

STATE OF NORTH CAROLINA
COUNTY OF DURHAM

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
24 EDC 01288, 24 EDC 01674

<p>█ by and through his parent █ Petitioner,</p> <p>v.</p> <p>Discovery Charter School Respondent.</p>	<p>FINAL DECISION</p>
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THIS MATTER came on for hearing before the Honorable Karlene S. Turrentine, Administrative Law Judge, on September 10-13, 2024, and September 16, 2024, at the Durham County Courthouse in Durham County, North Carolina and, on September 30, 2024, and October 2, 2024, at the North Carolina Office of Administrative Hearings in Wake County, North Carolina.

APPEARANCES

For Petitioner: Crystal Grant, Esq. and,
William Knight, Certified Student Attorney
Duke University School of Law's Children's Law Clinic
Attorneys for Petitioners

For Respondent: Donna R. Rascoe, Esq.
Cranfill Sumner, LLP
Attorneys for Respondent

WITNESSES

For Petitioner: █ Licensed School Psychologist (Psych-Educ Eval)
Dr. █ Expert Witness (Independent FBA)
█ Expert Witness (Speech-Language Pathologist)
█ Expert Witness (SpEd & SpEd Compliance)
█ grade science teacher
Dr. █ Pediatrician
█ Petitioner-Mom

For Respondent:

██████████ 7th grade SpEd teacher
██████████ Performing Arts teacher
██████████ 6th grade Social Studies teacher & Soccer Coach
██████████ 8th grade ELA teacher
██████████ 8th grade Math teacher
██████████ EC teacher, EC support
██████████ Psychologist (Discovery's FBA)
██████████ Occupational Therapist (OT eval)
██████████ Speech-Language Pathologist (1st speech-lang eval)
██████████ 8th grade School Counselor
██████████ 8th grade Special Education teacher
██████████ Exceptional Children's Director
██████████ Director
██████████ Middle School Director

EXHIBITS

For Petitioner:

EXHIBIT NO.	PETITIONER'S ADMITTED EXHIBITS
1	CV of ██████████
2	Email exchange dated January 13-17, 2023
4	██████ Psychological Report
5	██████ Psychological Report Addendum
8	Section 504 Plan
9	CV of Dr. ██████████
10	Functional Behavior Assessment dated May 13, 2024
11	CV of ██████████
12	Brief Dynamic Assessment of Language dated June 20, 2024
13	Children's Communication Checklist-2
14	Written Expression Sample
15	CV of ██████████
16	Report #1 from ██████████
17	Report #2 from ██████████
18	Report #3 from ██████████
19	Dr. ██████████ letter to Discovery dated September 24, 2021
20	Dr. ██████████ letter to Discovery dated March 3, 2023
22	Duke Medical Records for ██████████ (pp.1-41)
23	Email from Ms. ██████████ dated December 6, 2022
24	Email from Ms. ██████████ dated January 31, 2023
25	Email from Ms. ██████████ dated February 1, 2023

26	Email from Ms. [REDACTED] dated March 22, 2023
27	Email From [REDACTED] to Mom and [REDACTED] dated January 30, 2024
29	Email From Mom to [REDACTED] dated March 14, 2024
30	Email From [REDACTED] to Mom dated March 22, 2024
31	Email From [REDACTED] to Mom dated April 5-10, 2024
32	Email From Mom to [REDACTED] dated April 25, 2024
36	2022-2023 Slack Behavior Channel
37	Discipline Report dated September 7, 2023
38	Discipline Report dated January 30, 2024
40	Discipline Report dated April 4, 2024
42	Discipline Report dated April 23, 2024
44	May 2024 Notice of Long-Term Suspension and/or Exclusion
45	Discovery Charter School Handbook, pgs. 29-30
47	Email re FBA and MDR dated May 14, 2024
48	Email re March 15, 2024 IEP meeting dated March 8-10, 2024
50	Deposition of Ms. [REDACTED] pgs. 40-50 and oath
51	End of Grade Results 2023-2024
53	Response to Informal Requests for Admissions and Supplemental Responses, paragraphs: 4, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 40, 41, 42, 43, 44, 46, 47, 49, 53, 54, 55, 56, 58, 60.

For Respondent:

EXHIBIT NO.	RESPONDENT'S ADMITTED EXHIBITS
1.	Discovery Charter School Academic Calendars (2021-2024)
2.	September 3, 2021 Email Thread re Facebook Parent Group
3.	March 1, 2022 Section 504 Plan
5.	June 15, 2022 6 th Grade Report Card
8.	November 30, 2022 Speech-Language Evaluation by [REDACTED]
9.	November 30, 2022 Email Thread re Checking In
10.	December 6, 2022 Email from [REDACTED] re Suspension
11.	December 19, 2022 Occupational Therapy Evaluation by [REDACTED] [REDACTED]
14.	January 31, 2023 Email from [REDACTED] re Checking in
16.	February 13, 2023 Email from [REDACTED] re Suspension
18.	March 16, 2023 Email from [REDACTED] re Incident
19.	March 22, 2023 Email Thread re Incident
20.	April 3, 2023 Email Thread re Lunch Incident

21.	May 22, 2023 Email Thread re Check In
22.	May 24, 2023 Email Thread re Incident
23.	May 24, 2023 Occupational Therapy Notes by [REDACTED]
24.	June 14, 2023 7 th Grade Report Card
25.	2023-2024 [REDACTED] Class Schedule
26.	September 7, 2023 Discipline Report
27.	October 30, 2023 Email thread re Soccer Team Incident
29.	November 2, 2023 Occupational Therapy Evaluation by [REDACTED]
30.	November 14, 2023 Email thread re Incident in Math Class
31.	January 30, 2024 Discipline Report
32.	February 20, 2024 Email thread between Mom and [REDACTED]
33.	February 22, 2024 Occupational Therapy Notes by [REDACTED]
34.	March 4, 2024 Discipline Report
35.	March 5, 2024 Email thread re Bus Incident
36.	March 14, 2024 Email from [REDACTED] to Mom
37.	March 18, 2024 Email thread between [REDACTED] and Mom
38.	March 22, 2024 Email thread re Another Incident with classmate
39.	April 4, 2024 Email from [REDACTED] to Mom
40.	April 4, 2024 Discipline Report
41.	April 5, 2024 Discipline Report
42.	April 5, 2024 Emails in follow-up to Discipline Reports
44.	May 9, 2024 Email from [REDACTED] to Mom
46.	May 22, 2024 Occupational Therapy Summary by [REDACTED]
47.	Discovery Charter School Three Strike Talley Sheets
48.	June 14, 2024 8th Grade Report Card
49.	EOG Results Summary
50.	IXL Diagnostics Summary
52.	Discovery Charter School Character Strong Curriculum
54.	December 1, 2021 Email from [REDACTED] re Incident
56.	Duke Medical Records for [REDACTED] (pp.1-60)
57.	Excerpts from Deposition of Mom
58.	CCC-2 Journal Article, pages 1-6 and 17

Joint:

EXHIBIT NO.	JOINT EXHIBITS ADMITTED BY STIPULATION
1.	October 12, 2022 Special Education Referral
2.	October 12, 2022 Consent for Evaluation

3.	October 12, 2022 Prior Written Notice – Initial Referral
4.	February 9, 2023 Eligibility Determination
5.	February 9, 2023 Prior Written Notice – Eligibility
6.	March 9, 2023 Consent for Services
7.	March 9, 2023 Initial IEP (03/10/2023-03/09/2024)
8.	March 9, 2023 Prior Written Notice – Initial IEP
9.	March 24, 2023 IEP Progress Report (for IEP 03/10/2023 to 03/09/2024) Reporting Period 3
10.	May 31, 2023 IEP Progress Report (for IEP 03/10/2023 to 03/09/2024) Reporting Period 4
11.	September 18, 2023 Reevaluation Report
12.	September 18, 2023 Consent for Reevaluation
13.	September 18, 2023 Prior Written Notice – Parent Request FBA
14.	October 10, 2023 Functional Behavioral Assessment - Team Interview Data
15.	October 10, 2023 Prior Written Notice – FBA Initial Meeting
16.	December 6, 2023 Functional Behavioral Assessment – Data Summary
17.	December 6, 2023 Eligibility Determination – Reevaluation
18.	December 6, 2023 Prior Written Notice – FBA and OT Reevaluation
19.	October 31, 2023 IEP Progress Report (for IEP 03/10/2023 to 03/09/2024) Reporting Period 1
20.	January 3, 2024 IEP Addendum (01/03/2024 – 03/09/2024)
21.	January 3, 2024 Prior Written Notice – Review/Revise IEP
22.	IEP Progress Report (for IEP 03/10/2023 to 03/09/2024) Reporting Period 2
23.	March 5, 2024 IEP Annual Review (03/08/2024 – 03/07/2025)
24.	March 5, 2024 Prior Written Notice – Review/Revise IEP
25.	IEP Progress Report (for IEP 03/08/2024 to 03/07/2025) Reporting Period 3
26.	April 29, 2024 Manifestation Determination Review (04/04/2024 incident)
27.	April 29, 2024 Prior Written Notice – MDR
28.	IEP Progress Report (for IEP 03/08/2024 to 03/07/2025) Reporting Period 4
29.	DPI Considerations for Specially Designed Instruction, revised August 2019

OTHER DOCUMENTS

Transcript Volumes 1 through 7 were received and have been retained in the official record of this case.

ISSUES¹

The Parties identified the issues for hearing as follows:

1. Whether Respondent-Discovery Charter School (hereinafter, “Respondent” or “Discovery”) denied [REDACTED] a free, appropriate public education (“FAPE”) by failing to appropriately address his needs during the period of April 4, 2023 to July 26, 2024.
2. Whether Respondent failed to implement [REDACTED] Individualized Education Program (“IEP”) with fidelity during the period of April 4, 2023 to July 26, 2024.
3. Whether Respondent incorrectly failed to find that [REDACTED] behavior was a manifestation of his disabilities during the Manifestation Determination Review (“MDR”) meeting held on April 29, 2024.

BURDEN OF PROOF

Petitioner bears the burden of proof in North Carolina. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). “The administrative law judge shall decide [each contested] case based upon the preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency.” N.C.G.S. § 150B-34(a). “Courts give educators “deference . . . based on the application of expertise and the exercise of judgment by school authorities.” *Endrew F. ex. rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S.Ct. 988, 999 (2017). “By the time any dispute reaches court, school authorities will have had a complete opportunity to bring their expertise and judgment to bear on areas of disagreement,” and a “reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.” *Id.*

However, the Tribunal is not bound by Discovery’s interpretation of the law and how it was applied in providing [REDACTED] a FAPE. “Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority....” *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412, 144 S. Ct. 2244, 2273 (2024). Nevertheless, North Carolina

¹ These issues are pulled directly from the stipulated Final Pretrial Order filed September 10, 2024.

² From here on throughout this Final Decision, for anonymity and ease of reading, Petitioner [REDACTED] shall be referred to as “[REDACTED]” and, Petitioner [REDACTED] shall be referred to as “Mom”.

provides that actions of local boards of education are “*presumed* to be correct and the burden of proof shall be on the complaining party to show the contrary.” N.C.G.S. § 115C-44(b)(emphasis added).

Petitioners have the burden of proof on their filed motions, and the Respondent has the burden of proof on its filed motions.

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing and the documents and exhibits received and admitted into evidence, the stipulations of the Parties, arguments of counsel, and the careful review of the entire record in this proceeding, the Undersigned makes the following Findings of Fact. In making the Findings of Fact, the Undersigned has weighed all the evidence and assessed the credibility of each witness by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness, any interests, bias, or prejudices the witness may have, the opportunity of the witness to see, hear, know, or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case. Thus, pursuant to N.C.G.S. § 150B-33(b)(10) and N.C.G.S. § 150B-34(a), Undersigned hereby makes the following:

FINDINGS OF FACT

Unless specifically contradicted, this Order incorporates and reaffirms all Findings of Fact and Conclusions of Law contained in previous Orders entered in this litigation.

Background Information

1. Discovery is a public charter school located in Durham, North Carolina, serving grades 6-11 (T5 p.1283), with some 400 students enrolled. T6 p. 366:8-9. It is a STEAM school focusing on science, technology, engineering, arts, and mathematics. T5 p.1282.

2. The State Board of Education has approved Discovery’s charter subject to adherence to all requirements set forth in the provisions of its charter and in the Charter School Act. (*Id.* at 1285) All representations and conditions contained in the School’s application, including its instruction model, are binding on the School. (*Id.*)

3. At the time the Petitions were filed, [REDACTED] was [REDACTED] years old. He had been enrolled in Discovery as a student beginning in the fall of the [REDACTED] academic year and continued to be enrolled there for three (3) years through the end of the [REDACTED] academic year ([REDACTED] - [REDACTED] grades). Stip. 11, 13-14.

4. [REDACTED] is a “child with a disability” as defined by the IDEA, having a diagnosis of Oppositional Defiance Disorder (“ODD”) and Attention Deficit Hyperactivity Disorder-Combined Type (“ADHD”). Stip. 12; Joint Exh, p.7. He has also been diagnosed with anxiety and depression. Pet. Exh 22, p.4

5. Discovery was responsible for [REDACTED] educational programming until July 26, 2024, when Mom withdrew him. *See* Order Granting Motion for Stay-Put, filed August 14, 2024.

6. In March of 2022, Discovery developed a Section 504 Plan for [REDACTED] based on his diagnosis of ADHD-Combined. Pet. Exh 53, ¶4; Pet. Exh 8; Stip. 15.

7. Discovery developed this plan after Mom alerted it that she was concerned about some academic issues [REDACTED] was having and problems involving “some interactions with peers.” T2, 524:1-11. Specifically, Mom asserted she believed [REDACTED] was being bullied at school. Resp. Exh 2; T5, p.1303.

8. The accommodations provided under [REDACTED] Section 504 Plan included frequent check-ins, movement breaks, reminders to check work, preferential seating, extended time for testing, and multiple test sessions. Resp. Exh 3.

9. [REDACTED] 504 Plan proved to be effective during his [REDACTED] grade year but was not sufficient during his [REDACTED] and [REDACTED] grade school years. T6, pp.1391-92.

10. Throughout [REDACTED] time at Discovery, although much more prominent in the last eighteen months to two (2) years, [REDACTED] behaviors included a real problem with his being unable to maintain appropriate physical boundaries with others. His encroachment into others’ personal space included both non-aggressive and aggressive encounters. Additionally, [REDACTED] had major issues with inappropriate (including some racial and sexual) outbursts.

11. During his [REDACTED] grade fall semester at Discovery, [REDACTED] was involved in two physical altercations: a) the first on October 4, 2021, and; b) the second on November 30, 2021. Pet. Exh 53, ¶¶22-23.

12. Early in [REDACTED] [REDACTED] grade year, on September 19, 2022, Mom requested a special education evaluation due to her concerns with his academic performance (specifically in math) and explosive behavior, she believed [REDACTED] may have been on the autism spectrum. T2, p.526-527; Joint Exh 1, pp.1, 3.

13. In response, Discovery prepared a Special Education Referral, on October 12, 2022, and determined that an initial evaluation would be conducted. *Id.* During the initial referral meeting, the IEP team reviewed existing data and concluded that an initial evaluation should be conducted because eligibility for special education could not be determined just by review of the data that existed at that point. Joint Exh 1; T5, p.1183.

14. At the referral meeting, Discovery also created an Evaluation Plan, which determined that [REDACTED] would be evaluated in the following areas: speech-language, occupational therapy, psychological, social/developmental, educational, behavioral assessment

as related to autism spectrum disorder, sensory processing, and adaptive behavior. Joint Ex. 2; Stip. 17.

Initial Evaluations

15. █████ vision and hearing screenings results were satisfactory. Joint Exh 4.

16. In November and December of 2022, respectively, Discovery provided a speech and language evaluation and occupational therapy evaluation for █████ Resp. Exhs 8 and 11.

17. A Speech-Language Evaluation was conducted by █████ on November 30, 2022. T5, p.1057; Resp. Exh 8. She is a North Carolina licensed speech-language pathologist and works for Discovery in that capacity. She has been practicing speech-language pathology for almost 30 years. T5, pp. 1055-56. She holds a Bachelor of Science degree in communication sciences and disorders from Texas Christian University and a Master of Arts in speech pathology from the University of Memphis. *Id.* at 1056. Ms. █████ maintains an American Speech Hearing Association Certificate of Clinical Compliance. *Id.* at 1057. Ms. █████ was not offered as an expert witness.

18. Ms. █████ performed a full speech-language evaluation, including pragmatic language. She looked at his receptive and expressive language and did a clinical assessment of pragmatics. T5, p.1059. █████ scored solidly in the average range except that of pragmatic judgment, “which fell one point below the average range.” *Id.* at 1060.

19. Ms. █████ asserted that there is no difference between what assessments might be given in a school-based assessment versus a private assessment. However, when an assessment is “done in a school setting, we are under the guidelines under the Exceptional Children Program where you -- we have to show that there is a disability, that it does impact him educationally, and that specially designed services are required; whereas, in the private therapy world, those -- we look more at just the standard scores, and if there is a delay, then we provide services in those areas of need.” T5, p.1062.

20. In comparing her assessment to that of Ms. █████ Ms. █████ pointed out that she had two (2) sessions with █████ as opposed to Ms. █████ having only one (1). T5, p.1064. Additionally, although unfamiliar with the types of evaluations and tests administered by Ms. █████ (*Id.*), Ms. █████ asserted that she although she “do[es] not have access to the scoring manual, ...[she] look[ed] it up [and] found a study from the National Institute of Health that had said -- it was a case study of a student, and part of that report was listing...who should be given the Children’s Communication Checklist, and...what scores were considered average and what scores were considered deficient.” T5, p.1065. Upon her then review of Ms. █████ report, she “believe[s] Ms. █████ interpretation of these scores is incorrect[.]” *Id.* at 1068.

21. Ms. █████ stated that █████ tested within normal limits, so she did not see any significant concerns with his receptive language, expressive language, or pragmatic language. Tp.1061. Therefore, she concluded █████ did not require Special Education (“SpEd”) services in the area of speech or language. *Id.*; Resp. Exh 8.

22. Ms. [REDACTED] did not attend any of [REDACTED] IEP meetings—either to learn about [REDACTED] needs and concerns outside of her assessment, or to share her report. Thus, her assessment failed to account for [REDACTED] inappropriate language and ongoing social concerns. T5, pp. 1077, 1078, 1083. She did testify that *any* speech-language pathologist would be qualified to interpret her report, but no such person attended [REDACTED] Initial IEP meeting. *Id.* at 1078; Joint Exh 7. Thus, neither [REDACTED] mom nor the rest of the IEP team had opportunity to inquire of Ms. [REDACTED] or another speech-language pathologist about her report.

23. It is unclear whether the IEP team considered whether [REDACTED] behavior, including his inappropriate language and inability to understand spatial boundaries necessitated a consideration for speech or language services but, no speech or language services were included in [REDACTED] Initial IEP.

24. [REDACTED] Occupational Therapy Evaluation was conducted by [REDACTED] on December 19, 2022. She is a North Carolina licensed occupational therapist (“OT”) and has provided occupational therapy services to Discovery Charter School for approximately four years. T4, pp. 1020-1021. She holds a Master of Science degree in occupational therapy from Springfield College and works with various schools, including Discovery, to provide occupational therapy services. T4, p.1020.

25. Ms. [REDACTED] (initial) OT evaluation of [REDACTED] demonstrated that [REDACTED] displayed moderate difficulties with sensory processing related to vision, hearing, balance, and motion. Resp. Exh 11. [REDACTED] displayed sensory processing difficulties and executive functioning difficulties that affect his ability to regulate his energy and emotions. Moreover, the OT evaluation concluded that [REDACTED] had functional fine motor coordination and two-handed coordination. [REDACTED] visual-motor coordination tested below average and delayed motor planning. *Id.* at p.4.

26. Ms. [REDACTED] recommended OT services for [REDACTED] and, for his initial IEP, the IEP “team agreed to three times a month for 30 minutes to work directly on some of the perceptual skills that would affect -- could affect him in math and other areas potentially.” T4, p.1025.

27. [REDACTED] is a licensed school psychologist in the State of North Carolina. She is also licensed as a: psychological associate, health services provider, clinical mental health counselor, clinical mental health counselor supervisor and, qualified supervisor. She supports a variety of school systems, including charter schools, throughout North Carolina, and; she supervises autism clinics, provides clinical evaluations for autism and ADHD, does counseling and functional behavior assessments (“FBA”) and, creates behavior plans. T1, p.48-50. Regarding her work for Discovery, Ms. [REDACTED] does psychological evaluations, FBAs and BIPs for the school and attends meeting sometimes at their request. Ms. [REDACTED] was very credible in her testimony. She was not offered as an expert.

28. At Discovery's request, Ms. [REDACTED] conducted a Psychological Evaluation (also referred to in her Report as a Psycho-Educational Evaluation)³ on [REDACTED] on January 5, 2023, using the Behavior Assessment Scale for Children, third edition ("BASC-3"), Adaptive Behavior Assessment System, third edition ("ABAS-3") and, Autism Spectrum Rating Scale ("ASRS"). She also administered the Wechsler Intelligence Scale for Children, fifth edition ("WISC-V") and, the Reynolds Intellectual Assessment Scales, second edition ("RIAS-2"). Pet Exh 4; T1, p.52. Ms. [REDACTED] was initially unable to complete the educational evaluation initially because one or more teachers on the IEP team failed to provide the necessary information she requested from them (T1, pp.62-63, Pet. Exh 4) but, with assistance from Ms. [REDACTED] was able to conduct an Addendum Psychological Evaluation six weeks later, on January 26, 2023. Pet. Exh 5, using ABAS-3, ASRS and administering the Kaufman Test of Educational Achievement, third edition ("KTEA-3"). Pet. Exh 5.

29. Her Psychological Evaluation found that [REDACTED] cognitive ability fell within the average range and his academic skills were average in Reading, low in Math, and very low in Writing. Pet. Exh 5, pp.3-4. On the teacher's behavior rating scales, [REDACTED] overall behavior fell within the clinically significant range in the areas of hyperactivity, conduct problems, overall externalizing problems, anxiety, depression, functional communication and activities of daily living. Pet. Exh 4. Ms. [REDACTED] indicated in the report that "[Mom]'s ratings should be interpreted with caution do to elevated concerns regarding consistency." Pet. Exh 4, p.7. Mom indicated that "[REDACTED] fell in the very low range of adaptive behavior in the school setting and concluded that he requires significant supervision and support to complete age-appropriate adaptive behavior tasks." *Id.* Based on evaluation data, [REDACTED] cognitive ability falls within the Average range. Ratings provided by his mother and teacher regarding overall frequency of maladaptive behaviors that impede his functioning in the home and school environments suggest that he exhibits a wide range of behaviors that are of significant concern. Pet. Exhs 4 and 5.

30. Ms. [REDACTED] **learned that [REDACTED] had a significant frequency of maladaptive behaviors at home and at school and those behaviors "significantly impact his functioning within the school setting."** T1, p.54. **Yet, "[t]here was nothing [in the IEP team's referral] that suggested there were any significant behaviors."** T1, p.56. She opined that "[s]ome [of [REDACTED] behavioral characteristics are similar to the behaviors of youth diagnosed with Autism Spectrum Disorder..."⁴ Pet. Exh 5, p.7. Ms. [REDACTED] did not personally observe [REDACTED] behavior at school. T1, p.78.

31. Ms. [REDACTED] was finally able to complete her educational evaluation on [REDACTED] which "looks specifically at reading, writing, math, listening comprehension, oral expression, things like that." T1, p.59. Reviewing her Addendum Report, she found that [REDACTED]

"didn't exhibit any weaknesses in his ability to decode or to blend sounds reading familiar and unfamiliar words. He also did not have any difficulty with

³ Ms. [REDACTED] initial evaluation was a psychological and cognitive evaluation. Her Addendum Report is the result of her educational evaluation. T1, pp58-60.

⁴ There seems to be some confusion over whether [REDACTED] has actually been diagnosed with autism. There was testimony that [REDACTED] had never been diagnosed with autism but Discovery's Reevaluation Report of September 18, 2023 states that he has been diagnosed with AU (autism). Joint Exh. 11, p.2.

demonstrating an understanding for what he's read. The next area that was assessed was math, and his overall math score fell at a 76, which is lower...basic computation skills he struggles with, so age-appropriate computations. In the area of written language, he fell within the very low ranges. ... He has skill deficits in some math skills, so [needs] additional instruction in time, money, fractions, and measurement."

T1, pp.60, 61, 66.

32. Ms. [REDACTED] made several recommendations in her Report to address academics and behavior for [REDACTED] Pet. Exh 4, p.11; Pet. Exh 5, p.7. Her first recommendation reads:

"The information reported herein should be considered as representing a part of the IEP Team's efforts to collect and evaluate all relevant data regarding this student. Test scores alone should not be used to determine eligibility for special programs without considering all other information required by state or federal regulations. **The IEP Team has final responsibility for making determinations.**"

Id.

33. Nevertheless, the psychological evaluation reveals that [REDACTED] scores on "Hyperactivity, Anxiety, and Conduct Problems fall in the clinically significant range and probably should be considered among the first behavioral issues to resolve." Pet. Ex. 4, p.12. Under each of these categories, the report lists behaviors with which [REDACTED] had skill deficits, including "interrupting others, acting without thinking, not waiting for turn, making decisions, lying, and breaking rules." *Id.*⁵

34. Because the ratings were so high on the behavior rating scale," Ms. [REDACTED] knew that "there had to be something going on." Transcript Vol 1 57:11-14. Thus, she included recommendations at the end of her initial report to target "social skills" she believed were appropriate for the IEP team to include in [REDACTED] IEP. Her recommendations included addressing [REDACTED] "hyperactivity, interrupting others, having poor self-control, acting without thinking, and not waiting for turn, anxiety, worrying about what others think, worrying about tasks, worrying about things[in general], being nervous and making decisions, and [other] conduct problems[like] lying and breaking rules." T1, 58.

35. The psychological evaluation concluded that [REDACTED] experienced some weakness in processing speed, that he had a significant frequency of maladaptive behaviors that impact his functioning within the home setting. T1, pp. 53-54. Based upon rating scales, Ms. [REDACTED] reported that [REDACTED] exhibited a high frequency of maladaptive behaviors at school, and that he needs a significant amount of supervision and support to complete adaptive behavior skills while in the home setting. *Id.* at 54-55.

⁵ The first three of these were listed under Hyperactivity, making decisions was placed under Anxiety, and the last two were listed under Conduct Problems. Pet. Exh 4, p.12.

36. Ms. [REDACTED] did not recommend a behavior intervention plan for [REDACTED] stating “that is not where you go first. A behavioral intervention plan is [done] after you’ve tried some things and you’ve collected data and seen that they’re not effective and that the behavior is escalating[.]” T1, p.79.

37. Many of Ms. [REDACTED] findings were echoed in [REDACTED] Eligibility Determination including that [REDACTED]

“has persistent deficits in social communication and social interaction across multiple contexts[;]”...“struggles with making connections with others [and...]struggles with initiating conversations with others; ...often misses social cues when interacting with his peers. He does not recognize subtle cues in body language, tone, eye gaze that indicate others’ discomfort with him invading their personal space; ...[he] lacks the ability to respond to shifts in social situations, and the ability to develop or maintain or understand relationship norms. [REDACTED] was noted to impulsively respond....[He] does not demonstrate any difficulties with adapting to change[but] requires predictability or routines when interacting with his environment.

...[Hi]s repetitive motor movements, difficulty adapting to change in his environment and is abnormal fixation, along with his find [sic] motor skills requires [sic] specially designed instruction in written expression and math calculation.”

Joint Exh 4, pp.7-8 (emphasis added).

Initial IEP

38. With Mom concerned about [REDACTED] not being able to keep up in class and his behavior in the classroom, the IEP team convened on February 9, 2023 (the “February 2023 Meeting”) to review the evaluation results and consider whether [REDACTED] was eligible for services under the IDEA. Joint Exh 4. Mom and [REDACTED] godfather participated in the February 2023 Meeting along with three members of Discovery’s staff: [REDACTED] – LEA representative and interpreter of evaluation results, [REDACTED] – special education teacher, [REDACTED] – regular education teacher and, [REDACTED] other team member (OT). Joint Exh 4, p.14. The team considered [REDACTED] possible eligibility in three categories: Specific Learning Disability (LD), Emotional Disability (ED), and Autism (AU). The team completed the required Eligibility worksheets for each of the eligibility categories and considered the impact of various deficits on [REDACTED] educational performance. *Id.*

39. [REDACTED] was identified as a “child with a disability” as defined by the IDEA at the conclusion of the February 2023 Meeting. *Id.* at 13-14.

40. In the February 2023 Meeting, the IEP team found that [REDACTED] deficits associated with Autism did impact his educational performance as he “struggles to interact with peers in whole group settings, he becomes fixated on a situation [and] is removed from the educational environment for re-direction and focus [and] he easily becomes distracted by environmental stimuli.” *Id.* at 8. Incredibly, the IEP team found that deficits associated with a

possible Emotional Disability did not impact [REDACTED] educational performance. *Id.* at 9. The IEP team wrote:

“[REDACTED] has demonstrated minimal behavioral incidents during this school year. He has not received any out of school suspensions. [H]e has demonstrated minor incidents in class. [His] behavior has no adverse effect on his educational performance. [REDACTED] has the ability to make academic progress in the general curriculum without the support of specially designed instruction for behavior support in the general education classroom.

Id. at 9.

41. The IEP team determined that [REDACTED] was eligible for special education services as a student with a disability under the categories of Specific Learning Disability (“SLD”) and Autism (“AU”). Joint Ex. 4; Stip. 19.

42. The IEP team planned to reconvene in March of 2023 to develop an IEP. Joint Exh 5, February 9, 2023 Prior Written Notice – Eligibility p.1.

43. The team provided Mom with a prior written notice for the February 2023 eligibility meeting that same day. Joint Exh 5.

44. The IEP team convened on March 9, 2023 (“March 2023 IEP Meeting”) and developed an initial IEP for [REDACTED] based upon the evaluations and eligibility determination decisions from the February 2023 Meeting. Joint Exh 7, March 9, 2023 Initial IEP (03/10/2023-03/09/2024).

45. Mom attended the March 2023 IEP Meeting, along with Ms. [REDACTED], a member of the parental support team, and Mr. [REDACTED], [REDACTED] godfather. Ms. [REDACTED] (LEA representative), Ms. [REDACTED] (special education teacher), Ms. [REDACTED] (regular education teacher), and Ms. [REDACTED] (occupational therapist) also attended the March 2023 IEP Meeting. Joint Exh 7.

46. [REDACTED] initial IEP contained his eligibility categories of SLD (primary) and AU (secondary). The IEP team developed goals related to improving [REDACTED] fine motor skills and math computation. The initial IEP contained the following services: a) Math services for thirty minutes, three times per week in a general education setting; b) OT services for thirty minutes per month in a special education setting, and; c) Indirect OT (supplemental aids/services) two times per reporting period for 10 minutes each. Joint Exh 7, pp.7-9.

47. The initial IEP also included accommodations for English Language Arts (“ELA”), math, science, social studies and other areas which included: a) check-ins with the teacher for movement breaks, as needed; b) preferential seating away from distractions and near

the teacher; c) use of graphic organizers; and, d) small group testing—no more than ten students. *Id.* at 9-10.

48. Despite Discovery's own psychological evaluation of ██████ having revealed he had a significant frequency of maladaptive behaviors which significantly impact his functioning within the school setting and, having recommended that "contingency management strategies [be utilized] to teach ██████ new behavioral skills" were needed, his initial IEP did not include any accommodations or interventions geared toward assisting ██████ with his behavior issues. Pet. Exh 4, p.11; *see also FOF #30 above*. Instead, the team determined that ██████ did not have any behaviors that impeded his learning or that of others. Joint Exh 7, p.4.

49. Moreover, although ██████ Eligibility Determination noted many issues with ██████ social skills and inability to read social cues, the IEP failed to address anything in reference to his social skills." Pet. Exh 50, p.21. Instead, it set four (4) OT goals for ██████ which focused on handwriting, copying skills, and shape visualization. Joint Exh 7, pp.5-6. It also set two (2) math goals for ██████ focused on computation. *Id.* at 6-7. This IEP also implemented accommodations similar to those in ██████ 504 plan, to allow him to access the curriculum in general education classes, specifically: ██████ was provided with teacher check-ins, preferential seating, graphic organizers for his schoolwork, and testing in a separate room. *Id.* at 9-11.

50. Discovery provided Mom with a prior written notice for the initial IEP on that same day, March 9, 2023. Joint Exh. 8.

51. On March 24, 2023, the School issued a progress report for the initial IEP goals. At the time, ██████ had made limited progress due to the short period of time that the IEP had been in place. Joint Exh 9.

52. On May 31, 2023, Discovery issued another progress report for the initial IEP goals. Joint Exh 10. By this time, ██████ had made limited progress on his multiplication and division math goals but was progressing at a rate appropriate to meet his annual goal as to addition and subtraction goals. *Id.* ██████ was also progressing at a rate appropriate to meet his annual goal as to two of his fine motor skills goals but had made limited progress on the remaining two fine motor skills goals. *Id.*

Behavioral, Social and Bullying Issues BEFORE Discovery's Reevaluation of ██████

53. In November 2022, Discovery teachers documented at least two (2) incidents in which ██████ was being beaten up⁶ or kicked by other students. Pet. Exh 36, pp.1-2.

⁶ Ms. ██████ described the first incident as "consensual play" because it started with ██████ and other boys pushing each other back and forth. However, at some point, ██████ pushed one child in the shoulder and that child pushed ██████ to the floor. From there, ██████ was smacked repeatedly and another child "jumped in and started actually punching ██████ in the head and chest until [someone else] came in and pulled [the child] off[of ██████ ...And all kids stated they saw [the child] actually hitting (not 'play hitting') ██████ until [the child got ripped off] of ██████ Pet. Exh 36, p.1.

54. Between December 6, 2022 and February 2, 2023, [REDACTED] received a one (1) day out-of-school suspension (“OSS”) for making threatening statements to his class; was found behaving inappropriately by biting himself hard enough to leave marks; had to be separated from another student after having pushed her. T2, pp. 529-530; Pets Exh 23; Exh 36, p.2; Exh 53, ¶¶24-26.

55. On February 7, 2023, [REDACTED] had a conflict with another student in the gym. Pet. Exh 36, p.2.

56. On February 9, 2023, the same day as the initial referral meeting, [REDACTED] received three (3) days’ OSS after threatening to throw a chair at another student. Pet. Exh 53, ¶27; Stip. 33.

57. On February 17, 2023, another student called [REDACTED] a “cotton picker.” The other child received 1 day’s OSS for “hate speech.” Pet. Exh 36.

58. On March 6, 2023, [REDACTED] was assigned detention for rolling around on the classroom floor while making strange noises and refusing to do his schoolwork. He received lunch detention for classroom disruption. Pet. Exh 36, p.5; Exh 53, ¶28.

59. On March 9, 2023, [REDACTED] received three (3) days’ out-of-school suspension for telling another child “he would throw a chair at him” and rolling around on the classroom floor. Pet. Exh 36, p.3.

60. On March 16, 2023, [REDACTED] sat on top of a picnic table next to another student who was sitting on the picnic bench. The other child told [REDACTED] to move “because [REDACTED] is different and then pushe[d] [REDACTED] off the...table.” When [REDACTED] returned to sit on the table top, “his feet accidentally kick[ed the other child]’s lunch box and back pack off the bench. The child grab[bed] [REDACTED] shirt and pull[ed] him off the picnic table, ripping [REDACTED] shirt in the process. He then h[e]ld [REDACTED] arm while [another person] hit [REDACTED]. The three boys participated in a restorative justice meeting with Ms. [REDACTED]. Pet. Exh 36, p.6.

61. On March 22, 2023, [REDACTED] went around calling other students “monkeys” and one particular student, “black monkey.” *Id.* at ¶29. That same day, [REDACTED] was “yelling things out in science class including telling kids he wanted ‘to suck their toes’ and that they look ugly.” Pet. Exh 36, p.7.

62. On April 2, 2023, [REDACTED] and another child had words when the other child “ma[d]e fun of [REDACTED] for being mixed race[,]” after which, [REDACTED] made fun of the gap between the child’s teeth. The other child yelled “shut the f**k up[and, ...]call[ed] [REDACTED] a ‘stupid Black n****.’” Initially, the other child said [REDACTED] started it and Ms. [REDACTED] took the child at his word and did not want to suspend him for cursing because she believed [REDACTED] had been harassing the child. However, in a later update, the child admitted he made fun of [REDACTED] race *before* [REDACTED] brought up his teeth. Pet. Exh 36, p.8-9. The other child “received a warning for hate speech and [was told] he will earn the consequence associated with hate speech...OSS if this were to happen again. Pet. Exh 36, p.9.

63. On April 12, 2023, [REDACTED] kept bothering another student by being distracting/disruptive and making comments toward the other student. Pet. Exh 53, ¶31. In response, the other child threatened to punch [REDACTED] in the face if he kept talking. Ms. [REDACTED] “had a conversation with [the child] about threatening other students. ...[She] talked [with the child] about consequences” but, it appears the child did not receive any consequences for his threat against [REDACTED]. Pet. Exh 36, p.10.

64. On April 25, 2023, [REDACTED] was rolling around on the classroom floor again. Pet. Exh 53, ¶32.

65. On April 28, 2023, [REDACTED] used foul language toward two (2) boys and “poked a student in the rear[]” with a key. *Id.* at ¶33; Pet. Exh 36, p.13.

66. On May 4, 2023, [REDACTED] tried to forcibly hug on a teacher and a student. That same day, he told other students that their parents were going to die. Pet. Exh 53, ¶34. Pet. Exh 36, p.14.

67. On May 22, 2023, a Discovery teacher felt it necessary to warn other teachers that [REDACTED] was being “impulsive and yelling out in advisory.”⁷ Pet. Exh 36, p.15.

68. On May 23, 2023, [REDACTED] inappropriately hugged another student in the restroom. *Id.* at ¶36.

69. [REDACTED] attended summer school at Discovery in the summer of 2023. Stip. 22.

70. On September 7, 2023, [REDACTED] “was riding in a vehicle with other members of the [practice] soccer team...when [he] made a number of inappropriate comments including that he was going to ‘stick a pickle up his ass’ as well as several racist comments and several suicide related jokes. [REDACTED] had two restorative conversations⁸ during his lunch the following days as a result of his behavior. [He] was also removed from the soccer team.” Pet. Exh 53, ¶37.

71. The incident was reported to Discovery by the parent driving the vehicle. There were four other boys (students) in the vehicle with the parent and [REDACTED]. After receiving the report, Discovery held a restorative justice circle between [REDACTED], Ms. [REDACTED], Ms. [REDACTED], and Coach [REDACTED]. None of the students present for the incident participated in the restorative

⁷ This teacher, [REDACTED] attributed [REDACTED] behavior that day to his not having had his medicine—thus, a disability-related behavior. Pet. Exh 36, p.15.

⁸ Although several of Respondent’s witnesses described Discovery’s restorative justice circles as being conversations in which a wrong-doer discusses the wrong they’ve done with the person/s against whom the wrong was done and thereby is given the opportunity to make amends, neither of these restorative conversations in which [REDACTED] was held to participate included anyone with whom he was in the car during this incident. Coach [REDACTED] testified that the purpose of this circle was to allow [REDACTED] to apologize to him (the Coach) and for him to make sure [REDACTED] was “OK” with being put off the soccer team.

circle, nor were they required to participate. None of the staff members present for the restorative circle were present to observe [REDACTED] behavior. T4, pp.805, 816.

72. When asked if it was the September [REDACTED] incident alone that led Coach [REDACTED] to the difficult decision of removing [REDACTED] he made clear that it was not this single incident. Rather, it was a “culmination” of [REDACTED] inappropriate behaviors that led him to remove [REDACTED] from the team. T4, pp.806, 820.

73. As [REDACTED] did not make the soccer team in his [REDACTED]-grade year, he only participated in practice in his [REDACTED]h-grade year. Soccer season begins at the start of the school year, in August. Thus, [REDACTED] **was only on the team for, at most, “right around a month” before his cumulative behaviors became so inappropriate that they justified his removal.** T4, pp.826-829.

Discovery’s Restorative Justice Circles for Behavior Modification

74. Several of Respondent’s witnesses testified to Discovery’s practice of having students engage in restorative justice circles.

75. Participation in said circles was voluntary⁹ and [REDACTED] engaged in several during which he was led to apologize for his actions toward others. T4, p.822. There is no evidence of record that [REDACTED] ever participated in a restorative circle during which someone else apologized to him.

76. [REDACTED] was led in one such restorative circle after being removed from the practice soccer team:

“[W]e sit in a circle together. There is a talking piece. We respect the talking piece, and we just air out our thoughts. [REDACTED] expressed to me his disappointment with being removed from the team. We talked about why he had been removed from the team. By the end of our restorative justice meeting, he understood why, and I did feel that it did a lot of good in repairing our relationship afterwards.

...[W]hen there’s an incident that involves other students, there’s no requirement that those students get part of the restorative circle[.]

T4, p.822.

77. When Mr. [REDACTED] was asked for his understanding of restorative justice, the following exchange took place:

⁹ Ms. [REDACTED] testified “the restorative practices, are...not optional in the sense that it’s a philosophy that our whole school embodies. That said, in order for an effective conversation to happen, there have to be willing participants. ...[There were] times where students refused to participate in restorative practices with [REDACTED] ...[I]f the students won’t have a restorative conversation together, there’s still a separate individual reteaching conversation. T6, pp.538-39.

██████████ To repair behaviors.

THE COURT: With the person against whom the behaviors are directed or just with strangers?

██████████ With the person being involved.

THE COURT: So how could you have a restorative justice circle with nobody there except for the child who made the comment? Who is he being restored to? What is that?

██████████ It was more restoring our relationship because it had been damaged at the time given my dismissal of him from the team.

THE COURT: Okay, I understood you to say that the idea of restorative justice is to restore the person who has done the wrong to the person to whom they've done the wrong, is that correct?

The Witness: And to restore the relationship between teachers and students. ...And coaches and students.

THE COURT: And...in this particular instance, I heard you say ██████████ was in a car with four other students and a parent driving, is that right?

The Witness: Correct.

THE COURT: The parent driving, is she one of the teachers?

The Witness: He is not[. ...N]o, Your Honor.

THE COURT: Okay, so correct me if I'm wrong, but I heard you say that none of the four students were [sic] in this restorative circle, is that correct?

The Witness: Yes, sir, Your Honor.

THE COURT: And the parent that was driving was not in the circle, am I correct?

The Witness: Yes, Your Honor.

THE COURT: And you and Ms. ██████████ and Ms....[██████████] You all were not [present] in the car, am I correct?

The Witness: Correct.

THE COURT: So what was the purpose of having a restorative justice circle with [REDACTED] and three people who weren't even there to hear or observe [what happened]?

[REDACTED] They just helped with the process of organizing the restorative circle. It was primarily a conversation between me and [REDACTED] to repair our relationship after me dismissing him from the team.

THE COURT: Okay, so in this case, the restorative justice had nothing to do with helping [REDACTED] become a better person. It was really just to try to make him feel better about the fact that you put him off the team, am I correct?

[REDACTED] And to repair our relationship.

THE COURT: Why was the relationship broken?

[REDACTED] Because naturally, any student after -- or player being removed from the team, they will not be happy about what has happened.

T4, pp.816-19.

78. Even during [REDACTED] short time spent practicing on the soccer team, Coach [REDACTED] had to run along him at practice—which he did for no other student. He did it “sheerly out of worry” about [REDACTED] and needed to watch his behavior on the field. T4, p.810. After he was removed from the soccer team, [REDACTED] was allowed to join Coach [REDACTED] for after school soccer, an after-school activity that is open to the entire student body. According to Coach [REDACTED] [REDACTED] largely spent this time playing one-on-one with Coach [REDACTED]. However, [REDACTED] was not allowed to play after-school soccer when he was suspended. T4, pp.829-830.

79. After the IEP was put in place, Mom saw no difference in [REDACTED] behaviors or his academics. She stated: “I didn’t really see much of a change. It was kind of like a standstill, like we were just bobbing around. Nothing had positively -- we didn’t go in a positive direction with like math per se. It almost seemed like he was getting behind in a way because class was still moving forward, but he was still trying to keep up with what he just learned. T2, pp.532-533.

Reevaluation and Discovery’s FBA

80. [REDACTED] began his eighth-grade year at Discovery in August 2023.

81. Despite the absence of behavioral goals or supports in [REDACTED] IEP, Discovery was also aware that [REDACTED] had been exhibiting a pattern of disruptive behavior at school. Thus, on September 18, 2023, the IEP team held a Reevaluation Meeting to discuss behavior concerns and whether [REDACTED] should be reevaluated. Joint Exh 11. Present at the meeting

were: Mom, [REDACTED] (LEA representative), [REDACTED] (SpEd teacher) and, Mr. [REDACTED] (regular education teacher). *Id.* at 3.

82. Mom expressed her concerns that:

- a) since being kicked off the practice soccer team, [REDACTED] had additional emotional struggles and did not want to go to school (T2, pp.538-39);
- b) [REDACTED] struggled with saying inappropriate things, behavioral issues and his grades were slipping (*Id.*);
- c) If [REDACTED] had an issue on the bus, his day would go downhill from that point. There were a lot of negative interactions with peers and she wanted help with that (T3, p.551);
- d) [REDACTED] needed not only behavioral supports but to be taught what would be appropriate and not appropriate (*Id.* at 550);
- e) Following his removal from the soccer team, kids said things to him that were not nice. *Id.* at 538-539; Joint Ex. 11.

83. Together, the team proposed conducting a Functional Behavior Assessment (“FBA”) “based on behaviors [REDACTED] had exhibited that year.” Pet. Exh 53, ¶14. Mom gave her written consent for both. Joint Exh 11, p.3; Joint Exh 12. Discovery issued a prior written notice to [REDACTED] mother on the same day as well. Joint Exh 13. EC Director, [REDACTED] contacted school psychologist and convened a team to conduct the FBA. The team consisted of the classroom teacher, special education teacher, parent and [REDACTED] T5, p.1197.

84. On October 10, 2023, [REDACTED] Discovery’s then-school psychologist facilitated the Functional Behavioral Assessment Team Interview. Joint Exh 14; T4, p.996. That FBA meeting continued into an IEP meeting which she did not attend. T4, p.1003-04. She testified that a functional behavior assessment is a process by which a team can determine if there are problematic behaviors a student is exhibiting in the school environment. The process tracks patterns with a student’s behavior so the team can determine whether behavior supports are needed. T4, pp.996-97. Despite [REDACTED] behavior having become more aggressive with time, the team identified [REDACTED] blurting out and non-aggressive touching of other students as behaviors to be targeted.

85. Ms. [REDACTED] testified that she interviewed [REDACTED] for Discovery’s FBA. T4, p.1000; Joint Exh 16. Ms. [REDACTED] did not personally observe [REDACTED] in the classroom or with his peers in any setting but left that for his teachers to do and then record their observations in the FBA data summary. T4, p.1002-03, 1007.

86. Ms. [REDACTED] reviewed Dr. [REDACTED] FBA report (Pet. Exh 10) and “found it contains a lot of information that [she] wasn’t sure where...it had come from.” T4, p.1005. Ms. [REDACTED] could not tell that Dr. [REDACTED] had interviewed several teachers, [REDACTED] and Mom as part

of her FBA. *Id.* Upon reading that Dr. [REDACTED] observed [REDACTED] but did not personally observe any problem behaviors, Ms. [REDACTED] appeared to criticize Dr. [REDACTED] approach of accepting teachers' observations of [REDACTED] problem behaviors upon which to determine how to resolve those behaviors. She stated, "I think it depends on the student and depends on if others are reporting an amount of observed difficulties, behavioral difficulties [but], I would [have] do[ne] another observation." *Id.* at 1005-06.

87. On October 31, 2023, Discovery issued a progress report for the initial IEP goals. Joint Exh 19, October 31, 2023 IEP Progress Report for IEP 03/10/2023 to 03/09/2024, Reporting Period 1. [REDACTED] had made limited progress toward his math goals. *Id.* Discovery indicated that [REDACTED] IEP should be revised to include new goals. *Id.* [REDACTED] had met two of his fine motor skills goals, while the other two fine motor skills goals were progressing at a rate appropriate to meet his annual goal. *Id.*

88. Over the course of three (3) sessions, held October 5, 2023, October 19, 2023 and November 2, 2023, Ms. [REDACTED] conducted a second OT evaluation of [REDACTED] Resp. Exh 29. [REDACTED] scored low in motor coordination. *Id.* at 2.

89. The Summary of Data for Discovery's completed FBA was reviewed by the team on December 6, 2023. Joint Exh 16; T4, p.989. The FBA Summary listed two (2) problem behaviors engaged in by [REDACTED] 1) speaking out (when not his turn to speak), and; 2) physical contact with other students (non-aggressive manner, bumping into other students). *Id.* at 1. The team selected to target [REDACTED] speaking out. *Id.*

90. [REDACTED] testified that she was one of [REDACTED] EC teachers and EC support staff during his [REDACTED] grade 2023-24 school year. T4, p.938. She made observations of [REDACTED] in his math classroom while she was training the new EC teacher, [REDACTED] from sometime in October 2023 "through January or February." T4, p.940. She also worked with Ms. [REDACTED] general education math teacher. *Id.* She did two (2) zoom meetings with [REDACTED] and participated in some of his IEP meetings that year. *Id.* at 940-41.

91. Ms. [REDACTED] testified that [REDACTED] was a happy student, cooperative and "capable of most of the eighth-grade work." *Id.* at 942. She stated that "between [her] and the other EC teachers, we would actually look at his goals...and [see] what he needed to work on[and]...we would do trials at least once a week, one trial in whatever goal that they needed at that time[... to see if they meet that goal]. *Id.* at 944-45. "Part of [her] job was to speak with the gen ed teachers to make sure the accommodations and modifications [of [REDACTED] IEP] were being followed...[s]o we...I would make sure. I would go to each individual teacher and just reiterate and sure they were following the accommodations that he needed." T4, p.948.

92. Ms. [REDACTED] testified that she "assisted the EC teacher [Ms. [REDACTED] with knowing the goals and modifying [REDACTED] work to support [his] goals.... [They] would look at these Zearn lessons to see if [they] could incorporate [his IEP] goals into that lesson. If [they] could not find a way to do that, [they] would give him different work to do." T4, p.968. However, when asked where those modifications could be found in [REDACTED] lesson plans, she stated Ms. [REDACTED] had that information[.] ...[T]he lesson plans were kept more personally and not in an official...document or location[.]” *Id.* at 968-69.

93. Ms. [REDACTED] observed that [REDACTED] would initially try to rush through schoolwork just to complete it, but with help, he would slow down to do the work with her. T3, p.942.

94. Ms. [REDACTED] acknowledged that some of the numbers would have to be adapted to “just a little bit lower standards,” but generally claimed that [REDACTED] could do the work. *Id.*

95. Ms. [REDACTED] specified that [REDACTED] had to be told to slow down to successfully work through his Zearn program. T4, pp.943-44.

96. According to Ms. [REDACTED] [REDACTED] math goals appropriately met eighth grade standards. Eighth grade standards “are expressions and equations, number system functions, geometry, statistics[but, she admitted...that] for...multiplication and division[, [REDACTED] need more help.... [The IEP team] said that there was limited progress because [they] were still working on whole numbers at that time, because we knew he was still having trouble with multiplication and division.” T4, pp. 978-79; *see also* Progress Report, Joint Exh 22.

97. Although reflected on his IEP, Ms. [REDACTED] denied [REDACTED] was at a fourth-grade level for math but admitted he had some deficits below grade level. T4, p.953.

98. Although Discovery’s FBA reports that [REDACTED] “EC teacher and EC director described ‘meltdown’ behaviors which are believed to primarily occur at times when [REDACTED] has not taken his prescribed medications[and [REDACTED] reported not taking his medication multiple occasions[(Joint Exh 16, p.1),] Ms. [REDACTED] testified she “couldn’t tell when he was off his medications[and she] never saw any meltdowns[.]”¹⁰ T4, p.988.

99. Interestingly, Ms. [REDACTED] is listed as [REDACTED] EC teacher on the December 6, 2023 FBA Data Summary but she testified the “meltdown” language in the summary was not hers. Instead, she attributed that input to *either* Ms. [REDACTED] or Mr. [REDACTED] Ms. [REDACTED] was the EC director for the entire 2023-24 year. T4, p.988-89.

100. The January 3, 2024 IEP Addendum reflects Ms. [REDACTED] as [REDACTED] SpEd teacher but, she left Discovery “sometime in February 2024” and [REDACTED] [REDACTED] a retired EC teacher was hired to replace her. T4, p.949-50; Joint Exh 20, p.10.

101. Although Discovery’s FBA states that it was based on [REDACTED] exhibited behavior, the team did not choose to target his most egregious behaviors. Joint Exh 16. The proposed actions therefrom were to convene the IEP team to: a) discuss Discovery’s FBA results; b) discuss the OT evaluation results; and to: c) amend the IEP to remove OT direct services and add the accommodation for the 3x policy. Joint Exh 18, p.1.

The Three-Strike Policy

102. Contrary to other teachers’ testimony, [REDACTED] [REDACTED] grade science teacher, advisory teacher, and regular [REDACTED] grade team lead (T2, p.414, 421) [REDACTED] testified

¹⁰ More than a couple Discovery teachers testified they did not know when [REDACTED] was on medication or off.

that she could recognize when [REDACTED] had taken his medication and when he had not. He has good and bad days:

“Good days are, he comes in and he sits down, and he does what he is asked to do. You know, we don’t have any interruptions or outbursts. He doesn’t have any interactions -- negative interactions with other students. That’s a good day.

...Bad days normally entail him not being on his medication. You can really tell, and it’s lots of outbursts, being out of his seat, some kind of form of physical touch with another student, not participating, like zero, like ‘I’m not doing work. I’m not doing anything’, so.”

T2, p.410.

103. To get attention, [REDACTED] would “make a joke out loud, fall out of his chair, comment on something that someone else is talking about.” *Id.* at 411.

104. To manage [REDACTED] erratic behavior on bad days, Ms. [REDACTED] instituted a three-strike (“3x”) rule. She testified:

“I don’t 100% recall calling it 3-strikes. I might have said that, but we more or so had like that in my classroom, like, ‘hey, if I have to talk to you X amount of times [3 times], then we’re going to have to have a private conversation, or there are going to be some consequences that follow it.’ So that’s kind of how things worked in my class, like I would tell him, you know, ‘hey, refocus, recall,’ and if it got to a point, then, you know, ‘I need you to come sit next to me. We’re going to do this work, you know, together,’ or, ‘hey, do you [need to] take the time to step out?’ So I think out of all the time that I’ve had [REDACTED] in my class, I really only had to put him out like -- put him out, put him out like, ‘I’m done,’ one time. But outside of that, he has used the fish bowl, or we have used the fish ‘bowl, kind of to give him a reset space, and then he’d come back, or he would sit directly beside me. We would complete the work, and then I would say, you know, ‘are we ready to go back to our seat?’”

T2, p.415.

105. The 3x method was something Ms. [REDACTED] mom used in daycare and Ms. [REDACTED] implemented it in her classrooms before. She started using it with [REDACTED] and it worked for her, [REDACTED] responded to it in her classroom. *Id.* at 416. She “remember[ed being] in an IEP meeting. We were talking. I voiced that this is what works in my classroom...and [the team discussed it and decided] this is something [they all] should try. ...[A]fter...that, ...we had a team meeting to figure out what would constitute a strike. ...I don’t remember all of them[but,] I do know that outbursts and touching were strikes....” *Id.* at 416-17.

106. Ms. [REDACTED] taught [REDACTED] from the beginning of school in August 2023 until February 29, 2024, when she had to leave Discovery for personal reasons. T2, p.421. Ms.

██████ was ████████ EC teacher for that entire time but when Ms. ████████ returned to Discovery May 7, 2024, to finish the school year and, by that time, Ms. ████████ was gone. *Id.* at 420-21, 433.

107. Ms. ████████ testified that there were serious concerns about Ms. ████████ work. Ms. ████████ observed Ms. ████████ “just...holding the wall up. She just kind of would stand back. [She] didn’t...really interact much with the students a lot.... I never saw her pull out anybody and I know that that was an accommodation for...several of our students. ...Ms. ████████ was not doing the job she was hired to do[.]” T2, p.423-24. ████████ was part of Ms. ████████ caseload. *Id.* at 425.

108. Teachers were involved in Discovery’s discipline of ████████ “sometimes, but ultimately the decisions were left up to an administration [sic]. T2, p.426. ████████ is a student of color, and his appearance reflects that. *Id.* Ms. ████████ opined that she believed “race had an impact on his discipline at Discovery[...because t]here seems to be a lack of consistency about how things are handled...when it has to do with persons of color. ...[I]f...a person of color did something and a person that wasn’t of color did [the same thing], [Discovery] would not always [apply] the same discipline.” *Id.* at 426-27. Ms. ████████ confirmed she had personally witnessed this disparity in the outcome of ████████ discipline. *Id.* at 434-35.

109. The 3x policy was not utilized across the board by all of ████████ teachers or coaches, nor was it utilized with other Discovery students. T4, p.823, 874.

The January 3, 2024 Addendum IEP Meeting

110. Regarding the January 3, 2024 IEP meeting, ████████ testified: “At this particular time, we weren’t looking at adding or deleting anything as it pertains to his goals. We were wanting to find out what we could do as a team and as a school to address the behaviors that were identified in that functional behavior assessment...” T5, p.1206.

111. On January 3, 2024, the IEP Team met to add the 3x policy as an accommodation to ████████ then-current IEP. Additional accommodations/modifications were also added to: provide wait time for responses, allow ████████ to type assignments requiring more than 3 sentences instead of handwriting them, warn ████████ of upcoming fire drills before the drill was to occur, grant ████████ the use of fidgets when necessary, and giving ████████ assigned seating on the bus. T4, p.974; Joint Exh 18 and Exh 20, p.7-8.

112. Mom was confused about how the 3x policy was implemented. T3, pp.555-56. Moreover, Mom wanted ████████ to be taught what was inappropriate so *he* understood how the “policy” would be implemented.

113. Even though the IEP team reviewed Discovery’s FBA results at the January 3, 2024 IEP meeting, ████████ IEP dated 01/03/2024 to 03/09/2024 still stated “No” to the question: “Does the student have behavior(s) that impeded his/her learning or that of others?” Pet. Exh 53, ¶16.

114. Instead, the IEP team determined that a BIP was not warranted and continued with the accommodations already in his IEP. While the IEP team removed [REDACTED] OT goals, they kept his math goals the same. Joint Exh. 20, pp.5-6. Additionally, though there were concerns regarding Ms. [REDACTED] delivery of SpEd services to [REDACTED] the IEP team failed to address that issue as well.

115. Although the 3x policy seemed to work for Ms. [REDACTED] the record reflects it did not work with [REDACTED] for the other teachers at Discovery. T6, p.1558.

116. The 3x policy was not an actual “policy” of the school. There was no real training on how to utilize it and teachers had no idea how other teachers were utilizing the rule. T5, p.1168.

117. As such, for the whole time [REDACTED] was enrolled at Discovery, he never had a BIP developed or implemented as part of his IEP. Pet. Exh 53, ¶19.

118. Likewise, while enrolled at Discovery, [REDACTED] never had IEP goals targeting behavior or socio-emotional concerns. *Id.*

The March 5, 2024 Annual IEP meeting

119. On March 5, 2024, an annual IEP meeting was held. Mom asserted that [REDACTED] desperately needed social and behavioral goals to address inappropriate behavior. The team did not address those concerns because they ran out of time but, it was agreed the team would reconvene on March 15, 2024. Mom was tasked with coming up with the behavioral goals in the meantime. T3, pp.578-80; Joint Exhs 23 & 24.

120. Mom wanted a third-party to help look into behavioral issues and goals that would help [REDACTED] T3, pp.580-581.

121. EC Director [REDACTED] testified at deposition that “a case manager reached out to contact the mother to meet, and that the mother refused to meet.” Pet. Exh 50, p.45; T5, pp.1260-61. At trial, she testified that “the administration informed us that the parent had cancelled the meeting from March 15th and would reach out to us to reschedule that meeting[.]” but no one ever did. T5, pp.1259-60.

122. The record reflects that Petitioners’ counsel had requested Respondent’s initial counsel to allow the March 15th meeting to be rescheduled as soon as possible following receipt of the results of Dr. [REDACTED] independent FBA. T3, pp.581-83; Pet. Exh 48.

123. The IEP team never reconvened. T3, p.583.

Behavioral, Social and Bullying Issues AFTER Discovery’s Reevaluation & FBA

124. On October 19, 2023, [REDACTED] had a verbal altercation with another student. Pet. Exh 53, ¶39.

125. On January 30, 2024, [REDACTED] continuously kept talking, laughing “and blurt[ing] out comments at inappropriate times[.]” in Ms. [REDACTED] class. She utilized the 3x policy “and then he had a reset conversation with Ms. [REDACTED] outside of class]. After...return[ing] to class, another student...threw a pencil at [REDACTED]. Instead of informing [Ms. [REDACTED] he] threw the pencil back and it hit another student in the head. ...[After 3 warnings,] [REDACTED] was [removed from the] class for the rest of the period.” Pet. Exh 27; Exh 38, p.7.

126. March 4, 2024, [REDACTED] engaged in a physical altercation with another student on the bus. The record does not reflect who started the fight but does reflect the other student called [REDACTED] a ‘ni****’ and he called her a ‘bit**’. At the time of the incident, Mom had requested [REDACTED] sit in the front next to the bus driver but he was found to have moved “his seat closer” to the other student before the fight began. Pet. Exh 39, p.7. As a result, [REDACTED] received a 1-day OSS. *Id.* at 8.

127. On March 14, 2024, Mom reported to Discovery that he was being “taunted” and called names by a particular girl at school.¹¹ Pet. Exh 29.

128. On March 22, 2024, Mom reported again, that [REDACTED] was being verbally and physically bullied by a student and that such bullying had been “ongoing” and “persist[ant] despite [the school’s] attempts to address it[.]” Pet. Exh 30. Ms. [REDACTED] responded that the school has “made a class schedule change to further separate this classmate and [REDACTED] during the school day...[to] make it so that they do not have any core classes together. This change will start following spring break.” *Id.*

129. On April 4, 2024, while getting on the bus, [REDACTED] reportedly told two classmates that he wanted to “touch them” and “sexually assault”¹² them. Resp. Exh 40, p.6. [REDACTED] received a 7-day OSS and was excluded from riding the bus for the rest of the year. *Id.* at 7; Stip. 35.

130. The next day, on April 5, 2024, “during the transition to specials for [REDACTED] grade, [a teacher over]heard [REDACTED] say, ‘I hate these n*****.’” Resp. Exh 41, p.6. [REDACTED] was given an additional 1-day OSS for “hate speech.” *Id.* at p.7; Stip. 36.

131. Also, on April 5, 2024, Discovery’s music teacher reached out to Mom to say that although [REDACTED] really loves being on stage and part of the musical production, “it has been quite a struggle keeping him focused this week.” Pet. Exh 31. Ms. [REDACTED] wondered if there was an issue at home. Mom responded, “Regrettably, [REDACTED] has been facing threats, harassment, and bullying primarily from one student, who is also part of the play. This student’s behavior

¹¹ The record reflects multiple encounters between [REDACTED] and a particular unnamed girl who appears to have been bullying (or at the very least, intimidating and teasing) him and, which encounters often resulted in [REDACTED] being disciplined.

¹² The parties stipulated to the occurrence of this incident. However, based on the totality of the evidence in the record, the Tribunal finds it incredulous that [REDACTED] actually used the words that he wanted to “sexually assault” the other children. Several of Respondent’s witnesses testified to the use of the words but none of those witnesses was actually present during the incident.

towards [him] has been extremely hostile, leading to a spill-over effect on him.” *Id.* In addition, because [REDACTED] was suspended for eight (8) days, he was not allowed to continue in practices for the musical play. *Id.*

132. On April 23, 2024, [REDACTED]

“roamed around the classroom bumping into other students, making inappropriate dancing gestures in others’ personal space, and making inappropriate statements. There were at least 11 instances of bumping into other students and making gestures in other students’ immediate space. [He] would walk up to students and ‘shoulder bump them’ while appearing to try to ‘walk straight through’ classmates while pushing them out of the way with his body. ...[REDACTED]’s dancing motions included hip thrusts and making an ‘L’ on his forehead directly in front of others. ...[He] also made statements such as ‘you look like a Black island boy,’ called a classmate ‘special’ (as in ‘special needs’), called a classmate a pedophile, made fun of classmates’ hair, and made fun of classmates’ foreheads.”

Pet. Exh 42, p.7.

133. As a result of [REDACTED] April 23, 2024 behavior, Discovery gave [REDACTED] a 5-day OSS for the “harassment” of other students and a 5-day OSS for “hate speech” for a total of 10 days OSS to be served from April 25, 2024 through May 8, 2024. *Id.* at 6, 8.

134. From May 21, 2024 through May 28, 2024, Discovery teachers kept 3x tallies on [REDACTED] Pet. Exh 43; Resp Exh 47. Therein, is recorded several classes in which [REDACTED] blurted out in class being disruptive. Additionally, [REDACTED] is heard to: a) yell out, “What’s a dike?” in the middle of ELA class; b) say the “n” word loudly in Math class. *Id.*

Math

135. [REDACTED] [REDACTED] came out of retirement to be an [REDACTED] grade EC teacher at Discovery. T5, p.1126. He had been an EC teacher for over 30 years prior to that. He testified he was [REDACTED] EC teacher from February 19, 2024 – June 7, 2024, in Ms. [REDACTED] math class. *Id.* at 1127-29. Mr. [REDACTED] testified that [REDACTED]

“IEP stated he received services in math. I was in the math class five days a week when I was at school. I was there for the entire class period. I would work with him on his math lessons, usually with Zearn or IXL (computer programs). I would ask him if he needed help. Quite often he would say that he did not need any assistance. Many times I would sit down next to him and say show me that you’re working, how to work these problems. Most often he would be able to work them with no problem. Sometimes he would have to go back and rework the problems because Zearn...the program itself kicks you back...if you’re unable to answer the questions correctly.”

T5, pp.1128-29.

136. Later in his testimony, Mr. [REDACTED] stated that although he was there beginning February 19th, he “was more of an observer and learning the protocols to follow in the classroom[]” until sometime in March when [Ms. [REDACTED]] left. T5, pp.1140-41.

137. There were approximately 8 EC students in Ms. [REDACTED] math class. T5, p.1156. Mr. [REDACTED] had never used Zearn before so part of his observing and learning was also learning to use Zearn with the children. *Id.*

138. [REDACTED] “was working on fourth grade math skills, stated in the IEP every day, and also non-grade fourth grade level math skills every day.” *Id.* at 1157. The class was 55 minutes long. [REDACTED] IEP called for 30 minutes of SpEd in math, 3 days per week. Mr. [REDACTED] “worked with him every single day, it probably average about 30 minutes per day, because some days [he] might work with him 10 minutes; other days [he] might work with him for 20 minutes; other days 30 minutes. It varied.” *Id.* Thus he believed on average he was giving [REDACTED] the required 30 minutes three times each week. However, Mr. [REDACTED] never documented the plans for modifying [REDACTED] work. He never printed out any of [REDACTED] work samples from IXL for his own or the IEP team’s review. T5, pp.1157-59.

139. Mr. [REDACTED] did not track how often [REDACTED] got off task and did nothing. *Id.* at 1159. He did not keep biweekly data as required by [REDACTED] IEP. *Id.* at 1160; Joint Exh 23, p.6; Joint Exh 25.

140. In May 2024, Mr. [REDACTED] created the Three Strikes Tally Form because [REDACTED] “misbehavior was becoming more frequent.” T5, p.1161. He was the EC teacher in [REDACTED] language arts class, too, so although he did not service [REDACTED] in ELA, [REDACTED] observed [REDACTED] behavior in both ELA and math. *Id.*; *see also* Resp. Exh 47.

141. Mr. [REDACTED] stated that there was no need to track data on [REDACTED] behavior prior to when he created the tally form “because the 3-strikes protocol was being followed, and it was working. ...[REDACTED] wasn’t referred to the office for his behavior and wasn’t asked to reset with an administrator or another teacher[in ELA or math class].” T5, 1161-62.

142. Even with his over 30 years of experience as a SpEd teacher, **Mr. [REDACTED]** claiming he had not been there the whole year—**did not know if [REDACTED] had met his IEP math goal** at the end of his [REDACTED] grade year. T5, p.1178.

143. [REDACTED] started teaching general education in 1973 and moved into teaching special education in 1975. For five years, she taught SpEd in Iowa, went to graduate school, married a military man and then moved to Alabama. She continued teaching SpEd—even as her family kept moving—in Fayetteville North Carolina, Atlanta Georgia and Germany, back to Fayetteville. She taught K-2, K-8, 6-8 and 9-12 grades at varying times, including doing “a self-contained Specific Learning Disability (“SLD”) class and Occupational Course/s of Study. T1, 254-55. Thereafter, Ms. [REDACTED] became a Program Specialist and later, the

Coordinator of Services for Students with Disabilities in the [REDACTED] (North Carolina) School System. T1, 255.

In 2002, she moved to the NC Department of Public Instruction (“DPI”) where she became a monitoring compliance officer for the State of North Carolina. *Id.* Ms. [REDACTED] was responsible for monitoring special education practices and implementation for one-third of the state of North Carolina, including 67 out of the state’s (then) 100 hundred charter schools. In this role, she checked IEPs for compliance with state regulations, conduct regional trainings for state special education directors on how to write IEPs, and was eventually responsible for implementing an outcome-based monitoring system for educational progress across the state. T1, 255-259; Pet. Ex. 15.

After retiring in 2014, she went to work part-time with the National Heritage Academy Charter Schools, “and then COVID hit and [she] moved to the mountains.” T1, 256. Ms. [REDACTED] continues to renew (and holds) her NC teaching license even after her retirement and is licensed in SpEd and media and curriculum. She also holds a lifetime teaching license in the State of Iowa in the areas of SpEd, general education, media and curriculum. *Id.*

Ms. [REDACTED] is President of the NC Council for Exceptional Children, “the largest professional group of Sp[Ed] educators in the world.” T1, 259. She has spent many years at DPI reviewing files to determine compliance or noncompliance. T1, 259-60. Although retired, she tutors students in math twenty (20) hours per week, does SpEd consulting, working with both parent attorneys and a school district on due process matters, and sometimes testifies as an expert witness in SpEd. Pet. Exh 15; T1, p269.

144. Petitioners offered Ms. [REDACTED] as an expert in Special Education and Special Education Compliance. The Tribunal accepted her as such without objection. T1, 260.

145. Ms. [REDACTED] was retained by Petitioners “to look at the paperwork for compliance and following IEDA and the appropriateness of [REDACTED] IEP.” T1, p.261.

146. Ms. [REDACTED] reviewed [REDACTED] three IEP documents: a) the initial IEP dated March 9, 2023; b) the January 3, 2024 IEP Addendum, and; c) the March 5, 2024 IEP Annual Review (Joint Exhs 7, 20 & 23). She also reviewed Ms. [REDACTED] psychological assessment, Ms. [REDACTED] OT assessment report, Prior Written Notices, Invitations to meetings, revaluation reports, and discipline reports. Pet. Exh 16, p.1.

147. Thereafter, Ms. [REDACTED] produced a written report of her findings and conclusions (“Report #1”). Pet. Exh 16.

148. In her Report #1, Ms. [REDACTED] concluded that:

- 1) The Individualized Education Program (addendum) that was developed 1/3/2024 is not developed to enable [REDACTED]’s involvement and ability to make progress in the general curriculum. In addition, the IEP did not meet his other educational, functional, and behavioral needs;

- 2) The Present Level of Academic and Functional Performance (“PLAAFP”) is non-compliant as it has no baseline information from either informal or formal assessments, it does not describe the student’s academic and/or functional needs, and it does not provide enough information to develop a measurable annual goal....;
- 3) No connection is made between [REDACTED] grades and test scores and the PLAAFP;
- 4) Although the initial IEP annual goals included a condition, a target and a level of proficiency, “[w]hen the addendum was completed, there was no new assessment data provided as to the progress [REDACTED] had made towards reaching those goals.
- 5) The Prior Written Notice (“PWN”) for the 1/3/2024 IEP meeting is non-compliant in that it does not provide sufficient detail about why the actions were proposed or refused. There is no explanation of why a behavioral intervention plan was not developed to work on the behaviors [REDACTED] had been having since he enrolled in the school, but instead the PWN states that no actions were refused.

Pet. Exh 16; Joint Exh 21. Moreover, [REDACTED] math goals did not change between [REDACTED] and [REDACTED] grades. T1, p.270.

149. Thus, she testified that if a monitor came to review it, the IEP would have been found to be non-compliant. [REDACTED] IEP failed to give a clear picture of the child—his strengths, his needs, data showing how he is doing, the impact of how his disability impacts his access to the general curriculum—these are all missing. T1, p.264.

150. After doing an FBA for the purpose of understanding the function of [REDACTED] behaviors, Discovery refused to institute a Behavior Intervention Plan (“BIP”). Instead, Discovery instituted the 3x policy which has no basis in research. “A BIP shows you how to do positive behavior reinforcement. This 3-strikes policy was...negative....” T1, p.265-66.

151. According to Discovery’s data, [REDACTED] “was four years below grade level[] in math. T1, p. 269. “There were notes that when the teacher stood beside him, he would do the work. But when the teacher moved away, he...stopped.... ...The math...went from seventh grade goals, that appeared to be almost on a fourth-grade level, to saying that these goals in eighth grade are on an eighth-grade level. But if you look at [them,] they were like intervals of time and, ...that’s not the eighth-grade curriculum. The eighth-grade curriculum is about integers and slopes and all the different things that are challenging for many of our kids as well as some of our adults....” T1, p.270.

152. When focusing on whether math services outlined in the IEP were appropriately implemented, Ms. [REDACTED] testified that there should be documentation that the services were

actually delivered...logs, student work samples, informal assessments. “When you’re doing progress monitoring, you should be keeping records along the way of the nine weeks before you fill out the progress report. And by doing that, ...when you go to the next IEP, you’re able to show the members of the team the progress the student has made, instead of just saying...you made progress.” T1, p.276. Discovery did not have the documentation to show [REDACTED] progress or lack thereof.

153. [REDACTED] IEP Progress Report for 2023-24 Reporting Period 3 reflects: “According to IXL data, [REDACTED] is currently working on an approximate 4th grade math level. ...The majority of the time in math class, [he] declines assistance. Joint Exh 25.

154. Discovery’s habit of asking [REDACTED] whether he needed help and walking away when he said ‘no’—which happened frequently—does not meet the definition of specially designed instruction. T1, 277-78. “Specially designed instruction is not just giving help for accommodations. It’s [time] spent meeting the unique needs. And in this child’s case, he had some significant deficits in math, and just asking [him], ‘do you need help?’, is not explicit direct [specially designed] instruction.” *Id.* at 278.

155. Although IXL may be used to collect biweekly data for progress monitoring, it is not usually used that way. Yet, even after additional records were requested from Discovery, Discovery could produce no biweekly data of [REDACTED] progress and, Ms. [REDACTED] saw none. T1, pp.283, 285.

156. For many of [REDACTED] objectives, Discovery listed [REDACTED] status as “Limited progress due to extra time needed...Limited progress due to revisions of IEP needed [(Joint Exh 22)] and Limited progress due to incomplete work. Joint Exh 25. Moreover, [REDACTED] objectives in his final IEP (for 3/8/24 to 3/7/25) completely changed from numerical problems to word problems. Joint Exh 23, p.6; Exh 25, p.1; T1, p.279-80. “So if he was having limited progress and the goals needed to be changed, I would assume they’ve been changed in line with something to do with the topic that those goals were written on[but,]” that is not what happened. *Id.* She went on to state:

“These are completely different goals than what was there previously. So one of the things that I like to see is some documentation somewhere that the goals either had been mastered, or . . . when given a multi-step mathematical problem based on eighth grade standards, he’ll identify correct mathematical operation to solve each problem, and then limited progress due to incomplete work, limited progress due to incomplete work, limited progress for all of this. They talk about the objectives had to do with last word problems, time word problems, money word problems, and then measurement word problems. So they shift[] -- gears were shifted in the IEP to different skills.”

T1, 281-282.

157. Still, ██████████ progress reports from the second semester of his 8th grade year showed he struggled with “incomplete work” with no strategies put in place to assist him with organization, work completion or staying on task. T1, 284.

158. On June 12, 2024, Ms. ██████████ interviewed ██████████ and Mom and reviewed ██████████ 504 Plan again, this time sequentially by grade. T1, p.267.

159. In her Report #2, Ms. ██████████ noted that in 6th grade, Discovery put a 504 Plan together for ██████████ with many accommodations listed, but Discovery “provided no documentation that these accommodations were provided. ...[Nevertheless, d]uring 6th grade, ██████████ appeared to be doing fine in math.” Pet. Exh 17. Although he did not pass the 6th grade EOG, both ██████████ and Mom reported to Ms. ██████████ that the teacher helped him and he made a passing grade. *Id.* at p.2.

160. At the beginning of ██████████ 7th grade, Mom sent a written request to Discovery on September 19, 2022, asking for an assessment to determine if ██████████ was eligible for SpEd services under IDEA. Pet. 17, p.2. Discovery held a referral meeting on October 12, 2022, but the initial eligibility meeting was not held until February 9, 2023—which “exceeded the state compliance requirements by over a month.” *Id.* His initial IEP was instituted in March, 2023.

161. At the end of 7th grade, there were no progress reports to review so Ms. ██████████ “was unable to determine if A[nthony] had mastered the goals from the 7th grade IEP. ...The 7th grade IEP...goas were working on multiplication and division computation of whole numbers, decimals and fractions. The second goal was about word problems using integers and adding and subtracting to solve them.” *Id.* at 4.

162. ██████████ Report #2 continues:

“In the [PLAFP] for the IEP written in March 2024 it stated that ██████████ ‘struggles with mathematical operations when completing assignments and tests. His performance is below grade level when completing math assignments.’
...When [he] had the special education teacher standing beside him, he would start work, when the teacher left, he was off task and rushing through his work.

The goals for 8th grade were ‘given a multi-step mathematical problem based on 8th grade standards, ██████████ would identify the correct math operation and solve.’ The objective [however,] had to do with elapsed time word problems, money problems, and measurement word problems. ...I was provided no documentation that the goals for 7th grade were mastered or that progress [was] made. In the present level[,] it states that [he] is below grade level and then the goal states that he would be given 8th grade level math problems.

There are comments about lack of focus and organization and how they affect his grades and work production, however, there are no goals to address these issues. There are some accommodations that were listed in each of the IEPs, but...the[y] were not] effective strategies. ...

There is documentation throughout his paperwork that [REDACTED] has problems focusing and does better when he is getting 1-1 attention. **One of the considerations for eligibility was serious emotional disability. The behavioral/emotional evaluation ratings fell in the clinically significant range for areas of hyperactivity, aggression and overall externalizing problems. Although this information was available, and the school had conducted a F[BA,] there were no goals on his IEP to address his behaviors that were interfering with his learning nor was a behavior plan developed to address these issues. There were no goals to address his organizational skills[or the lack thereof]."**

Pet. Exh 17, pp.4-5.

163. Ms. [REDACTED] also completed a third report ([REDACTED] Report #3) upon completion of her review of [REDACTED] progress reports. After finding "no clear documentation that a meeting was held to address" [REDACTED] inability to achieve his IEP goals "or [to] put strategies in place to assist with work completion" and, noting that there was "no clear explanation in the Prior Written Notice as to how the goals were determined for the annual review," Ms. [REDACTED] concluded that:

"It appears from my experience writing and monitoring IEPs that the school did not appropriately calculate [REDACTED] mastery of concepts from one year to the next. The development of the second IEP was done without regard to the previous IEP. At the same time [REDACTED] was failing his math class and he was not proficient on either the [REDACTED] grade or [REDACTED] grade End of Grade assessment.

Pet. Exh 18, p.2.

164. [REDACTED] Report #3 finishes with recommendations for compensatory education services in math. Based on [REDACTED] needs, "he should have been receiving math instruction each day for the entire period." Instead, he received math services three days a week[for only 30 minutes a day. Ms. [REDACTED] calculates her recommendation for the amount of compensatory math services by noting that,] According to the class schedule provided..., classes were 50 minutes each session. [So,] As he was only receiving 3 days a week, adding 2 additional class periods based on a 36-week calendar would mean that at a minimum, he should be receiving 60 hours of compensatory education for additional math instruction." Pet. Exh 18, pp.2-3.

165. Ultimately, Ms. [REDACTED] opined that [REDACTED] progress reports alone do not "verify[] actual [SpEd] instruction took place. ...[E]vidence of service delivery [is shown] through logs and biweekly data[.] ...[REDACTED] **did not receive a free and appropriate public education**...[as h]e had significant needs...only received three half-hour sessions a weeks, and he was four years below grade level in math according to [Discovery's own] data. ...[There were eight (8) SpEd

students in the 55-minute general education class.] So that is not enough time to remediate the skills that he does not have that he missed out or even direct him to the new instruction that's being presented. So you've got two things going on here. You've got what is he still lagging in, and they're still moving forward.

T2, pp.294-96.

166. Ms. [REDACTED] further opined at trial that she recommended 60 hours of compensatory education in math—one-on one- tutoring and instruction. T2, pp.300-01.

Speech Language IEE

167. [REDACTED] received her bachelor's degree from George Washington University in 1991 and a Master of Science in communication sciences and disorders from the Massachusetts General Hospital Institute of Health Professions in 1998. T1, p.175. She is a licensed Speech and language pathologist in both North Carolina and the State of Massachusetts, a member of the American Speech Language Hearing Association and, "recently...joined the New Zealand Speech Therapy Association." T1, pp.176, 178. Her training and work involve understanding and knowing how to remediate difficulties in the area of listening, speaking, reading, and writing. She has had extensive training and worked extensively with students having a comorbid¹³ presentation of autism with attention issues and mental health issues[and, ...]the comorbidity of a communication disorder or communication impairment plus mental health challenges and difficulties with their attention." T1, pp.181-82.

168. In 2007, Ms. [REDACTED] began working at Duke University Medical Center's Department of Speech Pathology and Audiology as a Clinical Coordinator. From 2008-2015, she was a Senior Clinician in this department where she performed feeding and speech-language evaluations, evaluated and treated children who have Autism Spectrum Disorders, Apraxia of Speech, Expressive Language Disorder, TBI, and Articulation/Phonological Disorders, and created a dynamic informal assessment protocol to evaluate and treat social communication in pediatric patients with high functioning autism, pragmatic language difficulties and TBI. T1, pp.175, 77-78; Pet. Exh 11. She left Duke in 2012 to co-found Rubycube, a company that has brought to market three (3) applications that assist individuals with social learning challenges in achieving social-emotional goals. Since 2015, she has been the Clinical Director of Rubycube Social, a private speech pathology practice, where she has provided cognitive and communication therapy services to individuals of all ages in the setting of group and individual treatment sessions, consulted with educators on strategies for integrating social-emotional learning into the curriculum, and performed comprehensive Independent Educational Evaluations for students in contract with east coast school districts, which include recommendations for receptive and expressive language, pragmatic language, executive function, verbal reasoning, and written expression. Pet. Exh 15.

¹³ Ms. [REDACTED] defined comorbid to mean "children who have communication disorder or delay with comorbid ADHD and mental health issues." T1, p.182.

169. Her work has been in public and private schools, hospital settings (both inpatient and outpatient), and in private practice and outpatient clinics. *Id.* at 176-177. In school settings, she provides staff training, direct services, helps other student clinicians, consults with staff, conducts Independent Educational Evaluations (“IEE”), and assists with developing IEPs—dependent upon what each school requests of her. *Id.* Ms. [REDACTED] has also won grants for her work. In her current position, she works “with school districts as conducting independent educational evaluations for students in contract with East Coast school districts, which include recommendations for receptive and expressive language. She is “trained to recognize when there is either a delay or a disorder in spoken communication, and then we are also trained to make recommendations about treatment and how to go about treating and supporting these students in their functional environments.” T1, p.179.

170. Petitioners offered Ms. [REDACTED] as an expert in the areas of: pediatric speech pathology, speech-language deficits and disorders, pragmatic language disorders, speech language assessment of children, speech-language assessment of children with autism, ADHD and mental health disorders, development of speech-language goals and related service plans, development of goals for written language and related service plans for IEPs and the Curriculum of Social Thinking. The Tribunal accepted her as such without objection.

171. Ms. [REDACTED] was hired to do a comprehensive Independent Educational Evaluation (“IEE”) of [REDACTED] “to provide information to [REDACTED] and his Mom] about [his] area of disability following evidence-based practices...” T1, p.185. She met [REDACTED] in person, interviewed him, and administered several evaluations. As a result, on June 20, 2024, she produced her Brief Dynamic Assessment of Language (“[REDACTED] Report”) on [REDACTED]¹⁴ “a combination of informal dynamic tasks and standardized tasks” meant to give evaluators an idea of “how a student responds under a variety of different conditions.” T1, p.191.

172. Her [REDACTED] Report is designed to provide information about how (and how appropriately) [REDACTED] uses language, including “information about a [hi]s receptive and expressive language, [hi]s pragmatic language, [his] social communication, as well as narrative language.” *Id.* at 191-92. She also evaluated “[REDACTED] executive function and written expression[.]” (*Id.* at 192) opining that since [REDACTED] was a rising ninth grader, entering an environment where he would be expected to “demonstrate [his] knowledge in writing” and “demonstrate [his] organization skills and [his] ability to plan and think ahead,” it was important to assess both of these areas as well. This way, she could have insight into both “what he understands and what he can say verbally, getting a sense of how he uses language to interact with the functional tasks of an eighth grader.” *Id.*

173. On August 2, 2024, Respondent served a Subpoena on Ms. [REDACTED] requesting she produce, in pertinent part, the “complete file related to your work [in this matter] including records reviewed, any observations or evaluations conducted and any reports you have prepared.” Exh 3, attached to Motion in Limine.

¹⁴ Respondent objected to any testimony by Ms. [REDACTED] on the basis that her response to Respondent’s subpoena requesting her complete file failed to include certain documents used in her consideration and evaluation of [REDACTED]. The Tribunal addresses this under the section of this Final Decision labeled Motion in Limine and in its Conclusions of Law thereafter.

174. In response to the subpoena, Ms. [REDACTED] through Petitioners' counsel—forwarded to Respondent's counsel the following documents: her [REDACTED] Report, "what [she] had in [REDACTED] hard file, the testing protocols that [she] used, the writing sample that [REDACTED] did for [her] and the communication between [Mom] and [Ms. [REDACTED]] about setting up the appointment." T1, pp.185-86.

175. Further, during her deposition, she confirmed these were the documents she utilized in coming to her expert opinion.

176. At trial, Ms. [REDACTED] testified that, in addition to those produced, she also utilized the following documents for her IEE of [REDACTED]

- i) [REDACTED] [REDACTED] psychological evaluation;
- ii) Dr. [REDACTED] [REDACTED] FBA;
- iii) [REDACTED] [REDACTED] 2022 Speech Evaluation;
- iv) Pragmatic Scale I and II; and,
- v) [REDACTED] March 5, 2024 IEP.

177. In explaining why she did not send these five (5) documents to Ms. [REDACTED] Ms. [REDACTED] credibly testified, "My assumption was that all parties...already had that information, so that I did not need to duplicate sending that to Ms. [REDACTED]. So that's -- that was my misunderstanding and my fault[.]" (T1, p.186) "Ms. [REDACTED] "did not understand that that was part of my file for him, simply because my file was what I had worked on. ...And although I used those, they -- I didn't print them out. I didn't have them as part of the hard file, and my assumption was -- as I'm understanding a faulty assumption, was that all parties already had that information." T1, p.189. Ms. [REDACTED] did, however, forward the additional five (5) documents to Ms. [REDACTED] email during lunch on the first day of trial.¹⁵ *Id.* at 186-87.

178. Ms. [REDACTED] evaluation of [REDACTED] took place after the spring semester ended. She took notice of [REDACTED] [REDACTED] 2022 speech and language evaluation which was 1½-2 years old which reflected [REDACTED] had "functional and average receptive and expressive language...has average intelligence and can be quite smart[but,] felt it was important to gather additional data because in my years of experience, what I know is that sometimes receptive and expressive language only doesn't give you the full picture of what -- of how a student functions in the classroom." T1, p.193. "A different set of measures would be important at this stage of his academic career." *Id.* She also did a parent interview and had Mom and a teacher (Ms. [REDACTED] fill out a few checklists. T1, p.193-94.

¹⁵ Prior to trial beginning, the Undersigned heard arguments on Respondent's Motion in Limine—which was only filed that same morning. During counsel arguments, Petitioners' counsel asserted that Respondent had at no time inquired whether Ms. [REDACTED] had utilized an IEP for her report—even though Ms. [REDACTED] kept referring to an IEP in her deposition. Until the morning of the trial, Petitioners had no understanding Respondent was seeking to argue [REDACTED] had failed to disclose her use of the IEP for her report. T1, p.22, 27-29.

179. Upon review of Dr. [REDACTED] psychological report and seeing [REDACTED] scored way below average in the adaptive skill area of communication (Pet. Exh 5, p.6), she opined that “this student has some challenges with communication in spite of having what appears to be average receptive and expressive language. So his total approach to communication there is something – there’s more to see there and more to learn.” T1, p.195-96.

180. The results of the parent-teacher responses on the Children’s Communication Checklist revealed

“that [REDACTED]’s overall communication is quite low, which is consistent with Dr. [REDACTED] evaluation of him, and that he had -- well, for -- let’s see, the teacher results, the social interaction difference score, which helps us understand if the student’s communication features are consistent with autism. [And,] Ms. [REDACTED] the way she filled out the checklist rendered a score that is consistent with autism. The way Mom filled out the checklist, it was just overall poor communication, not necessarily consistent with autism. However, in both cases he had very far below average scores. I’m talking below the 10th percentile.

...What was significant to me, particularly in the -- in how the teacher filled out this checklist, is how impaired he was in nonverbal communication and social relations and in initiation. That tells us that his pragmatic language is quite impaired in the classroom setting, not knowing when to initiate, not knowing how to initiate, not knowing how to fluidly join group discussions, not knowing how to read somebody’s nonverbal cues or many people’s nonverbal cues in -- when you’re sharing space with other people, so that was quite significant.”

T1., pp.199-200.

181. When asked how these behaviors might show up in the classroom in a person with these impairments, Ms. [REDACTED] described [REDACTED] regularly observed behaviors, saying it looks like “a person calling out when it’s not their turn, using inappropriate language that’s not appropriate to the context. It might look like somebody not respecting somebody’s personal space.” T1, p.201.

182. Ms. [REDACTED] used the CUBED-3 assessment to inquire into [REDACTED] narrative language (storytelling abilities) and found that [REDACTED] narrative language skills were deficient:

“...[REDACTED] has scattered abilities with -- he’s quite a fluent reader, and...he does a fairly good job of using some complex vocabulary in his -- in his retelling...[and although h]e did include characters, problem plan, an attempt, and an ending, but no feeling response and no resolution. So that’s important because how we tell stories is also -- also gives us insight into how we have conversations. ...And so [REDACTED] narrative complexity is not what we would hope for an eighth grader, rising ninth grader.”

T1, p.204.

183. Ms. [REDACTED] also evaluated [REDACTED] with the Functional Assessment of Verbal Reasoning and Executive Strategies (S-FAVRES). Pet. Ex. 12. At 4. This test provides “robust information about reading comprehension, written expression, verbal reasoning, organization skills.” It is also standardized, so its scores can be used as a “benchmark against age-matched peers.” T1, p.205.

184. Even in areas of receptive and expressive language where [REDACTED] received average scores, Ms. [REDACTED] believed “this student has some challenges with communication in spite of having what appears to be average receptive and expressive language.” T1, pp.194-96; Pet. Exh 4, p.9; Exh 5, p.6.

185. Ms. [REDACTED] opined [REDACTED] IEP did not provide him a FAPE “[i]t didn’t have any specially designed instruction in social communication.” *Id.* at 217. It “would have been more appropriate to have a communication professional involved in his case even if only on a consultative basis, somebody with training in these kinds of communication deficits.” *Id.*

186. Thus, regarding compensatory education, Ms. [REDACTED] recommended that [REDACTED] receive 36 hours “in the areas of executive function and social communication.” T1, p.218. She opined believed that this amount of instruction was appropriate because [REDACTED] “should have had that at least as part of his eighth-grade year if not before.” T1, pp.219-20. The hourly rate for such instruction is between \$100 and \$150 per hour. *Id.*

Independent Functional Behavior Assessment (“FBA”)

187. Dr. [REDACTED] holds bachelors, masters and doctorate degrees in Special Education and is board certified by the Behavior Analyst Certification Board (“BCBA”). T1, p.87. She began her career as a general education classroom teacher and special education teacher, then worked as an early intervention provider for infants and toddlers with developmental disabilities She also worked for the Center for Autism and Related Disabilities at the University of Florida and was a professor for 12 years at Winthrop University. As a professor, she “taught courses related to assessment in special education, methods of teaching individuals with disabilities, applied behavior analysis and positive behavioral interactions and supports, characteristics of disabilities, so different disabilities characteristics courses...at [both] the undergraduate and graduate level[s].” T1, p.88. Dr. [REDACTED] has published approximately 20 peer-reviewed journal articles on related subjects. T1, p.89. Currently, she consults in school districts across the State of North Carolina and also works as a behavior analyst for Applied Behavior Analysis, conducting three to four functional behavior assessments (“FBA”) each month and regularly doing IEP consultations. T1, pp.87, 91-92.

188. Petitioners offered Dr. [REDACTED] as an expert in the areas of functional behavior assessment, behavior supports for students with disabilities, interpretation of educational evaluations and assessments for instructional purposes, evidence-based practices and supports for students with ADHD and autism, and IEP consultation. With the exception of being an expert in the area of interpretation of educational evaluations and assessments for instructional

purposes, Respondent had no objection to Dr. [REDACTED] expert designations. Over the objection of Respondent, the Tribunal received Dr. [REDACTED] as an expert in all areas offered. T1, p.96.

189. After Discovery's FBA resulted in little to no behavioral help for [REDACTED] Mom requested an independent FBA and Dr. [REDACTED] was retained to perform it. T1, p.37.

190. To start, Dr. [REDACTED] received and reviewed [REDACTED] educational records received from Petitioners' counsel and Discovery. Then, on May 6, 2024, Dr. [REDACTED] conducted a virtual group interview of [REDACTED] teachers (including his SpEd teacher), during which she asked each one what were [REDACTED] persistent problem behaviors. She also inquired about [REDACTED] academic performance and peer interactions. T1, pp.121-34; Pet. Exh 10.

191. Based on the teachers' responses and data from Discovery, Dr. [REDACTED] selected two (2) target behaviors: a) Disruption—shouting out, getting out of seat, getting into the personal space of peers, saying off-topic things, racial slurs, making unkind comments to peers, and making fun of peers; and, b) Inappropriate Verbalization—cursing and sexual comments toward peers. T1, p.101; Pet. Exh 10, p.2. In her Report, she also identified "Physical Altercations"—where [REDACTED] "may lean on or push students (not in an aggressive manner)" but which actions could "lead to peers pushing him back in an aggressive manner." Pet. Exh 10, p.2.

192. On May 13, 2024, Dr. [REDACTED] went to Discovery and conducted an FBA observation of [REDACTED] for three (3) class periods, lunch and recess. T1, pp.99-100, 121; Pet. Exh 10. Upon Dr. [REDACTED] arrival at Discovery, Ms. [REDACTED] advised she would not be allowed to talk or interact with [REDACTED] or any of his teachers while there—even though there were times when [REDACTED] was not engaged in instruction and Dr. [REDACTED] would not have been interrupting anything.

193. During her FBA, Dr. [REDACTED] observed that [REDACTED] interacted almost solely with teachers and adults but had no interaction with peers. The one time he *attempted* to interact with a group of peers, Dr. [REDACTED] observed that he approached the group, said something (which she did not hear), was ignored by the entire group and, then [REDACTED] walked away to interact with the teacher. Dr. [REDACTED] opined that if [REDACTED] interactive behaviors with peers are predictable, he may use that knowledge to get attention by acting out because his peers will ignore him but teachers will not.

194. Although there was no dispute that [REDACTED] continued to engage in said behaviors more regularly as the school year went on. Dr. [REDACTED] did not personally observe [REDACTED] engage in any of the targeted behaviors. T1, p.103. Yet, she found Discovery had **no evidence-based supports** in place for [REDACTED] behaviors. "[T]he only strategy that the[team] shared with [her] was the 3-strikes rule that they were using, but they indicated that it wasn't successful in decreasing his disruptive behaviors." T1, p.105.

195. Dr. [REDACTED] completed her FBA report on May 13, 2024. Pet. Exh 10. Therein she concluded that:

- a. [REDACTED] experienced difficulty establishing peer interactions and had a history of being bullied by his peers. [REDACTED] needs substantial instruction and support to learn social skills to successfully establish and maintain peer relationships. [REDACTED] struggles with social cues from others and use of appropriate personal space. *Id.* at 1.
- b. [REDACTED] uses offensive or inappropriate language. *Id.* at 1.
- c. [REDACTED] perceives constructive feedback as a personal attack which results in arguments and [REDACTED] entering “fight” mode. *Id.* at 2.
- d. [REDACTED] is hypersensitive to noise; has food sensitivities; experiences distress if room is too warm; sensitivity to bright lights; likes to wear compression shorts, long sleeves, and clothes without tags; chews on nonedible items; continuously seeks movement; and may lean on tables and chairs for sensory input. *Id.* at 2.
- e. [REDACTED] tells his therapist that all is well in order to get out of counseling. *Id.* at 2.
- f. [REDACTED] requires prompting for daily activities. [REDACTED] requires one on one assistance to initiate a task but can work independently once he understands the task but, [REDACTED] is easily distracted when working independently. *Id.* at 2.
- g. [REDACTED] has a restricted range of interests and is not motivated to engage others outside those interest areas. *Id.* at 2.

196. After which, Dr. [REDACTED] opined that [REDACTED] engaged in disruptive behavior, inappropriate verbalizations, and physical altercations: a) to gain attention from/engagement from peers; b) to escape from corrective feedback; and, c) to escape from or avoid work. *Id.* at 3.

197. Dr. [REDACTED] recommended that a Behavior Intervention Plan (“BIP”) be put into place for [REDACTED] an individualized plan just for him, instead of some school-wide social/emotional program instituted to teach skills to the entire student population as a whole. T1, pp.112-13. The school already had a school-wide program for social/emotional learning and, the evidence clearly showed that that program was not working for [REDACTED] as “he was continuing to have these problem behaviors and was getting suspended multiple times.” T1, pp.113-14.

198. The 3x policy was not evidence-based or peer reviewed and, the school’s restorative justice program failed to work for [REDACTED] Dr. [REDACTED] opined that the difference between

199. In recommending that a BIP be put in place for him, Dr. [REDACTED] determined: [REDACTED] **“has had fifteen days of suspension...prior to this [her] independent assessment. [There is] no behavior intervention plan in place, no behavioral goals on his IEP, no social**

goals on his IEP even after autism was added as a secondary eligibility category, and no accommodations that are based on positive behavioral interventions and supports or other evidence-based practices. Pet. Exh 10, p.4 (emphasis added).

200. As part of the BIP, Dr. [REDACTED] recommended:

- a) Replacement Behaviors—which would: assist [REDACTED] in completing required tasks with his peer in a positive manner, help him use self-monitoring tools during independent work; teach him to engage in available movement-based activities without disrupting the learning of others and; teach him how to initiate conversations and interactions with peers in a manner that is well-received by peers. Pet. Exh 10, p.4.
- b) Specific Antecedent Interventions and Proactive Strategies—to teach the replacement behaviors to include: increased opportunities for structured peer interactions; self-monitoring tools and checklists; how to avoid power struggles; explicit social skills instruction; adult-facilitated peer support strategies; consequence interventions/management strategies, and; social problem-solving strategies. Pet. Exh 10, pp.4-6.
- c) Consistent Progress Monitoring and Evaluating the BIP. *Id.* at 6.

201. Dr. [REDACTED] opined that although she had never observed one, Discovery's restorative social justice circle was no solution to [REDACTED] behaviors and therefore was inappropriate because its "answer" was to address [REDACTED] poor behavior *after* the behavior has already occurred: "[W]ith social justice, it's more of they're coming up with in the end some sort of consequence that is going to help everybody feel better about the situation. You know, you're going to do this to make amends for this[.]" T1p.160.

202. Contrarily, the social problem-solving solutions Dr. [REDACTED] recommended were geared toward addressing the behavior *before* it occurs by helping [REDACTED] gain new tools to decrease and eventually eliminate the poor behavior: "[W]ith social problem-solving, it's trying to help the child process why this problem happened in the first place and how they could get their needs better by learning new skills. *Id.*

203. Dr. [REDACTED] BIP recommendation would be appropriate for [REDACTED] regardless of whether he had taken his medication on a given day. T1, p.161.

Other Witnesses

204. Dr. [REDACTED] was [REDACTED] pediatrician from the time he was in 4th grade until she retired in June 2023.

205. She credibly testified that: a) [REDACTED] regularly complained to her that his Discovery peers constantly made fun of him (T2, pp.483-84, 514), and; b) the first time she ever heard [REDACTED] talk about having a friend at Discovery was in the spring of 2024. T2, p.487.

206. However, due to her proximity (or lack thereof) to [REDACTED] schooling, Dr. [REDACTED] testimony assisted the Tribunal only by way of confirming the symptoms physicians readily encounter in children with ADHD, ODD and anxiety and those she observed in [REDACTED] have impulse control issues, feel nervous, restless, difficulty in sitting still, become easily annoyed or irritable, feel afraid as if something awful might happen, struggles with peers, worries a lot. Pet. Exh 22.

207. [REDACTED] (formerly [REDACTED] [REDACTED] is a [REDACTED] grade SpEd teacher in Kentucky. Prior to that, she worked for Discovery for two (2) years as a [REDACTED] and [REDACTED] grade SpEd teacher.

208. During [REDACTED] [REDACTED] grade, she was a SpEd teacher in his math class. T3, p.716-17. Although [REDACTED] did not have an IEP and therefore was not receiving SpEd in [REDACTED] grade and, contrary to all the competent evidence of record, Ms. [REDACTED] testified that [REDACTED] “was very exceptional at math.” *Id.* at 717.

209. According to her, [REDACTED] “was a studious student[.]...seemed to access the general curriculum very well [and h]e accessed his general environment very well[and....] during lessons he would be attentive[,] very focused on what was being taught in the lesson. ...When it was independent time to work on assignments, ...he would do his work. ...He knew the expectations in the classroom, and he followed them very well.” T3, pp.717-18.

210. Ms. [REDACTED] described [REDACTED] and his interactions with peers unlike *anyone* else...even making [REDACTED] out to be the leader of his peers during class activities. Incredulously, she stated:

“...[H]e wanted to be the leader. He wanted to take on that role. And so, he would mostly lead the group into the activity, asking the questions, solving the work. He didn't want to always do the work, because he didn't want to be the one doing all the work. And so he would encourage his peers, hey, like you've got to pitch in, too. I can't do everything. And so that was really -- really nice to see him take that role on.

Now there were times where, you know, if he was having a rough day and he wasn't as talkative, he'd be like, hey, do you mind doing the work? He would advocate for himself very well to his peers and to the teachers. Hey, I'm not feeling well. I -- I'm -- I'm just going to sit down and be quiet today, and they'd be like, okay, I understand; thank you for sharing, so.

T3, p.719.

211. Ms. [REDACTED] had no knowledge that [REDACTED] had a 504 plan in [REDACTED] grade. T3, p.739. She also did not know whether [REDACTED] passed his end-of-grade tests in [REDACTED] grade. *Id.* at 740.

212. At the beginning of his [REDACTED] grade year, Mom requested the school determine whether [REDACTED] was eligible for SpEd services because she “ha[d] concerns in math[and [REDACTED] ha[d] expressed that he has had a hard time understanding math for the past 3 years. [Moreover, his m]ath teacher, Mrs. [REDACTED] has seen a problem with his focus. He will focus when someone is standing next to him but once he’s working independently, he will lose focus. Mrs. [REDACTED] would like to see him advocate for himself more.” Joint Exh 1, p.1.

213. A SpEd Referral meeting was held on October 12, 2022 (the fall of [REDACTED] grade) and, though not serving him, Ms. [REDACTED] “was in charge of the paperwork” because she was the [REDACTED] grade SpEd teacher, T3, p.721. Ms. [REDACTED] testified that Mom “had concerns that [REDACTED] academic performance...he may be on the autism spectrum, and his explosive behavior. *Id.* at 722.

214. Ms. [REDACTED] participated through the process and was part of the IEP team who developed [REDACTED] initial IEP on March 9, 2023, and, she was involved in implementing the IEP through the end of the 2022-23 school year. T3, pp.725-26.

“So with the service delivery being 30 minutes three times a week, I would be in the math classroom assisting. During instruction time, I would make sure that he would be attentive, whether it was through check-ins, me observing from the corner, just making sure that he was being attentive, and he had his materials ready to go. If he did not, simple corrections, whether it would be a quiet conversation or maybe hand signals, students prefer that so that way they’re not being pointed out from their peers. And also with the implementation of this IEP, we did have to change his schedule so that he was in the classroom. That way I was able -- he matched my schedule so that way I was able to serve him in the correct classroom for the services, but back to service delivery, though.

The Court: So he changed? Instead of you going to the class he was in, he changed to come into some class that you were in?

The Witness: Yes, ma’am.

215. When asked why the [REDACTED] she describes (from [REDACTED] grade) is an entirely different child in math ability, behavior, and lack of leadership, than the [REDACTED] described by everyone else—including his IEP—in [REDACTED] grade, Ms. [REDACTED] asserted that he was a year older, more mature and going into [REDACTED] grade was a big deal. T3, pp.736-38.

216. Ms. [REDACTED] developed [REDACTED] one [REDACTED] grade math goal for the Initial IEP: “given multiplication and division computation problems using whole numbers, decimals, and fractions, [REDACTED] will solve with 80 percent accuracy in 4 out of 5 trials.. T3, p.744; Pet. Exh 7, p.6.

217. When asked what grade level the goal was for, Ms. [REDACTED] stated:

“...[I]t was very difficult to get him a baseline grade level because observing him in the classroom and also seeing him complete grade-level assignments, being able to put a

grade level on here was very difficult for me. So I made it vague to where it was give him multiplication, division, computation problems of whole numbers. So that way he was exposed to a variety of problems, whether it be third grade, fourth grade, fifth grade, maybe even seventh grade.... So he could be exposed to or I could assign him assignments that were from as far as kindergarten, I believe so, kindergarten, if not absolutely first grade, all the way up to at least seventh grade or eighth grade.

[A short bit later, Ms. █████ changed her answer and stated...] so since [the IEP] does not state specifically what grade level, the grade levels he was working on, some of them were fifth grade, but most of them -- most of them that he was being tested on were high sixth grade, if not low seventh grade.”

T3, pp.744-45, 747. She worked with █████ “for two-ish months....” T3, p.752.

218. To explain how she remembered specific work strategies she used with █████ Ms. █████ claimed to have taken detailed notes on her work with him—which notes had since been destroyed. T3, pp.749-51. Yet, as noted she did not know or could not remember whether he passed his EOG tests or whether he was, in fact, below grade level in math.

219. She admitted Discovery provided documents for her review in preparation for her testimony and was being paid (by way of reimbursement) for her appearance in court. T3, p.754, 759.

220. █████ was █████ performing arts “teacher” at Discovery. She led the school’s theatre productions and had directed █████ in at least two (2) of them. Her testimony supported evidence which showed █████ enjoys being the center of attention and was disappointed to have been excluded from the production/s when he was suspended. She credibly testified that █████ was sometimes a little inappropriate but he responded well to her talking with him or “giv[ing] him a look[...to] reel him back in.” T4, p.789.

221. █████ was █████ grade social studies teacher at Discovery. T4, p.795. He was also █████ homeroom teacher and “coached █████ in eighth grade as a practice [soccer] player[.]” and oversaw the after-school soccer program. T4, p.797. In homeroom, the children “do programs such as Character Strong, developing student relationships, along with testing, training, and preparing for the year, preparing for the day, too. ...As far as [Mr. █████] could remember, there were not many disruptions in the classroom.” *Id.* Unlike the other teachers, Mr. █████ refused to acknowledge that █████ had any “bad days” nor would he agree that █████ acted “inappropriate[ly]” during these “disruptions.” Instead he described them as “high energy” days when █████ failed to take his medications. *Id.* at 798-800, 811. According to Mr. █████ simply telling █████ to “slow down” and be calm worked. *Id.* at 811-812.

222. Mr. █████ testimony was filled with irreconcilable contradictions—particularly when it came to █████ behavior and relationship with his peers.

223. Mr. [REDACTED] testified that, in the classroom, [REDACTED] communicated well with him (the teacher) and did not cause many disruptions. *Id.* [REDACTED] was an average social studies student and received a 69 (which is a “D”) as his final grade in Mr. [REDACTED] class. *Id.* at 798.

224. “[A]fter leaving the sixth grade, [after school soccer is] where [Mr. [REDACTED]] saw [REDACTED] the most. [He] did not see [REDACTED] a lot outside of that. ...[E]very Tuesday and Thursday in the off-season, not during girls’ and boys’ soccer seasons, ...we would do after-school soccer behind the school from four to five o’clock. ...[A]ny sixth, seventh and eighth grader, girl or boy, was eligible to come out[...and] [REDACTED] regularly participate[d] in th[e] after-school program[.]” T4, pp.800-01. [REDACTED] loved soccer, tried out for the soccer team in 7th grade but “[u]nfortunately, due to skill level, he did not make the team.” *Id.* at 801. He tried out for the team in 8th grade and, again, did not make the team but did make the practice team.¹⁶ *Id.* Mr. [REDACTED] stated he “**never saw any disruptive behavior at after-school soccer**. I saw positive interactions. I saw lots of teamwork when he was on -- it was usually about 7 on 7. We would just do scrimmages, and I saw a lot of teamwork from [REDACTED] ...[H]e loved playing striker. He wanted to get all the goals.” *Id.* at 802 (emphasis added).

225. After testifying that he never saw disruptive behavior from [REDACTED] during soccer, Mr. [REDACTED] admitted that three or four times he “did have to sit [REDACTED] out from practices at times” due to disruptive behavior. T4, p.803. When asked to clarify, Mr. [REDACTED] stated “three times[.]” (*Id.* at 804) and then, on cross, went back to “three or four times[.]” *Id.* at 820.

226. Mr. [REDACTED] testified he was not present for the vehicle incident (*see FOF #70*) nor was he involved in the disciplinary action which followed¹⁷ but he was involved in the

“restorative meetings with [REDACTED] related to that event. ...[He] met with [REDACTED] Ms. [REDACTED] and Ms. [REDACTED] [Discovery guidance counselors]. [They all] sat down to discuss his dismissal or dismissal as a practice player from the team. ... [REDACTED] was emotional...after being removed. However, at the end of our restorative circle, [REDACTED] understood] why he was removed. He also showed a -- really he wanted to [keep] com[ing] out to after-school soccer later that year, and he did, and he continued to come out frequently. ...So [REDACTED] was removed from the [practice] squad...”

T4, pp.805-06. He continued,

¹⁶ Mr. [REDACTED] later clarified that [REDACTED] did *not* make the regular soccer team but made the “practice squad”—a group of “five to six practice players who are as much part of the team as anyone on the active roster[but don’t] participate in games immediately. However, I am *usually* able to get all practice players in at least one game during the season....” T4, p.803.

¹⁷ Though Mr. [REDACTED] was not involved in the decision to suspend [REDACTED] it was his decision to remove [REDACTED] from the practice soccer team. He stated, “I used my discretion on that when it became too much of a disruptive behavior on the team...[and] could [not] be rectified....” T4, pp.812-13.

“We wanted to give [REDACTED] every chance we could. It did get to the point where it was too disruptive, and there was a worry about the team’s safety, after it was reported to me about the carpool issue[...that] he made a racial comment...as well as...suicidal comments.”

T4, pp.814-15. However, Mr. [REDACTED] could *not* explain how [REDACTED] comments created a *safety* issue for the team. In fact, he stated the racial comment “could be seen as offensive to the other players. T4, p.815. As to the suicidal comments, Mr. [REDACTED] stated he “believe[d] [REDACTED] was intending for it to be a joke in the car, but there was no time I had ever thought that [REDACTED] had suicidal thoughts. It was just something that did make the students in the car uncomfortable.” T4, pp.815, 821.

227. Mr. [REDACTED] claimed that after [REDACTED] was removed from the practice team, his and [REDACTED] relationship was stronger than ever as [REDACTED] “would often come seek [hi] out from [his class]room[d]uring lunch[.]” T4, pp.806-07. Mr. [REDACTED] asserted he *never saw any disruptive behaviors from [REDACTED] again*—his “observations of [REDACTED]’s conduct and interactions with peers and adults...for the time period after he was removed from the practice squad through the end of the ’23-’24 school year...[were a]ll positive interactions with peers and adults and players. ... Kids really got along well with him, and during lunch, they got along very well with [REDACTED] They liked playing with him. They liked – they thought he was hilarious.”¹⁸ T4, p.807-08.

228. Though he “never” saw disruptions from [REDACTED] during soccer, Mr. [REDACTED] “made sure to be on field with [REDACTED] at all times.” T4, p.808. “[R]emember[ing] days where [REDACTED] did not take his medication, and he might have been a little off. ..It was sheerly out of worry.” *Id.* at 810.

229. On cross, Mr. [REDACTED] admitted he never observed [REDACTED] engaged in any peer interactions outside of soccer and had no idea whether [REDACTED] had any friends. T4, p.810. “[During] the eighth grade year[...m]y interactions with him outside of soccer field were very limited.” *Id.* at 813-14.

230. [REDACTED] was [REDACTED]’s grade ELA teacher. She credibly testified that [REDACTED] “was often energetic and enthusiastic. He liked to participate, answer questions. He often liked to be up front if, you know, to answer questions, like I said. He had, I would say, uneven performance in class. Sometimes he had difficulty focusing during group or independent work time.” T4, p.835. She believed [REDACTED] capable of making Bs in ELA, if only he did the work and turned it in. *Id.* at 836-37.

231. She was part of [REDACTED] Discovery’s FBA team Interview in October 2023 during which the team decided his blurting out and physical contact with other students were the behaviors that needed to be targeted. Ms. [REDACTED] believed there were other behavioral problems that should be targeted, the team was told to focus on just two. T4, p.852.

¹⁸ Evidence in the record supports that [REDACTED] peers felt uncomfortable by his “jokes” (T4, p.821) or often laughed *at* him not *with* him.

232. Ms. [REDACTED] testified that [REDACTED] was “very social. He wanted to interact a lot with other peers. He would sometimes move around and try to talk to different students in class. Sometimes there was not very kind exchanges between [REDACTED] and some other students....” T4, p.853. The unkind behavior came from both [REDACTED] and the other students. *Id.* at 853-54. [REDACTED] blurted out in her class—sometimes rando things, sometimes things related to what was being taught, sometimes unkind things: “just things that came to his head, ...he’d just blurt it straight out of his mouth[.]” T4, p.873.

233. Ms. [REDACTED] observed [REDACTED] engage in “friendly interactions” with peers but she could not say for certain that [REDACTED] had “a friend.” T4, p.868-69.

234. [REDACTED] was [REDACTED] grade math teacher. She credibly testified that [REDACTED] regularly needed to be slowed down, redirected and given individual assistance as he became easily frustrated if he could not get an answer quickly and tended to do computer lessons with which he was already familiar instead of trying to learn something new. T4, pp.884-86. She often read to him or had him read to her so that he could gain the concept he needed to learn. *Id.* A teacher’s being near [REDACTED] and personally interacting with him helped him stay on track. *Id.* at 890-91.

235. While reviewing [REDACTED] IXL data from sixth grade quarter 1 through eighth grade quarter 3, Ms. [REDACTED] read to the Court that when eighth grade began he took “almost a grade level drop from the sixth” (from a 630 to a 530) “and then in that third quarter, a score of 350. So that would be...at least about two grade levels...from the beginning of eighth grade quarter 1 to quarter 3.” *Id.* at 887-88. However, she did not agree that this drop in scores was reflective of [REDACTED] actual math abilities, but rather reflected his impulsive behavior of clicking through answers quickly without engaging with the problem. *Id.* at 888.

236. She believed he could do better but “[REDACTED] needed quite a bit[of teacher instruction to]... maintain[] his engagement in what he’s doing. *Id.* at 893, 911. Keeping [REDACTED] on track to maintain his engagement required instruction that consisted of both teaching math and redirecting [REDACTED] *Id.* at 911. She retaught lessons to [REDACTED] but did not track how many times she had to reteach a topic to him. *Id.* at 919.

237. [REDACTED] was an [REDACTED] grade school counselor at Discovery and [REDACTED] was on her caseload during [REDACTED] grade year. T5, p.1095.

238. At some point that year, she learned of [REDACTED] diagnoses of anxiety and depression. She witnessed [REDACTED] and his peers going “back and forth...[saying] unkind things[to one another].” T5, p.1121. She did not remember if [REDACTED] ever told her he was being bullied. “He told me that he was struggling with peers, but—and if—if he did use the bullying word...I would have reported to administration. ...I don’t remember.” T5, p.1122.

239. [REDACTED] is the Exceptional Children’s Director at Discovery. She became aware of [REDACTED] when Mom requested a SpEd evaluation and was involved in some capacity with each stage of the process from the child-find referral through each of [REDACTED] IEPs. T5, pp.1181-90.

240. She credibly testified to her belief that “although [REDACTED] may have had some incidents, it didn’t rise to the level of needing a behavioral intervention plan nor behavior goals to be implemented in the IEP[]” even though a BIP can be delivered in general education. T5, p.1216-18. However, Ms. [REDACTED] did not know that teachers were reporting the 3x policy was not working with [REDACTED] T5, p1221.

241. Ms. [REDACTED] confirmed that [REDACTED] altercations with other students—for which he was suspended each time—and his threatening statements (for which he was also suspended), self-harm, bumping into students such that they had to be separated from one another, threatening to throw a chair (on more than one occasion)—were all aggressive behavior. T5, pp.1268-70.

242. She also agreed that [REDACTED] having poked a child in the rear was both aggressive and sexual in nature, as was his “pickle in the a__” comment. T5, p.1271. “...Although we see these incidents that have taken place, when [Discovery] conducted the Functional Behavioral Assessment, none of these things were brought to the attention either by the teacher or the team as having been concerns. What the team saw mostly within the classroom setting was the speaking out and then the bumping of the students.” T5, p.1270. “Had this information been brought to the IEP team, yes, we would have considered that information. We weren’t shared this information, and nor were we shared this information when we completed the Functional Behavioral Assessment.” T5, p.1272.

243. Yet, Mom brought these concerns up to the team during each IEP meeting and the team still did nothing to effectively address them.

244. Ms. [REDACTED] frankly admitted “It’s a collective failure, if these things took place and were not shared. It needs to be shared at any point when we have a student that we are considering whether that child needs the support from the Exceptional Children’s Program, and even once we’ve had a student that we’ve determined that the child needs it, we should be looking at the whole child, not just the academic support that we can provide the student.” T5, p.1273-74;

245. For of all the days [REDACTED] had OSS during [REDACTED] grade, Discovery provided two (2) lessons with Ms. [REDACTED] and five (5) sessions with “another special education teacher” but, he attended only one (1). T5, p.1274.

246. Ms. [REDACTED] confirmed that she would not permit Dr. [REDACTED] from interacting with [REDACTED] or his teachers during Dr. [REDACTED] FBA observation due to “protect[ing] instructional time[] but she stated Dr. [REDACTED] did not request to speak to “any other teachers.” T5, p.1222.

247. Ms. [REDACTED] also confirmed that Ms. [REDACTED] “was not invited” to the initial IEP meeting either to interpret her report for the team or to assist the team in creating the IEP. T5, p.1235. Ms. [REDACTED] was also not invited to the initial IEP meeting but Ms. [REDACTED] said she “was able to share the information from [Ms. [REDACTED] speech therapy] report in the meeting.” T5, p.1236.

248. [REDACTED] is Discovery's founder and director. Discovery has almost 500 students and she stated she acts as superintendent for the school. T6, p.1366. Clearly passionate about her school, Ms. [REDACTED] was less than believable throughout her testimony as time and again she failed to answer the questions asked her and made every effort to change the narrative so that Discovery would be in the best light and [REDACTED] would not.

249. As she proceeded to try and persuade the Tribunal that charter school administrators have so many more obligations and so much more work to do than regular public school administrators, Ms. [REDACTED] lost credibility. T6, pp.1366-67.

250. She testified that all the students' parents have her cell number so "[t]hey can reach out to [her] directly, or they can go to one of the [other] administrators.... [She] help[s] them understand the process of who they need to talk to.... ...For newer parent [she's like directory assistance but]; for parents who've been around a lot longer...[t]hey may...want to share more information about something going on with the child outside of school that may be impacting the school...." T6, p.1367-68. [REDACTED] Mom was not one of those long-term parents (from whom Ms. [REDACTED] would take calls) when he was in [REDACTED] and [REDACTED] grade but, Ms. [REDACTED] insisted she "tr[ies] to be very, very accessible—unlike people in other schools. *Id.* at 1368.

251. When asked whether Discovery used co-teaching with [REDACTED] Ms. [REDACTED] said, she'd "have to look at a definition of co-teaching." T6, p.1369. When asked what Discovery did with a letter it received from Dr. [REDACTED] referencing [REDACTED] being bullied, Ms. [REDACTED] responded by first inquiring, "was [Dr.] [REDACTED] still his pediatrician at the time?" *Id.* at 1372. Then she stated generally, "Well, I think the same thing we do when there are any report of bullying; we investigate and try to understand what's actually happening, and we get to the bottom of it. ...All allegations of bullying against [REDACTED] have been investigated.]" T6, p.1373. When asked what Discovery found, she did not know but refused to say so. *Id.*

252. When asked about the incident in which [REDACTED] was discovered "on the ground, surrounded by a large group of students...and [he] got up from the ground, crying and being escorted to lunch by 2 [redacted named people]," Ms. [REDACTED] refused to acknowledge [REDACTED] was at the center of a fight he was losing. Instead, she claimed not to "know any context on the situation[]" even though the account was written by one of her teachers who also wrote: "All of this appeared like a huge group fight from where I was standing...." Pet. Exh 36, p.1. Ms. [REDACTED] continued her downward spiral of unreliability by asserting, "I wish I could see the names that are blanked out, because...it looked like two students may been helping him." *Id.*

253. The Tribunal discounted Ms. [REDACTED] testimony due to: a) her consistent dodginess; b) her effort at bolstering Discovery's actions or inaction, and; c) her having so little direct knowledge of [REDACTED] time at Discovery—i.e.) she did not know whether the bus driver was aware of [REDACTED] disability and she did not know whether [REDACTED] was co-taught in his math class.

254. [REDACTED] is Discovery's middle school director. During [REDACTED] [REDACTED] grade year, she was the director of students for [REDACTED] and [REDACTED] grades. She was an assistant principal when he was in [REDACTED] grade and was [REDACTED] [REDACTED] grade science teacher prior to that.

255. Ms. [REDACTED] testified that the

"reset part of th[e 3x] policy...is guided instruction towards [REDACTED] that debriefs him of behavior, what happened, and then what is a replacement behavior that could better serve him in the context of the classroom typically. ...[W]e focused on the fact that there needed to be an adult present. It wasn't just an independent reset. The student would be with myself or Ms. [REDACTED] or his EC teacher, Mr. [REDACTED]. At that point, he would be with an adult to debrief on the behavior and have instructions for a better replacement.

My role was to speak with [REDACTED] about the behavior that occurred. A teacher would reach out to me if he reached the three warnings within the classroom environment, and I would talk with him about, hey, like, walk through, tell me what happened, what was going on, who was impacted, what could we do instead?"

T6, pp.1395-96.

256. Although no other witness could testify to such, Ms. [REDACTED] credibly asserted the reset portion of the 3x policy was

"a well-supported research strategy, research-backed strategy, I should say, that focuses on teaching a replacement behavior. It's not just a silent sit-down over here. It's not just you're removed from the classroom, and you don't come back. There's that instructional component to it with an adult that tries to figure out what, what it was the student was trying to access by having the behavior to begin with and what could be an alternative to help -- help them move forward in a more productive manner."

T6, p.1396.

257. Ms. [REDACTED] testified that North Carolina schools training defines bullying "as something that's repeated. It's targeted to a particular classmate, and there is imbalance of power." T6, p.1404. Discovery did not consider [REDACTED] to have been bullied.

In reviewing his EOG scores, Ms. [REDACTED] determined [REDACTED] was proficient in [REDACTED] grade but not in [REDACTED] [REDACTED] or [REDACTED] grades. T6, p.1409.

258. Just as various witnesses for Petitioners testified that [REDACTED] IEP was not appropriate for him and was not reasonably calculated to provide him educational benefit, several of Respondent's witnesses testified that [REDACTED] IEP was appropriate for him and the goals therein were reasonably calculated to provide him education benefit.

259. Respondent offered no expert witnesses.

Relevant Procedural History

260. This contested case began with Petitioners' first Petition (OAH Docket No. 24 EDC 1288), filed April 5, 2024, in which Petitioners assert that they are petitioning for relief from actions by Respondent which caused the minor child, [REDACTED] to be deprived of a Free Appropriate Public Education ("FAPE"), specifically by:

- a) failing to provide an IEP reasonably calculated to enable him to make progress appropriate in light of his circumstances and, failing to implement [REDACTED] IEP with fidelity;
- b) failing to implement his IEP services consistently (with fidelity); and,
- c) failing to appropriately respond to his educational needs related to bullying by peers and, failing to include behavioral and socio-emotional goals and supports in his IEP.

Petition, pp.51, 60, 62.

261. Subsequently, on May 2, 2024, Petitioners filed a second Petition for Contested Case ("MDR Petition") (OAH Docket No. 24 EDC 1674) regarding a Manifestation Determination Review ("MDR") in which Petitioners asserted that Respondent deprived [REDACTED] of a FAPE by:

- a) failing to consider all relevant information at a MDR held April 17 and April 28, 2024, regarding behaviors exhibited by the child;
- b) failing to find that [REDACTED] behaviors in school are a manifestation of his disability;
- c) failing to amend [REDACTED] IEP to address disability-related behavior and his needs.

MDR Petition, p.1, 8-9.

262. Both cases were assigned to the Undersigned and, an expedited hearing was set for the MDR case to be heard on May 31, 2024. *See* Notice of Expedited Hearing and Pretrial Scheduling Order, filed May 8, 2024, p.1.

263. Pursuant to the Expedited Scheduling Order, the Undersigned held a pre-trial conference with counsel on Friday, May 10, 2024 during which Petitioner's counsel advised that Mom had requested a behavioral assessment ("BA") of [REDACTED] three (3) months prior and, the BA was now scheduled to be done on Monday, May 13, 2024 but, because of the Discovery determining that [REDACTED] behavior was not a manifestation of his disability, the Discovery had suspended him for 10 days and he would not be in school to have the assessment. Moreover,

there were just two (2) weeks left in the school year prior to end of grade exams. *See Stay Put Order, FOFs# 2 and 4.*

264. Following the arguments of both parties' counsel, the Undersigned verbally ordered that [REDACTED] be allowed back in school on Monday, May 13, 2024, throughout the week and for as long as it took for the BA to be completed. Although Respondent's counsel disagreed with the Tribunal's decision, he agreed that he would advise his client to follow the oral order of the Tribunal, which Respondent did. In agreeing to allow [REDACTED] back into school immediately, the parties' counsel asserted that there was no longer need for an expedited hearing.

265. On May 14, 2024, following the Discovery's recommendation for exclusion from the school, Petitioner filed a Motion to Invoke Stay Put in the matter of 24 EDC 1674.

266. Later that same day, Respondent's counsel filed a Notice of Settlement in which he advised "[t]he parties have agreed to a settlement of all matters between them. The agreement is subject to the approval of the Discovery Charter Board, which is anticipated by May 21st, if not sooner. Once that happens, the Petitioner will filed [sic] dismissals in both contested cases." Notice of Settlement, p.1. Pursuant to that Notice of Settlement, Petitioner's Second Petition—which, as filed, required an expedited hearing thereof—was removed from the expedited hearing calendar.

267. On May 22, 2024, a Notice of Appearance of new counsel for Respondent was filed and Respondent's former counsel filed a Motion to Withdraw as Counsel of Record for Respondent.

268. Confused as to Respondent's need for new counsel, the Undersigned held another pretrial conference with all counsel of record on May 23, 2024, via Webex, and was notified that the Discovery's Board rejected the negotiated settlement reached between the parties. Following the conference, the Undersigned issued an Order Allowing the Withdrawal of Respondent's (initial) Counsel.

269. At this point, there were just two (2) weeks remaining in the 2023-2024 school year. Resp. Exh 1, p.3.

270. On May 24, 2024, the parties filed a Joint Status Report and Motion to Consolidate the cases and cancel the MDR hearing scheduled for May 31, 2024. *Id.* at p.2.

271. The parties' final pre-trial conference in the MDR matter of 24 EDC 1674 was scheduled for May 28, 2024. During that pre-trial conference with counsel, the parties agreed that the issue of stay put would resolve Petitioners' main concern asserted in the 24 EDC 1288 MDR Petition—whether the child would be allowed to remain in Respondent's Discovery.

272. Thereafter, the Tribunal issued an Order for Respondent to Respond to Petitioners' Motion along with a Notice of Hearing on the motion and, on June 7, 2024, Respondent filed its Response to the Motion for Stay Put.

273. On May 31, 2025, the Parties filed a Joint Motion to Consolidate Cases and Continue Hearing. Therein the Tribunal was advised that the Parties reached agreement on the issue of the minor child's placement through the end of the 2023-24 school year, thus an expedited manifestation determination hearing is no longer necessary, and; the Parties' two (2) cases (24 EDC 01288 and 24 EDC 01674) should be consolidated.

274. On June 13, 2024, an Order Consolidating the two cases was issued by OAH Chief Donald van der Vaart and, the Undersigned issued a Notice of Hearing on the Stay Put Motion (by agreement of counsel).

275. The Undersigned heard Petitioner's Motion to Stay Put on June 13, 2024 at the Office of Administrative Hearings, Raleigh, Wake County, North Carolina.

276. On August 14, 2024, the Tribunal granted Petitioners' Motion for Stay Put concluding that the State's grant of a right to exclude a child from a charter school following violation of the student code of conduct was preempted by the IDEA's procedural mandate that during the pendency of an administrative, disciplinary, or due process complaint, the student is entitled to "stay put" in his educational placement as defined. 20 U.S.C. § 1415(j); *See also* Stay Put Order ¶¶8-9 for end of stay put.

277. On August 19, 2025, Petitioners filed a Motion for Partial Summary Judgment on issues of Respondent having failed to provide the child a FAPE, and; Respondent filed a Motion to Dismiss Petitioners' Section 504 claims being brought pursuant to the Rehabilitation Act of 1973, as amended, under 29 U.S.C. §§ 701 et seq. Both motions were heard by the Undersigned on August 27, 2025.

278. On August 30, 2025, the Tribunal issued an Order Denying Petitioners' Motion for Partial Summary Judgment but Granting without prejudice Respondent's Motion to Dismiss the 504 claims.

279. On September 10, 2024, about an hour before the trial on the merits was to begin, Respondent filed a Motion in Limine requesting the Tribunal

"exclude any testimony regarding the alleged failure to provide Petitioner appropriate math services as the Petition for a Contested Case Hearing in this matter does not include math services as one of the alleged denials of FAPE, and; exclude certain testimony from Petitioner's witness [REDACTED] regarding the alleged failure to develop or implement appropriate IEPs or to provide the appropriate special education, related services, supplementary aides, services, accommodations, modifications and evaluations based on Petitioner's individualized needs...."

280. Also, before the trial began, the Parties offered their Joint Proposed Order on the Final Pre-Trial Conference for the Tribunal's consideration.

281. With a couple of minor changes, the Tribunal adopted said proposed order as the Final Pretrial Order in the case and entered such into the record at that time.

282. After hearing counsel arguments on the Motion in Limine, the Tribunal denied Respondent's motion "as to Ms. [REDACTED] testimony, insofar as her testimony, based on her area of expertise can be connected and related to the IEP[]" (T1, p.33) and, reserved ruling on that part of the Motion in Limine regarding math services until after the evidence was presented.

283. Petitioners filed their written Response to Respondent's Motion in Limine on September 11, 2024.

284. Prior to the Parties' writing their Proposed Decisions, the Undersigned informed counsel that Respondent's Motion as related to Petitioner's notice of a denial of FAPE regarding [REDACTED] math services was being denied. (The Tribunal's conclusions of law regarding such are outlined below.)

Manifestation Determination Review

285. Although Discovery knew of [REDACTED] diagnosis of ADHD-Combined and Oppositional Defiance Disorder ("ODD"), the IEP team seemed to ignore the diagnosis and all of its resulting behaviors as being part of [REDACTED] disability. Joint Exh 1. As reflected in the initial March 9, 2023 IEP, the IEP team determined that [REDACTED] did not have any behaviors that impeded his learning.

286. [REDACTED] behavioral issues and social deficits resulted in him being harassed and bullied by other students. Pet. Exh 53, ¶¶47, 49; Resp. Exh 9.

287. Between the time period of April 5, 2023 to July 26, 2024, [REDACTED] was disciplined on four occasions for engaging in various verbal altercations with other students.

288. On one of those occasions, April 4, 2024, [REDACTED] was reported to have told two (2) students on the bus that he "wanted to touch them...[and] to sexually assault them." For this particular action, Discovery suspended [REDACTED] from school for seven (7) days.

289. Following the incident, on April 29, 2024, the IEP team convened to conduct an MDR and ultimately concluded that [REDACTED] April 4, 2024 behavior was not a manifestation of his Specific Learning Disability and Autism.

290. Nevertheless, Petitioners entered into agreement with Respondents regarding [REDACTED] remaining in Discovery through the end of the school year and then the Parties jointly requested Petitioners' MDR issue be removed from the expedited calendar.

Parties' Stipulations

291. Just prior to trial, the Parties submitted a joint proposed final pretrial order containing all of their agreed-upon (jurisdictional, party, legal and factual) stipulations which was approved (with minor changes) and filed as the Tribunal's Final Pretrial Order, on September 10, 2024, and is hereby fully incorporated herein by reference.

BASED ON the foregoing Findings of Fact, the Undersigned makes the following

CONCLUSIONS OF LAW

1. The Parties are properly before the Office of Administrative Hearings (OAH") in that the OAH has personal and subject matter jurisdiction over this contested case, OAH is the proper venue for this matter and, the parties received proper notice of the hearing in this matter.

2. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels. *Charlotte v. Heath*, 226 N.C. 750, 755, 40 S.E.2d 600, 604 (1946); *Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011). *Warren v. Dep't of Crime Control*, 221 N.C. App. 376, 377, 726 S.E.2d 920, 923, *disc. review denied*, 366 N.C. 408, 735 S.E.2d 175 (2012).

3. This Order incorporates and reaffirms the Conclusions of Law contained in the previous Orders entered in this litigation.

4. As the party seeking relief, Petitioners bear the burden of proof in this action. *Schaffer ex. Rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005); Stip. 3.

Free Appropriate Public Education ("FAPE")

5. The IDEA requires that "[a] free appropriate public education must be available to all children residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school." 20 U.S.C. § 1412(a); 34 C.F.R. § 300.101(a).

6. FAPE "means special education or related services" that are provided at the public expense, conforms to the state educational agency's standards, and "[a]re provided in conformity with an individualized education program. *Id.* at § 300.17.

7. Whether a school district has provided a student with FAPE depends on

- a) whether the IEP has been "formulated in accordance with the requirements of the [IDEA]"; and,

- b) whether the individualized instruction in the IEP is “reasonably calculated to enable the child to receive educational benefits.” *Bd. of Ed. v. Rowley*, 458 U.S. 176, 207-8 (1982).

8. A “FAPE comprises ‘special education and related services’- both ‘instruction’ tailored to meet a child’s ‘unique needs’ and sufficient ‘supportive services’ to permit the child to benefit from that instruction.” *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 748-49, 197 L.Ed. 2d 46 (2017) (quoting 20 U.S.C. §§ 1401(9),(26),(29)).

9. A hearing officer may find a denial of FAPE where the public agency’s procedural inadequacies: (1) impeded the child’s right to a free appropriate public education; (2) significantly impeded the parents’ opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the child; or (3) caused a deprivation of educational benefits. 20 U.S.C. § 1415(f)(3)(E)(ii); see also N.C. Gen. Stat. § 115C-109.8(a).

10. The IDEA spells out particular requirements for the content of all IEPs. The IEP must include “A statement of measurable annual goals, including academic and functional goals designed to . . . [m]eet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum. 34 C.F.R. . § 300.320(a)(2), (a)(2)(i). These goals must also “meet each of the child's other educational needs that result from the child's disability.” *Id.* at § 300.320(a)(2)(ii). There must be a description of how “the child's progress toward meeting the annual . . . will be measured.” *Id.* at § 300.320(a)(3).

11. An IEP must include:

“A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child—

- (i) To advance appropriately toward attaining the annual goals;
- (ii) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other non-academic activities; and
- (iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section.

Id. at § 300.320(a)(4).

12. In developing the IEP, the IEP Team must consider “the strengths of the child; the concerns of the parents for enhancing the education of their child; the results of the ...most

recent evaluation of the child; and the academic developmental and functional needs of the child.” 20 U.S.C. § 1414(d)(3)(A).

13. The formal requirements of FAPE require that all of a child’s special needs must be addressed in the educational plan. *Town of Burlington v. Dep’t of Educ. For Com. Of Mass.*, 736 F.2d 773, 788 (1st Cir. 1984), *aff’d sub nom. Sch. Comm. of Town of Burlington, Mass. V. Dep’t of Educ. of Mass.*, 471 U.S. 359, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985).

15. Charter schools must make exceptions to their methodologies when necessary to implement the IDEA and provide a student with FAPE. *Dehesa School District and Community Montessori Charter School*, 69 IDELR 230 (2017).

16. Respondent is a local education agency (“LEA”) receiving funds pursuant to the IDEA and is responsible for ensuring that the requirements of the *North Carolina Policies Governing Services for Children with Disabilities* are met for children with disabilities who attend its school. N.C.G.S. § 115C-106.3(11); NC 1500-2.24(b); NC 1502-10(b).

17. Children with disabilities who attend public charter schools, and their parents, retain all rights under the IDEA and *North Carolina Policies Governing Services for Children with Disabilities*. 34 C.F.R. 300.209(a); NC 1502-10(a).

18. An LEA is required to provide a disabled student with educational instruction that is uniquely designed to meet the student’s needs through an IEP that is reasonably calculated to enable him to receive educational benefit. *See e.g. Hendrick Hudson Bd. of Educ. v. Rowley*, 458 U.S. 176, 188-89 (1982); *MS ex rel. Simchick v. Fairfax County Sch. Bd.*, 553 F.3d 315, 319 (4th Cir. 2009).

19. School districts are not charged with providing the best program. Rather, they must provide a program that is designed to provide the child with an opportunity for a free appropriate public education. *Rowley*, 458 U.S. at 189-90. The public school district satisfies this test if it provides “personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 980 (4th Cir. 1990) (quoting *Rowley*, 458 U.S. at 203).

20. While the IDEA requires an LEA to provide specialized instruction and related services “sufficient to confer some educational benefit upon the handicapped child,” the IDEA does not require “the furnishing of every special services necessary to maximize each handicapped child’s potential.” *Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997) (quoting *Rowley*, 458 U.S. at 199-200).

21. “Loss of the services of a particular provider, of a particular educational environment, of a number and/or quality of therapy hours, of a particular form of mainstreaming or educational programming, or of ESY may be regrettable, but the IDEA does not demand that any particular set or level of services be maintained for a student merely because they were previously provided to that student. Rather, the IDEA demands only that the services provided

constitute ‘meaningful educational benefit.’ ” *Wagner v. Bd. of Ed. Of Montgomery County, MD*, 340 F. Supp.2d 603, 616 (D. Md. 2004) (citing *Rowley*, 458 U.S. at 192).

22. A court’s role in reviewing the administrative proceeding concerning IDEA “is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities they review.” *Rowley*, 458 U.S. at 206; accord *Hartmann*, 118 F.3d at 999. The Supreme Court has directed that “courts must be careful to avoid imposing their view of preferable educational methods upon the States.” *Rowley*, 458 U.S. at 207. Courts must defer to educators’ decisions as long as an IEP provides the child “the basic floor of opportunity that access to special education and related services provides.” *Tice v. Botetourt County Sch. Bd.*, 908 F.2d 1200, 1207 (4th Cir. 1990) (citation omitted; quoting *Rowley*, 458 U.S. at 201).

23. However, when a school district fails to offer “cogent and responsive explanation” it is not entitled to deference. *Gaston v. Dist. Of Columbia*, 2019 U.S. Dist. LEXIS 130566 at *25-26 (D.C. August 5, 2019).

24. North Carolina law provides that “[a]ny party may file with the Office of Administrative Hearings a petition to request an impartial hearing with respect to any matter relating to the identification, evaluation, or educational placement of a child, or the provision of a free appropriate public education of a child, or a manifestation determination.” N.C.G.S. § 115C-109.6(a).

25. The petition filed under N.C.G.S. § 115C-109.6(a) must allege a violation that occurred not more than one year before the date the parent or the LEA knew or reasonably should have known about the alleged action that forms the basis of the due process petition. N.C.G.S. § 115C-109.6(b); NC 1504-1.8(a)(2).

26. ██████ is a child with a disability for purposes of the IDEA who attended Discovery Charter School from August ██████ through May ██████ and was entitled to receive a FAPE during the time of his attendance at Discovery Charter School. ██████ and his parents were entitled to all rights under the *North Carolina Policies Governing Services for Children with Disabilities* for the period of ██████ attendance at Discovery Charter School.

27. Petitioners are only able to assert rights under the IDEA for the time period that ██████ was attending Discovery Charter School. Stay-Put Order, ¶8. Thus, any claim for denial of FAPE in this action is limited to the time period between April ██████, and July ██████, when ██████ was attending the School. *Id.*

28. It took five (5) months, from October 12, 2022’s SpEd Referral meeting to the March 9, 2023, Initial IEP meeting to get an IEP in place to serve ██████. Discovery was on notice of that he had behavioral issues prior to instituting the IEP but attempted to manage ██████ behavior through his 504 Plan accommodations.

29. Despite Mom’s repeated requests for help and intervention, another seven (7) months passed (to October 10, 2023) before Discovery decided to do a Functional Behavioral Assessment and, when it did, it failed to consider *any* of the aggressive or sexual behaviors

which had been being exhibited by [REDACTED] for over a year. Instead, the team focused on his blurting out and non-aggressive bumping into others.

30. The IEP must include the child's full range of needs "whether they be academic, physical emotional, or social." *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1089; *Citing U.S. Dep't of Educ., Notice of Policy Guidance 57 Fed. Reg. 49, 274 at 49,275 (1992)* (stating that an IEP must address "the full range of the child's needs").

31. [REDACTED] Initial March 9, 2023, IEP did not address his social-emotional needs. Even after Discovery's FBA, the IEP team chose to institute a 3x policy which has no basis in research, followed by a reset with a teacher or administrator. This change was made in the January 3, 2024 IEP Addendum. The 3x policy did not work and Discovery continued to ignore [REDACTED] emotional needs which hindered him from accessing his education.

32. Petitioners' expert, Ms. [REDACTED] opined that the January 3, 2024 IEP did not provide [REDACTED] FAPE because "[i]t didn't have any specially designed instruction in social communication. ...[It] would have been more appropriate to have a communication professional involved in his case even if only on a consultative basis, somebody with training in these kinds of communication deficits." T1, pp.216-17.

33. Petitioners' expert, Dr. [REDACTED] opined the 3x policy was not evidence-based or peer reviewed and, neither it nor the school's restorative justice program worked for [REDACTED] Discovery failed to put a behavior plan in place, had no behavioral or social goals in his IEP, and no accommodations based on positive behavioral interventions or supports.

34. Petitioners' expert, Ms. [REDACTED] opined that [REDACTED] IEP Addendum in January 2024 and March 2024, was not developed to enable [REDACTED] involvement and ability to make progress in the general curriculum. The IEPs did not meet his other educational, functional, and behavioral needs. Moreover, the Present Level of Academic and Functional Performance is non-compliant as it has no baseline information from either informal or formal assessments, it does not describe [REDACTED] academic and/or functional needs, and it does not provide enough information to develop a measurable annual goal. Ms. [REDACTED] further opined that with [REDACTED] weaknesses in math, the 30 minutes of time three times a week was not "reasonably calculated to enable [REDACTED] to make progress appropriate in light of his circumstances." *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017). These deficiencies in [REDACTED] IEPs denied him a FAPE.

35. Despite their own psychologist's opining that [REDACTED] had significant frequency of maladaptive behaviors which significantly impact his functioning within the school setting, Discovery failed to develop IEPs in consideration of evaluations, clinical diagnoses, the FBA, implementation data, and special education professionals.

36. The January 3, 2024 and March 9, 2024 IEPs were not appropriate for him and were not reasonably calculated to provide him educational benefit. Thereby, Discovery failed to provide [REDACTED] a FAPE by failing to give him the tools necessary for him to access his education.

Implementation of the January 2024 and March 2024 IEPs

37. The only academic goal in [REDACTED] IEPs was in math.

38. [REDACTED] IEP required that he get 30 minutes of individualized special instruction three times per week. However, none of his EC teachers actually kept track of the time they spent with him or, if they did, they could not produce proof thereof. There is nothing in the educational record to show that it was done and Discovery's own witness, Mr. [REDACTED] admitted he would spend 10 minutes here or there, twenty on another day—which he thought should add up to the required time.

39. In addition, [REDACTED] IEPs required student work samples be collected, informal assessments be done and bi-weekly data collected to measure [REDACTED] progress. There is no evidence of record to show Discovery did anything other than have [REDACTED] test in IXL or Zearn *sometimes* and, none of those test results are in the record. A couple of Discovery's witnesses testified to have collected such data but could not produce it and had no idea where it was as it was never placed in his educational records or reflected in his progress reports.

40. Thus, for the one-year statute of limitations at bar, Discovery has nothing to show that [REDACTED] progressed in math. To the contrary, the evidence overwhelmingly supports that [REDACTED] did not progress but declined in math and that due much in part to Discovery's knowing he needed one-on-one oversight to learn and get his work done but refusing to supply [REDACTED] that oversight and teaching.

41. Although Discovery consulted with [REDACTED] mother through emails, and formal and informal meetings from April 5, 2023 to June 7, 2024, **Discovery failed** to provide special education services as described in [REDACTED] IEPs and failed to implement his IEPs with fidelity.

Respondent's Motion in Limine

42. Respondent's motion to exclude any testimony regarding the alleged failure to provide [REDACTED] appropriate math services on the basis that the Petition failed to include math services as one of the alleged denials of FAPE should be **DENIED** as [REDACTED] measurable annual goals addressed nothing but math in the child's IEP. The "last IEP had one math goal, and then there were three objectives underneath that. ...[N]o other goals[.]" T2, p.298; Joint Exh 20, pp.4-5; T4, p.946. Respondent therefore could not be unaware or surprised that Petitioners' broad allegations of a FAPE denial encompassed [REDACTED] math services or the lack thereof. T7, pp.1684-86.

43. Respondent's motion to exclude any testimony from [REDACTED] regarding the alleged failure to develop or implement appropriate IEPs or to provide the appropriate special

education, related services, supplementary aides, services, accommodations, modifications and evaluations based on Petitioner's individualized needs where:

- a. Ms. [REDACTED] has been designated as an expert in the area of speech-language pathology;
- b. Ms. [REDACTED] relied upon an evaluation conducted on June 20, 2024, *after* [REDACTED] was no longer attending Discovery Charter School;
- c. Ms. [REDACTED] responded to an August 8, 2024 subpoena for her "complete file related to your work on the above referenced special education due process matter including records reviewed, any observations or evaluations conducted and any reports you have prepared." Ms. [REDACTED] responded to her deposition subpoena through Petitioner's counsel.
- d. Ms. [REDACTED] testified at deposition that Exhibit 4 from her deposition did indeed reflect documents responsive to the subpoena. ([REDACTED] Deposition, pp. 48-50). Ms. [REDACTED] testified that the only additional documents in her file were testing protocols.

This second part of Respondent's Motion in Limine should also be DENIED.

Petitioners' Claim Regarding Manifestation Determination Review ("MDR")

44. Petitioners' MDR claim is MOOT as Petitioners waived their right to argue Respondent's failure relative to the MDR when: a) they reached agreement with Respondent that [REDACTED] would be allowed to remain in Respondent-Discovery through the end of the 202[REDACTED] school year; b) requested the matter be removed from the expedited calendar; c) Mom voluntarily chose to remove [REDACTED] from Respondent-Discovery thereafter; and, d) Petitioners admitted the Tribunal's Order Granting Petitioners' Motion for Stay Put resolved the MDR issue.

FINAL DECISION

BASED ON the foregoing Findings of Fact and Conclusions of Law,

IT IS ORDERED, ADJUDGED AND DECREED that:

1. Respondent's Motion in Limine is hereby **DENIED**.
2. Petitioners' MDR petition is hereby **DISMISSED WITH PREJUDICE** as Petitioners have waived their right to argue that issue.
3. Petitioners are the prevailing party with regard to the January 3, 2024 and March 9, 2024 IEPs appropriateness and failure to implement with integrity.

4. For the denial of FAPE due to the inappropriate January 3, 2024 and March 9, 2024 IEPs, Petitioners are entitled to compensatory related services and travel costs therewith associated.

5. Respondent is **ORDERED** to provide compensatory educational (math) services from a private provider or providers of Petitioners' choice for the period of March 3, 2025 through August 31, 2026, based on the services and recommendations outlined in [REDACTED] Reports #1, 2, and 3 (Pet. Exhs 16, 17, and 18).

6. Respondent is further **ORDERED** to provide behavioral/socio-emotional and/or executive functioning services from a private provider or providers of Petitioners' choice for the period of March 3, 2025 through August 31, 2026, based on the services and recommendations outlined in Dr. [REDACTED] FBA, dated May 13, 2024 (Pet. Exh 10).

7. Respondent shall pay to Petitioner-Mom any travel costs necessary for [REDACTED] to obtain the compensatory services outlined herein, at the rate of \$.70/mile.

8. The cost to Respondent for compensatory related services and necessary travel combined **shall not exceed twenty thousand dollars (\$20,000.00)**. Invoices for services and receipts for travel shall be paid by Respondent within twenty-one (21) days of receipt by Respondent.

9. Petitioners are entitled to attorneys' fees.

NOTICE OF APPEAL RIGHTS

In accordance with the Individuals with Disabilities Education Act and North Carolina's Education of Children with Disabilities laws, the parties have appeal rights regarding this Final Decision.

Any party aggrieved by the findings and Final Decision of the Administrative Law Judge may appeal the decision by commencing a civil action either: a) In State Superior Court **within thirty (30) days** after receipt of notice of this decision, pursuant to N.C. Gen. Stat. § 115C-109.6, **or**; b) In federal District Court **within ninety (90) days** after receipt of notice of this decision, pursuant to 20 U.S.C. § 1415.

Because the Office of Administrative Hearings may be required to file the Official Record in the contested case with the State or federal court, **a copy of the Petition for Judicial Review or Federal Complaint must be filed with the Office of Administrative Hearings at the time the appeal is initiated** in order to ensure the timely preparation of the Official Record.

Unless appealed to State or federal court, the State Board shall enforce the Final Decision of the Administrative Law Judge.

SO ORDERED. This the 25th day of February, 2025.



Hon. Karlene S. Turrentine
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 N.C. Admin. Code 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center which will subsequently place the foregoing document into an official depository of the United States Postal Service.

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This the 25th day of February, 2025.



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