wrote to her "[j]ust saying this situation makes me feel very uneasy," Sheldon was referring to the situation and that an attorney was involved. Weston knew an attorney was involved, because she had met with the school's attorney in September. On cross-examination, Weston testified that she had "sometimes" expressed to the parents that G.B. had difficulty with self-control. G.B. occasionally had attention issues and needed to be redirected. Weston stated that she told the parents at a March 13, 2018, conference that

she saw issues with G.B.'s self-regulation in social situations, after she had observed him during recess. Weston advised the petitioners that she would work on this with G.B. Weston testified that she noted that G.B. was engaging in "silly" behavior several times in her log and testimony. She said characterized behavior as not paying attention, distracted, physically moving around and not paying attention.

Jessica McCarthy (McCarthy) testified for respondent. McCarthy is employed by respondent as a first grade teacher. She has been employed by respondent for fifteen years. She holds an elementary education certificate and a special education certificate. Her duties include teaching science, social studies, math, reading, making sure the students feel comfortable, shine in their own ways, and understand the curriculum. She is also responsible for communicating with parents and other staff members. There are nine sections of first grade. She taught G.B. during the 2017-2018 school year. G.B. was in first grade. There were twenty-one students in the class. Four students attending that classroom for part of the day were special education students. When those students were in the classroom, an aide accompanied them. A student teacher was also in the classroom from April until the end of the year.

McCarthy indicated that G.B. would come into class in the morning with his older sister, who made sure that he would get to class or came in to wish him a great day, if he arrived just before her. G.B. unpacked his bag and started the morning routine and assignments. The class would then begin their lessons and activities. G.B. was compliant with these tasks and did not resist doing the work. McCarthy considered G.B. to be above grade level in reading and "bright," as were several other students in the class. In September, the class was given the F&P test which aids in determining a student's reading level. These students scored above grade level on that test. First graders are supposed to be at level "D." G.B. was at level "L." McCarthy adjusted the reading programming to challenge these students. For example, she gave them challenge words to learn instead of the class words because he already knew them.

G.B.'s mother had talked to McCarthy about concerns she had with G.B. including inferencing and trying to figure out how the characters feel. McCarthy testified that these are a really tricky skill for kids. McCarthy stated that G.B. did not engage in any behaviors

in her class, which interfered with his ability to learn or other students' abilities to learn. G.B. did not engage in any behaviors which interfered with her ability to teach the curriculum to G.B. or any of the students. G.B. did not engage in any behaviors which caused him to receive a disciplinary action.

G.B. interacted socially with his classmates. McCarthy testified that he had lots of friends. "The funny thing about my class last year was they all were like – they liked to play together." [T3-24: 17-19.] There were times when G.B. would just want to draw by himself. Sometimes students just want to do their own things. McCarthy stated that G.B. played like a typical first grader. He had two really close friends and they would play together often.

McCarthy contacted G.B.'s parents about concerns she had about socialization problems twice during the school year. However, McCarthy thought these were typical first grade issues. One example was the Bee Ball. It is a bumblebee themed activity. If the students were walking in the hall nicely or they get a compliment, then the student could get a bee on the wall. At the end the period for this activity, the students get a Bee Ball party, which includes a funny science experiment like making slime or making a maze and putting pom-poms through it. At G.B.'s Bee Ball, the class had different kinds of paper laid out and they had to choose the type of paper and make it into shapes which could hold books or hold folders. The students worked in teams to achieve the goal. G.B. became upset because he wanted to do it a certain way and he could not get it to hold the books or the folders. McCarthy attempted to help him and redirect him to no avail. McCarthy stated, "[b]ut the thing about that was, after it happened, it was over and he wasn't – it wasn't a tantrum; it was just him, like, kind of getting upset and crying, like, 'I couldn't get it to do what I wanted it to do.'" McCarthy called G.B.'s parents because he was upset. She indicated she would do this with any parent of a student who was upset.

There was another incident that McCarthy recalled involving G.B, about which McCarthy called his parents. The gym teacher alerted McCarthy that G.B. was very upset in class because they were on teams and his team did not or was not winning. G.B. was upset and sulking and did not want to play. McCarthy stated that many kids feel this way.

McCarthy explained that G.B. had a stuffed animal toy that he would bring into class. G.B. would then do stories or writings that would be from the stuffed animal. He would also insert statements that the stuffed animal would say. McCarthy permitted other children to also bring in a toy and use it in this way. There were only a couple of times when McCarthy had to call G.B.'s mother and let her know that G.B. was not paying attention, because he had taken his toy out in class when he was not permitted to do so. McCarthy advised the parent that G.B. needed to keep his toys put away during school. G.B.'s mother advised she would tell him he could no longer bring the toy to school. McCarthy also indicated that she had to email petitioners and let them know that G.B. was fooling around with the toy.

McCarthy testified that G.B. was a pleasure to have in class and that she did not have any major behavior issues with him. He did great academically. McCarthy provided G.B. with challenge work because he was performing above grade level. G.B. turned in his homework. McCarthy did notice that when she helped G.B. with his work, he would sometimes respond by wanting to do it his way and saying "No, that is not how I was I was (sic) doing it." This was not atypical behavior for a first grader. However, McCarthy did reach out to G.B.'s mother and advised that he was not doing his personal best and that he could do better.

McCarthy reviewed G.B.'s progress reports. (R-2.) McCarthy filled these out for first grade for all of the categories except the specials, like library, music, etc.. She entered comments about his grades which included, "participates in class," "well-mannered and respectful," "exceeding the standard," "applies extra effort," "pleasure to have in class." G.B. received mostly "M" (mastered) grades. All students received a "W" (working toward the standard) grade for science and social studies because the standards for these subjects were new. G.B. received "Ws" in art and physical education in the beginning of the year; however he received "Ms" for the remainder of the year. McCarthy indicated under "work habits" that G.B. "stays focused on tasks." G.B.'s desk was at times unorganized. He did not always comply when prompted to organize and clean it. She gave him "Ws" in these areas.

In the Fall, petitioners attended a conference with McCarthy. McCarthy stated that the petitioners were upset because G.B. did not get accepted into the special reading program, Beyond the Books. McCarthy explained that that was because of the respondent's rules. McCarthy explained that G.B. did not qualify for this special program because McCarthy gave him "Ws" in the work area.

After the petitioners referred G.B. to the child study team, McCarthy filled out paperwork the team requested after the school year ended. (R-7.) G.B. progressed throughout the year and by the end of the school year he read on an "L" level, which was above second grade level. He performed on a high level in math also.

Relative to the category of Learning and/or Behavioral Concerns, McCarthy wrote that she had "no major behavioral issues with G.B. He has friends in class and is social." She wrote that he benefits from a schedule and routine, which is typical of a first grader. McCarthy felt there was no reason for her to refer him to the child study team. Relative to G.B.'s strengths, McCarthy checked the following categories, positive attitude, hard-worker, works well independently, respectful of authority, motivated, cooperates, creative, musically talented, and artistically inclined. McCarthy also indicated that G.B. was very compassionate. Under the category of Academic Concerns, McCarthy checked disorganized and other. McCarthy testified that she selected other because G.B. had "some trouble with the idioms, expressions, and inferencing." Many first graders struggle with these skills. Under the category of Behavioral Concerns, McCarthy indicated that G.B. was "easily distracted." McCarthy testified that this is typical for a first grader. McCarthy indicated that there was no need for an Intervention and Referral Service plan (I&RS).

On cross-examination, McCarthy reviewed the Nemours evaluation and stated that she received it from petitioners in May 2008. McCarthy reiterated that G.B. did not display any atypical behavior for a first grader. Under "Emotional and Behavioral Functioning, Behavioral Assessment System for Children, Third Edition," McCarthy's responses to the Nemours evaluation request for information showed that her scoring indicated that G.B. was at risk for attention issues. McCarthy acknowledged that G.B. had attention issues. When directed to the section labeled "Conner's Third Edition Rating Scales," McCarthy

indicated that she was not surprised that G.B. had elevated inattention for his age group because he had attention issues. (J-1.) Relative to the Autism Spectrum Rating Scales, McCarthy's information reported G.B. as very elevated for unusual behaviors, very elevated for attention and self-regulations for behavioral rigidity, impulse control. McCarthy suggested that these results arose from the fact that G.B. was above level in language. McCarthy acknowledged that G.B. had issues with attention and behavioral rigidity.

McCarthy participated in the Initial Evaluation Plan Meeting. (J-2.) McCarthy stated that she has seen G.B. have a blinking tic. McCarthy declined to say G.B. had a sing-songy voice and that he had difficulty with empathy.

Relative to the child study team referral, McCarthy indicated under Learning and Behavioral concerns that G.B. could "become very distracted and then his work may become sloppy or not his best." (R-7.)

McCarthy reviewed a video, taken by G.B.'s mother, of G.B. at a December school concert in second grade. (P-14.) G.B. engaged in a blinking tic. G.B. was doing movements, but not the same as the rest of his classmates. McCarthy testified that she never saw him act like that and that if she had she would have contacted the parents because "I feel like that was more of a prevalent thing going on."³ McCarthy was not present at this second grade concert because she was on maternity leave.

McCarthy gave G.B. "Ws" in "Listens Attentively" and "Organizing" and this prevented him from participating in the Beyond Books program.

³ P-14 was ordered sealed because other students were recorded on it. Respondent objected to the use of this video during the hearing and its admission into evidence. It was admitted into evidence. While the video displayed G.B.'s behaviors which were consistent with the testimony and evidence in this matter, the video was a small clip of G.B.'s performance during his second grade holiday concert in December 2018. Although the video was authenticated, no evidence was produced to place the video in context relative to the G.B.'s activities, events of his day, feelings about participating in the concert, etc. As a result, although admitted, it was not relied upon by this tribunal in reaching the decision. Having said that, McCarthy indicated she would have referred G.B. to the child study team or at least reported this behavior, if she had been at that concert, which she was not. However, it is troubling that other teachers and staff were present at that concert and it appears that no one else referred G.B. or reported the concerns, which were apparent on the video and to McCarthy.

McCarty on the initial evaluation plan meeting report indicated that the Social Emotional Considerations, Other were a subcategory of parent input.

For petitioners

Tori Foster, Ph.D. (Foster), testified on behalf of the petitioners. This was her first time testifying at any administrative hearing. Dr. Foster earned a Doctorate in Educational Psychology with a concentration in School Psychology in 2010 from the University of Georgia. (P-13.) This six-year program focused equally on the disciplines of education and psychology and included coursework and practicum experiences. In her clinical experiences, Dr. Foster conducted evaluations of students related to learning disabilities, intellectual impairment, and social, emotional, and behavioral concerns. Dr. Foster worked in public schools as a school psychologist, for which her duties included participating in special education eligibility meetings, gathering data about those students, monitoring their progress, determining whether students met the criteria for a disability in terms of their learning, and developing and implementing plans for those students. Dr. Foster trained and consulted with teachers. Dr. Foster also worked outside school settings to learn additional skills to provide services to children with medical complexity, like genetic disorders, and behavioral interventions.

Dr. Foster completed an internship at the University of Nebraska Medical Center (Nebraska) during which she worked in primary medical care settings, including pediatrician's offices, because they are usually the front line for parental concerns about behavior, and in the public school system. While at Nebraska, Dr. Foster trained in administering, scoring, and evaluating the Autism Diagnostic Observation Schedule (ADOS). Dr. Foster completed a fellowship at Vanderbilt Medical Center in their Treatment and Research Institute for Autism Spectrum Disorders. During this fellowship, Dr. Foster evaluated five children, from young children aged two through teenagers. Dr. Foster presently works at Nemours doing a combination of the diagnostic and assessment pieces, related to services Nemours offers to families for treatment. Dr. Foster continued her training, administration, scoring, and evaluations with ADOS.

G.B. came to Nemours through the Access Clinic, which is a referral by the family, who has some concerns, not necessarily specifically about one diagnosis but maybe a range of developmental concerns. The first visit is an interview, a review of history and some observation of the child. If there is sufficient concern during the first visit, then the child is referred to a specialist like Dr. Foster, who has more expertise related to specific diagnoses related to autism. Dr. Noeder conducted this first visit with G.B. and indicated there were concerns raised for ASD regarding G.B.'s history of hyper-focusing, obsessions, inattention, hyperactivity, anxiety, and social challenges. Dr. Foster also noted that G.B. had been evaluated prior to kindergarten, although not by Nemours, because of observed difficulties in transitions and non-compliance. Dr. Noeder recommended comprehensive, psychological testing for G.B.

Dr. Foster has not created IEPs; however, she administers the standardized testing, observes the student, evaluates information from parents, teachers, etc., and writes reports. She recommends educational services and goals to be included in IEPs. She has participated in eligibility meetings and IEP meetings. She has made determinations, pursuant to IDEA, about whether a student was eligible for special education and related services.

Dr. Foster was qualified and accepted as an expert in clinical psychology, school psychology and Autism Spectrum Diagnosis. There was a request that she be qualified and accepted in the preparation of IEPs. This was denied, not because Dr. Foster was not an expert in the development of IEPs, but because it is a necessary lesser included expertise in her fields of school psychology and diagnosis of ASD. It was not a separate discipline.

Dr. Foster explained the Nemours evaluation report that she prepared about G.B. (J-1.) G.B. was referred to Dr. Foster through Nemours' behavioral and developmental access clinic, which is a screening mechanism to determine which children need further evaluation. At that level, G.B. was seen by a psychologist, Dr. Noeder, who determined that full psychological testing was in order. G.B. was then referred to Dr. Foster and scheduled for a testing visit. Input from G.B.'s parents and teacher was requested. On March 9, 2018, Dr. Foster conducted a parent interview and reviewed medical records,

which are included in her findings in the report in the developmental and medical history and educational history sections. Dr. Foster observed G.B.

The Diagnostic and Statistical Manual, (DSM-5), sets forth the criteria for a diagnosis of autism, which includes difficulties in two significance areas. Those are social communication, and repetitive or restricted behaviors, interests or activities. When evaluating the child for this diagnosis, Dr. Foster considers her own observations, and information from the child's parents, teachers, and others, who see the child interact with others.

Relative to her report, Dr. Foster made "Behavioral Observations" of G.B, who was then seven years old. (J-1.) G.B. was endearing and had lots of energy. He followed his interests and impulses pretty freely. He expressed topics that related to his interests, as they popped into his head. As a result, Dr. Foster was required to provide pretty concrete prompting to clearly steer the conversation in a certain way. Alternatively, she had to ask him a question that was more to the point and more direct, instead of relying on him to pick up on the fact that they needed to move onto another topic." [T5-66, 67:1-13.] Dr. Foster was also required to provide some behavioral prompting, which included redirecting G.B. back to his chair, or trying to motivate him to get through the activities by promising him a prize. Dr. Foster opined that her observations were consistent with a diagnosis of ASD, with G.B. being at the higher functioning end of the spectrum. He used sophisticated language. However, he had difficulties picking up on non-verbal cues or engaging in a free-flowing back and forth conversation that felt balanced and did not feel one sided. Dr. Foster testified that this was in line with the first criteria for autism. G.B. had a tendency to discuss and fixate on his interests and talk at length and with specificity about them. Dr. Foster testified that that was very akin to the symptoms that are outlined in the DSM for the second criteria for autism.

G.B. displayed some symptoms of behavioral inflexibility, which included completing activities in a preferred manner. Despite repeated direct instructions to do it in a different manner, G.B. continued to do it in his preferred way. Dr. Foster testified that this is a symptom of ASD. Dr. Foster opined that these symptoms are definitely not typical for a child his age. While some six-year-old children display some of these symptoms

some of the time, the totality of symptoms G.B. displayed, including those very specific symptoms that he displayed, are associated with ASD.

The first assessment given to G.B. was Child with Autism Rating Scale, Second Edition, High Functioning Version (CARS). This is a clinician completed scale, which means the doctor fills out a paper protocol. The headings for the CARS' sections include, Object Use in Play, Listening Responsiveness, Visual Sense, or Social Emotional Reciprocity. Numeric ratings for each of these are based on Dr. Foster's observations of G.B. and information received from the parents. The scores are added up and determine the level of child's symptoms, either no evidence, mild to moderate, or severe. G.B.'s results yielded a score in the severe level. Dr. Foster opined that the result was valid because it was based on her observations and parental information. Dr. Foster concluded that "[t]hese concerns elevated to a degree indicative of severe symptoms of ASD."

G.B.'s parents and McCarthy, the first grade teacher, completed the Autism Spectrum Rating Scales (ASRS). This is a standardized questionnaire. There are normed scores that had been collected by sampling across the United States over a number of years. Dr. Foster testified that this was to make sure that what she observed about G.B. is representative of how he behaves outside of the clinic. The ASRS scores reflect the level of concern the rater has in comparison to expectations for that child's age and sex. The ASRS results showed that G.B. had difficulties with social communication, engaged in repetitive play, had restrictive interests, which significantly impacted his social functioning, difficulties in the development of relationships, and adaptive functioning. G.B.'s first grade teacher's report resulted in scores falling within the elevated to very elevated range on four of eight treatment scales. McCarthy indicated significant challenges with sustaining attention, limited responsiveness, not listening or seeming to listen, when spoken to in the school setting. This indicated that G.B. uses language in an atypical manner, engages in some repetitive motor mannerisms or repetitive interests, has difficulty tolerating changes to his routine, and has problems with attention and impulse control. These affect his educational functioning.

The next test Dr. Foster administered to G.B. was the Autism Diagnostic Observation Schedule-2 (ADOS), which is semi-structured. It is standardized in the

sense that it is always the same activities; however, the activities are less structured and more conversational or play-based. This test is thought of as the gold standard to look at social skills, communication skills and behavior. The test deliberately sets up social situations to observe how children respond. There is an elaborate coding system, and the evaluator looks at things from consistency of your eye contact, and whether you combine that with your words, and with gestures and your facial expressions.

G.B.'s results were a "mixed array." [T5-79:16-17.] He is able to speak very articulately. G.B. could use his skills, when it related to his interests and terms. During those tasks he could speak at great length and in great detail about the topic. During this communication he could maintain eye contact. However, when Dr. Foster was trying to pull more information out of G.B. about a topic, other than his choosing, and have him report on it, G.B. struggled. G.B. could coordinate gestures and his facial expression with his oral speech, but could not typically combine these with eye contact. Therefore, G.B. has a great vocabulary, but it was hard for him to use it when the communication was not initiated on his terms. G.B.'s responses could be really limited, awkward, or negative in some ways.

Relative to page 6, first full paragraph of her report, Dr. Foster made observations about G.B.'s repetitive and restricted behaviors. G.B. had atypical ways of talking. G.B. puts together sophisticated phrases that are stilted and sound like they have been lifted from somewhere or heard somewhere. Typically, children do not speak in this way to each other. G.B. also repeated certain phrases at different points. This is a symptom of autism. G.B. also speaks about things in very highly specific ways, which is slightly unusual. In relation to his play behaviors, Dr. Foster noticed that G.B. had some creative ideas and conveyed them through the little figures. However, G.B. gravitated to the objects, rather than the little people. He made the object the main character in the story. Dr. Foster attempted to direct G.B. back to playing with her. G.B. had a tendency to veer off and do his own thing. This also struck Dr. Foster.

Dr. Foster testified that the results of the ADOS yielded a value that was higher and placed G.B. over the cutoff for autism. "Overall [G.B.'s] performance... met classification for an Autism Spectrum Disorder. His overall comparison score indicated

that he is showing a high level of autism-related symptoms ...” Therefore, the symptoms of autism were present. G.B.’s score was at an elevated level, similar to his CARS score.

The third test Dr. Foster conducted was a cognitive assessment WISC-V, which evaluates children’s thinking and problem solving abilities. It involves how children process and reason with different types of information, like verbal information, visual spatial information, how fast a child can process really simple rote tasks, and how well they can hold things in their memory. If a child scores very low on the WISC-V, one would not expect their social skills to be at the same level. G.B. scored above average across different domains. Dr. Foster testified that he did the best on tasks that were looking at his visual special abilities and fluid reasoning, which is novel problem solving skills. A high WISC-V score does not mean that the child does not have autism.

Dr. Foster had G.B.’s parents fill out a BASC-3, which is broader questionnaire than the ASRS. The BASC-3 is administered similar to the ASRS. It is a questionnaire for parents and teachers. The BASC-3 looks at a broad range of different behaviors, including externalizing behaviors, internalizing behaviors, adaptive skills, symptoms of inattention or hyperactivity. The BASC-3 provides a general look at behavioral symptoms or emotional symptoms and does not correspond directly to a diagnosis. Dr. Foster is looking for patterns of elevations and symptoms.

Dr. Foster explained the questionnaire measures tables located on pages 10 through 12 of her report. (J-1 at 10.) The first table is the Adaptive Behavior Assessment System (ABAS). This is given to the parents and asks about the child’s everyday skills, which include self-help skills, cleaning up around the house, everyday routines, like bathing, and accessing the community. The first table is reporting on the measure that G.B.’s parents completed. Dr. Foster testified that for most of the scores, G.B. was in the average range. However, he was below average in areas related to his communication, and self-direction, which relates to initiative, independence, taking ownership of his tasks, and organizing himself. G.B. had a low score in home living, which relates to his everyday sense of managing his own activities at home, like cleaning up after himself and doing skills around the house. G.B. scored below average in health, and safety and self-care,

which are types of practical skills. These scores are normed against children of that age and sex.

The second table, (J-1 at 11) reports G.B.'s BASC-3 scores. It has two columns reflecting information from the parents and teachers. These table reflects all types of behaviors. It also reflects scores for the Conners-3, which is more focused on the symptoms that are associated with ADHD or other disruptive behavior disorders, like inattention, hyperactivity, problematic behaviors, and difficulty with peer relations. The scores are normed against children of that sex and age. Dr. Foster testified that on the BASC-3, both G.B.'s parents and teacher indicated scores for attention that were moderately elevated, or "at risk." The parents were indicating concerns with withdrawal which involves social engagement. The parents were indicating concerns with G.B.'s functional communication. Relative to the Conners-3 scores, the parents indicated that there were very elevated levels of hyperactivity and impulsive behavior. The teacher was not indicating that as much at school. G.B.'s parents and teacher indicated elevated scores for inattention.

The third table, (J-1 at 12) is the Autism Spectrum Rating Scale. This focuses specifically on areas associated with a diagnosis of ASD. These scores are normed against children that age and sex. The questionnaire was completed by G.B.'s parents and teacher. Dr. Foster testified that G.B.'s teacher actually reported more concerns in the areas we look for with autism, as compared to his parents. G.B.'s parents noted some scores that are considered high average in the areas involving G.B.'s ability to self-regulate his behavior and ability to interact with adults. McCarthy's scores were more elevated. McCarthy's ratings produced elevated scores for the broad categories of social communication and self-regulation. McCarthy's ratings produced very elevated scores for unusual behaviors.

In the broken down categories for treatment scales, which look at more specific areas of functioning, the biggest concerns for G.B. are in the areas like atypical language, which includes speaking in an odd way, and saying phrases out of context in terms of the social conversation. McCarthy's ratings produced an elevated score for atypical language. Stereotypy is looking at repetitive behaviors, which can include repetitive

mannerisms. McCarthy's ratings produced a very elevated score for stereotypy. For behavioral rigidity, McCarthy's ratings produced a very elevated score.

Dr. Foster testified that in G.B.'s case, the elevations occurred mainly in terms of his tendency to fixate on certain topics or subjects, which includes having unusual interest, in terms of focus and intensity, and having difficulty being flexible. McCarthy indicated that she had concern with G.B. tending to fixate on one way of doing things and having difficulty with redirection to other ways of thinking about doing things. These both relate to the stereotypy and behavioral rigidity scales. The last section in which G.B. received a very elevated score was related to his attention.

Dr. Foster testified that based on her observations and the assessments she made clinical impressions. G.B. has a medical diagnosis of ASD. G.B. is a very bright child, and had very high cognitive scores. G.B. has trouble in the consistency of his communication and communicating in a truly back and forth manner with others at the level expected for his age. There is a lopsidedness between G.B.'s cognitive ability and his social interaction. G.B. has difficulty making and sustaining age appropriate relationships over time. Relative to stereotypic behaviors, G.B.'s speech patterns were unusual for his age. G.B. had behavior and flexibility deficiencies related to following a certain routine and having difficulty with transitions. G.B. exhibited focus on highly specific interests.

Dr. Foster opined that "[a]lthough he's currently demonstrating age appropriate academic skills," all of his deficits and symptoms are impacting G.B.'s educational functioning. Dr. Foster reiterated that her opinion, relative to the impact on G.B.'s educational functioning, was primarily supported by McCarthy's ratings that were showing those elevated concerns in the school setting, which were at a level above the ones even that the parents were indicating on some of the scales. Dr. Foster testified "that even though he's getting the grades, essentially, these are the ways that this diagnosis can disadvantage him, in terms of his academics and in terms of his ability to engage in tasks that are not on his terms." [T5-98:2-24.] Dr. Foster expressed concern for G.B.'s broader educational functioning, which includes belonging in the school community, ability to participate in activities that do not just involve him and that are more social and involve

group work. Dr. Foster also expressed concern for G.B. stress wise and emotionally. Dr. Foster also testified that G.B. did not meet the diagnostic criteria for a specific disorder related to executive functioning, like ADHD. However, Dr. Foster noted in her report that if the symptoms related to ADHD persist and begin to interfere with his functioning at home and school, then further diagnosis may be warranted.

Based on her opinion, Dr. Foster made recommendations for G.B., including school programming and intervention. (J-1 at 13.) Dr. Foster reiterated that she found G.B. to have difficulty with attention, with organizing himself, getting started on tasks, keeping himself on track without a lot of redirection, difficulty with transitions and accepting when things differ from his own preferences or his own expectations. She reiterated the concerns related to G.B.'s communication, socialization, and belonging over time. Dr. Foster opined that "because of those areas, because those are clearly impacting educational functioning in a broad sense, I think that it's important to provide him with specialized support." Dr. Foster opined that G.B. required a formal learning plan, such as an IEP. The demands for G.B. are going to increase over time; socially things become much more sophisticated and difficult. Academic demands become higher and behavior expectations increase. McCarthy already noted some of these concerns.

Dr. Foster recommended a mixed model programming. He requires an appropriate academic environment for his learning and progress, to which other supports are added for the areas beyond academics. Dr. Foster recommended such services in her report. She noted social skills instruction was significant and necessary and that G.B. also potentially needs school based counseling or interventions that target behavioral and social concerns, with which he struggles.

Dr. Foster opined that G.B. is eligible for an IEP. First, she looked at special education law and determined that G.B. met the criteria a disability out of the thirteen categories outlined in the IDEA. G.B. also meets the second prong required by the IDEA, which looks at impact. G.B. meets the criteria that there is an adverse effect on his educational functioning. This looks at broader functioning, not just academic functioning.

Dr. Foster met with G.B. in February 2019, for a follow up visit, at which time she made certain observations relative to his progress and provided some practical help and advice to address some of the challenges they were facing with G.B. (P-5.) G.B.'s parents reported continuing concerns that were consistent with Dr. Foster's prior impression of G.B.. These included difficulties complying with expectations at swimming, because he had specific preferences for how he was going to spend his time, some emotional outbursts in home and community settings, when things did not fit his expectations, fell outside his routine, or the understanding that he had about the way things were going to unfold. G.B. continued to experience challenges in the school setting, and they had been called by school about his behavior related to his expected use of a Chromebook. G.B.'s parents related that they have seen him engage with peers; however, these activities are more parallel play than interactive play. G.B. continued to have difficulty with communication, including advocating for himself when he has a problem. G.B.'s attention problems persisted. It was a challenge for him to organize himself and execute tasks, including bringing home the right assignments for his homework.

During this meeting, G.B.'s parents shared the video from the school concert. (P-14.) G.B. was challenged by taking part in the less structured activity. He was physically removed from the placement of the other children. He did not imitate their level of engagement with the song, or their level of confidence in knowing exactly how to handle or present in that situation. G.B. showed repetitive blinking and grimacing and an exaggerated or wooden kind of stilted expression that was consistent with an ASD diagnosis.

Dr. Foster provided the parents with advice about how to help G.B. in these less structured activities, in which the rules are not as clear and there are unspoken rules about behavior. Dr. Foster suggested that G.B. and his parents develop concrete expectations and rules for the activity to provide structure and clarity.

During the meeting Dr. Foster testified that her observations were consistent with her prior observations of G.B.. When his expectation of a toy was not met, he stopped engaging with Dr. Foster without substantial prompting by his parents. G.B. displayed his unusual interest behavior and was only really eager to share information related to his

interests. This was in contrast to his refusal to engage with Dr. Foster and answer her questions. Dr. Foster maintained that G.B. still required an IEP.

Dr. Foster explained the respondent's speech language pathologist's report, the Townsend report, which Dr. Foster had reviewed before her February meeting with G.B. (J-3.) Dr. Foster testified that she found the summary of conclusions and the recommendations consistent with her findings. Townsend had a good understanding of some of the complexity of the social and communication skills that were involved with G.B., including his pragmatic language and his social use of language. Townsend was able to observe G.B. in the school setting. Dr. Foster admitted that her practice is unable to do that because of billing issues; however, she opined that the lack of observation does not affect the validity of her report, because she deliberately gets information from the school setting by way of teacher reports. Townsend considered the social skills and academic impact of the language difficulties. She also noted G.B.'s difficulties with making inferences. Dr. Foster agreed with Townsend's conclusion that as G.B. gets older, his social, behavioral, and academic expectations are only going to increase. The recommended interventions were necessary to prevent those deficits from inhibiting G.B.'s future progress.

Dr. Foster agreed with the interventions, which were recommended by Townsend, including social skills intervention and weekly work with a speech language pathologist to address developmental pragmatic communication skills. Dr. Foster believed that Townsend's report supported G.B.'s eligibility for an IEP.

On cross-examination, when questioned about McCarthy's testimony, for which Dr. Foster was not present, that there were no social or behavioral concerns which impacted G.B.'s educational functioning, Dr. Foster indicated that that was confusing to her because it was inconsistent with the information she provided directly to Dr. Foster in McCarthy's own endorsement on the rating scales and her comments.

Dr. Foster also explained that a 504 Plan comes from the Americans with Disabilities Act and addresses an individual's ability to access the general education curriculum. It provides supports so that the student may participate in activities or

instruction. The IDEA addresses the impact of a condition on a major life activity. An IEP is more of a modification of the curriculum and potentially adding different elements into the standard curriculum to actually change your education. Dr. Foster opined that her recommendations for modifying G.B.'s curriculum should be implemented and that data should be collected relative to effectiveness and progress. G.B. needs defined goals that are continuously monitored and tracked to help determine whether interventions are effective or should be modified. G.B. requires specific concrete measurable goals, a formal process for evaluating if the interventions are actually working and determining if there are measurable changes in behavior in response to these interventions. If they are not working, then there must be a mechanism for editing or modifying these accommodations. An IEP will provide consistency from year to year as he changes grades and teachers. Dr. Foster stated a 504 Plan is not specific about who must participate. However, with an IEP the parents are members of the team and are active members of the process.

S.B., G.B.'s father, testified on his own behalf. S.B. first noticed that G.B. was different when he was about six months old. G.B. would lay there and thump his feet. G.B. took an early interest in letters and numbers and even taught himself the alphabet. He could name letters in a book before he could say "mama" or "dada." At the same time, from an early age, G.B. had difficulties with eye contact. He was very focused on his interests.

Prior to kindergarten, G.B. had a full psychological evaluation and IQ test conducted at The Center for the Gifted in Philadelphia.⁴ G.B. had difficulty completing the tests. As a result, they could not get an accurate IQ. The results showed elevated IQ, with the caveat that G.B. did not fully complete the test. The report generated referenced ADHD and some behavioral concerns. The Center recommended that the school be informed about G.B. before he entered school. S.B. testified that they followed this path with respondent. There was "zero" response. His wife, H.B., asked respondent about the report, which they provided to the school. Respondent acknowledged that they

⁴ This evaluation and report was mentioned several times over the course of the hearing dates. However, the report was never produced.

might have received it, and asked that petitioners provide another copy. No one ever responded when the report was provided the second time.

G.B. has difficulties with swimming and other extra-curricular activities. He has difficulties with peer group activities, during which G.B. tends to play along side other children or his sisters. When he does play with other children, it has to be an activity in which he has specific interests, like math, or a topic of his choosing. G.B. does not engage in fluid, bond-building conversation with anyone, including his parents.

After petitioners received Dr. Foster's evaluation report, they sent a letter to respondent's child study team enclosing Dr. Foster's report and asking that an IEP be developed. (P-3.) The respondent went through the standard procedure and set up an initial evaluation plan meeting, in which S.B. participated. The tone of the meeting was not great from the time it commenced. Harris, the school psychologist, started saying, "You know, we feel bad; we'd love to help you but our hands are tied." S.B. testified that petitioners were told during the meeting that you cannot get special education until you try general education interventions first. If those do not work, then they would consider special education. Harris made a snide remark at the end of the meeting about petitioners' youngest daughter who was about to enter school, by saying "[n]ow remember, ... when she starts school, you've got to start with general education. Don't ask for special education right away." [T5-294:1-4.] S.B. testified that McCarthy was a great teacher. McCarty walked the petitioners out of the meeting and told them "[y]ou're doing the right thing. You've got to keep making noise and keep fighting for G.."

S.B. related that there have been incidents at school related to G.B.'s behaviors. For example, one day G.B. came home from school and asked that his autism be removed because he can never do anything fun because of it. After pressing G.B. for more information, G.B. related that they had an assembly at school that day. He thought he would get chosen and did not. As a result he got very upset. G.B. said he was sent to the bathroom and he missed the rest of the assembly. G.B. could not relate any more details. S.B. stated it is difficult for any seven year old to relate more details sometimes, but it is very difficult to get the needed level of detail from G.B. Petitioners wrote to the school asking what happened. The principal responded that she had not heard anything.

Petitioners asked the school for more information. G.B.'s teacher and counselor eventually responded indicating that G.B. was not chosen to participate in the assembly and started crying. He started having a meltdown in the assembly in the gym in front of his classmates. The teacher thought it was appropriate to send G.B. to the bathroom to calm himself down, because so many students were at the assembly. School said he was in the bathroom for five minutes. G.B. said it was more like half an hour. When they retrieved him from the bathroom, depending on the accounts from the teacher or counselor, G.B. spent time with Weston to talk about it. Petitioners told school they did not think it was appropriate for a child diagnosed with autism, who has a history of breakdowns, to be sent to the bathroom all alone to calm himself down. Petitioners told school that they need someone to contact them if these events occur. S.B. indicated that the principal finally responded again saying that she had a chance to speak with the teacher and counselor and that they were really happy and that it was great that G.B. could calm himself down. This did not make any sense to S.B.

S.B. testified about the Chromebook incident. He related that this is typical behavior for G.B. S.B. expressed the quality of G.B.'s meltdowns. G.B. is not just crying. His becomes so distressed that he cannot even speak. If he tries to speak, then you cannot understand anything he is saying. There have been other incidents at school about which petitioners are aware. They are consistent with his behavior at home.

S.B. related an incident when he took G.B. to his Take your Child to Work Day event a week or two before the instant hearing date. They had all kinds of activities and classes. S.B. asked for G.B. to be in a group with his sister, so she could keep an eye on him just to make it easier. Around lunchtime, S.B. got a call to go over to the event because G.B. was crying and refusing to participate. S.B. went over to G.B. After the event, they circulate pictures of all of the kids with their hands in the air celebrating their day, and G.B. was just off to the side of the group with the leader sulking. G.B.'s behavior that day is consistent with this behavior at home.

Weston has touched based every six to eight weeks to discuss G.B.'s counseling and provide updates. Weston is a nice lady, who is doing the right thing. She had to ask the principal if she could speak with petitioners because of everything that was going on.

S.B. inferred that it was about this litigation. She indicated that G.B. has difficulty with attention, which did not surprise S.B. Her updates are not very specific. S.B. was concerned that the counseling is “not very goal oriented.” [T5-309:12.] She has not presented any specific goals toward which they are working. Also, S.B. expressed concern because he gleaned from Weston’s statements to petitioners that there are other incidents involving G.B.’s behaviors about which they have not been told.

S.B. stated that the petitioners do not agree with allowing G.B. to use the Chromebook anytime he feels upset just by him requesting it. G.B. obsesses about Chromebook or iPad time and is bright enough to ask for it at times, even when he is not distressed, just because it is what he wants to do. There is no collaboration or cooperation offered by the respondent.

G.B.’s academic performance has started to suffer. The questions are now more complex, and require thought, analysis, or comprehension. He just received a 67% on a test. He is receiving Bs in science. Similarly, in his homework for example, he will have to look at a picture and then answer questions. G.B. cannot get past a literal description of the picture to interpret what is displayed. Another example was a question which indicated this type of bird can grow up to twenty pounds and then asked how big these animals get. G.B. answered by saying it does not say because it is not listed in inches or feet and that measures size. G.B. is very literal and rigid. G.B. also melted down because he could not answer the question. This type of behavior is increasing.

Credibility

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 story 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 fact finder “is free to weigh the evidence and to reject the testimony of a witness . . . when it is

contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth.” Id. at 521–22; see D’Amato by McPherson v. D’Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). 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). Similarly, “[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the . . . [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.” State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), cert. denied, 10 N.J. 316 (1952) (citation omitted). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable one. Renan Realty Corp. v. Cmty. Affairs Dep’t, 182 N.J. Super. 415, 421 (App. Div. 1981).

After reviewing the evidence, I make the following **FINDINGS of FACT:**

Sheldon and McCarthy had numerous inconsistencies between their testimonies and their communications with respondent’s staff members, the petitioners, Dr. Foster, and Townsend, which disabled their credibility.

Sheldon testified that G.B. did not engage in any maladaptive behaviors in the classroom which interfered with his or his classmates’ abilities to learn, and she provided G.B. with commendations on his progress reports and report card. G.B. had no difficulties academically. G.B.’s behavior was not atypical of a second grader. Sheldon had few concerns.

However, in private internal emails with other staff members, Sheldon expressed concerns for G.B.. Sheldon detailed the incident G.B. had over use of a Chromebook, which is one of G.B.’s favored activities. In this incident, G.B. became very upset when he was unable to play on the Chromebook, as he had expected, at the end of the day. Sheldon spoke with petitioners about this and emailed Weston. She wrote that “G.

demonstrated a fixed mindset and couldn't adapt to choosing a new activity." She further wrote that "[o]nce he focuses on a task or activity that he wants to do, he's unable to refocus to another task or activity." Sheldon shared with Weston that she "was feeling uncomfortable about the situation knowing that there was a lawsuit going on that makes me feel uncomfortable." Sheldon again emailed Weston on October 28, 2018, expressing concerns about G.B. Sheldon wrote that G.B. "works independently, doesn't really collaborate with a partner." G.B. "has rigid thinking, ideas come into his head and he can't move past them."

On November 18, 2018, Sheldon also emailed Clune, the respondent's Learning Consultant, asking for advice because G.B. was "really struggling with independent work, center work and chapter book." Sheldon wrote that she believed it was a time management issue. Sheldon wrote in the email that she asked "him before Daily 5 centers begin what activities he is going to complete, which he works on (if I don't ask, he just goes on Epic) but then never seems to turn the work in-probably because he needs just a little more time to complete them but then never seems to complete them." Sheldon noted that when G.B. does finish his reading he does not take the time to stop and jot down the notes, she requested. When he does jot down those notes he writes the same things. Sheldon continued to write that "[t]here are also issues with organization." She further wrote as follows: "which I understand is a part of who he is."

Contrary to her testimony, Sheldon's reports, which she filled out for Townsend's evaluation of G.B., were consistent with the observations and concerns she expressed in these emails. Townsend wrote that Sheldon's input for the evaluation revealed that G.B. struggles with attention, executive functioning, higher level language and rigidity.

Similarly, McCarthy had the same inconsistencies between her testimony and her communications with respondent's staff and the evaluators. McCarthy testified that G.B. did not engage in any maladaptive behaviors, which interfered with his ability or other students' abilities to learn in the classroom. G.B. did well academically. McCarthy stated that G.B. interacted socially with his classmates. Relative to the child study team referral, McCarthy wrote that she had "no major behavioral issues with G.B." While he benefitted from a routine, she felt there was no reason to refer him to the child study team.

However, McCarthy related an incident related to the Bee-ball, during which G.B. became very upset, because he wanted to do the activity a certain way and he could not make his way work. McCarthy attempted to redirect G.B., to no avail. This was consistent with times when McCarthy attempted to help G.B. with his work by suggesting another way to do it. G.B. would say, “no,” that is not the way he was doing it. McCarthy also indicated that G.B.’s desk was unorganized at times, and he did not always comply when prompted to organize and clean it. McCarthy gave G.B. “Ws” as grades for these skills.

McCarthy’s reports, which she filled out for the Nemours evaluation of G.B., were consistent with these observations and concerns, and not her testimony. McCarthy’s responses to the Nemours evaluation request for information showed that her scoring indicated that G.B. was at risk for attention issues, which during cross-examination, McCarthy acknowledge G.B. had. Relative to the ASRS, McCarthy’s information reported G.B. as very elevated for unusual behaviors, very elevated for attention and self-regulations for behavioral rigidity, and impulse control. Dr. Foster’s opinion, relative to the impact on G.B.’s educational functioning, was primarily supported by McCarthy’s ratings that showed those elevated concerns in the school setting, which were at a level above that of G.B.’s parents on the same scales. Recognizing the inconsistency between her reports and comments about G.B. to the evaluation and her testimony at the hearing, McCarthy attempted to explain away these results in her testimony during cross-examination. She submitted that the high scores were caused by G.B.’s advanced language level. This position made little sense in light of the totality of circumstances presented herein.

The inconsistencies between their testimonies and the communications they had with respondent’s staff or when information they provided evaluation materials to Dr. Foster and Townsend could not be resolved, except to conclude that they were comfortable providing accurate information about and their concerns for G.B., when they had an expectation that their communications and reports would not be shared or the information contained therein would not be attributed to them. These “private” communications were more genuine, and more importantly were consistent with the observations, Dr. Foster’s and Townsends’ evaluation results, the observations of

petitioners, and with the manifested symptoms of G.B.'s ASD. As a result, the credibility of their testimony, which appeared to "tow the party line," was disabled. The lack of credibility undermined their testimonies about their observations of G.B. in their classes, and the quality and extent of the impact of G.B.'s ASD on his educational functioning.

Relative to the experts, both Harris and Dr. Foster were accepted and qualified as experts in the field of school psychology. Harris was accepted as an expert in the development of IEPs. Dr. Foster was also accepted as an expert in clinical psychology and autism spectrum diagnosis. As part of her expertise, she was able to testify as an expert about IEPs. While they both testified in a professional manner and based their opinions on their experience, Dr. Foster's testimony and opinion was more credible.

Dr. Foster's extensive academic and practical training provided support and reliability to the methodology she employed in assessing G.B. and formulating her results. Dr. Foster actually observed G.B.. She was able to evaluate the information provided by the petitioners and McCarthy, and the results of G.B.'s tests. The fact that this information about others' observations of G.B. outside the clinical setting and the test results were consistent with her observations added reliability to her conclusions, clinical impressions and recommendations. Dr. Foster was able to explain the data she analyzed and the patterns she saw in the results, which related to G.B.'s ASD diagnosis. She demonstrated how the assessments and data showed that G.B.'s symptoms satisfied the two diagnostic criteria for autism.

She further competently discussed the differences between an IEP and a 504 Plan. She clearly and authoritatively demonstrated that G.B. was eligible for an IEP because the symptoms of his disability impacted his educational functioning in several areas. She credibly demonstrated why G.B. needed measurable goals and continued data collection to determine if the services and interventions were working, and if not to modify these as he matures and his social and academic responsibilities increase.

Unlike Dr. Foster, Harris never observed or formally met G.B.. Harris did not complete any assessment of G.B. Instead, Harris simply relied upon the fact that two evaluations are required for an initial evaluation of a student suspected of having an

educational disability in order to be eligible for special education, which G.B. did not have. At the initial evaluation plan meeting, there were no further evaluations because the child study team “did not feel that those evaluations needed to be completed.” Harris failed to provide any support for this summary statement. As an expert in the development of IEPs, Harris opined that when it is determined that evaluations are not required, the child study team must provide the reasons for that determination pursuant to the Administrative Code. However, no such reasons were written in the initial evaluation plan for G.B..

When reviewing the “Results” of the Nemours report, Harris discounted that the “social communication difficulties in engagement and repetitive play restricted interest have significantly impacted G.B.’s social functioning, development of relationships and adaptive functioning” as being based on parent input and observation of G.B. during the testing situation. Harris did not address that McCarthy’s reports demonstrated that G.B.’s educational functioning was impacted.

Also, Harris’ position that an IEP could not be developed with a student who only had social and behavioral needs, unless they were so significant that they interfered with the student’s academics, was unsupported. Her further statement that educational functioning includes areas beyond grades, but it does not include social skills or executive functioning was likewise unsupported. Harris did not cite to any regulation, law, section, or standard to support her testimony. As a result, her opinion was less reliable than Dr. Foster’s.

In sum, the inconsistencies and contradictions between Sheldon’s and McCarthy’s testimonies, and their respective reports of their observations of G.B., which they may not have expected to become public, made their testimonies unreliable. Their “private” comments were consistent with the results of the Nemours’ and Townsend’s evaluations, and consistent with petitioners’ and Dr. Foster’s observations. This made their “private comments” more genuine and believable. Dr. Foster’s education, training, and experience made her testing, evaluation, clinical impressions, and recommendations more reliable. Her opinion was credible. Harris’ lack of detail, failure to correct the initial evaluation plan’s procedural violations, and unsupported positions rendered Harris’ testimony unreliable.

FINDINGS OF FACT

After carefully reviewing the exhibits and documentary evidence presented during the hearing, and after having had the opportunity to listen to testimony and observe the demeanor of the witnesses, I **FIND** the following to also be relevant and credible **FACTS** in this matter:

G.B. is a now eight year old boy. Beginning in his infancy, petitioners noticed that their son had quirky behaviors. G.B. repetitively thumped his foot on surfaces as an infant. He learned to identify letters of the alphabet prior to speaking his first full words. As G.B. grew, petitioners noticed that G.B. hyper-focused on topics, which were atypical interests for his age. As a result, prior to beginning kindergarten, petitioners had G.B. evaluated at The Center for the Gifted in Philadelphia (Center), where they conducted a full psychological evaluation and IQ test. Although the results of this report are unknown and cannot be analyzed or found as fact herein, petitioners provided the report to respondent, when G.B. matriculated into respondent's school. Respondent made no inquiries about the report and took no action. At respondent's request, petitioners delivered another copy of the report to respondent. A determination about whether the respondent should have made additional inquiries of the petitioners or McCarthy cannot be made because the substance of the report was not presented. However, respondent took no action relative to the report, when it was provided to them a second time.

During the 2017-2018 school year, G.B. attended respondent's first grade and was enrolled in McCarthy's class. G.B.'s progress reports and report card indicate that G.B. made progress academically and mastered the core subjects. However, petitioners continued to be concerned about challenges G.B. was experiencing at home and with his school work. In this regard, they were also especially concerned about the the areas of social skills and appropriate behavior. McCarthy too had concerns about G.B. and his behavior, as was detailed in her email communications to Weston and Clune and found above as fact.

Having received no response from respondent about the Center report, and continuing to have concerns about their son, petitioners took G.B. for an evaluation at Nemours Behavioral and Developmental Access Clinic in November 2017. Dr. Noeder conducted this first screening of G.B.. Dr. Noeder indicated that there were concerns raised for ASD arising from G.B.'s history of hyper-focusing, obsessions, inattention, hyperactivity, anxiety, and social challenges. Dr. Noeder determined that a full psychological testing of G.B. was needed. As a result, Dr. Noeder referred G.B. to Dr. Foster.

On March 9, 2018, petitioners and G.B. met with Dr. Foster at Nemours for comprehensive diagnostic testing and evaluation related to a possible diagnosis of ASD. Dr. Foster personally observed G.B. and completed the following evaluations of G.B., to wit: the CARS, ASRS, ADOS, WISC-V, and BASC-3. This testing included standardized tests and rating scales, which were completed by the petitioners and McCarthy.

The first assessment given to G.B was Child with Autism Rating Scale, Second Edition, High Functioning Version (CARS). The headings for the CARS' sections include, Object Use in Play, Listening Responsiveness, Visual Sense, or Social Emotional Reciprocity. Numeric ratings for each of these based are based on Dr. Foster's observations of G.B. and information received from the parents. G.B.'s results yielded a score in the severe level. As Dr. Foster opined, the result was valid because it was based on her observations and parental information. Dr. Foster concluded that "[t]hese concerns elevated to a degree indicative of severe symptoms of ASD."

G.B.'s parents and McCarthy, then G.B.'s first grade teacher, completed the Autism Spectrum Rating Scales (ASRS). This is a standardized questionnaire. This information was specifically sought by Dr. Foster, because she wanted to make sure that what she observed about G.B. was representative of how he behaves outside the clinical setting, in the community and at school. The ASRS results demonstrated that G.B. had difficulties with social communication, engaged in repetitive play, had restrictive interests, which significantly impacted his social functioning, development of relationships and adaptive functioning. McCarthy's teacher report, report resulted in scores falling within the elevated to very elevated range on four of eight treatment scales. G.B. had significant

challenges with sustaining attention, limited responsiveness, and not listening or seeming to listen when spoken to in the school setting. This indicated that G.B. uses language in an atypical manner, engages in some repetitive motor mannerisms or repetitive interests, has difficulty tolerating changes to his routine, and has problems with attention and impulse control. These affect his educational functioning.

G.B. was evaluated using the Autism Diagnostic Observation Schedule-2 (ADOS), which is semi-structured assessment. This test, which utilizes less structured and more conversational play-based activities, evaluates social skills and communication skills and behavior, by deliberately setting up social situation to observe how children respond. In coding the observations, Dr. Foster evaluated certain behaviors G.B. exhibited from consistency of his eye contact, and whether he combined that with his words, gestures and his facial expressions.

G.B.'s results were a "mixed array." He has an advanced vocabulary for his age and spoke very articulately. G.B. used his skills when it related to his interests and the communication was on his terms. During this communication, he maintained eye contact. However, when Dr. Foster tried to solicit more information from G.B. about a topic other than one of his choosing and have him report on it, G.B. struggled. G.B. could coordinate gestures and his facial expression with his oral speech, but could not typically combine these with eye contact. G.B.'s responses could be really limited, awkward, or negative in some ways.

G.B. had repetitive and restricted behaviors. G.B. had atypical ways of talking. Although he used sophisticated phrases when speaking, they were stilted and sound like they have been lifted from somewhere or heard somewhere else. This is atypical speech for children. G.B. also repeated certain phrases at different points during the evaluation. This is a symptom of autism. G.B. also speaks about things in very highly specific ways, which is slightly unusual. In relation to his play behaviors, G.B. gravitated to the objects, rather than the little people, although he had some creative ideas about them which he conveyed. The object was the main character in the story. G.B. was resistant to redirection. He continued to do the activity his own way when redirected. All of these results were consistent with petitioners' and McCarthy's observations and concerns.

The results of the ADOS placed G.B. over the benchmark for autism “Overall [G.B.’s] performance ... met classification for an Autism Spectrum Disorder. His overall comparison score indicated that he is showing a high level of autism-related symptoms...” Therefore, the symptoms of autism were present. G.B.’s elevated score was consistent with his elevated CARS’ score.

G.B.’s thinking and problem solving abilities were evaluated through a cognitive assessment, the WISC-V. This test involved how G.B. processed and reasoned about different types of information, like verbal information, visual spatial information, how fast he could process really simple rote tasks, and how well he could hold things in his memory. G.B. scored above average across different domains. G.B did best on tasks involving his visual special abilities and fluid reasoning. G.B. had a high WISC-V score. This result does not mean that he does not have autism.

G.B.’s parents and teacher completed a BASC-3 questionnaire, which is broader than the ASRS. The BASC-3 is administered similar to the ASRS. It is a questionnaire for parents and teachers. The BASC-3 looks at a broad range of different behaviors, including externalizing behaviors, internalizing behaviors, adaptive skills, symptoms of inattention or hyperactivity. The BASC-3 provides a general look at behavioral symptoms or emotional symptoms and does not correspond directly to a diagnosis. Patterns of elevation and symptoms in the results are analyzed and the data is detailed in tables.

The first table was the Adaptive Behavior Assessment System (ABAS). (J-1 at 10.) This questionnaire, given to the parents, asks about the child’s everyday skills, which include self-help skills, cleaning up around the house, everyday routines, like bathing, and accessing the community. G.B. was in the average range for most of the scores. However, he was below average in areas related to his communication, and self-direction. Self-direction relates to initiative, independence, taking ownership of his tasks, and organizing himself. G.B. had a low score in home living, which relates to his everyday sense of managing his own activities at home, like cleaning up after himself and doing skills around the house. Relative to practical skills, G.B. scored below average in health, safety and self-care.

The second table reported G.B.'s BASC-3 scores. (J-1 at 11.) It has two columns reflecting information from the parents and teachers about all types of behaviors. It also reflects scores for the Conners-3, which is more focused on the symptoms that are associated with ADHD or other disruptive behavior disorders, like inattention, hyperactivity, problematic behaviors, and difficulty with peer relations. On the BASC-3, petitioners and McCarthy indicated scores for attention that were moderately elevated, or "at risk." The parents indicated concerns with withdrawal, which involves social engagement. The parents indicated concerns with G.B.'s functional communication. Relative to the Conners-3 scores, the parents indicated that there were very elevated levels of hyperactivity and impulsive behavior. The teacher did not indicate that as much at school. However, G.B.'s parents and teacher indicated elevated scores for inattention.⁵

The third table was the Autism Spectrum Rating Scale, focused specifically on areas associated with a diagnosis of ASD. (J-1 at 12.) Again, the questionnaire was completed by petitioners and McCarthy. McCarthy actually reported more concerns about G.B. in the areas related to autism, as compared to the petitioners. G.B.'s parents noted some scores that were considered high average in the areas involving G.B.'s ability to self-regulate his behavior and ability to interact with adults. McCarthy's scores were more elevated. McCarthy's ratings produced elevated scores for the broad categories of social communication and self-regulation. McCarthy's ratings produced very elevated scores for unusual behaviors. All of the scores were consistent with their prior observations of G.B. and the observations of others, including Sheldon and Weston.

Relative to more specific areas of functioning, the most significant concerns for G.B. were in the areas like atypical language, which includes speaking in an odd way, and saying phrases out of context in terms of the social conversation. McCarthy's ratings produced an elevated score for atypical language. McCarthy's ratings produced a very

⁵ Dr. Foster opined that G.B. did not meet the diagnostic criteria for a specific disorder related to executive functioning, like ADHD. While he did not satisfy this diagnostic criteria, G.B. still had attention issues of concern and related behaviors, which impacted his educational functioning. Dr. Foster noted in her report that, if the symptoms related to ADHD persist and begin to interfere with his functioning at home and school, then further diagnosis may be warranted.

elevated score for stereotypy, which are repetitive behaviors, which can include repetitive mannerisms. For behavioral rigidity, McCarthy's ratings produced a very elevated score.

In G.B.'s case, the elevations occurred mainly in terms of his tendency to fixate on certain topics or subjects. G.B. had unusual interest, in terms of focus and intensity, and difficulty being flexible. McCarthy indicated that she had concern with G.B. tending to fixate on one way of doing things and having difficulty with redirection to other ways of thinking about doing things. These both relate to the stereotypy and behavioral rigidity scales. The last section in which G.B. received a very elevated score was related to his attention.

Dr. Foster made clinical impressions based on her observations and the assessments. She medically diagnosed G.B. with ASD. G.B. had very high cognitive scores. G.B. has trouble in the consistency of his communication and communicating in a truly back and forth manner with others at the level expected for his age. There is an inequity between G.B.'s cognitive ability and his social interaction. G.B. has difficulty making and sustaining age appropriate relationships over time. Relative to stereotypy behaviors, G.B.'s speech patterns were unusual for his age. G.B. had behavior and flexibility deficiencies related to following a certain routine and having difficulty with transitions. G.B. exhibited focus on highly specific interests.

Dr. Foster opined that "[a]lthough he's currently demonstrating age appropriate academic skills," all of his deficits and symptoms are impacting G.B.'s educational functioning. Dr. Foster reiterated that her opinion, relative to the impact on G.B.'s educational functioning, was primarily supported by McCarthy's ratings that demonstrated those elevated concerns in the school setting, which on some of the scales were at a level above those of G.B.'s parents. Dr. Foster opined "that even though he's getting the grades, essentially, these are the ways that this diagnosis can disadvantage him, in terms of his academics and in terms of his ability to engage in tasks that are not on his terms."

Dr. Foster expressed concern for G.B.'s broader educational functioning, which includes belonging in the school community, ability to participate in activities that do not

just involve him and that are more social and involve group work. Dr. Foster also expressed concern for G.B. stress wise and emotionally.

Based on her opinion, Dr. Foster made recommendations for G.B., including school programming and intervention. (J-1 at 13.) G.B. had difficulty with attention, with organizing himself, getting started on tasks, keeping himself on track without a lot of redirection, difficulty with transitions and accepting when things differ from his own preferences or his own expectations, and concerns related to his communication, socialization, and belonging over time. Pursuant to special education law, G.B. met the criteria of the disability category of autism set forth in the IDEA. G.B. also met the second prong required by the IDEA, which looks at impact. There is an adverse effect on G.B.'s educational functioning, which is broader functioning, not just academic functioning. The demands for G.B. are going to increase over time; socially things become much more sophisticated and difficult. Academic demands become higher and behavior expectations increase. McCarthy already noted some of these concerns. G.B. was eligible for an IEP.

G.B. is in need of a mixed-model programming. G.B. requires an appropriate academic environment for his learning and progress, to which other supports are added for the areas beyond academics like social skills instruction. G.B. requires an IEP as the mechanism to deliver this programming and the recommended services and to monitor his progress toward the established goals. G.B. requires placement in an appropriately challenging academic setting, which is characterized by high levels of available support and explicit, systematic instruction, including learning activities that are structured, organized, and comprise a clear scope and sequence, along with accommodations and modifications to minimize the impact of his noted deficits, and supplemental services, like social skills instruction and school-based counseling. Relative to his educational programming and functioning, G.B. also requires the programming, modifications, interventions and services provided for in paragraphs 5, 6, 7, 8, 9, and 10 of Appendix II of Dr. Foster's report. G.B.'s services and interventions must be monitored and evaluated to make sure that G.B. is progressing towards the identified goals. Since G.B.'s challenges will continue each year as his grade level and teachers change, and will change as he matures, and academic and social pressures increase, it is important that

this data be collected to allow for modification of his programming and services to address these changes.

By correspondence, dated May 25, 2019, petitioners wrote to respondent requesting G.B. be referred to the child study team for evaluation and special education and related services. Petitioners produced the Nemours report and a DOE advisory communication, which explained that students who academically achieve are still eligible for and IEP if certain deficits exist.

McCarthy was again asked to provide observations, feedback, and comments about G.B. She completed the respondent's child study team packet. On June 12, 2019, an initial evaluation plan meeting was held. Notably present at the meeting were Harris, and McCarthy. Interestingly, although she was the school psychologist, Harris never met or observed G.B. before this meeting or after it. Although McCarthy's comments expressed concern for G.B. in certain areas and detailed certain incidents and observations, she stated that she had no concerns.

At this meeting, the respondent summarily determined that G.B. was ineligible for further evaluation and an IEP. The initial evaluation plan, which was prepared by respondent lacked any written reason for their decision contrary to the requirements of the Administrative Code. No written reason for the denial of evaluations was provided under the heading of "[e]valuations are not warranted at this time for the following reasons:"

No substantive consideration appears to have been given to the Nemours report in relation to further evaluations. The diagnostic testing was minimally mentioned. Additionally, at no time after presentation of the Nemours report did respondent or any of its staff members, dispute G.B.'s diagnosis. In fact, the actions of the respondent's staff clearly demonstrated that they accepted his ASD diagnosis. Subsequently, in August 2018, petitioners filed their due process petition seeking, evaluations, development of an IEP including special education and related services, and compensatory education. McCarthy, Harris, Sheldon, and Weston were all clearly aware, as of September 2018,

that the petitioners had filed their due process petition. This appeared to have a chilling effect on them.

In September 2018, G.B. began second grade in Sheldon's general education class. The curriculum does not contain any specific classes related to social skills which are graded. Although not a participant in the initial evaluation plan meeting, and not a member of the child study team, Sheldon was aware that G.B. had been diagnosed with ASD. Sheldon knew and observed that G.B. had issues with organization, attention, and time management, as a result of his ASD. Sheldon documented G.B.'s challenges in the classroom. Although Sheldon testified that G.B. did not engage in any behaviors in the classroom that interfered with his or his classmates' abilities to learn, and she provided G.B. with commendations relative to his progress and behavior, Sheldon sought help from Weston and Clune relative to G.B.. Specifically, Sheldon wrote, that G.B. "demonstrated a fixed mindset and couldn't adapt to choosing a new activity. Sheldon further wrote that "[o]nce he focusses on a task or activity that he wants to do, he's unable to refocus to another task or activity."

On October 28, 2019, Sheldon again wrote to Weston expressing concerns for G.B.. In this regard, Sheldon had specific social concerns for G.B. because he "works independently, doesn't really collaborate with a partner." G.B. had "rigid thinking, ideas come into his head and he can't move past them."

On November 18, 2019, Sheldon wrote to Clune, the respondent's learning consultant asking for advice in addressing G.B.'s behavior. Sheldon detailed that G.B. was "really struggling with independent work, center work and chapter book," which she believed was related to a time management issue. Sheldon further indicated that she asks G.B. "before Daily 5 centers begin what activities he is going to complete, which he works on (if I don't ask, he just goes on Epic), but then never seems to turn the work in probably because he needs just a little more time to complete them but then never seems to complete them." Sheldon observed issues with organization. All of this Sheldon understood to be manifestations of G.B.'s ASD. These impacted his ability to perform educationally.

In January 2019, during pendency of this matter, respondent hired Townsend, a speech pathologist, to perform a Social Skill evaluation of G.B. As part of Townsend's evaluation, Sheldon provided observations, ratings, and comments. Townsend's report indicated that Sheldon's input for the evaluation revealed that G.B. struggles with attention, executive functioning, higher level language and rigidity. G.B. scored below average in the CELF-5 Pragmatics Profile, which is intended to identify verbal and nonverbal pragmatic deficits that may negatively influence social and academic communication. Relative to the the Test of Problem Solving Elementary, Third Edition (TOPS-3), G.B. scored in the low average range for making inferences, below average for sequencing and negative questions, and average in problem solving, predicting, determining causes. Overall, his scores were average, while his Social Language Development test scores were mostly average to high average. G.B. scored below average in supporting peers, which measured G.B.'s ability to generate tactful comments or responses in tricky social situations with the goal of avoiding hurting the feelings of others in the situation. Finally, relative to Social Skills Improvement System (SSIS) G.B.'s summarized scores in social skills placed him in the 22% rank and in problem behaviors in the 10% rank. G.B.'s score was low average for Behavioral Levels for Social Skills Behavioral Levels for Problem Behaviors. Townsend concluded that G.B. "needs direct social skills intervention." In addition, Townsend recommended that G.B. work with a speech-language pathologist weekly to address development of pragmatic conversation.

Also in January 2019, G.B. began meeting with Weston for counselling in school. Although Weston's sessions are conducted with goals in mind for G.B., there is no formal data collected about the efficacy of these sessions and no data collected relative to G.B.'s progress. The sessions lacked this needed formality. The lack of recorded data produced little concrete information for the petitioners, when Weston updated them on G.B. Weston too observed that G.B. had "difficulty with self-control' in social situation.

Respondent's refusal to provide evaluations of G.B., despite the Nemours report and McCarthy's reports to Dr. Foster, and response to the child study team referral denied G.B. a FAPE. G.B. was eligible for special education and related services under the classification of autism. Respondent denied the evaluations in order to deny G.B. special

education or delay its implementation. It was respondent's obligation to evaluate G.B., it was not petitioners' obligation.

G.B.'s deficits and challenges with attention, with organizing himself, getting started on tasks, keeping himself on track without a lot of redirection, with transitions and accepting when things differ from his own preferences or his own expectations, and difficulties related to his communication, socialization, have an adverse impact on G.B.'s educational functioning, which is broader functioning and not just an academic functioning. Respondent should have provided G.B. with an IEP taking into account Dr. Foster's and Townsend's recommendations. G.B. was denied a FAPE. G.B. was denied the IEP and those services from June 2018, when the initial evaluation plan meeting occurred, through July 2019, at which time petitioner's relocated to the new district. It cannot be determined if G.B. was entitled to special education prior to June 2018, because the results of the Center evaluation are not known and G.B. was not referred to the child study team. While the evidence submitted shows that G.B.'s educational functioning was adversely impacted by his symptoms during the 2017-2018 school year, G.B. was not diagnosed with ASD until issuance of the Nemours report and respondent was not aware of his disability, until the Nemours report was tendered to respondent with petitioners' May 28, 2019 correspondence. G.B. is entitled to compensatory education to place G.B. in the position he would have been in had he been provided that special education and the related services for the period between June 2018 and July 2019. This compensatory education need continues despite petitioners' relocation out of respondent's district.

Due to petitioners' move to a new school district in July 2019, respondent may not develop an IEP for G.B., at this time.

LEGAL ANALYSIS

The Individuals with Disabilities Act (IDEA) was enacted to assist states in educating disabled children. It requires states receiving federal funding under the Act, such as New Jersey, to have a policy in place that ensures that local school districts provide disabled students with FAPE designed to meet their unique needs. See, 20

U.S.C.A. § 1412; N.J. Const. art. VIII, IV, 1; N.J.S.A. 18A:46-8; N.J.A.C. 6A:14-1.1 et seq., Hendrick Hudson Cent. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). State regulations track this requirement that a local school district must provide FAPE as that standard is set under the IDEA. N.J.A.C. 6A:14-1.1. A FAPE and related services must be provided to all students with disabilities from age three through twenty-one. N.J.A.C. 6A:14-1.1(d). A FAPE means special education and related services that: a) have been provided at public expense, under public supervision and direction, and without charge; b) meet the standards of the State educational agency; c) include an appropriate preschool, elementary, or secondary school education in the State involved; and d) are provided in conformity with the Individualized Education Program (IEP) required under sec. 614(d). 20 U.S.C. § 1401(9).

In order to provide a FAPE, a school district must develop and implement an IEP. N.J.A.C. 6A:14-3.7. An IEP is “a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs.” Sch. Comm. of Burlington v. Dep’t of Educ. of Mass., 471 U.S. 359, 368, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385, 394 (1985).

In addition, when scrutinizing a FAPE claim, there is a two-part inquiry. A court must first ask whether the state or school district has complied with the procedures of the Act when developing the IEP, and second, whether the IEP developed through the Act’s procedures is “reasonably calculated to enable the child to receive educational benefits.” Rowley, 458 U.S. at 207, 102 S. Ct. at 3051, 73 L. Ed. 2d at 712. While the IDEA does not require a school district to provide an IEP that maximizes “the potential of a disabled student, it must provide ‘meaningful’ access to education and confer ‘some educational benefit’ upon the child for whom it is designed.” Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 247 (3d Cir. 1999) (citations omitted). In “[e]xamining the quantum of benefit necessary for an IEP to satisfy IDEA,” the Third Circuit held “that IDEA ‘calls for more than a trivial educational benefit’ and requires a satisfactory IEP to provide ‘significant learning,’ and confer ‘meaningful benefit.’” *Ibid.* (citations omitted).

Following amendments to the State regulations, in 1989, the New Jersey Supreme Court enunciated the standard to be applied in determining the adequacy or the

appropriateness of an IEP. The Court in Lascari v. Ramapo Indian Hills Regional School District, 116 N.J. 30, 47-48 (1989), held that the education offered to a disabled child must be sufficient to confer some educational benefit upon the pupil. The Court went on to state that the current standard in New Jersey parallels the federal standard enunciated in Rowley. Lascari, 116 N.J. at 48. This standard provides the foundation upon which the pupil's IEP is built. Moreover, the IEP establishes "the rationale for the pupil's educational placement." N.J.A.C. 6A:14-1.3.

Other Third Circuit decisions have further refined that standard to clarify that such educational benefit must be "meaningful," "achieve significant learning," and confer "more than merely trivial benefit." T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572 (3d Cir. 2000); Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238 (3d Cir. 1999); Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 183-184 (3d Cir. 1988), cert. den. sub. nom., Central Columbia Sch. Dist. v. Polk, 488 U.S. 1030, 109 S. Ct. 838, 102 L. Ed. 2d 970 (1989). The Third Circuit has re-emphasized the importance of the inquiry into whether the placement proposed by the district will provide the student with "meaningful educational benefit." I.H. v. State-Operated Sch. Dist. of Newark, 336 F.3d 260 (3d Cir. 2003).

Consequently, a FAPE is defined in broad terms, as a limited definition would not encompass the many needs of such a dynamic population, that are consistent with the IDEA's corresponding mandate that the states provide each disabled child with specifically designed instruction that is tailored to the child's unique needs and is a "basic floor of opportunity." Rowley, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690. Notwithstanding the demand that a FAPE is one that is sufficient to confer some educational benefit that is more than trivial or "de minimis," it does not need to maximize the potential of the child. Polk, 853 F.2d 171. For this reason, the parents of a disabled child cannot compel a school district to provide an educational benefit that is better than the one under the IEP, providing the IEP is sufficient to confer a meaningful educational benefit that is more than trivial or "de minimis." Generally speaking, children with special needs must be provided an education tailored to their individual needs and that confers meaningful benefit. Ibid.

N.J.A.C. 6A:14-2.7(k) provides that procedural violations may lead to a finding that FAPE was denied if the violations impeded the child's right to FAPE; impeded the parents' opportunity to participate in the decision-making process; or caused a deprivation of educational benefits. It is "no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard." Bd. of Educ. v. Rowley, 458 U.S. 176, 205-6, 102 S. Ct. 3034, 3050, 73 L. Ed. 2d 690, 712 (1982). Our courts have observed that "[t]he procedural requirements of the IDEA are essential to the fulfillment of its purposes." D.B. and L.B. o/b/o H.B. v. Gloucester Twp. Sch. Dist., 751 F.Supp. 2d 764 (D.C.N.J. 2010).

Here, G.B. was denied a FAPE. Respondent's actions relative to the initial evaluation plan constitute a procedural violation of the IDEA. When it is determined that evaluations were not required, a child study team must provide the reasons for that determination pursuant to the Administrative Code. However, no such reasons were written in the initial evaluation plan for G.B.. Although respondent attempted through witness testimony and argument to maintain that the information entered under Teacher Input, Parent Input, and Other sections satisfied this requirement, this position was untenable and unsupported by the entries respondent's child study team made in those categories. No concrete reasons were provided explaining respondent's actions.

The United States DOE has advised as follows:

"it would be inconsistent with the IDEA for a child, regardless of whether the child is gifted, to be found ineligible for for special education and related services under the SLD category solely because the child scored above a particular cut score established by state policy. Further, under 34 C.F.R. §300.309(a)(1), the group described in §300.306 may determine that a child has an SLD if the child, 'does not achieve adequately for the child's age or to meet State - approved grade level standards...when provided with learning experiences and instruction appropriate for the child's age or State-approved grade level standards' in or or more of the following areas: oral expression; listening comprehension; written expression; basic reading skill; reading fluency skills;

reading comprehension; mathematics calculation; or mathematics problem solving.” US DOE Letter to Delisle, December 20, 2013.

The respondent’s procedural violation denied petitioners notice about why their request for evaluations was denied and what was the basis for denial. This procedural violation impeded G.B.’s right to FAPE and impeded the parents’ opportunity to participate in the decision-making process. Considered in the totality of circumstances presented herein, respondent’s procedural violation caused a deprivation of educational benefits to which G.B. was entitled. This procedural violation was used to inappropriately delay an evaluation for eligibility of G.B., under the IDEA. Therefore, I **CONCLUDE** that the respondent’s procedural violation delayed G.B from obtaining an evaluation for eligibility for special education. I further **CONCLUDE** that respondent’s procedural violations of the IDEA denied G.B. a FAPE, under these circumstances.

In order to be eligible for special education services under the IDEA a child must satisfy a two-prong test. First the child must have a disability. Second, the child must need special education and related services because of the disability. 34 C.F.R. 300.8 G.B. satisfied both criteria. Relative to the first prong, G.B. met all of the diagnostic criteria for ASD and was diagnosed with same by Dr. Foster. Respondent never disputed G.B.’s diagnosis of ASD. Respondent’s staff members repeated mentioned and considered G.B.’s diagnosis and his symptoms when educating G.B..

The clinical testing and assessments which considered Dr. Foster’s, petitioners, and McCarthy’s observations demonstrated that “[a]lthough he’s currently demonstrating age appropriate academic skills, all of his deficits and symptoms are impacting G.B.’s educational functioning.” The impact on G.B.’s educational functioning, was primarily supported by McCarthy’s ratings that were showing those elevated concerns in the school setting, which were at a level above the ones even that the parents were indicating on some of the scales. G.B.’s “diagnosis can disadvantage him, in terms of his academics and in terms of his ability to engage in tasks that are not on his terms.” G.B is challenged in his broader educational functioning which includes belonging in the school community, and his ability to participate in activities that do not just involve him and that are more

social and involve group work. This was evident in the incidents described by respondent's staff and the petitioners.

G.B.'s deficits and challenges with attention, with organizing himself, getting started on tasks, keeping himself on track without a lot of redirection, with transitions and accepting when things differ from his own preferences or his own expectations, and concerns related to his communication, socialization, have an adverse impact on G.B.'s educational functioning, which is broader functioning, not just an academic functioning, as respondent maintained. Respondent produced no competent evidence to the contrary. Therefore, G.B. satisfied the second prong. Based on the foregoing, I **CONCLUDE**, G.B. has met the required criteria and was eligible for special education services.

Despite this, respondent argued, and Harris testified, that without the second assessment by a speech language specialist, G.B. was automatically precluded from special education. N.J.A.C. 6A:14-3.4(f) provides that an initial evaluation for classification shall consist of a multidisciplinary assessment, which must include two assessments by two child study team members, of all areas of the suspected disability. N.J.A.C. 5A:14-3.5(c)(2), provides that a classification of autistic requires an assessment by a speech language specialist and a physician trained in neurodevelopmental assessment.

Under the circumstances presented herein, this position lacks merit. Respondent's position would require petitioners to obtain all of the required evaluations, before making a referral to the child study team. This position alone undermines the purpose of the IDEA in identifying students in need of special education. In this matter, it was a construct to allow the respondent to delay or deny services to eligible students. It was inequitable and inappropriate for the respondent to refuse to evaluate G.B. after their review of the Nemours report and then deny G.B. consideration for special education and related services, because he lacks the evaluations. It is noted that respondent never made this argument, until the instant litigation was pending. It was not listed in the Initial Evaluation Plan. It was not mentioned to the petitioners. Additionally, Townsend is a Speech-Language Pathologist. Although that evaluation was denied by respondent, it was ultimately completed in January 2019, Townsend's impressions were consistent with Dr.

Foster's. Therefore, I **CONCLUDE** that respondent's argument under these circumstances is without merit.

Similarly, respondent's argument that, because G.B. achieved academically he was automatically ineligible for and IEP is misplaced. It is inconsistent with the IDEA for a child to be found ineligible for special education and related services solely because the student achieves academically. Following respondent's reasoning, G.B. would never qualify for an IEP no matter the impact flowing directly from his social skills, behavioral, speech, and other challenges, so long as he received good grades. Pursuant to the IDEA, if a child achieves academically, but their educational functioning is impacted by a lack of achievement in oral expression; listening comprehension; written expression; basic reading skill; reading fluency skills; reading comprehension; mathematics calculation; or mathematics problem solving, then that child is entitled to an IEP. US DOE Letter to Delisle, December 20, 2013. G.B. has difficulties with oral expression, listening comprehension, written expression, and reading comprehension. What is required, by the IDEA, is an impact to G.B.'s educational functioning which is broader than his academics. The IDEA instructs that its purpose is to prepare an individual for further employment, education, further education and independent living. All of these areas require social and emotional competency and clearly developed executive functioning skills.

Therefore, I **CONCLUDE** that based on G.B.'s ASD diagnosis, the results of the clinical testing and assessments, and Dr. Foster's, Townsend's, McCarthy's, Weston's, and Sheldon's observations, G.B. was entitled to an IEP, even though he has achieved academically. I **CONCLUDE** G.B. was denied FAPE. While I make this conclusion, I must **DENY** petitioners' request that I order the development of an IEP by respondent, at this time. G.B. is no longer a student in respondent's district. The development of an IEP provides for prospective special education and related services. Therefore, it would be impossible for respondent to comply, if same was ordered. This denial in no way impacts the conclusion that G.B. had been entitled to an IEP and was denied one by respondent.

Relative to the IEP, it is clear that the development of an IEP by respondent can no longer be effectuated because petitioners moved out of the school district. However,

the recommendations made by Dr. Foster and Townsend should have been included in an IEP and delivered and administered by respondent during the 2018-2019 school year. Under these circumstances, a developed and implemented IEP with the classification of autism was appropriate and necessary, because G.B. was eligible for special education and because those modifications to G.B.'s curriculum required measurable goals, continuous monitoring, and consistent data collection to help determine whether the interventions were effective or should be modified. G.B.'s needs require consistency in these mechanisms during transitions from year to year and teacher to teacher to permit effective modifications of his programming and services as his academic, social and emotional needs and stresses change.

CONCLUSIONS

Therefore, I **CONCLUDE** that G.B. has ASD, a disability which made him eligible for special education and related services consistent with the recommendations made by Dr. Foster and Townsend, which should have been delivered and administered by respondent through and IEP with a classification of autism pursuant to the IDEA. I **CONCLUDE** that G.B.'s challenges and difficulties have an adverse impact on his educational functioning. I further **CONCLUDE** that G.B. was denied a FAPE when the respondent refused to evaluate him, did not provide a written explanation of their denial in the initial evaluation plan, and consequently failed to provide him with the educational services he required and to which he was entitled. I **CONCLUDE** that respondent is unable to develop an IEP for G.B. at this time because petitioners have moved into a different school district.

With regard to petitioners' request for compensatory education, it is noted that the purpose of compensatory education is to remedy past deprivations of a FAPE. As decided above relative to the respondent's second motion to dismiss for mootness, a compensatory education claim is not moot because the student relocates to a new school district. In order to award compensatory education, there must be a finding that the child has received an inappropriate education. M.C. ex rel. J.C. v. Cent. Reg. Schl. Dist., 81 F.3d 389, 397 (3d Cir. 1996).

Here, there is a finding that G.B. was deprived a FAPE. Compensatory education is an equitable remedy which is designed to compensate special education students for rights that have been denied to them by a school district. D.F. v. Collingswood Borough Bd. of Educ., 694 F.3d 488, 497 (3d.Cir.2012). A compensatory education award ought to be “reasonably calculated to provide the educational benefits that likely would have been accrued from special education services the school district should have supplied in the first place.” Reid v. District of Columbia, 43 IDELR 32 (D.C.Cir.2005). Compensatory education is not limited to reimbursement for out-of-pocket expenses, contrary to respondent’s arguments, and can include requiring a school district, which denied a FAPE to pay for services rendered to the student in their new school district or to contract to provide those services to that student. D.F. at 499. Compensatory education awards can also include establishment of an education fund or reimbursement for services rendered for a period of time.

Having concluded that G.B. was denied a FAPE by respondent, G.B. is entitled to an award of compensatory education. G.B. was denied a FAPE between June 2018, when the initial evaluation plan meeting occurred, through July 2019, at which time petitioners relocated to the new district. It cannot be determined if G.B. was entitled to special education prior to June 2018, because the results of The Center evaluation are not known and G.B. was not referred to the child study team. While the evidence submitted demonstrated that G.B.’s educational functioning was adversely impacted by his symptoms during the 2017-2018 school year, G.B. was not diagnosed with ASD, until the Nemours report was received by petitioners, in 2018. Respondent was only made aware of this diagnosis in May 2018, when petitioners transmitted it to the child study team. Therefore, the period during which G.B. was denied a FAPE is June 2018 through July 2019. Accordingly, I **CONCLUDE** that G.B. is entitled to an award of compensatory education and therefore, that the petitioners’ request for compensatory education is **GRANTED**.

ORDER

I hereby **ORDER** that G.B. is entitled to special education and related services under the IDEA with a classification of autism. I hereby **ORDER** an award of

compensatory education to G.B., to be +6consistent with the recommendations made by Dr. Foster and Townsend to provide G.B. with the special education and related services he should have received during those thirteen months, in order to place him in the position he would have been in had he had the benefits of the recommended programming, interventions, and services. I hereby **ORDER** that the relief requested in petitioner due process petitioner is hereby **SUSTAINED**, consistent with the above.

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.

October 15, 2019 _____

DATE

DOROTHY INCARVITO-GARRABRANT, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

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WITNESSES

For petitioner:

Margaret Sheldon

Barbara Harris

Angelina Weston

Jessica McCarthy

For respondent:

Tori Foster, Ph.D.

S.B.

EXHIBITS

Joint Exhibits:

- J-1 Nemours Psychological Evaluation Report by Tory Foster, Ph.D.; Date of Testing March 9, 2018
- J-2 Initial Evaluation Plan, dated June 12, 2018
- J-3 Beyond Communication Social Skills Evaluation; date of evaluation January 15, 2019;
- J-4 Weston Counseling Log 1/4/19-3/18/19
- J-5 Angelina Weston Resume
- J-6 Sheldon's evaluations of G.B. for Beyond Communication evaluation

For petitioner:

- P-3 Respondent's Answer to Petitioners' Due Process Petition
- P-4 Nemours Psychological Evaluation Report by Tory Foster, Ph.D.; Date of Testing March 9, 2018; **(duplicate) ADMITTED AS J-2**
- P-5 Follow-up Psychological Session Case Note dated February 27, 2019
- P-6 Initial Evaluation Plan meeting documents **(duplicate) ADMITTED AS J-2**
- P-7 Beyond Communication Social Skills Evaluation; date of evaluation January 15, 2019 **(duplicate) ADMITTED AS J-3**
- P-8 Weston Counseling Log 1/4/19-3/18/19 **(duplicate) ADMITTED AS J-4**

- P-9 Sheldon's evaluations of G.B. for Beyond Communication evaluation
(duplicate) ADMITTED AS J-6
- P-10 Petitioner's summary notes of phone conversation regarding Chromebook;
- P-13 Tori Foster, Ph.D. Curriculum Vitae
- P-14 Second Grade Holiday Concert Video *****SEALED*****
- P-15 Emails from Sheldon to Clune, Weston, and Mahoney

For respondent:

- R-1 Margaret Sheldon's Resume
- R-2 First Grade Trimesters Progress Reports and Report Card
- R-3 Second Grade Trimesters and Report Card
- R-4 2018-2019 Sheldon emails with parents
- R-6 Second Grade Discipline Log
- R-7 Child Study Team Referral Packet
- R-12 Emails between counsel; Emails between Weston and Godfrey
- R-13 Barbara Harris' Resume