

ARKANSAS DEPARTMENT OF EDUCATION
Special Education Unit

XXXX, as Parent of)	PETITIONER,
XXXX Student,)	
)	
vs.)	CASE NO. H-16-44
)	
EAST LAWRENCE COUNTY SCHOOL)	
DISTRICT)	
)	RESPONDENT

DECISION

NOW on this 21st day of September, 2016 came on for hearing Petitioner's Request for a Due Process Hearing, Petitioner, XXXX, as Parent of Student, represented by Theresa Caldwell, Attorney, and Respondent, EAST LAWRENCE COUNTY SCHOOL DISTRICT, represented by Don Mixon, Attorney. This cause was submitted upon the pleadings, the testimony of witnesses, argument of Petitioner and Respondent, and other matters and things from all of which the Hearing Officer finds and Orders. Hearing dates were June 22nd, 2016, July 19th, 2016, September 20th, 2016 and September 21st, 2016 in this matter. Based upon the testimony of the witnesses and the evidence presented and admitted into the record of this proceeding, I make the following findings of fact and conclusions of law:

Issues Presented:

Were the educational placements offered by East Lawrence County School District (hereinafter referred to as District or Respondent) from May 10th, 2014 to May 10th, 2016 reasonably calculated to provide Student (hereinafter referred to as "Student") with a free, appropriate public education (hereinafter referred to as FAPE)?

If not, is Student entitled to be declared eligible to receive special education services including but not limited to: compensatory educational services; an evaluation to address pragmatic language deficits, adaptive behavior deficits and functional impairment; a functional behavior assessment and development of a behavior support plan including training for teachers and staff; the need for a personal healthcare aide and needed related educational services as a result of the alleged failure of Respondent to offer special education and related services?

Petitioner seeking:

- 1) Evaluation to address pragmatic language deficits, adaptive behavior deficits

and functional impairment;

- 2) Compensatory education for related missed services;
- 3) Evaluation and appropriate IEP in:
 - a) least restrictive environment;
 - b) A Board Certified Behavior Analyst (BCBA);
- 4) Functional behavior assessment and development of a behavior support plan;
and
- 5) Training for Administrators, Teachers, Paraprofessionals and staff

Findings of Fact:

- 1) Student is age 9 and is enrolled in the 3rd grade at the, in the East Lawrence County School District;
- 2) Student has disabilities including Autism and OCD;
- 3) East Lawrence County School District is a Local Education Agency as defined in 20 U.S.C. 1401(19);
- 4) Student has attended school in the Forrest City District since Kindergarten;

Procedural History:

On May 10th, 2016, the Arkansas Department of Education (hereinafter referred to as "Department") received a request to initiate due process hearing procedures from XXXX (hereinafter referred to as "Parent" or "Petitioner"), the parent and legal guardian of Student. Parent requested the hearing because he believed that the District failed to comply with the Individuals with Disabilities Education Act of 2004, 20 U.S.C. §§1400-1485, as amended (hereinafter referred to as "FAPE" or the "Act") and the regulations set forth by the Department by not providing the Student with appropriate special education services, as noted in the statement of issues. At the time Parent filed a request for due processing hearing, Student was a nine-year-old, third grade, male enrolled in the District

In response to the Parent's request for hearing, the Department assigned the case to an impartial hearing officer. Thereafter, the date of June 22nd, 2016 was set as the date on which a hearing would commence should the Parent and District fail reach resolution prior to that time. An order setting preliminary timelines and instructions for compliance with the order was issued on May 10th, 2016.

Background:

The Parent has made 3 attempts to obtain special education services for his son since moving into the

Lawrence County School District during his 1st grade school year. Parent claims Student needs special education and related services because of his autism, which impairs his ability to make friends and interact appropriately with his teachers and peers. However, the District denies Student needs special education services because he is "too smart" and "has no academic deficit"

Case History

This request for a Due Process Hearing was filed on May 10th, 2016 and a Timeline Order was issued on that date. The Due Process Hearing was set for June 22nd, 23rd and 24th, 2016. On May 17th, 2016 an Opening Order and Pre Hearing Order was issued and mailed to the Parties. District Representative sent a FAX to the Hearing Officer on May 18th, 2016 stating the parties had waived the Resolution Session, which immediately triggered the commencement of the 45-day-timeline. On May 20th, 2016 the Hearing Officer issued an Amended Pre Hearing Order setting the Pre Hearing Conference for the morning of June 3rd, 2016 and the Due Process Hearing to commence that same afternoon. On May 31st, 2016 the Hearing Officer received a Motion to Continue from the Respondent. On June 1st, 2016 the Hearing Officer drafted and mailed an Order Denying that Motion to Continue. On June 2nd, 2016 the Hearing Officer received and reviewed the Petitioner's Pre Hearing Brief. On June 3rd, 2016 a Pre Hearing Conference was held and the Due Process Hearing was called in Walnut Ridge, Arkansas. One witness testified and the hearing was recessed until August 2nd and 3rd, 2016. On August 2nd the Due Process Hearing was called and counsel for the Petitioner moved to continue without objection because of a family medical emergency. The Due Process Hearing was reset for September 21st and 22nd, 2016. Counsel for the Respondent had filed a Motion to Reconsider the Hearing Officer's Order denying the submission of records as being untimely. Without objection, Respondent's Motion was sustained and District records were allowed to be introduced at the Due Process Hearing. Witnesses were called and the remaining days of the Due Process Hearing were held September 21st and 22nd, 2016 in Walnut Ridge, Arkansas.

Testimony:

Lucy Sellers:

This witness is the K-4 (Kindergarten through fourth grade) Special Ed teacher. She has a Bachelor's degree in K through sixth grade, endorsements in early childhood, English and social studies, she has a Master's degree in reading and she has Master level courses which gives her a certification in Special Ed on a Master's Level. She is now in her 20th year of teaching, 8 of which have been in Special Ed.¹ This witness knows the Student from when he was in first grade when she had a meeting to see if he needed services.²

Discussing her part in the process of getting from the referral conference to an evaluation conference,

¹ Vol. I, P. 14, L. 1-18

² Vol. I, P. 14, L. 21-25

the witness said they schedule the meeting, they hold the meeting and decide whether or not testing needs to be done. If the student does need testing, they set up a time frame, do the testing, come back, discuss the testing and make a decision.'

This witness testified the Student did not qualify for anything she did, as she does academics-reading, writing, math, core academics. She said the Student is super-smart, a straight- "A" student. A child has to have an academic deficit to qualify for resource services in her Special Ed program, and this Student does not have an academic deficit. She does not do speech, OT or PT, only academics.⁴

This witness was at the Student's evaluation conference in 2014 with his first grade teacher, Felissa Craig, the Student's father and grandmother, Lee Ann Cheadle and Nedra Nichols.⁵ According to the referral form, it states the Student had a 504 plan, meaning he is being covered for his disability, physical deficits go under 504.⁶

Reading from the referral form, the witness said the Student is in first grade and is performing on grade level academically, but has behavior and some medical issues. This witness testified they knew the Student had autism, they did the Autism Spectrum Rating Scale and got the psych report.⁷ In going over the Student's psych report, the witness noted the Kaufman Assessment Battery (an IQ test) was done, the Test of Educational Achievement was done, the Clinical Evaluation of Language Fundamentals (which is speech) was done, they did the Beery (which is the visual-motor) and they did an Autism Spectrum Rating Scale. Ashley Bateman, the school psych, did these.⁸ This witness' observation was on page 171, where it shows what she observed: Classroom and Playground.⁹

The Student's next testing session between the Student and the school psych was observed by this witness, who has a little checklist on students and turns it in to the school psych.¹⁰

At the end of school, the class is watching a movie and this witness observed 30 minutes. There were

³ Vol. I, P. 15, **L.** 7-17

⁴ Vol. I, P. 15, L. 21-25 and Vol. **I**, P 16, L. 1-16

' Vol. I, P. 16, L. 17-25 and Vol. I, P 17, L.1-6

⁶ Vol. I, P. 18, L. 13-17 and Vol. 1, **P.** 20, L. 11

⁷ Vol. I, P 19, L. 1-8 and Vol. I, P 22, L4-13

' Vol. **1**, P 22, L. 1 4-24

⁹ Vol. I, P. 23, **L.** 16-21

¹⁰ Vol. I, **P.** 24, **L.** 3-23

no concerns about problems the Student might be having with social interaction with peers¹¹ The witness observed the Student on the playground, and said she saw nothing that would indicate socially-inappropriate behavior there.¹² The psych examiner who made the report recommendations was not at the evaluation conference. Instead, the LEA, Nedra, explained the report to the parents at the meeting. The Kaufman assessment battery testing showed the Student's IQ to be 102, normal, the Student's knowledge index is 14, and everything falls in the normal area except the Stimulus Index.¹⁴ The Simultaneous Processing Index is the only band where the Student tests below average. When it talks about perceiving, storing, manipulating and thinking with visual patterns, this witness testified it is like remembering things, and said, discussing standard deviations, the Student has an 84, with 85 being borderline.¹⁵

This witness admitted math computation was weak for the Student.¹⁶ The witness testified the social domain is what the Student is lowest in. The witness said she did not think the Student's parents completed an ABES (adaptive behavior,¹⁸), but thought the parent just did the ASRS, which is the Autism Rating Scale.¹⁹

The witness testified, as to the pattern of scores and how they relate to a diagnostic criteria, she agreed that of the 13 categories of disability the IDEA has, the Student has autism.⁰ The witness said the Student does not have a learning disability, but testified the Student had behaviors related to his disability he is exhibiting in the classroom, on the playground and in the lunchroom.²¹

As to the decision determining disability, the form on Petitioner's Binder page 190, says "autism,"

¹¹ Vol. I, P 25, L 7-19

¹² Vol. I, P. 27, L 9-22

¹³ Vol. I, P. 28, L 22-25, and Vol. I, P 29, L 1-8 and Vol. I, P. 28, L 10-14

¹⁴ Vol. I, P 30, L 4-15

¹⁵ Vol. I, P 35, L 20-25 and Vol. I, P 36, L 1-13

¹⁶ Vol. I, P 37, L 24-25 and Vol. I, P. 38, L

¹⁷ Vol. I, P 40, L 17-18

¹⁸ Vol. I, P 30, L 6-8

¹⁹ Vol. I, P 42, L. 17-24

²⁰ Vol. I, P 43, L 9-25 and Vol. I, P 44, L 1

²¹ Vol. I, P. 44, L 10 and Vol. I, P. 44, L 11-23

yet on page 191 there is a check to indicate the Student does not carry that diagnosis. However, the witness testified it should say the Student has autism. She went on to say that everything goes into the meeting, and the Student does not have the existence of a disability to obtain services.²²

This witness said the Student's behaviors are not impacting his grades or his social interaction with peers

This witness again said to be placed in Resource, the Student would have to have an academic deficit" She said their school does not have a self-contained room, they have a Resource classroom, and the Student needs to be in the least restrictive environment, and since she has three children with her all day, if the Student was there he would be a total nervous wreck.²⁵

The District has one special ed teacher in each building²⁶ Discussing the continuum of placements required by the Department of Education and the IDEA, this witness said she was familiar with those, and agreed if it was decided the Student would be placed in Special Ed, he could be provided services in the regular classroom all day with indirect services, and if she was the Special Ed teacher providing those services she would be conferring with all the Student's Regular Ed teachers to be sure the services were implemented

The witness said she had heard of co-teaching, but they do not have it.²⁸ In discussing what would be done to deal with the Student's behaviors the witness observed and the teachers talked about, as far as the routines, the problems with interruptions, blurting out and interacting with peers, the witness said it would depend how severe they were In referencing the Conference Decision Form which states there was not enough evidence to support an adverse effect on the Student's education, the witness said that in addition to grades and reports, they usually talk about maturity level, and that a lot of times boys are more immature.³⁰

²² Vol. I, P. 45, L 1-7 and Vol. I, P 45, L. 10-14

²³ Vol. I, P 45, L 21-25 and Vol. I, P 46, L 1-5

²⁴ Vol. I, P. 46, L 11-12

²⁵ Vol. I, P 46, L 14-20

²⁶ Vol. I, P 46, L 21-25 and Vol. I, P 47, L 1

²⁷ Vol. I, P 47, L 2-21

²⁸ Vol. I, P 47, L 22-25 and Vol. I, P 48, L 1-3

²⁹ Vol. I, P 48, L 23-25 and Vol. I, P 49, L 1-6

³⁰ Vol. I, P. 49, L 18-25 and Vol. I, P 50, L 1-6

This witness testified she does not know if the Student is a behavior problem in the classroom because she is not in the classroom. She knows of him from the playground or when a therapist stopped by her room to pick up another child³¹

The witness testified that in the Walnut Ridge School District, for a student to qualify for Special Ed services-meaning they get an IEP-they must have an educational academic deficit adversely affecting their education.³²

The witness testified that if a student has issues with speech but no academic deficits, and there is a speech evaluation and a speech therapist thinks the student would qualify for Special Ed services, the district would qualify that child, based on the evaluation, for speech services, that if they had a speech delay, some kind of speech disability, they have to be serviced.³³ This witness acknowledged speech and Special Ed being under the same umbrella for Special Ed, but said speech addresses expressive language, social skills, and she only addresses academics except for potty training two students this year.³⁴

The witness testified if a student had a need for speech pathology, they would qualify for Special Ed if they had a problem with understanding what is said or expressing their thoughts, to be understood, and speech is different than report cards with all "A's"³⁵ The witness testified if a student has some kind of speech impairment in one of the 13 categories, they could have an IEP based on speech goals and objectives. She filled her said speech is the only exception they actually put on the IEP and count it for Special Ed minutes, and on a speech-only IEP, all the goals and objectives would be implemented by the speech pathologist³⁶

Ashley Bateman:

This witness has a Bachelor's in psychology from Williams Baptist College, attended grad school at ASU to receive a specialist in education with an emphasis on school psychology, and has been licensed by the Department of Education as a school psychologist specialist for five years." This

³¹ Vol. I, P 51, L 2-9

³² Vol. I, P 53, L 3-11

³³ Vol. I, P. 54, L 4-15

³⁴ Vol. I, P 54, L 16-23

³⁵ Vol. I, P 56, L 5-25, P 57, L 1-4

³⁶ Vol. I, P 57, L 11-16 and Vol. I, P 58, L 5-12

³⁷ Vol. II, P JO, L 2-14

witness is the person who would have done any evaluations for the school district³⁸. She served a consortium of school districts, and since that time has been employed solely by the Jackson County School District (since during this Spring)¹⁹

Usually, this witness does consultation or collaboration; if a committee or the Special Ed committee or 504 committee requests her presence at a meeting, she will be present. Or, if they have specific questions as to academic interventions, etc., she fields those questions on an as-needed basis." For her testimony, this witness reviewed her report. ⁴¹

In discussing her referral for the Student (he was performing on grade level, but had behavior and some medical issues), this witness testified she suspected autism, because they had a medical report from Dr. Skaug which was dated prior to the time this witness tested the Student, so she already knew a doctor had diagnosed the Student with Autism Spectrum Disorder and epilepsy n

This witness said when a doctor gives an Autism Spectrum Disorder diagnosis, it does meet one of the categories for a child to be identified under the autism category.'-' This witness testified further as to her report that she always looks at IQ and achievement, as well as observations, there are certain components to evaluate per disability category, so observations is one in multiple areas, and classroom-based assessment to let her know what the teacher says about the student's performing." She always does adaptive behavior, but did specific adaptive behavior related to autism, she took a social history, IQ, individual achievement, she did a CELF screener and found no deficits." Discussing whether or not observation is required, this witness said she did not do it, but it was completed, and that a lot of school districts do not, they have to have someone capable of doing it." In this case, it was the Special Ed teacher."

³⁸ Vol. 11, P. IO, L. 17-22

³⁹ Vol. II, P II, L. 1-16

⁴⁰ Vol. 11, P. 11, L. 22-25 and Vol. II, P 12, L. 2-4

⁴¹ Vol. 11, P 12, L. 5-7

" Vol. TT, P 12, L. 19-25 and Vol. TT, P 13, L. 1-23

<1 Vol. II, P 13, L. 24-25 and Vol. II, P. 14, L. 1-3

" Vol. II, P. 14, L. 7-15

" Vol. II, P 14, L. 18-19 and Vol. 11, p 15, L. 1-14

<6 Vol. 11, P 15, L. 22-25 and Vol. 11, P 16, L. 1-8

" Vol. II, P 16, L. 9-11

When asked about the Student's receptive or expressive language component not being done, this witness said she could not tell exactly how the CELF screener evaluates, that it does not separate expressive and receptive language and only gives a criterion score, which this Student passed "" Discussing communication and autism, the witness said they typically have difficulty either expressing themselves or have an issue with receptive language, that typically there are usually some pragmatic issues." The Student here was not evaluated for that, the witness saying it is not necessarily required.

A speech evaluation was not ordered for the Student, as this witness did not feel the need because the Student met the CELF screener criteria.⁵¹ So, when saying the Student was well above the level, there is no knowledge of whether or not the screener showed deficits in either expressive or receptive language.⁵²

When asked if this Student qualified for identification of a disability under the autism category when she came to the conference, she said it is two-fold for Special Ed-he would need a disability, would need to qualify for a disability, as well as a need for Special Ed, and they did not feel as a committee that the Student has a need for Special Education.⁵³ The witness reiterated whether or not the Student qualified under the autism category was a two-fold question; she said that because even though he has autism, there has to be a need for Special Ed, and she did not believe the Student had that need. "

This witness said she was not present at the Evaluation Programming Conference, nor is she required to be there, only someone with knowledge of the interpretation is required to be present, and their Special Ed teachers have training to be able to talk about test data.⁵⁵

This witness' report was dated June 27, and the conference was a little over two weeks later-" Since it is a committee decision what category and qualification a child would be placed under, this witness

⁴⁹ Vol. II, P. 16, L 15-24

⁵⁰ Vol. II, P 16, L 25 and Vol. II, P. 17, L 1-6

⁵¹ Vol. II, P 17, L 7-8

⁵² Vol. II, P 17, L 10-16

⁵³ Vol. II, P 17, L 20-24

⁵⁴ Vol. II, P 17, L 25 and Vol. II, P 18, L 1-11

⁵⁵ Vol. II, P 18, L 12-21

⁵⁶ Vol. II, P. 19, L 12-18

⁵⁷ Vol. II, P 20, L 5-9

said she does not always state in her report whether a student qualifies with a disability.⁵⁷ In the witness' summary of her report, she listed the Student recently completed first grade, has been performing on grade level but has behavior issues and some medical issues. Her information came off the referral form, here completed by Mr. McDaniel as to behavioral issues and the observations given by Ms. Lucy as to classroom, playground and lunchroom behavior, and the witness also included the previous evaluation of the Student from Dennis Developmental Center in 2013.⁵⁸

This witness did not do behavior testing; she did the Autism Spectrum Rating Scale, Parent and Teacher, which is a specific rating scale, like the BASC, but it does not look at necessarily hyperactivity or conduct disorder or the like, it looks specifically at the features of autism: social communication, unusual behaviors, peer socialization, adult socialization, things specifically related to autism and the autism rating.⁵⁹

The parent rated the Student to have difficulty in all areas assessed, and the teacher rated the Student to have difficulties in some, adult socialization, stereotype, behavior rigidity, sensory sensitivity.⁶⁰ The scale most elevated was self-regulation-- the extent to which the Student can appropriately focus attention on one thing while ignoring other things, and how well he controls behavior and thoughts and maintains focus and resists distraction. The teacher only rated two areas to be very elevated, stereotype and behavioral rigidity, which is whenever there is a change in routine, he is not going to just go with the flow, it will be disruptive for him.⁶¹

Discussing the Adaptive Behavior Scale, the witness said the Student's teacher rated the Student to be pretty good in all areas with the exception of social, self-direction, and work.⁶² As to this witness' personal observations of the Student, she testified she noted all relevant behaviors because they may impact the Student's ability to perform on the assessment. She noted popping knuckles, the Student was unwilling to even try some tasks about which he was not sure, and he required more encouragement and prompting to complete tasks as the tests got difficult.⁶³ For the written expression assessment, the witness testified that on one particular part the Student refused to

⁵⁷ Vol. II, **P** 20, L. 12-21

⁵⁸ Vol. II, **P**. 21, L. 22-25 and Vol. II, P. 22, L. 1-13

⁵⁹ Vol. 11, **P** 22, L. 17-25 and Vol. II, P 23, L. 1-3

⁶⁰ Vol. **II**, **P** 23, L. 11-15

⁶¹ Vol. II, **P** 23, L. 19-25 and Vol. II, P 24, L. 1-19

⁶² Vol. II, **P** 24, L. 20-25 and Vol. **11**, P 25, L. 1-4

⁶³ Vol. II, **P** 27, L. 7-25 and Vol. 11, P 28, L. 1-8

complete the task at all, no matter how much he was pressed to write."

While this witness testified she made no recommendations concerning the Student's placement, she testified she usually makes recommendations for teachers to take and use in the classroom with children who have specific issues with attention or hyperactivity or social issues, reporting on possible interventions or accommodations to use in the classroom.⁶⁵ This witness agreed she is required to use evidence-based practices in working with children who are autistic, and agreed some of the recommendations she made for the Student were actually specifically part of those evidence-based practices for children on the autism spectrum.⁶⁶ One of those is priming, which can be done for any social activity that is going to occur, and the witness did this for kickball and recess because those were social settings because of his social deficits, being low in socialization.⁶⁷

This witness did not recommend any of the social skills training for the Student⁶⁸ The witness testified there are several behavior interventions out there, it depends on the specific behavior. When asked how that is developed, the witness said a Behavioral Intervention Plan is just a plan, but the specific intervention being used per the plan would be evidence-based.⁶⁹ In her report, the witness noted "Given the behavioral symptoms," and "impulsivity and short attention span, additional instruction and/or behavioral strategies for students with hyperactivity and high destructibility are offered for consideration."⁷⁰

According to the witness' observations and those of Ms. Lucy, the Student had no regard to distance or height or personal safety when he jumped, his body language expressed anger, he is arguing with another peer, pointing his finger, and is bossy and tried to control the playground equipment, but the witness testified those are not associated with impulsivity or short attention span, but could be associated with social difficulties.⁷¹ The witness said the Student was inattentive in her behavioral observation, the Student's attention on the Dad's scale was a 67-elevated-and on the teacher's it was

⁶⁵ Vol. II, P. 28, L. 20-25 and Vol. II, P. 29, L. 1-5

⁶⁶ Vol. II, P. 29, L. 23-25 and Vol II, P 30, L. 1-14

⁶⁷ Vol. II, P. 31, L. 11-15 and Vol II, P. 33, L. 11-15

⁶⁸ Vol II, P 33, L. 16-25 and Vol 11, p 34, L. 1-3

⁶⁹ Vol 11, P. 35, L. 6-7

⁷⁰ Vol 11, P. 35, P. 23-24 and Vol. II, P 36, L. 1-6

⁷¹ Vol. II, P. 36, L. 10-15

⁷² Vol. II, P 36, L. 18-25 and Vol. II P 37, L. 1-12

a 49 as to attention issues, which the witness said is in the average rangen

When asked, considering the witness' report recommendations, if the Student has mainly social issues why the witness was not trying to address those with some sort of social skills training as opposed to the other techniques he may not need, the witness said she included socialization strategies and interventions and included the behavioral. She said those were to consider for the Student's teacher because Ms. Craig said he talks excessively, distracts others and speaks out frequently, which she considers to be somewhat inattentive or impulsive.⁷¹

The witness said she did not recommend social skills training, as she felt intervention strategies (priming, script-fading and peer-mediated procedures were a good start." The witness said she did not know the Student was receiving counseling at Dayspring.⁷⁵

This witness did not agree with the statement a child has to have an academic deficit to be placed in Special Education.⁷⁶ When asked if a child could have a behavior deficit and need Special Education, the witness said the deficit would have to be so severe that it greatly impacts their performance in the classroom, and she would look for discipline referrals, typically, or removal from the classroom, or such disruptive behavior in the classroom that the class cannot function with the student there or the student cannot function in class, cannot perform at grade level curriculum being provided, due to behavior-

As to placement, this witness said they look at the least restrictive environment to meet a child's needs⁷⁸, and said she believes the Student here is currently in the least restrictive environment, having a 504 accommodation plan.⁷⁹ She said she does not believe the Student has a need for Special Education, but would benefit from some classroom accommodation and that he is receiving that."

⁷² Vol. II, P. 37, L. 17-18, Vol. II, P 37, L. 23-25 and Vol. II, P 38, L. 1-6

⁷¹ Vol. II, P 40, L. 5-25 and Vol. 11, P 41, L 1

⁷³ Vol. II, P. 41, L 2-24

⁷⁵ Vol. 11, P 42, L 13-15

⁷⁶ Vol. II, P 53, L 1-4

⁷⁷ Vol. II, P 53, L. 21-25 and Vol. II, P 54, L 1-18

⁷⁸ Vol. II, P 55, L. 1-7

⁷⁹ Vol. II, P 67, L. 13-16

⁸⁰ Vol. II, P. 68, L. 9-18

She based this opinion from her 2014 report.⁸¹ She said they felt the input provided was valid and did not justify additional data collection because the Student was functioning well with accommodations in the classroom.⁸²

This witness agreed that if the Student does not learn social skills, it would impact him the rest of his life, it could potentially isolate him from his pers, it could have an impact on his employment, really on every aspect of his life.⁸³

When asked how the behaviors would be addressed, the witness said in a 504 plan." The witness said she is sure the social worker addresses some of the social skills issues (P. 62, L. 2-6), and when given a list of the Student's social deficits from the Dayspring report, the witness said she thought that was a lot of what they saw back in 2014, she would say the behaviors stayed the same.⁸⁵ Further referring to the 10-03-15 Dayspring report, the witness said that report was not at the October 9, 2015 conference.⁸⁶

The witness said the current Axis I diagnosis on the report is Obsessive-Compulsive Disorder.⁸⁷ At the time of her report, the Student had just completed first grade, and this witness evaluated him in the summer.⁸⁸

Lee Ann Cheadle:

She is the elementary principal, holds 2 Master's degrees, taught for 38 years, has certifications in Gifted and Talented, reading supervisory, reading specialist, administration, elementary 1-6, and just completed her specialist degree in superintendency⁸⁹

This witness testified she had not seen the Student very much as far as discipline in the office, maybe

⁸¹ Vol. 11, P. 69, L. 2-7

⁸² Vol. II, P 69, L. 17-25

⁸³ Vol. 11, P 57, L. 1-21

" Vol. 11, P. 60, L. 7-11

⁸⁵ Vol. 11, P. 52, L. 7-21

⁸⁶ Vol. II, P 65, L. 17-20

⁸⁷ Vol. II, P 66, L. 6-9

⁸⁸ Vol. II, P. 72, L. 18-25 and Vol. II, P 73, L. 1-3

⁸⁹ Vol. II, P. 77, L. 20-24

3 or 4 times, and said when she does she calls the parent to let him know what the Student has done.⁹⁰ The witness said she though there was one bus incident about which she called the Student's parent, but she does not have much interaction with the Student.⁹¹

This witness acknowledged she heard the prior witness Ms. Lucy's testimony about the Student not having special education services because he did not have an academic deficit. This witness said the that because the Student did not have an academic deficit, he did not qualify for Special Education, that the Student excelled on all his tests, she had "sort of recommended" him for Gifted & Talented, and said when she was at the IEP meetings for the Student she was looking at it academically, and agreed her decisions based on that meeting had to with whether the Student had an academic deficit.⁹²

The witness agreed the Student's father had made 3 referrals, and did recall a referral as to the Student by Ms. Lucy September of last year and attending a referral conference as to whether or not the Student needed testing or information needed to be gathered at all on whether the Student should be placed with Special Ed services, and said at that point in time she felt the 504 was meeting the Student's needs, looking at it academically.⁹³

This witness said educationally-speaking, she felt the Student's social issues were typical and that socially she has seen some students far more inept socially than this Student."

The witness testified she knew that Kellie Letbetter wanted to observe the Student on the playground, but that due to privacy issues Ms. Letbetter was told by Ms. Rider, the counselor, could not do that, and they felt Ms. Rider could meet with Ms. Letbetter to go over issues, even though the witness testified there was nothing to prohibit recess observation in the handbook, and there was not a written policy⁹⁵

When asked if they provided Ms. Letbetter a place to meet with the Student, this witness said all counselors can meet with students at lunch and that was the school's policy when this witness came%

⁹⁰ Vol. II, P 78, L. 7-10

⁹¹ Vol. II P. 78, L. 12-14, 20-21

⁹² Vol. II, P 79, L. 1-4, 6-25 and Vol. II, P 80, L. 1-7

⁹³ Vol. II, P. 85, L. 7-25 and Vol. II, P 86, L. 1-6.

⁹⁴ Vol. II, P. 86, L. 11-24

⁹⁵ Vol. II, P 87, L. 19-25 and Vol. II, P 88, L. 1-23 and Vol. II, P 89, L. 1-15

⁹⁶ Vol. II, P 90, L. 7-11

When asked if she was aware one of the things being asked for in this case is that a place be provided for Ms. Letbetter to meet with the Student that is a bit more private than sitting in the hallway, the witness said she "may have read it."⁹⁷ When asked why that had not been done, the witness said this was the policy when she came

On cross-examination as to counselors having a place to visit with a student, the witness said the time and place is lunch, that there is a table they can sit and visit, that there is a table behind the cafeteria if they want a little more quiet; there is a lunchroom cafeteria table and a table in the hallway, that all the students are at lunch so it is outside.⁹⁹

When asked if the Student had received any social skills training, the witness said if he had, it would be with Ms. Rider (the counselor), and said that at the last 504 meeting she (the witness) mentioned starting a social skills class with the Student and some of the other students, that she thought fourth grade was very difficult this year. The witness said when the parent mentioned social skills, she thought it was a good idea for the whole fourth grade class.

The witness agreed--said she guessed--that the Student would deserve to have privacy in talking to a counselor, rather than students being able to walk by or stand and listen or even know if he was getting counseling, but again said the district's policy throughout the years has been counselors come to the lunchroom.¹⁰² Responsive to questioning about contrasting the right to privacy on the playground vs. the right to privacy for counseling, and there being no private room, the witness said the occupational therapist and the physical therapist have a room, it is the stage and the curtains are not open. The witness agreed she did not know of any problem with a child being gifted and at the same time receiving Special Education Services.¹⁰¹

Robin Munn:

This witness holds a Bachelor's degree in communicative disorders, is certified through the State of

⁹⁷ Vol. II, P. 90, L 14-20

⁹⁸ Vol. II, P 91, L 2-5

⁹⁹ Vol. II, P 97, L 14-25, Vol. 11, P 98, L 1-8

¹⁰⁰ Vol. II, P. 93, L 11-19

¹⁰¹ Vol. II, P 95, L 21-21, P 96, L 1-4

¹⁰² Vol. II, P 101, L 17-25 and Vol. 11, p 102, L 1-9

¹⁰³ Vol. 11, P 102, L 20-25 and Vol II, P 103, L 1-4, & 19-22

¹⁰⁴ Vol. II, P 108, L 12-15

Arkansas, and is nationally certified through the American Speech, Language, and Hearing Association. She has been a licensed speech and language pathologist for 16 years.¹⁰⁵ She gave the Student a specialized speech and language evaluation arising out of a referral conference.¹⁰⁶ This witness agreed that from the documentation, although required, a testing of the Student's receptive and expressive language deficits was not conducted on the evaluation the district did in 2014, and said what led to her speech and language evaluation of the Student was the Student's parent spoke with this witness and referred the Student.¹⁰⁷ In reading where it said "Description of academic/developmental, and/or behavioral performance which prompted the referral," the witness said the parent stated the Student had a lisp and problems saying the "S" sound, as well as problems saying what he wants to say. The issues looked at by this witness were articulation and an expressive language deficit because of the parent saying the Student had problems saying what he wanted to say.¹⁰⁸ The witness said the Student's father did not mention anything about the Student having any pragmatic or social deficits in the referral.¹⁰⁹ At the time of the referral, the witness said she did not know anything about a receptive language, a speech and language evaluation being done in 2014.¹¹⁰

The witness said she tested the Student for receptive language deficits, and his scores were within normal limits for his age group.¹¹¹ She gave him multiple different tests, and testified his scores were average, and said also she did an observation of the Student's conversational speech during evaluations, in which he did not exhibit any articulation errors in connected speech. She further said the Student's teacher indicated the Student had no articulated errors in his connected speech in the classroom, and that while the Student did have some difficulty expressing his thoughts and ideas in asking and answering questions, those difficulties did not affect the Student academically.¹¹² Also, this witness testified the Student's teacher at that time, Hillary Anderson, put the Student's behavior, work habits and attitudes were all acceptable.¹¹³

¹⁰⁵ Vol. II, P. 111, L 16-25 and Vol. 11, P 112, L 1-6

¹⁰⁶ Vol. 11, P 112, L 7-15

¹⁰⁷ Vol. 11, P 112, L 18-25 and Vol. II, P. 113, L 1-10

¹⁰⁸ Vol. II, P 113, L 10-21

¹⁰⁹ Vol. II, P 114, L 2-4

¹¹⁰ Vol. II, P 114, L 5-8

¹¹¹ Vol. II, P 114, L 9-11 and 17-18

¹¹² Vol. II, P. 115, L 3-25 and Vol. II, p 116, L 1-25 and Vol. II, P. 117, 1-11

¹¹³ Vol. II, P 117, L 16-25 and Vol. II, p 118, L 1-2

The witness said there was a difference in receptive and expressive language, so as a speech pathologist with her experience, she did a second evaluation. She also said she believed the Student's father said on the social history the Student was high functioning autism. The witness said pragmatics and social skills of the Student were not an issue of the referral.

When asked the distinction between a specialized speech and a comprehensive evaluation that includes that, the witness said comprehensive includes an IQ, achievement, adaptive behavior, while a specialized speech and language only includes articulation and language, it does not include IQ, adaptive behavior or achievement.¹¹⁶ The witness said she did attend a conference for the Student after she conducted her speech and language evaluation.¹¹⁷ The witness testified there was a classroom-based assessment by the teacher, which is not a formalized, standardized assessment, it is a district assessment, and in this case it said the Student's behavior, attitude and work habits were acceptable.¹¹⁸

When it was noted the classroom-based assessment had a page not checked either yes or no: "Does the student get along with his or her peers and have age-appropriate social skills," but stated "Most of the time," and did that mean most of the time yes or no, the witness said she believed she spoke with Ms. Hillary and she said most of the time that yes, the Student did. The witness said that was an oversight and she should have gone back and had the teacher check "yes," but she did not.¹¹⁹

Xxxx:

Xxxx is the Student's father.¹²⁰ When asked to describe the Student's disabilities, this witness said the Student had an MMR shot at approximately age 3, and after that he began regressing developmentally-his speech, his sensory as to his bladder, he did not know when he had to go to the bathroom (he wore pull-ups until five or nearly six years old, though he had been nearly potty trained before the shot). The Student turned 10 last Saturday, and still has sensory toilet issues, he has to have frequent reminders, about every hour and a half. The Student's grandmother, with 28 years in

¹¹⁴ Vol. II, P 118, L. 13-23

¹¹⁵ Vol. II, P 120, L 11-12

¹¹⁶ Vol. II, P 121, L. 17-25

¹¹⁷ Vol. II, P. 123, L. 22-24

¹¹⁸ Vol. II, P 124, L. 24-25 and Vol. II, P 125, L 1-23

¹¹⁹ Vol. II, P. 128, L 5-23

¹²⁰ Vol. II, P 129, L 20-22

special education, first noticed all this.¹²¹ He also regressed a little in speech, and right after that he began preschool at Sloan Hendrix School you could hardly understand what the Student was saying.¹²²

In kindergarten there were issues like the Student spinning in circles, wanting to do flips all the time, he would jerk away from contact, he would have melt-downs, actually get on the floor and kick his feet and hands, hit anything or anyone in the way.¹²³ These were prompted by changes in routine.^m

When asked what behaviors the Student exhibited in first grade that might interfere with his schooling, the witness said when the Student starts a task, he must finish it before he goes to anything else, and it is hard to get him to stop.¹²⁵ The witness said there were social interaction issues, not just with children but with adults as well.¹²⁶ The witness took the Student to James L. Dennis for an evaluation, and his PCP was Dr. Warren Skaug.¹²⁷

When asked if he knew what the Student's first grade teacher meant in her report when she said the Student had problems with boundaries, the witness said it was about the Student's personal space, and that the Student invades other people's personal space all the time; he has boundaries, but does not understand other people also have boundaries.¹²⁸ The report of the first grade teacher also said the Student had problems with "impulsivity and attention." The witness said you can talk to the Student and there is seldom any eye contact, and the Student may go into another room, it is difficult to keep his attention.¹²⁹

When asked what the teacher meant when she said the Student could be aggressive with his peers and adults and interferes with their activities, and if the witness recalled hearing about aggressive behaviors the Student might have exhibited in kindergarten, the witness said there were some, which

¹²¹ Vol. II, P 130, L 2-17 and Vol. 11, P 130, L 12-20 and Vol 11, P 131, L 10-14

¹²² Vol. III, P 131, L. 15-23

¹²³ Vol. III, P. 132, L 3-15

¹²⁴ Vol. III, P 132, L 16-19

¹²⁵ Vol III, P 133, L. 1-9

¹²⁶ Vol. III, P. 133, L 11-12

¹²⁷ Vol. III, P. 133, L 18-24

¹²⁸ Vol III, P 134, L 1-17

¹²⁹ Vol. III, P 134, L 18-25 and Vol. III, P 135, L 2-7

a lot of this is what led to Dr. Skaug sending a referral to Dennis Development. ¹³⁰ When asked about the report saying the Student had difficulty concentrating and had unusual mannerisms, such as tics, pulling his hair, rubbing his nose, the witness said the Student did exhibit tics for a while, and would pull his hair to the point he actually had two bald spots on his head where he pulled his hair, and he would pinch his skin for a long time. ¹³¹

In talking about how the Student came to be diagnosed with autism, the witness said they went to the Student's primary care physician, Dr. Warren Skaug, then at the Children's Clinic in Jonesboro, and the Dr. said he could see some signs, so he referred the Student to Dennis Development and, the witness thought, Families, Inc., and he also thought Dayspring did one. Then they met again with Dr. Skaug and Dr. Skaug read all the reports and said he had no problem diagnosing the Student at that time. ¹³² One of the things recommended was continued counseling at Dayspring, so by the time James L. Dennis did a report in 2013, the Student was already in counseling at Dayspring for his social skills, aggression, to help with his meltdowns, transitions. ¹³³

There was also recommended designing and implementing a behavior program for the Student. ¹³⁴ When asked if any kind of behavior system was put in place for the Student after he came to this school, the witness said it was the same policy as any other student. ¹³⁵

When asked what behaviors prompted the witness' first referral asking for Special Education for the Student in May of 2014, the witness said there were transition issues, everything has to be done a certain way, routine, and there are actually times the witness had to hold the Student to keep him from hurting people, that his whole demeanor changes. ¹³⁶

The parent/witness has made three referrals--for first grade, second grade and third grade. ¹³⁷ When asked why the parent/witness had sought Special Ed services for the Student, the witness said the Student is not getting any help with transition from one subject to the next or one room to the next,

¹³⁰ Vol. III, P 135, L. 8-13 and Vol. III, p 136, L. 6-13

¹³¹ Vol. III, P 136, L. 14-22

¹³² Vol. III, P 137, L. 7-23

¹³³ Vol. III, p 137, L. 24-25 and Vol. III, P 138, L. 1-9

¹³⁴ Vol. III, P 138, L. 10-12

¹³⁵ Vol. III, P 138, L. 12-16

¹³⁶ Vol. III, P 138, L. 17-25 and Vol. III, P. 139, L. 1-9

¹³⁷ Vol. III, P 139, L. 12-18

not getting any social interaction with other kids, peers, adults to help with his change in routines. us When asked how the parent/witness compared the Student socially with his peers, the parent/witness said based on his observations of other children that age, the Student is probably a couple of years behind.¹³⁹

In talking about the Student's maturity level, the witness said some parents can tell a child to stay in a certain place and they will, but this Student must, for example, hold his father's hand in a store or he will wander off ¹⁴⁰

When asked about ordering food off a menu in a restaurant, the witness said the Student can, but it has to be a certain way; he listed an example of being brought a Styrofoam cup and the Student yelling at the waitress in the restaurant full of people that the wrong cup was brought out-the Student did not understand that is socially inappropriate. ¹⁴¹ The witness also said the Student did not know the proper way to interact with his peers if they are doing something the Student thinks is not the way to do it, that he always thinks he is right and is rude with them. ¹⁴² The parent/witness said he is a single father with no other children in the home, and he can't teach all this at home. ¹⁴³ The witness also testified about the Student's lack of social skills with his cousins. ¹⁴⁴

Also discussing the Student's interaction difficulties with other students, the witness said two years ago the Student came home and said he was being bullied on the playground, that children were getting in his face and pushing, and the witness went to the counselor, Ms. Kelly Rider, who knew about the Student's disabilities, and told her he did not know if it was true or not, but that if bullying was going on, it had to stop. ¹⁴⁵ The witness said Ms. Rider said she would look into it. ¹⁴⁶ The witness said a few weeks later he was called about more problems on the playground, and he suggested maybe something more was needed, such as setting boundaries and consequences for crossing the boundaries, since many autistic children need boundaries. The witness said Mrs.

¹³⁸ Vol. III, P. 139, L. 19-25, Vol. III, P 140, L. 1-5

¹³⁹ Vol III, P 140, L. 6-13

¹⁴⁰ Vol. III, p 140, L. 19-25 and Vol. III, P 141, L. 1

¹⁴¹ Vol. III, P 141, L. 5-19

¹⁴² Vol III, P 141, L. 23..25 and Vol. III, P. 142, L. 1-19

¹⁴³ Vol. III, p 142, L. 19-25 and Vol III, P. 143, L. 1

¹⁴⁴ Vol. III, p 143, L. 2-17

¹⁴⁵ Vol. III, P 144, L. 9-25

¹⁴⁶ Vol III, P 145, L. 1-2

Cheadle, to whom he made these comments, said she had not thought about that, and the witness said let's try it and see how it goes. The witness said when he saw Mrs. Cheadle a couple of weeks later, she said it seemed to be working. The witness said he thought this was at the first of the year, and while they tried taking the boundaries away, that did not work, so the Student went the whole with boundaries.¹⁴⁷

The witness said he had not asked to watch the Student's interactions with his peers on the playground, but that Kelly Rider, the therapist for the Student, had asked if she could watch the Student on the playground but was told no.¹⁴⁸

The witness said for the most part the Student was not able to come home and relate what happened that day at school, so the witness asked the teachers for the Student in second and third grades to keep daily notes. The notes were made in notebooks, the Student brought them home in his backpack, and the witness reviewed them each day." As to the Student's behaviors, the witness said he heard about the Student blurting out without raising his hand, having problems with transitioning from one task to another and interrupting or arguing with the teacher.¹⁵⁰

The witness said Dr. Skaug prescribed a Benik vest for the Student, which goes on like a weighted vest, and is to be worn one hour to an hour and a half on, then one hour off daily.¹⁵¹ The witness said the Student had problems with transitioning the vest on and off, both at school and at home.¹⁵² The witness said the Student also has trouble with using his inside voice, that he has a weighted blanket at home for when he is upset, and that he also has a pop-up deer hunting blind in his bedroom when he needs alone time, a confined space.¹⁵¹

The witness said he saw the same behaviors in the Student not being able to interact with other children, such as when they were out in public the Student pushing other children out of the way to get to the top of play equipment, and needs frequent reminders to wait his turn.¹⁵³ The witness said

¹⁴⁷ Vol. III, P 145, L 3-25 and Vol. III, P 146, L 1-4

¹⁴⁸ Vol. III, p 146, L 5-13

¹⁴⁹ Vol. III, P. 147, L. 7-25 and Vol. III, P 148, L 1-11

¹⁵⁰ Vol. III, P 148, L 12-25

¹⁵¹ Vol. III, P 149, L 1-20

¹⁵² Vol. III, P 149, L 24-25 and Vol. III, P 150, L 1-6

¹⁵³ Vol. III, P 150, L. 7-25 and Vol. III, P 151, L. 1-20

¹⁵⁴ Vol. III, P 152, L. 13-25 and Vol. III, p 153, L 1-5

he has also seen the Student get in the faces of other children and adults.¹⁵⁵ Discussing the Student's behaviors, the witness said one of the things he recalled was visiting with the Student's first grade teacher at nine weeks, Ms. Hillary, addressing some of the things in the notebook about the Student and some of the things on the 504 and what was being done, and one of the comments was "Well, I can't treat one kid different than another."¹⁵⁶

The witness said last year, when school had been in session about a month, he made a referral for the Student to receive Special Education, and on the form he filled out as to the description of what prompted the behavior he put "behaviors associated with autism."¹⁵⁷ The witness said this was prompted by the way the Student interacted with his peers, some of the journal entries then and the end of the year before.¹⁵⁸

The witness said the Special Ed teacher, Lucy Sellers, made the comment to the witness about a behavioral IEP, which he understood to mean that because his grades were good, because there was no academic deficit, he would not qualify for a regular IEP, but a behavioral IEP could be done.¹⁵⁹ However, the witness said that when that actually got brought up, Ms. Lucy said she did not say that.¹⁶⁰ The witness said at the meeting there was no teacher present.¹⁶¹ The witness said the only papers at the meeting was the actual decision form Lucy Sellers had.¹⁶² The witness said that at this hearing is the first time he heard about an email being sent from the teacher.¹⁶³

The witness said he was not asked to provide records from the Student's primary care physician from time to time for consent, but that he (the witness) brought in records to the school. The witness said in the second grade year he signed a consent for Dayspring to share information with the school, which is a part of the yearly review at Dayspring.¹⁶⁴

¹⁵⁵ Vol. III, P 153, L. 6-25 and Vol. III, P 154, L. 1-5

¹⁵⁶ Vol. III, P 154, L. 6-17

¹⁵⁷ Vol. III, P 154, L. 21-25 and Vol. III, p 155, L. 1-5

¹⁵⁸ Vol. III, P 155, L. 1-12

¹⁵⁹ Vol. III, P 155, L. 14-25 and Vol. III, P 156, L. 1-3

¹⁶⁰ Vol. III, P 156, L. 15-21

¹⁶¹ Vol. III, P 156, L. 22-24

¹⁶² Vol. III, P 157, L. 22-25

¹⁶³ Vol. III, P 157, L. 12-17

¹⁶⁴ Vol. III, P 158, L. 1-16

The witness said there was a point the school would not answer a question from Kellie Letbetter of Dayspring because the school counselor, Kelly Rider, or a teacher, said there was no consent letter on file, so the witness made sure there was one on file because he felt it important Ms. Letbetter could observe the Student on the playground and his interaction with his peers to know what treatment to use.¹⁶⁵

The witness said Dayspring renews a treatment plan every three to six months, and he provided this dated 10-03-15 to the school during one of the 504 meetings¹⁶⁶ The witness said one of the things listed on the goal was in the Student's own words, saying "I need to stop hitting still, and still listen better. I need to stop ignoring, too."¹⁶⁷ In discussing the Student hitting, the witness said the hitting was more at home than school, he believed, but that there was an incident in the first grade where the Student slapped a teacher on the hand when she tried to take a book away from him.¹⁶⁸

The student received a teacher assault disciplinary for that (the Student was reading instead of eating breakfast, had been told three times to put up the book, and when the teacher took the book the Student slapped her. He could not transition, could not stop what he was doing).¹⁶⁹ As far as anger outbursts, the witness said he did not hear too much of it at school, but saw it a lot in public. As an example, the witness said if they go somewhere and the Student does not want to leave when it is time to go, he will start yelling and such, and that there have been a few times the witness had to pick the Student up and carry him out.¹⁷⁰

As far as the Student interrupting others in conversations, the witness said this is frequent and most of the time with the Student, throughout all settings¹⁷¹

Talking about the Student's daily living skills or lack thereof the witness said the Student can brush his teeth if he is made to do so (there is a sensory issue), he has to have frequent prompts to shower (and could be sitting in the shower picking his toes instead of showering), he can dress himself and button his shirts (but you have to stay after him), he can pop popcorn in the microwave because he has a routine on which buttons to push, but cannot make a sandwich; the witness has never seen the Student answer the doorbell, and the witness did not know what the Student would do as to a fire

¹⁶⁵ Vol. III, P 159, L 4-25

¹⁶⁶ Vol. III, P 160, L 2-12

¹⁶⁷ Vol. II, P. 160, L 13-16

¹⁶⁸ Vol. **111**, p 160, L 23-25 and Vol. III, P 161, L 1-9

¹⁶⁹ Vol. III, P 161, L 11-22

¹⁷⁰ Vol. **III**, P 161, L. 23-25 and Vol. III, P 162, L 1-11

¹⁷¹ Vol. III, P 162, L 12-18

alarm except that he reacts to loud noises—a loud noise is a change in atmosphere, and the Student will try to find a place away from everything to hide. Although the Student knows to look both ways, he is unable to cross the street by himself because he has no fear for what could happen and would not know even if a car was coming not to cross the street.¹⁷²

The witness said the Student has no fear of danger, so cannot be left alone for any period while he plays with a friend unsupervised—the Student could be on the monkey bars hanging from his toes, he has no threshold for pain, he could be hurt and not realize it—he was hit in the head with a softball over the summer and had to get four stitches, but never cried at all; instead, he merely told the witness the coach wanted him. The Student cannot pay attention on a ball team; the witness said the Student would run through the whole outfield or sit and play with his glove, no attention to the game—”

When questioned about the Student expressing joy, the witness said it was very seldom; the witness said, as to whether he thinks the Student has the ability to exhibit expressions consistent with events, that he thinks the Student knows when he enjoys doing something or not, but does not know how to express it.¹⁷⁵ The witness said the Student is unable to read facial expressions or body language and takes everything literally so no one can tease him—”⁶

In discussing his efforts to have Kellie Ledbetter see the Student at school, the witness said Ms. Ledbetter wanted to see the Student interacting with others at school, so the witness talked to Ms. Rider, maybe Ms. Cheadle, about that and about Ms. Ledbetter watching the Student on the playground, but he was told “no.”¹⁷⁷

As to the witness expressing his dissatisfaction about where the Student and Ms. Ledbetter meet at school, the witness said he has; that when Ms. Ledbetter first began seeing the Student they met on the stage during lunch, she would have him walk up on the stage while others were in the room eating, and he would go back behind the curtain, and the witness told them that was pointing the Student out, having him walk in front of all the other children, so now they go to a table out in the hallway on the third and fourth grade wing, but the witness has expressed that there needs to be a

¹⁷² Vol. 111, P. 162, P 20-25 and Vol. III, P 163, L 1-25 and Vol. III, P. 164, L 1-25 and Vol. III, P 65, L 1-2

¹⁷³ Vol. III, P 165, L 1-18

m Vol. III, P. 165, L 20-25 and Vol. III, P. 166, L 1-16

¹⁷⁵ Vol. III, P. 167- L 3- 14

¹⁷⁶ Vol. 111, P 167, L 15-25

¹⁷⁷ Vol. III, P 169, L 10-21

more private area, since other children walk back and see the Student.¹⁷⁸

The witness spoke about the Student's processing delays, talking about watching him in a school music program, where he was off in his own zone with the music, that the Student was capable of doing the routine, but it was the processing of it causing an issue.¹⁷⁹ The witness said the Student has physical therapy for his movements and balance, and occupational therapy through Integrated Therapies at Pocahontas, where they evaluate him and see if he qualifies.¹⁸⁰ In addition to his three IEP referrals, the witness said he had always dealt with the administration at the elementary, Ms. Cheadle or Ms. Sellers trying to obtain services for the Student.¹⁸¹

As to the Student's 504 Plan, the witness said a lot of the things on the Plan were not being followed through with, and in the 2014-2015 school year there were actually five 504 meetings scheduled, and in the process he asked Ms. Ledbetter to do a recommendation letter for the 504. One of the things Ms. Ledbetter talked about was the Student having significant social skills deficit, which the school has not addressed.¹⁸² As far as the Student's social skills, the witness said the third grade year may have been a little worse than the second grade.¹⁸³

The witness said he and the Student live with the witness' parents, and the Student has never been with a sitter.¹⁸⁴ The witness said he has not seen improvement in the Student's social interactions with teammates in two years of softball.¹⁸⁵

Conclusions of Law and Discussion:

Current case law holds that "the burden of proof absent a State Statute to the contrary in an administrative hearing challenging an IEP is properly placed upon the party seeking relief, whether that is the disabled child or the school district."¹⁸⁶ It is settled that staff shortages, even unexpected

¹⁷⁸ Vol. III, P 169, L. 22-25 and Vol. III, P 170, L. 1-25

¹⁷⁹ Vol. III, P 171, L. 1-25 and Vol. III, P. 172, L. 1-16

¹⁸⁰ Vol. III, P. 172, L. 19-25 and Vol. III, P. 173, L. 1-6

¹⁸¹ Vol. III, P 174, L. 5-17

¹⁸² Vol. III, P. 175, L. 8-24

¹⁸³ Vol. III, P. 176, L. 1-14

¹⁸⁴ Vol. III, p 178, L. 6-25 and Vol. III, P 179, L. 1-10

¹⁸⁵ Vol. III, P 195, L. 18-23

¹⁸⁶ *Schaffer v. Weast*, 44 IDELR 150 (U.S.2005)

ones, will not excuse a district from implementing IEPs. *Mesabi J, "ast Independent School District #2711 v. Minnesota State Educational Agency.*¹⁸⁷

Compensatory education is a proper method to provide FAPE to children with disabilities who were entitled to, but were denied, FAPE. *Leifer to Kohn v. Office of Special Education and Rehabilitative Services.*¹⁸⁸ If an Independent Hearing Officer finds denial of FAPE which affects a student's ability to meet objectives, even though not a willful denial, the Independent Hearing Officer may take into account equitable considerations in determining the amount of compensatory education and the type of services to be provided.¹⁸⁹

FAPE as defined for the purposes of this part are:

- a) To ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living;
- b) To ensure that the rights of children with disabilities and their parents are protected;
- c) To assist States, localities, educational service agencies and Federal agencies to provide for the education of all children with disabilities; and
- d) To assess and ensure the effectiveness of efforts to educate children with disabilities.

Case law is well settled that, while IEP's are subject to considerable procedural and substantive requirements, IEP's are not required to "furnish[] . . . every special service necessary to maximize each handicapped child's potential,"¹⁹⁰ What the IDEA requires is that IEP's provide a "basic floor of opportunity," consisting of services which are "individually designed to provide educational benefit"¹⁹¹ to a child with a disability.

¹⁸⁷ 110 LRP 15180

¹⁸⁸ 17 LRP 1319

¹⁸⁹ *Ipswich Public Schools v. Massachusetts State Educational Agency*

¹⁹⁰ *Board of Education v. Rowley*, 458 U.S. 176, 199 (1982)

¹⁹¹ *Board of Education v. Rowley*, 458 U.S. 176, 199 (1982)

Pursuant to Part B of the IDEA, States are required to provide FAPE for all children with disabilities between the ages of three (3) and twenty-one (21).¹⁹² In 1982¹⁹³ the U.S. Supreme Court addressed the meaning of FAPE and set forth a two-part analysis that must be made by Courts and Hearing Officers in determining whether or not a school district has failed to provide FAPE as required by Federal law.¹⁹⁴ Pursuant to *Rowley*, the first inquiry a Court or Hearing Officer must make is that whether the State, i.e., the local educational agency or district, has complied with the procedures and regulations as set out in the IDEA. Therefore, it must determine whether the IEP developed pursuant to the IDEA procedures was reasonably calculated to enable the student to receive educational benefits.¹⁹⁵ From the initial contact with the District, there have been made three requests for services, and each request has been reviewed and denied because of the academic level on which the student is performing. There has never been an IEP in place for this student. As to whether the District has complied with the procedures set forth in the IDEA, the Hearing Officer finds that the District did deny FAPE to the student on account of violation of procedural issues. In this case, the District has not complied with the procedures in any of the Referral Conferences.

In the 1st Evaluation Conference, the person who was to conduct the comprehensive evaluation conference was not present to explain the evaluation as required and there was no comprehensive evaluation of Student's speech as required. Although everyone knew Student had been diagnosed with Autism, no information was gathered from his physician or other testing done to assess his communication or social skills deficits.

In the 2nd Evaluation Conference there was no pragmatics testing done, despite the knowledge of Student's Autism. Despite knowledge of behavioral issues and socially-inappropriate behaviors on the playground, there was nothing done to determine Student's social or adaptive behavior deficits.

In the 3rd request for services, there was no Evaluation Conference because the decision was made not to test Student. This decision was made without the presence of Student's classroom teacher and despite the socially-inappropriate behaviors Student exhibited throughout his school day. District personnel misunderstood their obligations under the IDEA with regards to eligibility, as they continued to contend since Student had no academic deficit, he did not qualify for special education services. The principal of the school Student attends implied that as Student was intellectually-gifted academically, he could not possibly qualify for or need special education services.

The USDE continues to reiterate its position in this regard, stating:

¹⁹² 20 U.S.C. 1412(a); 34 C.F.R. 300.300A(a)

¹⁹³ *Hendrick Hillsdale Dist. Bd. of Educ. v. Rowley*

¹⁹⁴ 458 U.S. 176, 206-07 (1982)

¹⁹⁵ *Id.*

"I am writing to draw your attention to the Office of Special Education Programs' (OSEP) December 20, 2013 letter to Dr. Jim Delisle (Letter to Delisle) regarding determining eligibility for special education and related services under the Individuals with Disabilities Education Act (IDEA) for children with disabilities with high cognition; students who Dr. Delisle terms "twice exceptional students" or "2E students." Letter to Delisle pointedly addresses children with high cognition who may be eligible for special education and related services as a student with a specific learning disability, but also cites to the broader requirements in 34 CFR §300304(b)(1) and (2) that state, in part –

..." in determining whether a child has a disability .. the IDEA requires the use of a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, and prohibits the use of any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child."

'In spite of the guidance provided in Letter to Delisle, we continue to receive letters from those who work with children with disabilities with high cognition, particularly those with emotional disturbance or mental illness, expressing concern that some local educational agencies (LEA) are hesitant to conduct initial evaluations to determine eligibility for special education and related services for children with high cognition. In transmitting OSEP Memo 15-08, I am requesting that you widely distribute Letter to Delisle to the LEAs in your State, and remind each LEA of its obligation to evaluate all children, regardless of cognitive skills, suspected of having one of the 13 disabilities outlined in 34 CFR §300.8".¹⁹⁶

'The IDEA does not specifically address "twice exceptional" or "2E" students. It remains the Department's position that students who have high cognition, have disabilities and require special education and related services are protected under the IDEA and its implementing regulations.

'See Letter to Anonymous, dated January 13, 2010.¹⁹⁷ "That is, under 34 CFR §300.8, a child must meet a two-prong test to be considered an eligible child with a disability: (1) have one of the specified impairments (disabilities); and (2) because of the impairment, need special education and related services."¹⁹⁸

Having analyzed the first prong of the FAPE analysis, it is now necessary to consider whether or not the District substantively denied FAPE to the student *i.e.*, whether the District failed to provide an

¹⁹⁶ OSEP Memo - 15-08

¹⁹⁷ 55 IDELR 172

¹⁹⁸ OSEP Letter to Delisle, Dec 20, 2012

IEP that was reasonably calculated to enable the student to receive educational benefits.¹⁹⁹ Pursuant to *Rowley*, the goal of the IDEA is "more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside."²⁰⁰ Essentially, an IEP is not required to be designed to "maximize the student's potential commensurate with the opportunity provided to other children," thus making the standard that the District must meet very minimal.²⁰¹ However, what constitutes educational benefit when dealing with a disabled student must be determined on a case-by-case basis. Specifically, "the IDEA requires Public School Districts to educate 'a wide spectrum of handicapped children,' and the benefits obtained by children at different ends of the spectrum will 'differ dramatically.'²⁰²

An additional point of concern brought out in testimony was the refusal of the District to allow the Student's mental health professional to observe the Student's social interactions while on the playground "because of confidentiality issues." It appears that this is a double standard because the District has designated or provided no private area or room to assure confidentiality or privacy when the Student is receiving outside mental health services on school property during the school day. Counseling services are only allowed at a table set up in a hallway outside a cafeteria in a public hallway used by students and District personnel. Such a setup does not allow for any privacy or confidentiality for client/counselor interactions. When asked about this apparent dichotomy, the elementary principal responded "that's the way we've always done it." There is apparently no private space made available for any outside services provided to the District.

After hearing each witness and evaluating their credibility and reviewing the evidence presented in the transcript of the Due Process Hearing, the Hearing Officer finds there has been a denial of FAPE and Orders the following:

1. The District shall secure the services of a behavior analyst within ten (10) school days;
2. The District shall conduct an evaluation within twenty (20) school days to address the Student's pragmatic language deficits, the Student's adaptive behavior deficits and functional impairments;

¹⁹⁹ 34 CFR. 300.511(d); 20 U.S.C. 1415(l)(3)(B)

²⁰⁰ *Rowley*, 458 U.S. 176, 206-07 (1982)

²⁰¹ *CJN v. Minneapolis Public Sch.*, 323 F.3d 630, 63-68 (8th Cir.), cert denied, 540 U.S. 984 2003

²⁰² *C.B. by and through his parents, B.B. and C.V. v. Special School District No. 1, Minneapolis MN*, 262 F.3d 981 (8th Cir. 2011) (quoting *Rowley*, 458 U.S. 176, at 202 (1982))

3. The District shall conduct an evaluation within twenty (20) school days to address the Student's need for assistive technology;
4. The District shall utilize the services of the behavior analyst to provide expertise in the development and implementation of a Functional Behavior Assessment and the subsequent development of a Behavior Support Plan, if necessary, to address the Student's social skills, emotional and behavior deficits and to provide District staff any necessary training in the collection and incorporation of data into the Student's IEP if said IEP is found to be necessary after all evaluations are complete;
5. The District shall secure the services of a personal healthcare aide for Student, if appropriate, based on the above evaluations; and
6. The District shall allow the Student's mental health professional access to observe the Student during recess and lunch periods, unless prohibited by State or Federal statute, and provide a private space which affords the Student confidentiality and privacy during any in-school therapy sessions.

Finality of Order and Right to Appeal:

The decision of this Hearing Officer is final and shall be implemented unless a party aggrieved by it shall file a civil action in either Federal District Court or a State Court of competent jurisdiction pursuant to the Individuals with Disabilities Education Act within ninety (90) days after the date on which the Hearing Officer's Decision is filed with the Arkansas Department of Education.

Pursuant to Section 10.01.36.5, *Special Education and Related Services: Procedural Requirements and Program Standard*, Arkansas Department of Education 2008, the Hearing Officer has no further jurisdiction over the parties to the hearing.

It is so Ordered

Michael McCauley _____
Michael McCauley
Due Process Hearing Officer