**#20-041**

***V I R G I N I A:***

# DEPARTMENT OF EDUCATION

# DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES

***OFFICE OF DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES***

**In the matter of**

**XXXXXXXXXXXXX, a minor,**

**by her parent, XXXXXXXXXX, Petitioner**

**and VDOE Case #: 20-041**

**XXXXXXXXXXXXX PUBLIC SCHOOLS, Respondent**

## HEARING OFFICER DECISION

## Present for Hearing, February 19, 2020:

**Rhonda J. S. Mitchell, Hearing Officer**

**XXXXXXXXX, Parent, Petitioner**

**Kandise Lucas, Advocate for Petitioner**

**Mary Kathryn Hart, Counsel for XXXXXXXXX Public Schools (XXPS)**

**XXXXXXXXXX, Exceptional Education and Support Services, XXPS**

**XXXXXXX, Paralegal, XXPS**

**Brian Miller, Case Monitor, Virginia Department of Education**

## Present for Hearing, February 20, 2020:

**Rhonda J. S. Mitchell, Hearing Officer**

**XXXXXXXXXX, Parent, Petitioner**

**Kandise Lucas, Advocate for Petitioner**

**Mary Kathryn Hart, Counsel for XXXXXXXXX Public Schools**

**XXXXXXXXXX, Director of Exceptional Education and Support Services, XXPS**

**XXXXXXX, Paralegal, XXPS**

**Brian Miller, Case Monitor, Virginia Department of Education**

## Present for Hearing, February 21, 2020:

**Rhonda J. S. Mitchell, Hearing Officer**

**XXXXXXXX, Parent, Petitioner**

**Kandise Lucas, Advocate for Petitioner**

**Mary Kathryn Hart, Counsel for XXXXXXXXXX Public Schools**

**XXXXXXXXXXX, Director of Exceptional Education and Support Services, XXPS**

**XXXXXXX, Paralegal, XXPS**

**Brian Miller, Case Monitor, Virginia Department of Education**

## Present for Hearing, February 24, 2020:

**Rhonda J. S. Mitchell, Hearing Officer**

**XXXXXXXXX, Parent, Petitioner**

**Kandise Lucas, Advocate for Petitioner**

**Mary Kathryn Hart, Counsel for XXXXXXXX Public Schools**

**XXXXXXXXX, Asst Director of Exceptional Education & Support Services, XXPS**

**XXXXXXX, Paralegal, XXPS**

**Brian Miller, Case Monitor, Virginia Department of Education**

## Present for Hearing, February 26, 2020:

**Rhonda J. S. Mitchell, Hearing Officer**

**XXXXXXXXX, Parent, Petitioner**

**Kandise Lucas, Advocate for Petitioner**

**Mary Kathryn Hart, Counsel for XXXXXXXXX Public Schools**

**XXXXXXXXXXX, Director of Exceptional Education and Support Services, XXPS**

**XXXXXXX, Paralegal, XXPS**

**Brian Miller, Case Monitor, Virginia Department of Education**

## Hearing Location:

**XXXXXXXXX School Board Office, XXXXXXXXX, XXXXXXX, Virginia XXXXX**

**Court Reporter:**

**XXXXX Reporting and Video**

## INTRODUCTION and PROCEDURAL HISTORY

This matter came to be heard upon the filing of a request for due process hearing (complaint) by XXXXXXXXXXXXXX (Ms. XXXXX, Mom, parent or petitioner) through her advocate, Kandise Lucas (advocate), on behalf of her XXXXXXXX, XXXXXXXXXX (XXXXX, student or child). The complaint was filed on January 6, 2020 but later amended on January 19, 2020. The Hearing Officer (HO) was formally appointed by letter dated January 8, 2020 from XXXXXXXXXXX, Director of Exceptional Education and Support Services, XXXXXXXXX Public Schools (XXPS), XXXXXXX, Virginia. The HO accepted the appointment on January 8, 2020. Mary Kathryn Hart from the XXXXXXX XXXX Attorney’s Office was assigned to represent XXPS.

Both the initial complaint filed on January 6, 2020 and the amended complaint filed on January 19, 2020 were challenged by XXPS as legally insufficient. Although challenged by XXPS by Notice of Insufficiency and Motion to Dismiss, the amended complaint was found to be legally sufficient by decision of the Hearing Officer entered on February 3, 2020. Acceptance of the amended complaint reset the filing date to January 19, 2020. In both cases, XXPS filed a timely response.

Prior to the hearing, the parties convened for five prehearing telephone conference calls. The calls were conducted on January 10, 17, 29 and on February 10 and 17, 2020. The Hearing Officer provided proper notice for each prehearing conference call. All parties were represented on the calls.

The parties conducted a timely resolution session, however, the session was unsuccessful. Petitioner declined mediation.

Before the hearing, the Hearing Officer prepared a draft and final prehearing report; entered four prehearing orders; timely settled disputes; discussed the issues of the case with the parties; discussed any other administrative and substantive concerns; issued decisions on motions; reviewed and properly addressed filed documents; issued subpoenas; conducted a site visit; and set the hearing agenda. All notices, reports, decisions, prehearing and post hearing orders have been filed for record, will be later discussed, and are incorporated herein by reference.

The hearing dates were scheduled for February 19, 20 and 21, 2020. If required, February 24, 2020 was established as an extension date. However, an additional extension date of February 26, 2020 was later added to complete this five day hearing.

By prehearing order and through formal notice of the hearing, the parties were directed to deliver to the Hearing Officer and to exchange exhibits and witness lists not later than February 12, 2020. Both parties adhered to this directive.

The Hearing Officer conducted a site visit at XXXXXXXXXX Elementary School on February 18, 2020 where she observed what petitioner describes as a seclusion room and what XXPS refers to as a reset, calm down or meditation room. (Note, due to the many characterizations of this room, the HO may sometimes simply refer to this room as "the room" throughout this decision.) According to XXPS, this room is used to calm students who are exhibiting behavioral problems and doubles as a room for staff to relax. The Hearing Officer agreed to visit this room since the use of it for XXXXXXX is a strong point of contention between the parties.

While at the school, the Hearing Officer, over petitioner's objection, agreed to visit a second room. This room is referred to by school officials as the sensory room and is often used to calm students who exhibit behavioral tribulations. This room also doubles as the office of Ms. XXXX XXXX, the school behavior interventionist.

## Prehearing Orders:

The Hearing Officer entered four prehearing orders dated January 11, 18, 30 and February 11, 2020. Via these prehearing orders, the HO memorialized the following administrative matters:

* There were no objections to the appointed Hearing Officer.
* The hearing will be open to the public. This does not include camera coverage or live streaming. There will be no recording devices permitted (either audio or visual), other than those required by the court reporter. Witnesses, except the parent(s) and XXXXXXXXXXX, XXPS representative, will not be permitted to attend the hearing other than to provide testimony. Cell phones will be disabled. There will be no live streaming.
* The parent is represented by Advocate Kandise Lucas.
* The student may be present for the hearing, if deemed appropriate.
* There is no need for a foreign language interpreter.
* The parties do not object to decisions or other pertinent information being transmitted electronically or by facsimile.
* Motions, objections or other problems will be addressed via conference call and/or written decision.

As a matter of procedure, the Hearing Officer put the parties on notice of the following matters:

* that the petitioner would proceed first at the hearing;
* that the petitioner would carry the burden of proof;
* that the parties should be prepared to present oral opening and closing arguments;
* that the parties would be provided with a written decision by April 3, 2020 (later amended to September 14, 2020 due to delays resulting from COVID-19); and
* that the parties would be required to provide the Hearing Officer with written closing statements or briefs.

Additional matters were addressed in the prehearing orders such as: timelines; issues of the case; rules regarding media coverage; a resolution session dispute; subpoenas, exhibits and witnesses; and instructions regarding prehearing disputes. All four prehearing orders are fully incorporated herein by reference, have been summarized herein, and have been filed with the record of this proceeding.

## Formal Prehearing Decisions:

The Hearing Officer entered two prehearing decisions dated January 21, 2020 and February 3, 2020. Both decisions addressed Motions to Dismiss and Notices of Insufficiency filed by XXPS. In both decisions, the relief sought by XXPS was denied and the case was ordered to proceed to hearing.

More specifically, XXPS filed Motions to Dismiss and Notices of Insufficiency in response to both the originally filed complaint dated January 6, 2020 and to the amended complaint dated January 19, 2020. In both filings, XXPS argued that this case was premature since XXPS had not yet been afforded an opportunity to evaluate the student. XXPS adamantly contended that the parent refused permission and consent for XXPS to conduct evaluations, demanding instead independent educational evaluations. XXPS argued that they offered to conduct evaluations and were therefore in compliance with child find. XXPS advised petitioner that she could pursue independent evaluations if she disagreed with its findings. XXPS contended that child find does not apply until after the student has been evaluated by the school system and denied special education services. They alleged that absent the parent's consent to evaluate the student, the case was not ripe for adjudication.

XXPS further alleged that they were hindered from proceeding with child find because petitioner and her advocate acted unreasonably during the November 4, 2019 child study team meeting. XXPS argues that they were ready to proceed with child find but were unable to proceed due to a failure to cooperate by petitioner and her advocate.

In the amended complaint, the parent argued that XXPS acted unreasonably and in bad faith during the child study team meeting conducted on November 4, 2019. The child study team meeting was a precursor to evaluation. The parent contended that XXPS personnel were ill-equipped and unprepared for the meeting. The parent further claimed that student data was withheld and/or inaccurately documented by XXPS resulting in harm to the student. The parent alleged that XXPS unreasonably delayed child find procedures and protocols despite a teacher referral in September 2019 and the parent's repeated requests for help with XXXXXXX. The parent argues that instead of following the appropriate child find procedures, XXPS took the extreme measures of seclusion and restraint to correct the student's behavioral problems; thereby causing the student severe emotional damage. The parent claimed that she no longer trusted XXPS with her child and therefore lost confidence in their ability to perform any evaluations on XXXXXXX.

The HO concluded that the amended complaint sufficiently raised issues regarding the improper implementation of child find procedures by XXPS as dictated by 8 VAC 20-81-50**.** She found thatthe facts of the case were clearly in dispute and that evidence should be heard by a finder of fact who could make rulings of law and adjudicate the allegations, claims and disputes. The HO found the case ripe for adjudication. She also found that petitioner had properly requested a due process hearing as petitioner believed that violations of the child find provisions of the IDEA had occurred.

In its Motion to Dismiss and Notice of Insufficiency, XXPS also argued that the amended complaint did not satisfy 8 VAC 20-81-210 (F)(2) and 20 U.S.C. § 1415(b)(7)(A)(ii) and should be dismissed since it failed to state sufficient proposed resolutions to the alleged problems. XXPS also claimed that some of the proposed resolutions were inappropriate and/or not within the HO's authority.

The HO decided that XXPS was correct in its assertion that some of the proposed resolutions, such as ordering staff training and supervision, fell outside the HO's authority and were inappropriate for a due process hearing. However, she also decided that the amended complaint had other proposed resolutions that were appropriate for a due process proceeding and could be considered by the HO. The HO made clear that any proposed resolution or relief that was either inappropriate or that fell outside the HO's authority, would not be considered or granted. Overall, the HO found the amended complaint satisfied the requirements of 20 U.S.C. §1415(b)(7)(A) and was therefore legally sufficient.

## Prehearing Letter Decisions:

The Hearing Officer also issued two letter decisions dated February 9, 2020 and February 18, 2020. Both letter decisions have been filed with the record of this proceeding.

The letter decision dated February 9, 2020 granted a motion by XXPS to quash certain witness subpoenas that were sought by petitioner. Petitioner sought testimony from the district's superintendent of schools and school board members to primarily discuss the district's position on student restraint and seclusion. The HO did not deem their testimony necessary or relevant.

The letter decision dated February 18, 2020 denied a subpoena request by XXPS for electronic communications between the advocate and the parent. The Hearing Officer decided that the advocate should be permitted to freely communicate with the parent she represents; that to allow this information to be subpoenaed could strategically damage their case; and that such information could be voluminous. Therefore, the request to release electronic communications between the advocate and parent was denied.

## Interim Order:

The HO entered an interim order dated February 22, 2020. Following discussions at the hearing and coordination between the parties, the HO ordered that XXPS provide the student with homebound educational services through the end of the school year. The student was provided an in-home teacher or facilitator three times per week. The petitioner received a copy of the materials that were to be used.

The interim order also directed that XXXXXXX be evaluated. Both parties provided a list of evaluations they deemed important. It was ordered that XXXXXXX be tested by the independent educational evaluator that had already been scheduled by petitioner. It was also ordered that in the event the independent educational evaluator was unable to provide all evaluations, XXPS personnel would conduct the remaining evaluations.

It is here noted that on or about March 30, 2020, the homebound educational services for XXXXXXX were discontinued due to the closing of schools by order of Virginia's Governor, Ralph Northam. The Governor ordered that Virginian's stay at home due to the COVID-19 pandemic. Since XXPS personnel were either not working or working from home, the Governor's order either precluded or complicated XXPS' ability to conduct any evaluations. The evaluations were ultimately conducted by independent educational evaluators.

This interim order dated February 22, 2020 has been filed with the records of this case.

## Post Hearing Orders:

Following the formal hearing, disputes arose requiring the HO to issue three post hearing orders. These orders were entered on March 10, 17 and 31, 2020. A copy of each order has been filed with the record.

It was discovered that one of the independent educational evaluators was unable to perform all of the testing. As previously ordered, XXPS then became responsible for administering those evaluations. The post hearing order entered on March 10, 2020 was an XXPS evaluation scheduling order. XXXXXXXXXXX, as supervisory school psychologist for XXPS, was placed in charge of all testing and evaluations of XXXXXXX that needed to be conducted by XXPS. This meant that Ms. XXXXXX was responsible for scheduling the evaluations with petitioner, determining the location, and closely monitoring XXPS' evaluation process. Ms. XXXXX was given the authority to make final decisions regarding location and scheduling.

Per the scheduling options offered by XXPS, or unless otherwise decided by XXXX XXXXXX, tests were to be scheduled with the XXPS XXXXXX School Team members pursuant to the following scheduling options:

Batelle: Ms. XXXXXXX is available to administer the Batelle on March 16th or March 18th between the hours of 8: 00 AM and noon;

CELF-5: Ms. XXXXXXXXXXXX is available on March 19th at 12:30 or March 20th at 1:30 PM; or

Ms. XXXXXXXXXXX is available to administer the CELF-5 on March 19th or March 20th after 9:30 AM;

YCAT-2: Ms. XXXXXXXXXX is available to administer the YCAT-2 on March 13th between 8: 00 AM and 4:30 PM; March 16th between 8:00 AM and 4:30 PM; March 18th between 1:00 PM and 4:30 PM; or on March 20th between 2:00 PM and 4:30 PM.

It was also ordered that the evaluation or test results clearly identify and summarize any and all disabilities that may be found with XXXXXXX and provide rationale for the finding(s). Throughout the proceedings, petitioner expressed distrust of XXPS personnel. When given the proposed scheduling options, petitioner delayed the evaluations by questioning the credentials of the XXXXXXXXXX team identified to perform the evaluations as well as the credentials of XXXXXXXXXX. The HO ordered that individual credentials be included with the evaluation results. Albeit the delay, XXPS was unable to perform the evaluations anyway due to the stay at home order issued by the Virginia Governor.

Following an extremely confrontational conference call on March 16, 2020, the HO entered a second post hearing order on March 17, 2020. Therein, the parties were admonished for their unproductive and rude behavior on the March 16th call.

The order further dealt with XXXXXXX's continued need for evaluation, scheduling and XXPS' obligation, if any, to continue homebound services in view of the unprecedented school closures due to the COVID-19 pandemic. With the XXXXXXXXXX team evaluation scheduling options set forth in the first post hearing order now moot due to school closures, it was ordered that XXXXXXX be independently evaluated using evaluators from an XXPS preapproved list. It was also ordered that XXXXXXX's in person homebound services be discontinued and that she receive the same educational services offered by XXPS to other students during the pandemic.

The third post hearing order entered on March 31, 2020 extended the timelines for evaluations and briefs. The completion of final testing for XXXXXXX was extended to June 17, 2020.

Closing briefing dates for both parties and the HO's decision date were also extended. Petitioner's brief, including any relevant attachments, were ordered and due not later than 5:00 PM, July 1, 2020. XXPS' briefing date with any attachments was extended to not later than 5:00 PM, July 16, 2020. The Hearing Officer's decision date was extended to September 14, 2020.

## ISSUES

With concurrence from petitioner, the issues of the hearing were identified as follows:

* Whether there were procedural or substantive violations of the eligibility and/or child study requirements. If so, what relief, if any, should be granted?
* Whether the student was denied a free appropriate public education (FAPE).
* Whether the student has a disability.
* Whether the student is in need of special education and related services.
* Whether XXPS failed to provide the student with a FAPE during the 2019 - 2020 school year by failing to identify the student's disability.
* Whether XXPS violated Child Find regulations by failing to evaluate the student or by failing to properly interpret and consider the student's independent evaluation(s).
* Whether the student's alleged disability resulted in an adverse impact upon her educational performance or access to her curriculum.
* Whether the student's behavioral record was properly reflected by XXPS, and if not, did this alleged failure result in the denial of a FAPE.

## BURDEN OF PROOF

In *Schaffer v. Weast,* 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed.2d 387 (2005), the Supreme Court held that the burden of proof in a special education administrative hearing is properly placed upon the party seeking relief, whether that is the disabled child or the school district. In this case, the burden of proof and persuasion rests with petitioner. The standard of proof is based upon a preponderance of the evidence. 8 VAC 20-81.O.13.

## FACTUAL SYNOPSIS

In September 2019, XXXXXXX, at age four, was selected to attend pre-kindergarten (pre-k) with the Early Learning Preschool Program. This program has been identified as a federal program administered by XXXXXXX County Public Schools (XXPS). (School Board (SB Ex. 1-8)). XXXXXXX began her education at XXXXXXXXXXX Elementary School, XXPS. At the start of this hearing, XXXXXXX was five years old and receiving no educational services from XXPS. On October 21, 2019, XXXXXXX's parent, XXXXXXXX, removed XXXXXXX from school. Although XXPS offered homebound educational services through June 2020, such services had not materialized by the beginning of the hearing on February 19, 2020. Therefore, XXXXXXX had not received educational services from XXPS for almost four months.

Concerned about XXXXXXX's education, the Hearing Officer (HO) entered an interim order on February 22, 2020 concluding that XXXXXXX was in need of homebound educational services. Although discussions were underway prior to the hearing to arrange homebound services, discussions broke down due to issues about scheduling and curriculum. The HO therefore ordered the parties to meet before the hearing commenced the next day to arrange scheduling. XXPS would provide the services until the end of the school year as they had previously offered.

The parties met as ordered and agreed to commence pre-kindergarten homebound educational services for XXXXXXX on Monday, February 24, 2020. The teacher or facilitator would be teaching XXXXXXX on Mondays and Wednesdays between 6:30 and 8:00 pm, and on Sundays between 3:30 and 5:30 pm.

On or about March 30, 2020, the stay at home order was issued by Virginia's Governor, which was designed to curtail spread of the coronavirus (COVID-19). The Governor's order became effective on April 1, 2020 and mandated school closures. The order was to remain effective until June 10, 2020. As a consequence of the Governor's order, XXXXXXX's homebound services were interrupted.

While attending XXXXXXXXXX Elementary, it was reported that XXXXXXX exhibited the following behavioral problems:

* spitting;
* running from adults;
* running out of the classroom door;
* running outside of the school;
* failure to follow instructions;
* failure to follow redirection;
* overall disobedience;
* falling on the floor;
* pulling down her pants;
* playing in bathroom sink water;
* knocking things over; and
* talking back to adults;

Petitioner attributes these behaviors to the student's diagnosed noise sensitivity. She claims to have repeatedly informed the school of this problem including delivering a letter from XXXXXXX's occupational therapist on or about the first day of school that identified the problem. (SB Exh. 31) She claims that the school ignored XXXXXXX's noise sensitivity, permitting her to be exposed to noises that triggered her sensitivity, thus causing her undesirable behavioral outbursts.

Petitioner claims to have pleaded with XXPS personnel to help XXXXXXX with this problem. She asked that XXXXXXX be kept away from certain noises that would trigger a reaction and prompt negative behavior, including a "fight or flight" reaction. Instead, petitioner claims that XXPS managed XXXXXXX's negative behavior by placing her in a "seclusion room." She alleges that XXXXXXX referred to the room as the "jail room" resulting in her not wanting to attend school and being traumatized. She states that XXXXXXX has been emotionally damaged by this experience and so after 21 school days, on October 21, 2019, petitioner removed XXXXXXX from school altogether.

From September 3, 2019, the first day of school, to October 21, 2019, when petitioner removed XXXXXXX from school, XXXXXXX had been removed from the classroom and placed in "the room" at least five times. She had also been removed from the classroom and sent to the sensory room about nine times. Most classroom removals were due to behavioral problems and outbursts presented by XXXXXXX. However, she was also sent to the sensory room during nap time because she either could not or would not go to sleep along with the other children.

Prior to removing XXXXXXX from school, in an effort to help manage XXXXXXX's behavior, petitioner began going to the school to assist with XXXXXXX. In fact, petitioner was at the school, in XXXXXXX's classroom, every day for three consecutive weeks leading up to her complete removal of XXXXXXX from school on October 21, 2019. Petitioner claims to have witnessed the teacher, XXXXXXXX, mistreat XXXXXXX. Eventually, there were tensions between petitioner and Ms. XXXXX.

In September of 2019, petitioner claims that Ms. XXXXXX referred XXXXXXX for evaluation but that XXPS failed to follow through on the referral in a timely manner. During the hearing, Ms. XXXXXX testified that she requested assistance with XXXXXXX's behavior. (SB Exh. 33 and 34) She denied making a referral for special education evaluation. XXXXXXX had not been evaluated for special education services at the time of the hearing.

Petitioner claims that she advised XXPS of XXXXXXX's noise sensitivity issue at the beginning of school by providing the school's office and Ms. XXXXXX with a letter from an occupational therapist who had been working with XXXXXXX. Petitioner claims that XXPS unreasonably delayed evaluations and failed to appropriately address XXXXXXX's disabling noise sensitivity issue. Petitioner claims that she pleaded with XXPS for help with XXXXXXX and that they failed to either evaluate or conduct a child find study in a timely manner. She claims that the teacher, Ms. XXXXXX, refused to provide the accommodations she suggested, including use of headphones. Petitioner angrily claims that instead of addressing the underlying disability of noise sensitivity as the primary reason for XXXXXXX's negative behavior, XXPS personnel unreasonably restrained and secluded her child by placing her in a "seclusion room" without properly documenting these events and without notifying her -- the parent. Petitioner also claims that when she asked for the school occupational therapist to intervene, she was told the school did not have one. Petitioner later learned that the school did in fact have an occupational therapist on site. She saw a sign one day for the school occupational therapist while walking the halls of XXXXXXXXXXX Elementary School. Petitioner claims that XXPS' failures to timely identify and evaluate XXXXXXX as a child in need of special education resulted in violations of the child find laws.

A child study team met on November 4, 2019. (Parent's Exh. 14 - audio recording) Petitioner and her advocate were present for the meeting along with XXPS personnel. Petitioner argues that XXPS acted unreasonably and in bad faith during the child study meeting. The petitioner contends that XXPS personnel were ill-equipped and unprepared for the meeting. She and her advocate claimed that student data needed for the meeting was withheld and/or inaccurately documented by XXPS. They further claim that the team was inappropriately staffed. Based on these allegations, petitioner stopped the meeting and it was not rescheduled.

Petitioner alleges that XXPS unreasonably delayed child find procedures and protocols despite a teacher referral in September 2019 and her personal pleas for help. She argues that instead of following the appropriate child find procedures, XXPS took the extreme measures of seclusion and restraint to correct the student's behavioral problems - thereby causing the student severe emotional damage. She also alleges that the student's behavioral records did not properly reflect instances of seclusion and restraint. Throughout the proceedings, petitioner and her advocate expressed extreme distrust of XXPS staff and personnel.

On the other hand, XXPS claims to have offered to evaluate XXXXXXX. They claim that petitioner has unreasonably refused permission and consent for XXPS to conduct evaluations. XXPS argues that they have been in full compliance with child find procedures and protocols. XXPS denies that XXXXXXX was either restrained or secluded. They claim that XXXXXXX was placed in a "calm down or meditation room" (the room) when her behavior became uncontrollable. They further claim that XXXXXXX was never left alone in this room but had someone with her at all times, to talk to her and attempt to calm her down. XXPS denies that the teacher, Ms. XXXXXX, referred XXXXXXX for evaluation or child find in September 2019 as petitioner's complaint alleges.

They state that XXXXXXX was often sent to the "sensory room" with XXXXXXXXXX, the school's behavior interventionist, to assist with her behavioral problems. They state that XXXXXXX responded positively to this experience and often asked to go to the sensory room.

XXPS further claims that the child study team was prepared to go forward with the meeting but that petitioner's advocate unreasonably objected to the team members, made information and data requests that were unexpected and unusual, and consistently disrupted and confused the purpose of the meeting. XXPS claims that the child study team was appropriately assembled and in possession of enough information to proceed with the meeting.

Petitioner filed a request for due process hearing on January 6, 2020, later amended to January 19, 2020, summarily alleging XXPS violations of child find laws and improper restraint and seclusion of her child.

# XXXXXXXXXXXXX

At the hearing, XXXXXXX presented as an inquisitive, lively, well-spoken and active five year old. She was selected to attend the pre-kindergarten program at XXXXXXXXXXXXXXX Elementary School, XXXXXXX County Public Schools, for school year 2019-2020. XXXXXXX started school in September 2019 at four years old. An occupational therapist has diagnosed XXXXXXX with auditory hyper-responsivity (noise sensitivity). XXXXXXX likes unicorns and astrology.

Petitioner, XXXXXXXXXXXX, was appointed legal guardian of her granddaughter, XXXXXXXXXXX, on November 12, 2014, by order of the XXXXXXX XXXX Juvenile and Domestic Relations District Court, XXXXXXX, Virginia. She is referred to herein as Mom, the parent or petitioner. XXXXXXX's biological mother is currently incarcerated. The whereabouts of her biological father are unknown. Petitioner has maintained custody of XXXXXXX since her birth on October 11, 2014.

While attending XXXXXXXXXXXXXXX Elementary, it was reported that XXXXXXX exhibited some of the following behavioral problems: spitting; running from adults; running out of the door (fight or flight); using inappropriate language; failure to follow instructions; failure to follow redirection; overall disobedience; falling and rolling on the floor; taking off her clothing; urinating on the floor and playing in it; playing with her vagina; throwing or knocking over a classroom chair and bottles; striking adults; and talking back to adults. (see SB Exh. 33) To correct these negative behaviors, it is reported that on several occasions, XXPS took XXXXXXX to what XXPS has referred to as a reset room, meditation room, or calm down room until her behavior could be deescalated. Petitioner has referred to the room as a seclusion room. During these negative behavioral episodes, XXXXXXX was also sent to a sensory room where she was allowed to play with sensory toys/tools designed to calm her, curb or stop her negative behavior and outbursts.

On or about September 3, 2019, petitioner proffered to XXPS that the student suffered from noise hypersensitivity to common environmental noises causing over stimulation. It was suggested that the student wear headphones to block or cancel the noise and possibly correct her negative behavior. Headphones were provided and available for use in the classroom. Petitioner suggests that XXXXXXX's adverse behavior is the result of an auditory or noise sensitivity.

A letter from XXX Children's Hospital dated October 16, 2019 was provided to XXPS explaining XXXXXXX's auditory hyper-responsivity and her potential fight or flight responses to common environmental sounds. The letter explained that XXXXXXX was receiving weekly outpatient therapy to manage her behavior before and after her fight or flight episodes. (SB Exh. 31)

By order of the HO, XXXXXXX began receiving homebound educational services on February 24, 2020. This arrangement was productive but interrupted by the Virginia Governor's stay at home order in response to the COVID-19 pandemic resulting in schools closing.

## HEARING SUMMARY

This hearing was conducted on February 19, 20, 21, 24 and 26, 2020. The hearing commenced with opening statements from both parties.

The following witnesses were duly sworn and provided testimony on behalf of the petitioner:

Day 1, February 19, 2020: Transcript I Page #:

XXXXXXXXXXX Student 5

XXXXXXXXXXXX Petitioner/Parent 56

XXXXXXXXX Principal, XXXXXXXXXXXXXXX Elem. School 115

Day 2, February 20, 2020: Transcript II Page #:

XXXXXXX Former Special Ed Teacher, Expert 412

XXXXX XXXXXX XXXXXXX's Pre-K Teacher, XXPS 548

Day 3, February 21, 2020: Transcript III Page #:

XXXXXXXXXXX Professor, XX State Univ. 748

XXXXX XXXXXX XXXXXXX's Pre-K Teacher, XXPS 812

XXXXXXXXX Preschool Lead Teacher 924

The following witnesses were duly sworn and provided testimony on behalf of respondent:

Day 4, February 24, 2020: Transcript IV Page #:

XXXXXXXXXX Behavior Interventionist, XXPS 1141

XXXXXXXXXXX Family Advocate, XXPS 1228

Day 5, February 26, 2020:

Transcript V Page #:

XXXXXXXXX Dir., Sp. Education, XXPS 1414

Petitioner presented the following witness in rebuttal:

XXXXXXXXXXXX Parent/Petitioner 1650

XXPS called the following witness in rebuttal:

XXXXXXXXXX 1st Grade Teacher, XXPS 1715

Once dismissed, the HO directed each witness to not discuss their testimony with anyone. Each witness agreed to comply.

At the conclusion of testimony, the parties agreed to dispense with oral closing arguments because the room had been previously committed and people were waiting to enter. The HO provided guidance regarding the submission of closing briefs and the hearing concluded.

Throughout this proceeding the parties were at aggressive odds with one another. Confrontations often became hostile with the parties talking over each other. The advocate and her client often accused XXPS personnel of not telling the truth and insinuated that they were biased towards children of color. The HO was frequently required to intervene in an effort to deescalate confrontations. The hostility between the parties appeared deep-seated.

## WITNESS SUMMARIES

*Witnesses for the Petitioner:*

*XXXXXXX XXXX*: XXXXXXX, the subject of this due process hearing, was the first witness called by petitioner. It was decided that XXXXXXX would only be questioned by the HO due to her tender age. XXXXXXX's testimony was brief and credible. She testified to liking school and knew the name of her teacher, Ms. XXXXXX. She was able to name her school, XXXXXXXXXXXXXXX Elementary, and testified that she liked going to school.

XXXXXXX was very active during her testimony and required redirection. She testified that she was four years old. At the time of her testimony, she was actually five years old.

Due to the tender age, brevity and limited questioning of the witness, the HO did not inquire whether she understood the truth from a lie. Nonetheless, her testimony was credible. Tr. I, pg 5

*XXXXXXXXXXXXX*: Ms. XXXX, the petitioner, provided extensive testimony. Her testimony was at times emotional and very distrustful of XXPS. Although the HO found her testimony mostly credible, it appeared that her emotional state, clear concern for XXXXXXX, and absolute distrust of XXPS may have at times distorted her testimony.

Ms. XXXX began her testimony with opening remarks about XXXXXXX's medical history. She discussed how XXXXXXX was born prematurely causing health issues at the time, and how later in her life, treatment for reoccurring ear infections eventually led to her current noise or auditory sensitivities. She testified about how she has raised XXXXXXX from birth since her birth mother, Ms. XXXX's daughter, was unable to properly care for her.

She explained XXXXXXX's first day of school, September 3, 2019, and how she reluctantly dropped her off due to the clapping of people welcoming the students that she could see and hear in the hallway. She was unsure how XXXXXXX would react to the clapping noise due to her noise sensitivity. She explained that sure enough, 20 minutes later, the school called for her to come back and retrieve XXXXXXX due to her uncontrollable outbursts. When she picked her up, XXXXXXX was being contained in what appeared to be a storage room. On this day, a staff member suggested that XXXXXXX may be autistic or have Asperger’s syndrome and referred her to a psychologist, a Dr. XXXX. Ms. XXXX took immediate offense. She claimed that they had already labeled her child even though they had just met XXXXXXX.

Ms. XXXX took XXXXXXX home that first day but returned her to school the next day, September 4, 2020. After that, Ms. XXXX explained that she received calls from the school almost on a daily basis telling her that XXXXXXX had a bad day, without providing specifics. Although Ms. XXXX stated that she asked for specific behaviors and any data being kept on XXXXXXX, she was told that the school did not keep such data and no specifics were ever given to her about XXXXXXX's behavior. Ms. XXXXX stated that she would attend the school here and there to assist with XXXXXXX and that at first, she and Ms. XXXXXX, XXXXXXX's teacher, got along fine.

Ms. XXXXX testified that she provided the school with headphones for XXXXXXX as an intervention to block instigating noises and curb her behavioral outbursts. She said that XXXXXXX's teacher, Ms. XXXXXX, said they were a safety concern. Ms. XXXXX also testified that Ms. XXXXXX said that she did not have time to implement the headphone intervention. Ms. XXXXX testified that she went to other staff members expressing concern and frustration.

On September 9, 2019, Ms. XXXXX testified that she received a call from Dr. XXXXXX, the school principal, regarding XXXXXXX's explosive behavior in the classroom that day. She said that Dr. XXXXXX told her that XXXXXXX had been removed from the classroom twice that day because she knocked books off the shelf; threw a chair; and threw sensory bottles. Dr. XXXXXX said that XXXXXXX was removed from the classroom because her behavior was presenting as a possible danger to herself and others. Ms. XXXXX questioned whether XXXXXXX had actually thrown items or just knocked items over. Regardless, Ms. XXXXX was asked to pick up XXXXXXX on that day and not return her to school until September 11th. Ms. XXXXX referred to September 10, 2019 (XXXXXXX's mandated day out of school) as XXXXXXX being suspended and that she did, in fact, later receive a letter stating that XXXXXXX was not to return to school on September 10th. (SB Exh. 37)

Ms. XXXXX testified that she only first learned of other alleged behaviors by XXXXXXX on September 9th, while she was in the "seclusion" room, from Ms. XXXXXX's contact notes that were made available during discovery prior to the hearing. In those notes, Ms. XXXXXX wrote that XXXXXXX took off her pants; urinated on the floor; rolled around on the floor in the urine; and played with her vagina. Ms. XXXXXX wrote that staff had to change XXXXXXX's clothes. Ms. XXXXX admits that XXXXXXX was in different clothes when she picked her up from school but took issue with the behavioral descriptions written by Ms. XXXXXX about XXXXXXX, claiming that XXXXXXX would never do such things. Ms. XXXXX testified that she believed that Ms. XXXXXX, and perhaps other staff members, were not being truthful about XXXXXXX's behavior. She again expressed distrust of XXPS personnel.

Subsequently in her testimony, Ms. XXXXX, who is Black, accused Ms. XXXXXX of being prejudice. She claimed that while volunteering in the classroom, Ms. XXXXXX, who is Caucasian, spoke disparagingly to her about other Black parents and about Black students. When pressed by the HO, Ms. XXXXX conceded that Ms. XXXXXX had not used any racial epitaphs.

To summarize other testimony, Ms. XXXXX discussed XXXXXXX's allergy to milk for which she testified XXPS did not address. She claimed to have never received a copy of XXXXXXX's records, although she asked for them. She claimed that XXPS falsified reports, data and events. In support of her position that she fully cooperated with XXPS, she discussed documents that she previously signed agreeing to routine assessments. She discussed her willingness to volunteer and assist with XXXXXXX however and wherever possible. Ms. XXXXX testified that she was never told about XXPS' restraint and seclusion policy and resented such a policy being used on XXXXXXX. She claimed that as a result, XXXXXXX did not want to go to school and called it "jail." When questioned as to why XXXXXXX testified that she liked school, Ms. XXXXX explained that XXXXXXX just wants to play and be with her friends. She testified that XXXXXXX was often restrained and taken to the seclusion room without her consent, knowledge or documentation memorializing the incidents.

To further summarize, Ms. XXXXX testified about the issues and obstacles surrounding the implementation of homebound educational services for XXXXXXX. She testified about the November 4, 2019 child study meeting, claiming that the XXPS team was unprepared and did not have documentation appropriate for the meeting. She read through a list of suggestions made by XXXXXXXXX, XXPS lead teacher, designed to assist with XXXXXXX's behavior, claiming that none of the suggestions were implemented.

Ms. XXXXX testified that on or about October 25, 2019, her advocate requested from XXPS a comprehensive eligibility assessment. She claimed that XXPS personnel never discussed evaluations with her and that she had never heard of evaluations until she retained her advocate.

Ms. XXXXX read a letter from XXXXXXXXXX, occupational therapist, dated August 30, 2019 that she provided the school. This letter explained XXXXXXX's noise sensitivity to common environmental sounds, the need for use of the headphones, and informed of her current treatment through occupational therapy to manage her noise sensitivity. Ms. XXXXX emphasized that XXPS ignored the letter and that Ms. XXXXXX refused to use the headphones.

In addition to the use of headphones as suggested by the occupational therapist, Ms. XXXXX testified that she introduced a reward system to Ms. XXXXXX that was to be used just for XXXXXXX. She testified that Ms. XXXXXX did not adopt this reward system. She testified that XXXXXXX liked unicorns and astrology and she suggested that these topics be integrated into XXXXXXX's lessons. She testified that XXXXXXX was advanced and mentioned that she should be tested for the gifted program since she already knew how to read, her alphabets and her numbers. Ms. XXXXX also testified that Ms. XXXXXX used the sensory table in the classroom as a punishment and not for its intended purpose of calming students.

Ms. XXXXX testified about her stay in the classroom for three consecutive weeks to assist with XXXXXXX's behavior. She testified about what she witnessed during that three week period. She claimed to have heard Ms. XXXXXX yelling at the students. She expressed resentment for the fact that Ms. XXXXXX would not integrate her suggested interventions for XXXXXXX.

When questioned about her refusal to consent to XXXXXXX being evaluated, Ms. XXXXX said she agreed to her being evaluated for intelligence but not for special education services. She claimed that she did not know anything about evaluations until she hired her advocate, Kandise Lucas, who explained special education and evaluations to her. She testified that none of the XXPS personnel mentioned or suggested evaluations and that she had already scheduled independent evaluations for XXXXXXX with Dr. XXXXXXXXX that she would pay for herself.

However, Ms. XXXXX also testified that on or about October 4, 2019, XXPS requested permission to evaluate XXXXXXX but she refused believing that XXPS had forfeited their right to evaluate XXXXXXX. She testified that she pleaded with XXPS personnel for help and assistance but was rebuffed. She would schedule independent educational evaluations herself and testified that she would pay for them herself. Ms. XXXXX testified that she had lost all trust in XXPS employees to objectively and comprehensively assess XXXXXXX.

When asked about an emailed message to Ms. XXXXX from XXXXXX, XXPS social worker, dated November 13, 2019, that included a consent to evaluate form and prior written notice, Ms. XXXXX claimed to have never seen the consent to evaluate form. (SB Exhs. 47 and 48) Her testimony was unclear regarding one of Ms. XXXXXX's transaction notes dated September 16, 2019 in which child find was mentioned. She claimed to have known nothing about child find until she retained her advocate who explained everything to her.

Very importantly, despite an assertion in the due process complaint that Ms. XXXXXX requested evaluations for XXXXXXX on or about September 3, 2019, Ms. XXXXX admitted in her testimony that Ms. XXXXXX did not request that XXXXXXX be evaluated for special education services. The document to which she referred was a request for assistance to Ms. XXXXXX's lead teacher, XXXXXXXXXXXXX, not a request for evaluation. (SB Exh. 34) She again expressed distrust of XXPS and stated that she would rather have independent educational evaluations that she would pay for herself. She testified that she did not want XXPS personnel touching her child and declined to sign XXPS' consent to evaluate.

Ms. XXXXX testified about the differences in the seclusion room from when she first saw it in September to when the site visit occurred on February 18, 2020. She stated that more carpeting had been put on the walls. She stated that she tested the lock during the first visit and that the door locked from the inside.

Ms. XXXXX was questioned about several of the documents she signed before the beginning of school. She testified that she did not mention XXXXXXX's noise sensitivity on any of the documents during registration because she was unaware of the diagnosis when the documents were signed. She stated that she did not receive the letter from the therapist until late August and most of the documents were signed in May 2019. She emphasized that she provided the letter to the school as soon as she got it from the therapist. Tr. I, pg. 56 and pg. 1650; Tr. V, pg. 1650 (in rebuttal)

*XXXXXX XXXXXX*: Dr. XXXXXX identified herself as principal of XXXXXXXXXXXXXXX Elementary School, XXPS. In 2014, she earned an educational doctorate in educational leadership from Virginia Commonwealth University. Her testimony was credible.

Ms. XXXXXX began her testimony by discussing the mediation room, calm-down room, or seclusion room as described by petitioner. She stated that the purpose of the room was for students to deescalate, relax and feel safe. She discussed XXPS policy regarding the room and the school's Code of Conduct. She admitted that the room is not discussed in the Code of Conduct given to parents. She adamantly claimed that the room was safe and should not be characterized as a "seclusion" room. She testified that the room is also sometimes used by staff for yoga and for relaxation. She stated that a child is never left alone in the room and that the five times that XXXXXXX was in the room, someone was always with her.

Dr. XXXXXX testified about the differences in the room when Ms. XXXXX first saw the room on the first day of school in September, 2019 to when the HO made the site visit on February 18, 2020. She stated that the room had not yet been set up on the first day of school but that now it is set up with bean bag chairs, meditation mats and sensory toys. She explained that the room had a therapeutic benefit to calm students and served as a behavior intervention strategy. She testified that use of the room for XXXXXXX was not effective especially on September 9, 2019 when she was taken there twice that same day.

On September 9, 2019, Dr. XXXXXX testified that although she was not there most of the time and got most of her information from Ms. XXXXXX's notes, it was reported that XXXXXXX had been throwing or knocking things down in the classroom, hitting staff, not listening and running. She was taken to the meditation room in an effort to calm her. While in the room, it was reported that she took off her bottoms and was naked from the waist down. She asked to go to the bathroom but refused to put her clothes back on so staff could take her to the bathroom. She then urinated on the floor and attempted to clean it up with her own clothing. At that point Dr. XXXXXX arrived at the room and provided wipes for XXXXXXX to clean herself and gave her clothing. They could not locate the extra set of clothing brought by Ms. XXXXX so they found clothing from elsewhere. She then took XXXXXXX to her office to wait for someone to pick her up. She testified that she did not smell urine in XXXXXXX's hair.

She testified that families were verbally told when their child was placed in the room and that no data is kept. She testified that although technically considered a classroom removal, it was not XXPS policy to document it. She testified that classroom removals for pre-kindergarten (pre-k) students were documented in the Child Plus system, a system that she does not have routine access to. She testified that she did not have access to XXXXXXX's Child Plus files until on or about October 21, 2019.

The Child Plus files contain the teacher's routine daily contact notes retained through a federal program for pre-k students. She testified that these notes are not included in the student's cumulative file kept by the school. Ms. XXXXX was provided a copy of the notes in November, 2019.

Dr. XXXXXX also testified that XXXXXXX had never been restrained. She claimed that staff may have held XXXXXXX's hand but never restrained her as defined by XXPS policy. She testified about school personnel who were Mandt certified, explaining that there were staff members at the school who were trained on how to properly restrain a student but continued to insist that XXXXXXX had not been restrained. She stated that Ms. XXXXXX was certified in PBIS (positive behavior intervention support).

Her testimony then turned to a complaint of abuse to child protective services made by Ms. XXXXX against Ms. XXXXXX, XXXXXXX's teacher. Dr. XXXXXX remembered Ms. XXXXX expressing concerns about Ms. XXXXXX's attitude in September 2019 but did not recall her mentioning abuse at that time. However, she specifically remembered Ms. XXXXX using the word abuse in November of 2019. The allegations had to do with XXXXXXX being wrongfully restrained and secluded. Dr. XXXXXX testified that she filed the complaint in November 2019 with child protective services and that it was ultimately determined to be unfounded by the agency.

She then testified about an alleged incident involving Ms. XXXXXX yelling at another student. Apparently this incident was videotaped and seen by Dr. XXXXXX. When questioned about the ramifications of this incident on Ms. XXXXXX, Dr. XXXXXX stated that she handled it as a personnel matter but would not elaborate. Dr. XXXXXX was also questioned about a conversation she had with that child's parent in which she allegedly asked the parent not to file a complaint because it might result in Ms. XXXXXX being fired. Dr. XXXXXX denied having asked that of the parent. (Note: Petitioner's advocate indicated that a witness would be forthcoming to contradict this portion of Dr. XXXXXX's testimony but the witness was not produced.)

Dr. XXXXXX testified that she first saw the letter from the occupational therapist on or about September 11, 2019. She stated that Ms. XXXXXX had been given a copy of the letter on the first day of school. However, she testified that she knew about the letter earlier because Ms. XXXXX had mentioned it to her before.

Given the letter about XXXXXXX's noise sensitivities, when asked why XXXXXXX was not referred for evaluation, Dr. XXXXXX testified that such referrals for pre-k students go through the early learning preschool program. She stated that either she or Ms. XXXXXX could have also referred XXXXXXX for evaluation. She stated that she personally did not believe XXXXXXX had been in school long enough and that she did not appear to be academically impacted by her behavior. She also testified that Ms. XXXXXX had not referred XXXXXXX to child find.

She testified that they did not have enough information on XXXXXXX to see how she would function without Ms. XXXXX present. She mentioned that XXXXXXX had only been in school for a short time and that when the option was brought to Ms. XXXXX by Ms. XXXXXXXX to evaluate XXXXXXX, she said she did not want her child labeled. She testified that XXXXXXX had been sent to the meditation room at least five times the first week of school and that it was not working as an effective intervention. They then began to send XXXXXXX to the sensory room where she seemed much happier. She testified that Ms. XXXXX being at the school for three weeks was not a recommended intervention.

When testifying about the child find team meeting on November 4, 2019, Dr. XXXXXX admitted that many of the documents that could have been available at the meeting were not. She was unsure who was responsible for making the information available. She discussed the meeting and agreed that the advocate and/or petitioner expressed concerns about missing documentation and also the credentials of team members. She knew that Ms. XXXXX was frustrated. Dr. XXXXXX said that she did not know why the information was not made available to the team. Dr. XXXXXX admitted that she had not educated herself on auditory defensiveness prior to the meeting.

When asked about a verbal altercation between Ms. XXXXXX and Ms. XXXXX on October 18, 2019, Dr. XXXXXX testified that the problem involved a sticker used by the photographer to identify each student on picture day. She explained that Ms. XXXXXX and her students were in the gym waiting to take their pictures when Ms. XXXXX arrived with XXXXXXX. Ms. XXXXXX held on to XXXXXXX's sticker instead of placing it on her back like the other students. Ms. XXXXXX mentioned that she thought XXXXXXX might throw the sticker. Ms. XXXXXX and Ms. XXXXX got into a verbal altercation in front of the students.

When Dr. XXXXXX spoke to both Ms. XXXXX and Ms. XXXXXX about the incident, Ms. XXXXX told her that Ms. XXXXXX had an attitude. Ms. XXXXXX told Dr. XXXXXX that Ms. XXXXX was yelling at her in front of the students.

During her testimony, there was disagreement as to who actually requested that XXXXXXX be evaluated. The advocate asserted that Ms. XXXXXX requested evaluation and that XXPS simply did not move forward. Dr. XXXXXX denied that Ms. XXXXXX made a referral. XXPS claimed that it was the advocate, on behalf of the petitioner, that first requested evaluation in her October 25, 2019 email message wherein she asked for an eligibility assessment. (SB Exh. 44)

Referencing XXXXXXX's behavior problems, when asked why Dr. XXXXXX had not personally made the recommendation that XXXXXXX be evaluated, she testified that it was her understanding that other staff members mentioned it to petitioner before and that petitioner was not interested in having a label attached to XXXXXXX. It was her understanding that evaluations had been recommended by the Early Learning Preschool team but were rejected by petitioner. She stated that she defers to the preschool staff to make recommendations for referral regarding students in pre-k.

Dr. XXXXXX testified about a meeting conducted on September 11, 2019. Ms. XXXXXX, Ms. XXXXX, Ms. XXXXXXXX and herself were present for the meeting. She stated that Ms. XXXXX expressed concern about Ms. XXXXXX overstating XXXXXXX's behaviors and that they discussed strategies to support XXXXXXX in the learning environment. At the meeting, they discussed XXXXXXX's noise sensitivity and strategies to help XXXXXXX feel safe at school. It was decided that XXXXXXX would not go back to the room but to Ms. XXXXXX's room -- the sensory room.

Dr. XXXXXX testified that she was under the impression that the November 4, 2019 child study meeting was held at the parent's request. She stated that Ms. XXXXXX had not made the recommendation for child find and that the meeting was conducted because of an email from petitioner's advocate requesting a comprehensive eligibility assessment of XXXXXXX.

When asked why no data had been collected regarding XXXXXXX's behavior and the interventions used to curve her negative behavior, Dr. XXXXXX acknowledged that data would have been helpful to have at the child study team meeting on November 4, 2019. She testified that she did not know why the child study team did not have the information available at the meeting. Tr. I, pg. 237.

*XXXXXXXX*: Ms. XXXXX qualified as an expert witness in special education. She is a retired special education teacher from XXXXX XXXX Public Schools, XXXXX XXXX, Virginia. Her testimony was credible.

Ms. XXXXX did not interview with XXXXXXX. Her opinions were derived from a document review of the case.

Ms. XXXXX testified that the school occupational therapist should have been immediately contacted when Ms. XXXXX provided the school with the letter identifying XXXXXXX as a child with a sensory integration disorder. She testified that in her experience, when XXXXXXX presented with behavioral issues, coupled with the letter from the occupational therapist identifying her problem, she should have been immediately evaluated, data collected, observations conducted, and a functional behavioral assessment performed. She testified that child find should have been triggered when XXPS received the letter from the occupational therapist.

She testified that she had previously served on many child study teams, and that the team assembled by XXPS to review XXXXXXX's case was not composed of the appropriate personnel. She said that the team should have at least had an occupational therapist who would have been able to identify XXXXXXX's triggers that caused a sensory overload, and resulted in her undesirable behaviors.

Although Ms. XXXXX was questioned about the room, she did not qualify as an expert in restraint and seclusion. However, her testimony pointed out that there were no "calming" items in the room photos, just a mat and some chairs. She expressed concern that XXXXXXX was allegedly picked up and taken to the room when her behavior became a problem instead of providing an intervention. She stated that data should have been kept on when the child was taken to the room, who stayed with her, and the behaviors that caused her to be removed from the classroom.

Ms. XXXXX discussed what she would have done under the circumstances of this case, where the parent refused to sign the consent to evaluate the student. She testified that she would have tried to regain the trust of the parent. She would listen to the parent's views, answer their questions and fully collaborate with them. She would have thoroughly explained everything to the parent about the referral and child find process. She would have presented the parent with all available data and explained why the evaluations were necessary and what they would assess. When reviewing Ms. XXXXXX's request for assistance dated September 5, 2019, she stated that the request could be interpreted as a referral to child find. She testified that when a school division does not provide testing in a timely manner under child find, the parent has a right to independent educational evaluations. Tr. II, pg. 412

*XXXXX XXXXXX*: Ms. XXXXXX is a pre-k teacher at XXXXXXXXXXXXXXX Elementary School. She was XXXXXXX's teacher from September 3, 2019 until October 21, 2019 when petitioner removed her from school. Her testimony was lengthy and credible. She is trained in response to intervention (RTI) in instruction but not behavioral supports. She has been a pre-k teacher since 2014.

She testified that her pre-k program was under a federal program and that she was required to document her notes through a program called Child Plus. Her lead teacher, XXXXXXXXXXXXX, reviewed her notes and took action where necessary. She explained that in XXXXXXX's case, she could not make a referral for special education services, it had to be done by her lead teacher in corroboration with staff from the XXXXXXX XXXXXXXXX. She expressed concerns about XXXXXXX to Ms. XXXXXXXX and during the first week of school she made a request for assistance. She did not intend this to be a referral since she lacked the authority to make a referral. In fact, Ms. XXXXXX claimed not to know what a referral was under IDEA. In response to her request for assistance, Ms. XXXXXXXX offered suggestions that were implemented whenever possible.

She testified that Ms. XXXXX mentioned XXXXXXX's noise sensitivity during open house on August 30, 2019 and provided her with the letter from the occupational therapist on the first day of class, September 3, 2019. She admitted that she was unfamiliar with the disability of auditory sensitivity.

She testified that on XXXXXXX's first day of school XXXXXXX did not easily transition to the classroom. When she arrived in the hall, XXXXXXX was rolling around on the floor and crying. She appeared to be frightened. She got her up, held her hand and took her to the quietest place she could find which was the room. A staff member, Ms. XXXXX, went with them. Ms. XXXXXX stated that she sat on the mat with XXXXXXX, trying to calm her, talking to her and trying to persuade her to come to the classroom but XXXXXXX would not go. On that day she stayed with XXXXXXX for about 30 minutes leaving her class in the hands of her assistant.

She testified that on other occasions when XXXXXXX was taken to the room, she did not object and went willingly. She was never picked up to go to the room but was held by the hand. She did not appear frightened and did not refer to the room as "jail."

She testified about Ms. XXXXX being in the classroom for three consecutive weeks to help with XXXXXXX. She said that she initially thought that she was going to be in the classroom for one week, not three. She testified that the decision was made by her lead teacher and that she had no say-so about the arrangement. She testified that Ms. XXXXX was sometimes helpful with calming XXXXXXX and sometimes not.

Ms. XXXXXX testified that Ms. XXXXX admitted to her that she had spoiled XXXXXXX and that could be a part of her problem. On several occasions, Ms. XXXXXX witnessed XXXXXXX acting out with Ms. XXXXX by hitting her, yelling at her and sometimes cursing at her.

She testified that while in her classroom, Ms. XXXXX would yell at her in front of her students. She discussed an incident where Ms. XXXXX yelled at her because she did not give XXXXXXX her sticker on picture day. Ms. XXXXXX said that XXXXXXX did not want the sticker and so she just held it rather than upset her. Ms. XXXXX yelled at her for this. On that same day, October 18, 2019, Ms. XXXXX again yelled at her in the classroom when she took XXXXXXX's writing board because XXXXXXX was twirling around with it and not following the rules by sitting calmly.

When asked whether other parents came in and stayed in the classroom, Ms. XXXXXX testified they did not. She mentioned that parents or grandparents would occasionally pop in to see a child but would not stay. She said she inquired of her lead teacher about Ms. XXXXX's three week stay but was not provided an explanation. She stated that she was not privy to the meeting when this was decided.

Ms. XXXXXX testified that XXXXXXX had difficulty transitioning into the classroom most mornings, even when Ms. XXXXX was with her. Because of this, it was decided that Ms. XXXXX would bring XXXXXXX to school later than the rest of the students. Even so, she stated that XXXXXXX would put up a fight and argument outside the classroom almost every morning. She witnessed XXXXXXX yelling and hitting Ms. XXXXX outside the classroom. Once in the classroom, XXXXXXX would not follow the class rules.

During XXXXXXX's 21 days at school, Ms. XXXXXX testified that XXXXXXX had slapped her in the face; hit her assistant several times; hit other students with her book bag; run around the classroom; ripped signs off the walls; flung sensory bottles; knocked over furniture; and flipped over shoes. She stated that she would document these incidents in her Child Plus notes. (SB Exh. 33)

Given XXXXXXX's behavior, when asked why she did not request that XXXXXXX be evaluated or why she did not consult the school occupational therapist, Ms. XXXXXX again stated that she did not have the authority and that the decision had to be made by her lead teacher and staff at the XXXXXXXXXXXXXXXXX.

When asked about use of headphones as an intervention to dissuade XXXXXXX's negative behaviors, Ms. XXXXXX testified that she attempted to use the headphones provided by Ms. XXXXX but that XXXXXXX would use them sometimes and refuse to use them other times. She stated for example, that XXXXXXX would act out one day when listening to a song. On another day, when listening to the same song, she would be dancing and singing along. She also mentioned that, given XXXXXXX's temperament, her lead teacher suggested that the headphones might pose a safety concern. She mentioned that Ms. XXXXX had once told her that they were not noise-cancelling headphones anyway.

Ms. XXXXXX testified that she could not pin down what actually caused XXXXXXX's behavior and that she often acted out when she could not have her way or did not want to do something. She stated that in all her years of teaching, she had never experienced a child with such extreme behavioral issues. She never had to use the room before, or since, to quiet a child.

Ms. XXXXXX discussed many classroom interventions designed specifically for XXXXXXX. She mentioned use of: a Velcro scheduling chart, dry-erase board, star report system, integration of unicorns in the daily routine, a stop and think sign, books, coloring and other activities designed to help XXXXXXX calm her behavioral outbursts. She testified that she did not always have time to implement all of these interventions for XXXXXXX because she had 18 students to attend to. She stated that she did the best she could with XXXXXXX as she did with all of her students.

On September 9, 2019, Ms. XXXXXX testified that the students were eating lunch in the classroom. When it came time to clean up their trash, XXXXXXX did not want to clean up. She started running around the classroom, screaming and saying no, ripped things off the wall and throwing things. There were no loud noises to trigger her behavior so Ms. XXXXXX opined that XXXXXXX was having a temper tantrum simply because she did not want to clean up after lunch.

When questioned about her daily Child Plus notes, Ms. XXXXXX discussed the entries and explained her comments regarding XXXXXXX. Ms. XXXXXX also said that Ms. XXXXX once told her that she had spoiled XXXXXXX. Tr. II, pg. 548 and Tr. III, pg. 812.

*XXXXXXXXXXX*: Dr. XXXXX qualified as an expert in trauma and cultural competence. Her testimony was credible. She had not interviewed XXXXXXX. She provided a holistic view that was not specific to XXXXXXX.

She testified about the traumatic impact of restraining and secluding a child of XXXXXXX's tender age. She testified that such practices could cause XXXXXXX emotional harm due to her cognitive age and developmental level. She testified that children do not have the capacity to process isolation as a form of punishment and as a result, they may become traumatized. She likened XXXXXXX's association of the room with "jail" as emotional trauma. She testified that research shows that seclusion is not a best practice. Tr. III, pg. 748

## Witnesses for XXXXXXX XXXXXX Public Schools:

*XXXXXXXXXXXXX*: Ms. XXXXXXXX testified that she works as an early learning preschool teacher for XXXXXXX XXXXX. She serves 13 specific classrooms, 2 of which are located at XXXXXXXXXXXXXXX Elementary School. She is one of four lead preschool teachers that service XXPS. Her office and her supervisory chain is located at XXXXXXXXXXXXXXXXXXXXXXXX. Her job is to help the teachers. If there is a problem, they come to her for assistance. She has worked with school systems for 25 years, 13 of which were with XXXXXXX XXXX. She qualified as an expert in preschool, as a certified observer, and in curriculum development. Her lengthy testimony was credible.

Ms. XXXXXXXX testified that she did not do referrals. She sends them to the instructional development preschool zone team for action. She also testified that a teacher can go directly to the principal if she deems a referral for special education services to be appropriate for a child. Under such a circumstance, she testified that the referral would not have to be approved by the XXXXXXXXXX team. The teacher would discuss the referral with the parent and the matter would move on to the school's child study team.

She also explained that if the teacher refers through her, instead of the principal, there would be a discussion with the parent and building administrator (i.e. principal). After the discussions occurred, the referral would be sent to the development coordinator at XXXXXXXXXXXXXXXXXXXXXXXX who would do the necessary paperwork and send it to the zone team to initiate child find.

Ms. XXXXXXXX explained the request for assistance. When a teacher submits a request for assistance, the lead teacher is signaled to come into the classroom to observe the child and make recommendations to help the child acclimate to the classroom environment. She testified that when she observed XXXXXXX, she did not witness any of the reported extreme behaviors. She was in the classroom for four hours. She did, however, witness her throw her fruit cup on the floor once because she did not want it but she did not witness any extreme behaviors such as running or fleeing.

Ms. XXXXXXXX testified that it would be inappropriate to jump to eligibility before seeing whether the interventions worked. That would take time. In XXXXXXX's case, she testified that her attendance was inconsistent. She would often arrive later than the other students or left earlier in the day. She stated that she lacked sufficient information and there was insufficient time to observe. She testified that Ms. XXXXX was present a lot and that XXXXXXX needed more time to acclimate to the classroom, socialize and form bonds with the teaching staff without the parent being present.

She was in regular contact with Ms. XXXXX and they met several times. Several strategies were put into place to help XXXXXXX transition and when she observed the classroom, they were being used. She could not speak to whether the strategies were being implemented in her absence.

Ms. XXXXXXXX testified that she first met Ms. XXXXX on the second day of school. That she came in to observe because Ms. XXXXXX said she was going to submit a request for assistance. Ms. XXXXX was sitting in the classroom by the door. Ms. XXXXX told her about XXXXXXX's noise sensitivity and Ms. XXXXXXXX offered her help, if needed.

On or about September 6, 2019, Ms. XXXXX called Ms. XXXXXXXX complaining about Ms. XXXXXX. Among other things, Ms. XXXXX complained that she did not feel welcomed in the mornings. Ms. XXXXXXXX suggested a meeting be conducted on September 11, 2019.

Prior to that meeting however, an incident occurred on September 9, 2019. The staff could not calm XXXXXXX resulting in the principal, Dr. XXXXXX, deciding that XXXXXXX would stay home on the 10th and return to school on the 11th. Ms. XXXXXXXX informed Ms. XXXXX about the incident and XXXXXXX's requirement to stay home on the 10th.

A day or so later, Ms. XXXXX received an incident letter stating that XXXXXXX had to stay home on the 10th of September. Ms. XXXXX sent a response that Ms. XXXXXXXX told her would be kept with the incident letter and would not follow her to kindergarten. The letter and response would remain in XXXXXXX's pre-k records and not follow XXXXXXX into future years.

Ms. XXXXXXXX testified that she spoke to Ms. XXXXX about child find and often offered to move XXXXXXX to the XXXXXXXXXXXXXXXXXXXXXXXX or XXX Elementary. She said that Ms. XXXXX told her that she was not interested in either option. Ms. XXXXX told her that she did not want a stigma attached to her child and that Ms. XXXXXX was the root of the problem -- not XXXXXXX. Ms. XXXXX suggested that perhaps etiquette classes or more socialization could curb XXXXXXX's negative behaviors.

On September 11, 2019, the following persons met for two hours: Ms. XXXXXXXX, Ms. XXXXX, Ms. XXXXXX, Dr. XXXXXX and XXXXXXXXXXXX, family advocate. The primary concern was safety because it had been reported that XXXXXXX was running out of the building, turning things over and hitting her teacher. Suggestions were made during the meeting to help XXXXXXX transition and stay safe such as use of a unicorn behavioral chart, social stories, pom pom reward system, and transition cards. They also set up a table with her favorite items. They decided to use the sensory room for XXXXXXX during her outbursts instead of the room. Ms. XXXXXXXX testified that she did not think it was ever a good idea to use the room as an intervention.

The day after the meeting, Ms. XXXXX delivered a different behavioral chart that had stars. This chart was developed by the parent and XXXXXXX was to receive stars for good behavior. Ms. XXXXX also wanted Ms. XXXXXX to use a dry-erase scheduling board just for XXXXXXX instead of using the scheduling board used for the rest of the children. So this required Ms. XXXXXX to use two boards instead of one. She testified that it would have been difficult for her, as a teacher, to use both boards.

Ms. XXXXXXXX testified about a second meeting held at XXXXXXXXXXXXXXXXXXXXXXXX on October 2, 2019. Present for the meeting were Ms. XXXXX, Ms. XXXXXXXX, the preschool specialist, XXXXXXXXXXX and XXXXXXX. Ms. XXXXXX was not present for the meeting because of the tensions between she and Ms. XXXXX. Ms. XXXXX repeated her concerns about Ms. XXXXXX, saying she was the problem with XXXXXXX and complaining that Ms. XXXXXX was not doing what she suggested be done for XXXXXXX. Again, since the relationship between the teacher and Ms. XXXXX had deteriorated, they once again offered to transfer XXXXXXX to XXXXXXXXXX. Ms. XXXXX said she wanted XXXXXXX to remain in her current classroom because her friends were there. She seemed receptive to their ideas and suggestions to help XXXXXXX.

At the October 10th meeting, they discussed placing XXXXXXX on a modified schedule that would shorten XXXXXXX's day but over time add time back into her schedule. Ms. XXXXXXXX thought they had agreed to the modified schedule but later learned from a conversation with Ms. XXXXXX that the modified scheduled was not being followed. Ms. XXXXXX was not invited to this meeting either because of the tensions between she and Ms. XXXXX.

By that time, Ms. XXXXX was bringing XXXXXXX to school and staying most, if not all, of the day with her. When she spoke to Ms. XXXXX again about the modified schedule, she returned to her premise that Ms. XXXXXX was the problem. Ms. XXXXXXXX testified that it appeared to her that Ms. XXXXX wanted the teacher removed instead of placing the child elsewhere.

Ms. XXXXXXXX testified that on October 25, 2019, Ms. Lucas, the parent's advocate, sent an email to the school division requesting a comprehensive eligibility assessment for special education services and supports to be conducted within the next 60 days. She testified that a child study team was convened right away.

On November 4, 2019, Ms. XXXXXXXX was present for the child study team meeting. She testified that the meeting did not go well. She stated that she brought all of XXXXXXX's academic information but not the Child Plus notes or behavioral documents. She said the meeting was more about use of the seclusion room, staff credentials and missing documents than trying to determine if referral was needed. Nevertheless, the team agreed to conduct evaluations but Ms. XXXXX would not consent to XXPS conducting the evaluations due to her distrust of XXPS. She expressed a desire to have outside evaluations.

When asked why some documents, such PATH scores, were not made available at the child study team meeting, Ms. XXXXXXXX claimed that she did not know why. She did not know she was supposed to bring Child Plus notes, data about the room or behavioral documents to the meeting. She testified that she was prepared to provide an overview of the concerns surrounding XXXXXXX's behavior and was instructed to bring her Bracken and PALS scores. She testified that she was there representing Ms. XXXXXX. To her knowledge, the consent to evaluate form was later sent to the parent after the meeting. She testified that evaluations and most of those other documents that petitioner and her advocate were requesting are usually presented during an eligibility meeting, not a child study meeting.

Ms. XXXXXXXX testified that when Ms. XXXXX rejected child find, no procedural safeguards or prior written notice was given to her as required by IDEA. She also stated that there was no effort to educate Ms. XXXXX on special education law because she kept asserting that the teacher was the root of the problem.

She testified that XXXXXXX's PATH score of September 24, 2019 was 2.58 with 3.00 being the highest measure for aggressive and disruptive behavior. She did not bring this document with her to the November 4th child study team meeting. She stated that generally, teachers conduct lessons to try to improve a child's score.

She testified that pre-k students are not suspended. She claimed that they may be asked to stay out but that they are not suspended like K-12 can be. Thus, her testimony was that XXXXXXX was not technically suspended on September 10, 2019. Tr. III, pg. 924

*XXXXXXXXXX*: Ms. XXXXXX is the behavior interventionist at XXXXXXXXXXXXXXX Elementary School, XXPS. In that capacity she provides support to teachers, assists with check-in/check-out and behavior plans. She provides support to students with behavior issues and logs documents on the Swiss records. She is also a counselor with XXXXXXXXXXXX which provides intensive in-home and outpatient therapy. She was previously a special education teacher for three years.

Prior to her current job with XXPS, Ms. XXXXXX was a colab teacher. In that capacity, she wrote IEPs, behavior plans and provided monthly progress reports. She has a degree in psychology and was scheduled to receive her master's degree in mental health counseling in March 2020. She qualified as an expert in behavior intervention. Her testimony was credible.

Ms. XXXXXX testified that XXXXXXX started coming to her office because she was experiencing behavioral issues in her classroom. She explained that her office doubles as the sensory room and has a sensory path usually reserved for students K thru 5. An exception was made for XXXXXXX, a pre-k student, to come to the sensory room. She listed some of the items XXXXXXX liked to play with in her room, to include the beanbag and rocking chairs, calming jars and sand timers.

She testified that XXXXXXX would willingly go with her to the sensory room. She would often go to the classroom to get XXXXXXX during nap time because XXXXXXX did not do well during nap time. She would return her to the class once nap time was over without incident.

When XXXXXXX would exhibit other adverse behaviors, the protocol was for Ms. XXXXXX to call Dr. XXXXXX who would then call Ms. XXXXXX. She would visit her room 2 or 3 times a day starting after the September 11, 2019 meeting.

When asked why XXXXXXX was not sent to her room in the first place, Ms. XXXXXX explained that she works with K thru 5 children and that they probably did not initially think of her room as an intervention. She is not normally involved with the federal pre-k program but an exception was made for XXXXXXX.

Ms. XXXXXX said that she witnessed XXXXXXX yelling, screaming and running around the classroom. XXXXXXX did not appear scared or frightened. She testified that XXXXXXX would kind of laugh while she was running. She testified that there was no noise when she saw her run but that she was usually called after most of the behaviors had subsided. She testified that she would be called usually after XXXXXXX's interfering behavior and she would see the result. She would ask her to clean up her mess and remove her. XXXXXXX would willingly clean up her mess and they would leave. XXXXXXX stopped coming to her sensory room once Ms. XXXXX started coming to school to help with her so she assumed that Ms. XXXXX was taking care of the escalating behaviors.

She testified that she might have considered a behavior plan for XXXXXXX but there was not enough time to assess her. She testified that Ms. XXXXX's presence hindered their progress in this regard.

She further testified that if she were XXXXXXX's teacher she would have not immediately referred XXXXXXX for special education services but would have tried a classroom behavior plan. If that did not work, she would have drafted a behavior intervention plan. If her behavior persisted after that, then she would have referred her for a child study. She testified that she would have maintained data on the frequency of her behavior, the intensity of her behavior, and the duration of her behavior. She was unaware whether Ms. XXXXXX maintained that data.

Ms. XXXXXX testified that the room was in transition when XXXXXXX was being taken there during the first week of school. She said that there were mats and a file cabinet with manipulatives and sensory items in there during that time. Tr. IV, pg. 1141.

*XXXXXXXXXXXXXX*: The witness identified herself as the family advocate for the federal pre-k program. Her office was located at XXXXXXXXXXXXXXX Elementary School, XXPS. She works for Family and Community Engagement. Her department is located at XXXXXXXXXXXXXXXXXXXXXXXX. She explained that her job was to bridge the gap between parents and the school plus provide family resources. Her testimony was credible.

She testified that she first met Ms. XXXXX in May of 2019 at the pre-k recruitment. She testified that during recruitment Ms. XXXXX noted on one of the forms that XXXXXXX had asthma and was allergic to almond milk. Nothing was mentioned about her auditory defensiveness at that time.

She testified that the school later learned that XXXXXXX was bringing headphones to the school. She notified the health coordinator, XXXXXXXXXXXX, about this on the first day of school, September 3, 2019 when they got the letter from the occupational therapist.

Ms. XXXXX testified that she was the one that met Ms. XXXXX and XXXXXXX in the parking lot on the first day of school. Ms. XXXXX suggested that XXXXXXX wear her headphones to go into the school and that she hold her hand tight. With her headphones on and Ms. XXXXX holding her hand tight, Ms. XXXXX testified that they began to go into the school. She used the school's walkie-talkie to notify Ms. XXXXXX that her student with the headphones had arrived.

Since it was the first day of school, people were lined up clapping and applauding the arriving students. Mid-way through the line, XXXXXXX removed her headphones, threw them to the ground and broke loose from her. She tried to run but Ms. XXXXX said she grabbed her hand and took her to her classroom. She testified that she did not know what happened after that because she returned to her duties.

Ms. XXXXX testified that she interacted with Ms. XXXXX almost on a daily basis. She would see Ms. XXXXX bringing XXXXXXX to school almost every day and she would help transition XXXXXXX to the classroom.

Ms. XXXXX testified that she was a part of the meeting on September 11, 2019. They discussed the incident letter, behavior charts, the classroom teacher, the chain of command if an incident should occur, and decided not to use the room any further. In her opinion, the meeting went well. Ms. XXXXXX was not at the meeting because of existing tensions between she and Ms. XXXXX. Ms. XXXXX thought Ms. XXXXXX had falsified records and thought that XXXXXXX's behavior was not aggressive behavior but defiant behavior. She questioned whether XXXXXXX had thrown things on September 9th as documented by Ms. XXXXXX or whether she had just knocked items over.

After that meeting, Ms. XXXXX gave Ms. XXXXXX a long list of things she wanted done with XXXXXXX. Ms. XXXXXX appeared discouraged. However, even after receiving this list from Ms. XXXXX, Ms. XXXXX tried to encourage Ms. XXXXXX.

In Ms. XXXXX's opinion, the school bent over backwards to help with XXXXXXX. They took immediate action to help after the incident on the 1st day of school by putting Ms. XXXXX in contact with resources but this strategy did not seem to go anywhere. Among other actions, she tried to put Ms. XXXXX in contact with the clinical social worker at XXXXXXXXXX.

Ms. XXXXX suggested to Ms. XXXXX that XXXXXXX might need a smaller environment. She suggested XXXXXXXXXX where there are only about 80 pre-k students. There is a second part of the program for children with behavioral problems or IEPs. The third part of the building houses offices for the federal program. She thought XXXXXXX might not be overwhelmed at XXXXXXXXXX. In contrast, she stated that XXXXXXXXXXXXXXX had about 600 students. Ms. XXXXX rejected this proposal.

Ms. XXXXX testified about what she witnessed on picture day. The children were already lined up for their pictures when Ms. XXXXX and XXXXXXX arrived at the gym. XXXXXXX didn't want her identification sticker that the teacher was putting on the children's back or shoulder so she held on to XXXXXXX's sticker. Ms. XXXXX told her to put her sticker on like the rest of the children, that she was just four years old and to give her the sticker, but XXXXXXX did not want the sticker. Ms. XXXXX opined that Ms. XXXXXX was trying to avoid a scene with XXXXXXX. They went back and forth with Ms. XXXXX saying give her the sticker and Ms. XXXXXX saying that XXXXXXX did not want the sticker.

Ms. XXXXX then said to Ms. XXXXXX, "You need to fix your attitude." Ms. XXXXXX attempted to ignore her but then Ms. XXXXX said it louder. Ms. XXXXXX then asked her to refrain from talking to her like that in front of the kids or she would ask to have her removed. Ms. XXXXX said it again and Ms. XXXXXX asked Ms. XXXXX to remove her. Ms. XXXXX was not comfortable doing that so she called Dr. XXXXXX into the gym.

The students went back to the classroom and XXXXXXX fell over some bags. Ms. XXXXX said "See what happens." XXXXXXX was not injured or crying.

Ms. XXXXX testified that she spoke with Ms. XXXXX in the gym after the incident and suggested that she might want to go home that day. Ms. XXXXX refused and stayed at school that day. Afterwards, Ms. XXXXX spoke with both Ms. XXXXX and Ms. XXXXXX and both told her the day was stressful. Ms. XXXXX told her that she was going to stay to insure her child was going to be treated right that day. Ms. XXXXX recalls that Ms. XXXXX apologized to Dr. XXXXXX for her actions but not Ms. XXXXXX.

Ms. XXXXX then testified about XXXXXXX's modified schedule. After a meeting on September 11, 2019, it was decided that XXXXXXX would follow a modified schedule. She understood that XXXXXXX was to come into the school later to avoid the crowds and leave early. However, she later learned that Ms. XXXXX was arriving late with XXXXXXX but that she started staying all day with her. This pattern continued for about three weeks.

Ms. XXXXX testified that on or about October 21st, Ms. XXXXX's last day at the school, Ms. XXXXX told her that "She was going to get Ms. XXXXXX." She asked to take a picture of the room. With the approval of Dr. XXXXXX, Ms. XXXXX ended up taking pictures of both the room and the sensory room.

Ms. XXXXX testified that she thought she had a good rapport with Ms. XXXXX. She tried to answer her questions and respond to her concerns. She tried to provide resources. At some point, Ms. XXXXX told her that she thought XXXXXXX's behavior was not aggressive behavior but defiant behavior. Tr. IV, pg. 1228

*XXXXXXXXXXXXXXXX*: Ms. XXXXXXXXXX is the Director of Special Education Services for XXXXXXX XXXX Public Schools. Her testimony was credible. She qualified as an expert in special education, leadership and policy. She provided an overview of special education services and resources that are available in XXPS.

She testified that many students enter pre-k and general education that do not exhibit school-ready behaviors. Interventions are usually employed first to address the behaviors. She testified that it is really hard for a four-year old to sit still for 15 minutes to an hour. She said that it takes time and effort to teach these skills.

In XXXXXXX's case, Ms. XXXXXXXXXX testified that she needed to be observed and interventions deployed before identifying her as a child with a disability. She testified that XXXXXXX was academically performing at or above her same-aged peers.

She testified that there may have been cultural, social or behavioral differences that could have been addressed through tier one instruction. She testified to multiple levels of intervention that could have been used to assist with XXXXXXX's behaviors. She testified that before going to child find for special education services due to challenging behaviors, interventions should have first been attempted. Ms. XXXXXXXXXX testified that auditory defensiveness alone does not always impact a child to cause developmental delays. The child also needs to be observed to see how the auditory defensiveness is impacting the child educationally. Ms. XXXXXXXXXX testified that in her opinion, going to child find two or three months after the child had been exposed to the educational experience would be appropriate if there were a lack of progress coupled with a clear suspicion of disability. She further testified that a student could be identified with a medical condition without necessarily qualifying for special education services under IDEA.

Ms. XXXXXXXXXX opined that the XXXXXXXXXXXXXXX staff was attempting to figure out how to best help XXXXXXX. However, the short period of time that XXXXXXX attended school was not consistent. The environment was drastically changed with Ms. XXXXX in the classroom for three weeks.

She testified that although pre-k had a designated person who referred a child to child find, anyone could refer a child to child find if they believed the child had a disability that would require special education. In XXXXXXX's case, she testified that going straight to child find for behavioral problems without previous educational experience or opportunities to learn would be jumping the gun.

Ms. XXXXXXXXXX discussed three tiers of intervention. She explained that tier one interventions are designed to help students understand the schedule and expectations. This tier, used with positive reinforcements, provides opportunities for children to remove themselves from the situation if they become over stimulated or overwhelmed. She described tier two intervention as a check-in and check-out system involving different people coming in and forging relationships. Tier three interventions involve school counseling supports and can involve individualized behavior support plans with personal reward systems. Ms. XXXXXXXXXX also mentioned the availability of a pre-k therapeutic classroom.

When asked about taking XXXXXXX to the meditation room, Ms. XXXXXXXXXX testified that if the child was overwhelmed, over stimulated, or frightened, an adult taking the child there would have been appropriate since it was a quiet environment conducive to calming her. When asked whether the sensory room would have been a better choice, Ms. XXXXXXXXXX stated that it depended on the proximity of the room to the classroom and the activity in the hallways.

Ms. XXXXXXXXXX talked about the use of XXXXXXX's headphones. She stated that there appeared to be different triggers regarding when to use the headphones. She opined that the staff was trying to establish the triggers and just trying to help XXXXXXX. She testified that the school was attempting tier three supports that would have been a part of a behavior support plan.

She testified that if she had her druthers about documenting XXXXXXX's behavior and the actions taken to intervene, that information would have been documented. When asked whether the failure to document this information was negligent, Ms. XXXXXXXXXX testified that it was not the epitome of professionalism but the failure to document was not negligent. She opined that it would have been better if this data and information had been documented and put in a clear plan. However, she further testified that there was no regulatory requirement as far as she knew that required behavioral supports to be documented for a general education student.

She mentioned the teacher event notes as documentation containing data regarding XXXXXXX. She admitted that the teacher notes were not as clear as what an autism or behavioral expert would use to track time and frequency data but concluded that the teacher's daily notes were a form of data and documentation. She admitted that the notes, however, did not indicate what was being done to calm XXXXXXX's behavior and that the notes were written from a teacher's perspective and not the perspective of a behavior interventionist.

Ms. XXXXXXXXXX explained the child find process used for XXPS. She explained that jumping straight to eligibility without providing the student an opportunity to learn would be premature. She testified that a student could potentially be assigned a one-on-one as an accommodation without having an IEP. She explained that noise sensitivity may or may not qualify as a disability under IDEA.

Ms. XXXXXXXXXX explained XXPS' policy regarding independent educational evaluations. She discussed the meditation room and opined that it did not constitute seclusion since XXXXXXX had two adults with her while in the room.

She explained private placement options for eligible children in XXPS. She explained the functions of an eligibility team and an IEP team. On cross-examination, she discussed a September 21, 2018 report regarding XXPS' special education program as well as a document called the Critical Decision Points for Families of Children with Disabilities. Tr. V, pg. 1414

*XXXXXXXXXXXX* (XXPS, in rebuttal): Ms. XXXXXXXXX is a first grade teacher at XXXXXXXXXXXXXXX Elementary School, XXPS. Her testimony, although limited in scope, was credible.

Ms. XXXXXXXXX testified that she witnessed several instances of inappropriate behavior by Ms. XXXXX when she was in the school. She stated that she witnessed the picture day incident with Ms. XXXXX yelling at Ms. XXXXXX. She also witnessed Ms. XXXXX following the class down the hall. She testified that Ms. XXXXX would shake her head disapprovingly and make comments whenever Ms. XXXXXX would say something to the students or sing a song with the class. She also witnessed Ms. XXXXX interfere with Ms. XXXXXX's instructions to XXXXXXX and XXXXXXX would end up not doing what Ms. XXXXXX asked.

Of particular note was what Ms. XXXXXXXXX testified that she witnessed about Ms. XXXXX's behavior on October 18, 2019. She testified that Ms. XXXXX's behavior on that day disturbed her to such an extent that she reported it to the assistant principal. Ms. XXXXXXXXX was concerned that her students might have overheard Ms. XXXXX's inappropriate comments so she reported the incident. As a part of her testimony, Ms. XXXXXXXXX read aloud the following email message that she sent to the assistant principal on October 18, 2019:

"On Friday, I overhead a lady in front of Ms. XXXXXX’s door talking negatively about a classroom teacher and her practices. As my students and I walked by, she was on the phone stating that she ---stating what isn’t going on in the classroom and said, “Oh, don’t worry, I’m noting everything down, I’m going to take this bitch down.” She wasn’t really loud, but I heard her and worried that my students did as well. It also concerned me because of what I observed earlier this week and over the past few weeks. Earlier this week I observed her following the class and noticed that everything the teacher did, she would shake her head and make comments. She would also correct things the teacher said in the hallway and, in turn, the child would then not listen to the teacher. This was in front of the class and her child. I wanted to share because this was nothing – this is something that I felt uncomfortable with in our learning community, and noticed how it was making the teacher uncomfortable.”

The woman described in the above email message talking on the phone was identified by the witness as the petitioner, Ms. XXXXXXXXXXXX. The teacher was identified as Ms. XXXXXX. Tr. V, pg. 1716

## ELIGIBILITY

The evaluations in this case were completed as ordered by the HO in both prehearing and post hearing orders. However, the information is insufficient for the HO to determine whether XXXXXXX has a disability appropriate for special education services pursuant to the IDEA. It may be necessary for further testing and evaluations to occur once a child study and/or eligibility team has reviewed all available information. Moreover, such a determination is best left to a properly staffed eligibility team that is trained to make such decisions.

The independent psychological report clearly states that XXXXXXX does not meet the criteria for autism spectrum disorder. The YCAT found that XXXXXXX does not meet the requirement for two standard deviations below in any academic areas for an identification of developmentally disabled. Although there is some indication that XXXXXXX may have a speech and/or language concern, a more comprehensive evaluation should be completed before an accurate determination can be made. These evaluation results, any additionally needed evaluation results and any other available information about XXXXXXX should be considered by an eligibility team in collaboration with the parent.

For a child to be declared eligible for special education and related services it must be determined that the child is a “child with a disability” and is in need of special education and related services. When determining whether a child is a child with a disability and in need of special education, the school should draw upon information from a variety of sources, including aptitude and achievement tests, parent input, teacher recommendations, physical condition, social or cultural background, evaluations and adaptive behavior.

The evaluation identifying XXXXXXX as a child with noise hypersensitivity must also be considered by an eligibility team. XXXXXXX's reported negative behavior should certainly be considered. The determination as to whether noise hypersensitivity or XXXXXXX's behavioral patterns qualify her an IEP or 504 plan should be decided by an eligibility team. However, given XXXXXXX's reported behaviors, she should, at a minimum, be provided with a behavioral intervention plan.

It is clear to the HO that XXXXXXX is in need of supports and interventions regarding her behavior and noise sensitivity, however, the HO is not professionally trained to decide eligibility. Deference must be given to the educational professionals, in cooperation with the parent, as to eligibility for special education services and the crafting of an individualized education program (IEP), if deemed appropriate.

## FINDINGS OF FACT

Upon arrival on the first day of school, XXXXXXX exhibited behavioral concerns. XXXXXXX only attended school from Sep 3, 2019 to Oct 21, 2019. During this short period, XXXXXXX continued to exhibit behavioral concerns. Her behavior was so concerning that she had to be removed from the classroom setting at least 14 times to calm her. To assist with her behavior, her parent, XXXXXXXXXXXX, felt the need to accompany her to school and stay with her for three consecutive weeks. The teacher was so concerned about XXXXXXX's behavior that she requested assistance with XXXXXXX from her lead teacher during the first week of school.

The parent attributes XXXXXXX's interfering and adverse behaviors to a diagnosis of auditory sensitivity as described in a letter dated August 31, 2019 from an occupational therapist. The parent provided a copy of this letter to school officials on the first day of school. However, the testimony bears out that XXXXXXX reacted differently to the same noises at different times. Her concerning behaviors seemed to more align with her unwillingness or refusal to follow instructions. The testimony indicates that XXXXXXX was more likely to act out if she was told to do something that she did not want to do.

Petitioner, Ms. XXXXX, claims that she was pleading with school personnel for help with XXXXXXX. She contends that all she wanted was the best educational experience possible for XXXXXXX but that the school did not cooperate with her. As one example, petitioner claims that she asked for the assistance of an occupational therapist for XXXXXXX and was told that the school did not have one on site. However, she saw a sign for an occupational therapist while in the hallway. The school contends that the occupational therapist was only assigned to K thru 5 and not pre-k. Although this might be true, it is understandable that Ms. XXXXX became skeptical of information being given her by the school once she saw the sign. It may have been more truthful for school personnel to explain to Ms. XXXXX why the occupational therapist was not available to XXXXXXX rather than have her find the sign in the hallway.

Although XXPS claims that the occupational therapist was only available for K-5 students, an exception was made for Ms. XXXXXX, the behavioral interventionist, to work with XXXXXXX even though she normally only works with K-5 students. Such an exception could have also been made for the occupational therapist.

Testimony established that XXPS personnel were trying to establish interventions that could help with XXXXXXX's behavior. For example, sending XXXXXXX to the sensory room during her outbursts or when she could not sleep during nap time appeared to be a working intervention. Although well intentioned, it seems that Ms. XXXXX's three week stay in the classroom interfered with the school's ability to independently observe and assess XXXXXXX. Her disagreements, disparaging comments, interference and negative attitude towards XXXXXXX's teacher, Ms. XXXXXX, effectively stifled XXPS' ability to properly assess XXXXXXX and provide effective interventions.

It should be noted that when offered help in the form of evaluations, Ms. XXXXX clearly stated that she did not want XXXXXXX "labeled" and refused such assistance. She also refused to relocate XXXXXXX despite her unfavorable opinion of Ms. XXXXXX. When the child study team offered to evaluate XXXXXXX, Ms. XXXXX refused to give consent, adamantly stating that she did not trust XXPS to evaluate her child. Although it is evident that Ms. XXXXX wants what is best for XXXXXXX, her actions clearly impeded XXPS' ability to observe XXXXXXX unobstructed, design appropriate pre-special education interventions or move forward with evaluations.

Ms. XXXXX was not only prompted to take three weeks off of work to stay with XXXXXXX at school because of her behavior, but also because of her perception that XXXXXXX was being unlawfully restrained and secluded by XXPS staff. She contends that XXXXXXX called school "jail" because of being placed in the room. Ms. XXXXX claims that she would have to bribe XXXXXXX to go to school. However, although not asked directly about "jail," XXXXXXX testified that she liked school and did not appear distressed or frightened while discussing her school or her teacher.

As mentioned earlier in this decision, the room has many names. Ms. XXXXX considers the room a seclusion room. School personnel refer to the room as a reset, meditation or calm-down room. The testimony indicates that XXXXXXX was never left alone in this room and that the room was used to talk with XXXXXXX and provide her an opportunity to deescalate from behavioral outbursts. XXXXXXX was taken to this room at least five times during her short stay at school. School personnel deny ever restraining or bodily picking XXXXXXX up to get her in the room. They claim that XXXXXXX was lead to the room by holding her hand. No evidence was presented by petitioner to contradict this contention.

Ms. XXXXX and her advocate have made much-to-do about use of this room. They claim that XXXXXXX has been emotionally scarred due to seclusion. However, XXXXXXX did not appear to be emotionally distressed when talking about school during her testimony. Petitioner testified that XXXXXXX would of course say she likes school because she wants to be with her friends. This may be true, but if XXXXXXX were as traumatized by school as petitioner claims, it can be expected that she would have presented some hesitation about school.

Nonetheless, placing XXXXXXX in the room was not the best practice. Use of this room should have been the last resort, not the first resort. If XXXXXXX had to be removed from the classroom due to her behavior, it would have been better for her to have been sent to the sensory room from the beginning. XXXXXXX liked the sensory room and it seemed to calm her during her behavioral outbursts.

Petitioner claimed in her complaint that Ms. XXXXXX's request for assistance was a referral to child find. Neither the testimony nor the teacher's request for assistance support this contention.

## LEGAL ANALYSIS

## This is in essence a child find case. 8 VAC 20-81-50 discusses Child Find, in part, as follows:

A. Child find.

1. Each local school division shall maintain an active and continuing child find program designed to identify, locate and evaluate those children residing in the jurisdiction who are birth to age 21, inclusive, who are in need of special education and related services, including children who: (34 CFR 300.102 and 34 CFR 300.111)

a. Are highly mobile, such as migrant and homeless children;

b. Are wards of the state;

c. Attend private schools, including children who are home-instructed or home-tutored;

d. Are suspected of being children with disabilities under this chapter and in need of special education, even though they are advancing from grade to grade; and

e. Are under age 18, who are suspected of having a disability who need special education and related services, and who are incarcerated in a regional or local jail in its jurisdiction for 10 or more days.

8 VAC 20-81-50(D) outlines the Child Find referral process and timelines as follows:

1. Each school shall have procedures to process in a timely manner all referral requests for a child suspected of having a disability.

2. Each school shall have a team to review records and other performance evidence of the child being referred in order to make recommendations to meet the child's educational and behavioral needs...

5. Timelines for referral process.

a. The team shall meet within 10 business days following the receipt of the referral.

b. The team shall refer the child to the special education administrator or designee within three business days if the team determines that the child should be referred for an evaluation for special education and related services.

c. If the team decides not to refer for an evaluation for special education and related services, prior written notice in accordance with [8 VAC 20-81-170](https://law.lis.virginia.gov/admincode/title8/agency20/chapter81/section170/) shall be given to the parent(s), including the parent's right to appeal the decision through the due process hearing. (34 CFR 300.507)

The child find duty is triggered when the school has a reason to suspect a disability and reason to suspect that special education services may be needed to address that disability. The screening process for determining if a child is eligible for special instruction and services includes the establishment of a child study committee at each school to meet, identify, and recommend strategies to address the child's learning, behavior, communication, or development. Child find mandates that the committee meet within 10 business days following receipt of the referral. The committee is then mandated to refer the child to the special education administrator or designee within five (5) business days following the determination by the child study committee that the child should be referred for evaluation for special education and related services. 8 VAC 20-80-50C3. In this case, the HO must decide when, if at all, a referral for evaluation or child find was actually made.

8 VAC 20-80-52 directs that all children suspected of having a disability shall be referred to the special education administrator or designee, who shall initiate the process of determining eligibility for special education and related services. Referrals may be made by any source, including child study committee, school staff, a parent, or other individual.

Petitioner's complaint states that the teacher, Ms. XXXXXX, made a child find referral on the third day of school, on or about September 6, 2019. She contends that XXPS failed to move forward with child find. (see pages 5 and 6 of petitioner's amended complaint). However, during the hearing, neither the testimony of Ms. XXXXXX, XXXXXXX's teacher, nor Ms. XXXXXXXX, the lead teacher, confirms this allegation. Ms. XXXXXX testified that she submitted a request for assistance, not a referral to child find. In the request for assistance, she was asking Ms. XXXXXXXX for suggestions on how to handle XXXXXXX's behavior. Ms. XXXXXXXX testified that she observed XXXXXXX in the classroom setting and made what she thought were appropriate suggestions. Both Ms. XXXXXX and Ms. XXXXXXXX made clear that neither of them ever considered the request for assistance as a referral for evaluation or to child find.

It is here noted that the HO had to consider petitioner's amended complaint which alleged that XXXXXXX's teacher made a referral back in September of 2019 and that XXPS failed to act upon it. However, the testimony during the hearing made clear that XXXXXXX's teacher was asking for help with managing XXXXXXX's behavior and not making a referral to child find as alleged.

On October 25, 2019, Ms. Lucas, the parent's advocate, sent an email to the school division requesting a comprehensive eligibility assessment for special education services and supports to be conducted on XXXXXXX within the next 60 days. (SB Exh. 44 at 3). This message clearly triggered child find and a child study team was organized and met on November 4, 2019. (Tr. 3, pg. 1003) Petitioner claims that the child study team was unprepared and inappropriately staffed. Overall, the meeting was unsuccessful. (Petitioner's Ex. 14, audio recording) Despite this, the team recommended that XXXXXXX be evaluated based on the information they already had. A prior written notice and permission to evaluate were sent to petitioner. (SB Ex. 47-48). However, petitioner refused to permit XXPS personnel to evaluate XXXXXXX, proclaiming that she did not trust them with her child. XXPS, to no avail, has repeatedly offered to evaluate XXXXXXX.

Petitioner's refusal to permit XXPS to evaluate XXXXXXX and her deep seated distrust of XXPS is troubling. Due to initial time-constraints, the ultimate impact of COVID-19 on the hearing process, and petitioner's adamant distrust of XXPS, the HO permitted independent educational evaluations (IEEs) that were paid for by petitioner's health insurance. XXPS was to pay any deductibles. Any evaluations that XXPS personnel wanted to conduct that could not be conducted by IEEs were to be conducted by XXPS personnel. However, with the closing of schools due to COVID-19, only IEEs could reasonably be conducted.

Then there is the question of whether XXPS should have initiated child find themselves once they were given the letter from XXXXXXX's occupational therapist on the first day of school describing her auditory hypersensitivities. This letter, coupled with XXXXXXX's repetitive and extreme interfering and adverse behaviors should have triggered child find. She should have been suspected as a child with a disability in need of special education and related services even though she may have been academically advanced.

Ms. XXXXXXXXXX testified that it was not unusual for children at such a young age to exhibit unusual behaviors given it may be their first experience away from home and their first experience in a structured environment. However, XXXXXXX's behaviors were extreme. Her running from the building and the classroom as well as other adverse behaviors as described earlier in this decision, should have triggered child find. Ms. XXXXXX testified that she had not previously taught a child that displayed such adverse behaviors.

Despite the short period of time that XXXXXXX attended school, many people at XXXXXXXXXXXXXXX Elementary were aware of XXXXXXX's behavioral problems. To have to remove a child from the classroom 14 times in 21 days of attending school for behavioral issues should have been an alarm to trigger child find. Child find requires that the child must be screened if a disabling condition is indicated.

XXPS also claims that they did not have enough time to properly observe XXXXXXX in the normal school environment because petitioner was present in the classroom for three weeks before she removed her from school. They claim that Ms. XXXXX's presence distorted their ability to properly assess XXXXXXX. Despite Ms. XXXXX's presence, no other children in Ms. XXXXXX's class were taken to the room or removed from the classroom so many times in 21 days. XXXXXXX's extreme and alarming behavior coupled with the letter identifying her as a child with noise sensitivities presented clear red flags for child find.

Although XXPS should have formally referred XXXXXXX to child find, the problem with that assessment of this case is that when the subjects of evaluations or child find were broached with Ms. XXXXX by Ms. XXXXXXXX or Ms. XXXXX, Ms. XXXXX refused them both, stating that she did not want her child "labeled." Ms. XXXXX declined the prospect of special education because she did not want what she perceived as a stigma or label attached to XXXXXXX so XXPS attempted interventions. However, there is some question as to whether XXPS intended to proceed with child find at all because XXXXXXX was in school for such a short time and they claim to have needed more time to observe her. The parent did not make a referral or suggest evaluations until October 25, 2019 when her advocate sent an email requesting an eligibility assessment.

Ms. XXXXXXXXXX, Ms. XXXXXX and others testified that they were attempting to find interventions to calm XXXXXXX's behavior before officially referring her to child find. This approach may have been appropriate for a child that did not display such aggressive behaviors, but under the circumstances of this case, with XXXXXXX's running, hitting her teacher, hitting petitioner, knocking things over, and committing other unsafe acts, XXPS should have more thoroughly educated petitioner on special education eligibility procedures and the need for evaluations in XXXXXXX's case. However, the HO acknowledges that XXPS could not force Ms. XXXXX's consent to evaluations or child find.

Petitioner claims that XXXXXXX was emotionally harmed by XXPS when they placed her in the room as an intervention. She also claims that she was not meaningful briefed on special education procedures when she was crying out for help, thereby violating her IDEA procedural safeguards.

In the case of *Board of Education of Fayette County, Kentucky v. L.M*., 478 F. 2d 307, 216 Ed. Law Rep. 354 (2007), the Court held that to establish a procedural violation of the IDEA that caused substantive harm to the student, the student had to show that school officials overlooked clear signs of disability and were negligent in failing to order testing or that there was no rational justification for not deciding to evaluate.

Although XXPS should have probably referred XXXXXXX to child find earlier, they only had XXXXXXX in school for 21 days to observe XXXXXXX before Ms. XXXXX removed her from school. Three weeks of those 21 days, Ms. XXXXX was present at the school which interfered with school staff's ability to observe XXXXXXX without her parent and in a normal educational setting. XXPS was also trying to establish interventions that effectively addressed XXXXXXX's behavior. Also, Ms. XXXXX resisted testing for XXXXXXX when it was first brought to her attention. Importantly, XXXXXXX's testimony indicated that she liked school. She did not appear traumatized when she discussed school or her teacher at the hearing. Therefore, when considering only XXXXXXX's behavior, XXPS' actions did not rise to the level of negligence as set forth in *Board of Education of Fayette County, Kentucky v. L. M.* XXPS, as professional educators, should be given deference regarding the use of interventions as a precursor to referral for special education services. XXPS did not ignore XXXXXXX's behavior issues.

However, once XXXXXXX's noise sensitivity is added into the facts, coupled with her extreme and frequent negative behaviors, XXPS should have referred XXXXXXX for evaluations. The HO adopts Ms. XXXXX's position regarding XXXXXXX's referral. Ms. XXXXX, who qualified as an expert in special education, testified that the school occupational therapist should have been immediately contacted when Ms. XXXXX provided the school with the letter identifying XXXXXXX as a child with a sensory integration disorder. She testified that in her experience, when XXXXXXX presented with behavioral issues, coupled with the letter from the occupational therapist identifying her problem, she should have been immediately evaluated, data collected, observations conducted, and a functional behavioral assessment performed. She testified that child find should have been triggered when XXPS received the letter from the occupational therapist.

Once referred, XXPS should have done everything possible to educate Ms. XXXXX on child find and the apparent need for evaluations. If Ms. XXXXX refused to permit XXXXXXX to be evaluated, then XXPS would have had no alternative but to proceed with interventions, but XXPS would have done its job by identifying XXXXXXX as a child with a suspected disability. Child find requires that schools identify, locate and evaluate children with suspected disabilities. XXXXXXX began school with the suspected disability of noise sensitivity. She also began school with a behavioral issue beginning on the first day of school. Regardless of the fact that she was only in school for 21 days, it was XXPS' duty to recommend evaluations.

That XXXXXXX was in school for only 21 days does not excuse XXPS' failure to proceed to recommend evaluations to the parent. Ms. XXXXX was pleading for help with XXXXXXX. The fact that she did not seem interested in child find because she did not want her child labeled is no excuse for not proceeding, given XXXXXXX's alarming behaviors plus her diagnosis of noise sensitivity. Ms. XXXXX acted as an emotional parent trying to help her child. She is not an educator. XXPS should have fully and relentlessly educated Ms. XXXXX on the benefits of evaluating XXXXXXX and of child find. If Ms. XXXXX refused to permit evaluations once fully educated on the benefits, XXPS would have nonetheless fulfilled its child find responsibilities.

In the case of *Dubrow v. Cobb County Sch.. Dist..* 887 F.3d 1182, 1193-1104 (11th Cir 2018), the Court found that a student is unlikely to need special education if:

1. The student meets academic standards;

2. Teachers do not recommend special education for the student;

*3. The student does not exhibit unusual or alarming conduct warranting special education;* (emphasis added) and

4. The student demonstrates the capacity to comprehend course material.

In XXXXXXX's case, she apparently met academic standards and may have even been advanced, however, her behavior was unusual and alarming. Ms. XXXXXX did not recommend special education but she probably should have. This might be explained by the strained relationship between she and Ms. XXXXX, or, perhaps because she did not think she had the authority to recommend special education. Whatever the reason, she should have acted more proactively to have XXXXXXX evaluated. Her Child Plus notes are alarming regarding XXXXXXX's behavior and should have been acted upon by XXPS personnel. (SB Exh. 33) Although Ms. XXXXXX proactively requested assistance with managing XXXXXXX's behavior, the situation did not improve. Ms. XXXXX's insertion into the classroom environment for three weeks did not improve the situation either.

In *Alvin Independent Sch. Dist. v. A.D.,* 503 F/3d 378 (5th Cir. 2007) the Court found that a student with a diagnosis of ADHD did not require special education because he demonstrated satisfactory educational performance and social skills in the school setting. In this case, XXXXXXX has demonstrated the capacity to comprehend course material but it also appears that she has exhibited unusual and alarming conduct perhaps warranting special education. Her alarming behavior also puts the issue of her social skills in question. Testimony and exhibits indicate that XXXXXXX hit others, used unacceptable language, and spit. These actions do not present as acceptable social skills. XXXXXXX should have been identified by school personnel as a child suspected of needing special education services.

A student may also not require specially designed instruction when their needs can be addressed through accommodations provided through Section 504 of the Rehabilitation Act. See *Brado v. Weast*, Civil NO. PJM 07-02696, (JD. Md. Jan. 22, 2010). Once all necessary information has been collected, the type of assistance XXXXXXX requires will be left to an appropriately assembled team of educators in collaboration with the parent.

XXPS alleges that they did not have enough time to adequately assess XXXXXXX because petitioner removed her from the school after only 21 days. In the case of *W. B. v. Matula, 67 F.3d. 484 (3rd Cir. 1995)* the court stated the following: "Neither the statutes nor regulations establish a deadline by which time children who are suspected of having a qualifying disability must be identified and evaluated, but we infer a requirement that this be done within a reasonable time after school officials are on notice of behavior that is likely to indicate a disability." XXXXXXX was removed from the classroom fifteen times out of 21 days of school. She was disruptive. Her reported behavior on September 9, 2019 when taken to the room was very alarming. Her overall behavior for those 21 days, along with the letter from the occupational therapist (OT), should have alerted school personnel to suspect that XXXXXXX was a child with a disability. In this case, given XXXXXXX's behavior and the OT letter, 21 days was a reasonable enough time to suspect her as a child with a qualifying disability. XXPS should have identified her as such and commenced evaluation.

The court further states in *Matula* that "if school employees know or have reason to suspect that a child has a disability, these school employees have an affirmative duty to act on the child's behalf. If they fail to do so, they have defaulted in their obligation to identify, locate and evaluate children with disabilities who need individualized special education programs."

It would be remiss to not mention the requirement of least restrictive environment in this case. The IDEA requires that a child be placed in the least restrictive environment. 20 U.S. C. § 1412(5). Placing XXXXXXX in the room or sending her off to the sensory room away from her classmates was not the least restrictive environment, and it was certainly not the best practice, with or without the application of IDEA. It was not best practice to place XXXXXXX in the room during the first week of school, regardless of whether she had an adult with her or not.

In any case, whether XXXXXXX is in need of a behavioral intervention plan, a 504 plan or an individualized education program is best left to an appropriately staffed team once additional evaluations, if it is deemed they are needed, can be performed. But, if XXXXXXX is to continue to attend regular school, she is in need of tools that will help her to control her negative behaviors. The evidence shows that XXXXXXX's current behavior is not safe to others or herself.

There remains the issue of whether XXXXXXX was provided a free appropriate public education (FAPE). The Individuals with Disabilities Education Act (IDEA) guarantees the right to a free and appropriate public education for children with disabilities. It has not as yet been determined whether XXXXXXX is a child with a disability that qualifies her for special education services. From the information provided, the HO cannot determine whether XXXXXXX is a disabled child or not under the IDEA. That determination will be made by a team of educators in collaboration with petitioner.

Although XXPS violated child find by not referring XXXXXXX for evaluation and identifying her as a child with a suspected qualifying disability, XXXXXXX was not in school long enough to determine whether she was denied a free and appropriate public education. If XXXXXXX had been denied academically, she would have been denied a FAPE. The evidence does not support a conclusion that XXXXXXX was either developmentally or academically impacted. It does not appear that XXXXXXX was academically deprived. In this case, due to the brevity of XXXXXXX's school attendance, it cannot be assumed that the child find violation automatically equated to a denial of FAPE. Also, XXXXXXX continued to be educated through homebound services.

In the case of[*Endrew F. v. Douglas County School District*](https://en.wikipedia.org/wiki/Endrew_F._v._Douglas_County_School_Dist._RE%E2%80%931), the Court held that the IDEA provides disabled students the right to more than just token progress from one year to the following year. The "merely more than [*de minimis*](https://en.wikipedia.org/wiki/De_minimis)*"* standard was rejected. The Court held that all students should have a chance to meet challenging objectives. In light of the student's circumstances, schools must offer individualized educational programming that enable "appropriate progress." XXXXXXX was not in school long enough to determine whether she made progress or not. 21 days of in-school attendance is insufficient to determine the issue of FAPE.

The parties are hereby admonished that they must work together if XXXXXXX is to remain in XXPS. Throughout the hearing, petitioner expressed animosity and total distrust of XXPS and especially Ms. XXXXXX. Both parties are encouraged to work together and believe that everyone is working in XXXXXXX's best interest.

Except for Ms. XXXXXX's event notes from Child Plus, XXPS also failed to maintain detailed data relating to XXXXXXX's classroom removals and her behavior. Incident reports, interventions and other information regarding XXXXXXX should have been kept in a cumulative school file to detail XXXXXXX's behavior. This information would have been helpful to a child study team and the parent. Although the teacher kept daily event notes in the Child Plus system, these notes did not have the probative content for a behavioral assessment.

## FINDINGS

* *Whether the student was denied a free appropriate public education (FAPE)*. I FIND that XXXXXXX was not denied FAPE. Petitioner failed to meet her burden of proof on this issue. XXXXXXX's in-school attendance was too short to decide the issue of FAPE.
* *Whether there were procedural or substantive violations of the eligibility and/or child study requirements. If so, what relief, if any, should be granted?* I FIND that the child study team meeting was unable to productively proceed on November 4, 2019. There were no substantive or procedural violations, however, additional data and information could have been made available to the team and the parent. This lack of information was not fatal since the team ultimately agreed that XXXXXXX should be evaluated, however, petitioner declined to sign the consent form for XXPS to proceed with evaluations. Petitioner failed to meet her burden of proof on this issue.
* *Whether the student has a disability*. I FIND that an eligibility team must decide whether XXXXXXX qualifies as a disabled child under the IDEA. Petitioner failed to meet her burden of proof on this issue.
* *Whether the student is in need of special education and related services*. I FIND that an eligibility team must decide whether XXXXXXX qualifies as a disabled child in need of special education services under the IDEA. Petitioner has failed to meet her burden of proof regarding this issue.
* *Whether XXPS failed to provide the student with a FAPE during the 2019 - 2020 school year by failing to identify the student's disability*. I FIND that XXXXXXX was not denied FAPE. Petitioner has failed to meet her burden of proof regarding this issue. XXXXXXX has not as yet been determined to be a student with a disability.
* *Whether XXPS violated Child Find regulations by failing to evaluate the student or by failing to properly interpret and consider the student's independent evaluation(s).* I FIND that XXPS violated child find by failing to evaluate XXXXXXX in a timely manner. The November 4, 2019 child study team convened in a timely manner, however, the team convened in response to petitioner's October 25, 2019 request for a comprehensive eligibility assessment for special education services and supports. I FIND that XXPS should have offered to evaluate XXXXXXX when her adverse behaviors continued and escalated during the first week of school. XXXXXXX's adverse behaviors, coupled with receipt of the letter from the occupational therapist diagnosing XXXXXXX with noise sensitivity, triggered child find. XXXXXXX should have been identified as a child suspected of having a disability. Petitioner has met her burden of proof regarding this issue.
* *Whether the student's alleged disability resulted in an adverse impact upon her educational performance or access to her curriculum*. XXXXXXX has not been determined to be a child with a disability. I FIND that the determination as to whether XXXXXXX is a child with a disability rests with an eligibility team in collaboration with the parent. It has been reported that XXXXXXX is academically advanced and may require evaluation as twice exceptional. This should be considered by the team. I further FIND that 21 days of school attendance is an insufficient amount of time to determine whether or not XXXXXXX's educational performance was adversely impacted. She was also provided with homebound instruction which appeared to go well until schools closed. Petitioner has failed to meet her burden of proof regarding this issue.
* *Whether the student's behavioral record was properly reflected by XXPS, and if not, did this alleged failure result in the denial of a FAPE*. I FIND that XXPS did not appropriately maintain data as it relates to the student's behavior and attempted interventions but this did not affect a FAPE since XXXXXXX was not in school long enough to determine the impact on her educational opportunities. Petitioner has met her burden as it relates to maintaining data but not as it relates to a FAPE.

## ORDERS

It is hereby Ordered that XXXXXXX return to XXPS as a kindergartener when school begins on September 8, 2020. Due to COVID-19, school will be conducted virtually for at least the first nine weeks. Prior to school beginning on September 8, 2020, an eligibility team should be convened to review XXXXXXX's records, determine whether additional evaluations are required, and ultimately decide whether XXXXXXX is a child with a disability warranting special education services and supports. The team will meet virtually if necessary.

If the eligibility team should decide that XXXXXXX qualifies for special education services and supports pursuant to the IDEA, an IEP team will convene and an appropriate IEP will be written to address XXXXXXX's needs and that provides for appropriate supports, accommodations and goals. The team will meet virtually if necessary.

XXPS must maintain accurate and detailed data on XXXXXXX's future behavior, interventions and academic performance. The eligibility team should explore the possibility that XXXXXXX is twice exceptional. Additional evaluations should be conducted if the team deems them necessary. Petitioner will insure that XXXXXXX is accessible in a timely manner for any additionally required evaluations. The evaluations will be conducted by XXPS personnel. Petitioner will collaborate with the team.

It is further Ordered that XXXXXXX will receive a behavioral intervention plan. It will be the decision of the eligibility team to use the evaluations that have already been conducted on XXXXXXX or to conduct its own functional behavioral assessment (FBA). The FBA must include a description of the problem behavior, a hypothesis as to why the problem behavior occurs and intervention strategies that include positive behavioral supports. If the team should decide that a FBA is required, petitioner will make XXXXXXX available for the assessment.

Once in-school attendance begins, XXXXXXX will return to XXXXXXXXXXXXXXX Elementary School unless both parties agree that she should attend school at an alternate public school location, continue homebound education or continue school virtually. If XXXXXXX returns to school at XXXXXXXXXXXXXXX Elementary and her behavioral problems persist, it is Ordered that she will be promptly assigned a one-on-one aid until her behavior improves, whether or not she has been identified as a child with a disability. A one-on-one will serve to better assess what triggers XXXXXXX's behaviors (noise or otherwise), redirect her problem behaviors, maintain data, and help acclimate her to the school environment. A one-on-one will also help the teacher if XXXXXXX's behavior interferes with classroom instruction.

## RIGHTS OF APPEAL

Pursuant to 8 VAC 21-81-T and §22.214 D of the Code of Virginia, 1950, as amended, a

decision by the hearing officer in any hearing, including an expedited hearing, shall be final and binding unless either party appeals in a Federal District Court within 90 days of the date of the decision, or in a state Circuit Court within 180 days of the date of this decision.

IT IS SO ORDERED.

ENTERED: August 4, 2020

/s/

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Rhonda J. S. Mitchell

Hearing Officer

CF:

Virginia Department of Education

Advocate for Petitioner

Counsel for XXXXXXX XXXX Public Schools

Case Monitor