

Duval County School District  
No. 05-4065E  
Initiated by: Parent  
Hearing Officer: Ella Jane P. Davis  
Date of Final Order: June 29, 2006

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

█, )  
)  
Petitioner, )  
)  
vs. ) Case No. 05-4065E  
)  
DUVAL COUNTY SCHOOL BOARD, )  
)  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

This case was heard in Jacksonville, Florida, on January 23, 2006, and February 15, 2006, by Ella Jane P. Davis, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Thomas A. Delegal, III, Esquire  
Delegal Law Offices, P.A.  
424 East Monroe Street  
Jacksonville, Florida 32202

For Respondent: Collette B. Cunningham, Esquire  
Office of the General Counsel  
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City Hall, St. James Building  
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STATEMENT OF THE ISSUES

(1) Whether Petitioner is eligible to receive services and accommodations under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794;

(2) If Petitioner is eligible to receive services under the foregoing federal provisions, what services and accommodations should be provided; and

(3) If Petitioner prevails herein on the foregoing legal issues, is Petitioner entitled to attorney's fees and costs.

PRELIMINARY STATEMENT

Procedural History:

This cause arises from a Petition filed with the Respondent School Board and referred to the Division of Administrative Hearings (DOAH) on or about November 4, 2005.

Hereafter, so as to conform to federal reporting practices, unless the context renders "Respondent" or "School Board" easier for the reader to understand what has occurred, the Respondent School Board will be referred to as "the District."

The parties initially anticipated that their controversy could be treated as a request for due process hearing under Chapter 230, Florida Statutes, and the federal Individuals with Disabilities Education Act (IDEA). Consequently, DOAH's Clerk assigned an "E" suffix to the DOAH case number, erroneously signifying Exceptional Student Education (ESE), and on

November 4, 2005, notified the Department of Education that a case involving Free and Appropriate Public Education (FAPE) had been filed.

On November 8, 2005, a Notice of Telephonic Pre-Hearing Conference was issued by the undersigned, and a pre-hearing conference, pursuant to all existing IDEA guidelines, was conducted telephonically on November 10, 2005, resulting in an Order permitting the parties to establish certain preliminary matters between themselves and file a written stipulation on or before November 16, 2005.

Subsequent to further independent research, on November 15, 2005, the undersigned entered an Order to Show Cause, reading, in pertinent part, "It being well-settled law that [a] Section 504 of the Rehabilitation Act of 1973 claim, unaccompanied by any other issues, is not within the jurisdiction of the Division of Administrative Hearings, it is ORDERED: [that] The parties are granted to and until November 16, 2005, to show cause[,] in writing, filed with the Division of Administrative Hearings[,] why this case should not be dismissed as without jurisdiction."

Thereafter, there having been, as reflected by the DOAH case file and docket sheet, filings by the parties and/or Orders entered by the undersigned on November 22, 2005, November 29, 2005, and December 5, 2005, the District entered into a contract with DOAH, pursuant to Section 120.65, Florida Statutes, to

limit this case exclusively to the Section 504, issue, and to enter a recommended order, pursuant to Section 120.57(1), Florida Statutes, directed to the District School Board, which will enter a final order in this case.

A second telephonic pre-hearing conference was held on December 22, 2005, and, on December 23, 2005, an Order and Notice were entered which provided, among other requirements, for the parties to file an amended pre-hearing stipulation on or before January 18, 2006. On January 19, 2006, such a stipulation was, in fact, filed. DOAH's case file also reflects all other case activity prior to the scheduled disputed-fact hearing which was commenced, by agreement, on January 23, 2006.

After nine hours of hearing on January 23, 2006, it was determined that the case could not be completed that day. By stipulation, the hearing was continued to the next date mutually available to the parties and the undersigned. The hearing was concluded in six and three-quarter hours of hearing on February 15, 2006.

A Transcript of the January 23, 2006, portion of the final hearing was filed on February 9, 2006. A Transcript of the February 15, 2006, portion of the final hearing was filed on March 6, 2006.

A Post-hearing Order setting out the agreed post-hearing procedures and due dates was entered on March 7, 2006.

By agreement, the last after-filed exhibit (the deposition of Dr. Sari Bernstein) was filed on March 24, 2006.

On March 29, 2006, Respondent's Consent Motion for Extension of Time to File Proposed Recommended Order was filed. This agreed extension was granted by an Order entered March 31, 2006, requiring the filing of proposed recommended orders by April 14, 2006.

On April 13, 2006, Respondent's Second Consent Motion for Extension of Time to File Proposed Recommended Order was filed. Therein, the parties waived any time limit for the filing of this Recommended Order. That Motion appears to have been granted orally by telephone, but not followed-up with a written order, extending the time for filing proposed recommended orders to April 21, 2006. That act, pursuant to Section 120.57 (1), Florida Statutes, rendered the aspirational date for entry of this Recommended Order as May 22, 2006.

Petitioner's Proposed Final [sic] Order (without date and signature) was filed on April 21, 2006. Respondent's Proposed Recommended Order was filed on April 21, 2006. Petitioner's Proposed Recommended Order (with date and signature) was filed on April 24, 2006. Respondent's Notice of Filing Exhibits A, B, and C, to Respondent's Proposed Recommended Order was filed on April 28, 2006. These exhibits are copies of case law. All the

foregoing items have been considered in preparation of the instant Recommended Order.

The motion to strike, contained in footnote two of Petitioner's proposal is denied.

The Evidence:

Petitioner's mother testified on [REDACTED] behalf. The depositions of Dr. Mark Tomaski (an expert psychiatrist) and Dr. Sari Bernstein (an expert psychologist) also have been admitted in evidence. Petitioner had Exhibits P-1 through 14, and P-18 through 49, admitted in evidence.

Respondent presented the oral testimony of Patrick E. Hughes (an expert school psychologist); Joanne Philpot, Petitioner's tenth grade Advanced International Certificate of Education (AICE) English Honors II teacher; Cynthia Conteh, Petitioner's ninth and tenth grade AICE math teacher; Thaddeus E. Boggs, Jr., Petitioner's ninth grade Physics teacher and tenth grade Chemistry teacher; Kevin R. Sacerdote, Petitioner's tenth grade Advanced Placement (AP) World History teacher; Camilla Sims-Stambaugh, Duval County's Section 504 Program Manager (an expert in psychological assessment and evaluation of children in the school setting); Joyce Lynn, [REDACTED] School guidance counselor; Amy Winters, school psychologist (an expert in psychological assessment and evaluation of children in the school setting); James Otis, Petitioner's eleventh grade AP

Physics teacher; Remedios Devoe, Petitioner's eleventh grade AP Statistics teacher; and Katherine A. Robertson, Petitioner's eleventh grade AP English teacher.

Respondent also had Exhibits R-1 through 16, and R-17 through 32, admitted in evidence.

#### FINDINGS OF FACT

1. Petitioner ■■■ is a 17-year-old ■■■, DOB ■■■, who is currently enrolled in the eleventh grade at ■■■ School, Jacksonville, Duval County.

2. Since August 3, 1995, when ■■■ was in first grade, ■■■ has been identified by competent educators as "gifted."

3. ■■■ has an older brother. The older brother excelled in public school as a mainstream, gifted student, earning many honors and scholarships toward ■■■ current college career. ■■■ also has a younger sister, who is described by their mother, a respected clergyperson with a dual master's degree in mental health therapy and guidance counseling, as "sort of gifted." The parents had hoped that ■■■ and ■■■ sister could achieve the same scholastic results as their older brother.

4. ■■■ has been "treated" by a variety of medical and psychiatric/psychological personnel with psychotherapeutic drugs since ■■■ was two years old. All of ■■■ professional care revolves around ■■■ inability to focus and pay attention.

5. At the present time, ■■■ has been clinically diagnosed as suffering from Attention Deficit Hyperactivity Disorder (ADHD), predominantly inattentive type (that is to say ■■■ is more inattentive than ■■■ is oppositional and is easily distracted, rather than being distracting to other people); dysthemia (depression); and evidencing Asperger's features. This last diagnosis means that, although ■■■ is not truly autistic, and not truly manifesting Asperger's Syndrome, ■■■ has some obsessive and inattentive traits of autism. These clinical diagnoses have been made by competent psychiatrists and psychologists, including Dr. Mark Tomaski and Dr. Sari Bernstein, all of whom have relied in great part upon ■■■'s mother's reports of ■■■. behaviors, with little interest or input from ■■■. Indeed, ■■■'s mother attends ■■■ sessions with ■■■ current child psychiatrist, Dr. Tomaski, "to ensure sufficient communication."

6. There is no dispute between the parties that ■■■ is ADHD, dysthemic, and suffering from Asperger's features. There is no dispute, and the parties agree, that learning is a major life activity. The dispute herein is whether ■■■'s medical diagnoses substantially limit ■■■ in the major life activity of being able to learn. The District has rejected ■■■'s request for Section 504 accommodations.



7. At the 2006 hearing(s) herein, ■■■ described the current effects on ■■■'s life of ■■■ combined diagnoses (ADHD, dysthemia, and Asperger's traits) as affecting ■■■ personal hygiene (no regularized showering and brushing of ■■■ teeth for up to two weeks without her prompting), refusal to use deodorant, and inability to take ■■■ many medications properly without her prompting. ■■■ also maintains that ■■■ makes odd noises, like constant throat clearing; has eye tics from the medications ■■■ takes; has lack of eye-contact; hums while ■■■ eats; sucks food off ■■■ fork; sleeps ten hours on weekends if ■■■ is not interrupted; eats erratically during the day and seldom eats in the evenings (also probably due to ■■■ medication); and has a need to smell/sniff everything ■■■ touches.

8. As of the date of hearing, the parents had concerns that ■■■ will be able to live independently when ■■■ leaves home, but they hope that ■■■ passion for wood-working can be parlayed into a Bachelor of Fine Arts degree at a college in Savannah, Georgia.

9. Of greatest concern to ■■■ at the present time, however, is ■■■'s failure to do ■■■ homework unless ■■■ sits with ■■■ for large portions of the time from 3:15 p.m. until 9:00 p.m. each night, in order to keep ■■■ on task, and ■■■

failure, without [REDACTED] prompting, to turn in homework [REDACTED] has completed.

10. For instance, at some point, because of [REDACTED] telling her that [REDACTED] already had prepared [REDACTED] portion of a group homework project which [REDACTED] knew was due soon, [REDACTED] let [REDACTED] go on a church ski trip, but later discovered that [REDACTED] had not finished the school project.

11. [REDACTED] also described [REDACTED] as friendless, stressed, and lacking in social skills.

12. Dr. Tomaski has treated [REDACTED] continuously from December 2001 to the present. [REDACTED] has taken [REDACTED]'s foregoing history of [REDACTED] at face value and confirms that [REDACTED] cannot take [REDACTED] psychotherapeutic medicines alone and that [REDACTED] may sometimes become fearful and unable to ask questions or ask for help in class, due to [REDACTED] inability to read facial and social cues.

13. In 2002, Dr. Tomaski referred [REDACTED] to Dr. Sari Bernstein, for psychological testing. Dr. Bernstein concluded, as had previous medical personnel, that [REDACTED] met the criteria for ADHD, but at that time, Dr. Bernstein did not make a specific recommendation that [REDACTED] receive a Section 504 plan, and her report was not forwarded to school personnel. School personnel have never received this report.

14. [REDACTED] did well in [REDACTED] gifted and accelerated classes until [REDACTED] made the transition from middle school to high school.

█ began █ first year of high school (ninth grade) at █ in 2003, and has continued there to date.

15. At █, █ was enrolled in an accelerated program called AICE. This is a rigorous academic program through which students have the opportunity to earn college credit from █ University. If they successfully pass the curriculum and the final exams, their diploma entitles them to admission at approximately 400 colleges in the United States and to receipt of one-hundred percent Florida Bright Futures scholarships. During █ ninth and tenth grade years, and continuing to the present, █ eleventh grade year, █ also has taken a number of AP and Honors classes.

16. During the first quarter of █ ninth grade year, █ received an A in Integrated Math, an A in Earth/Space Science Honors, an A in Materials & Processes Technology I, and a B-minus in American Government Honors.

17. During the second quarter of █ ninth grade year, █ received an A in Integrated Math, a B in Earth/Space Science Honors, an A in Materials & Processes Technology I, and an A-minus in Health I (Life Management).

18. During the third quarter of █ ninth grade year, █ received an A in Personal Fitness, a B in Geometry Honors, a B in Biology I Honors, and a C in English Honors I.

19. █ scored a three in reading and a five in

mathematics (five being a perfect score) on the Florida Comprehensive Assessment Test (FCAT) administered in Spring 2004.

20. On or about April 27, 2004, Dr. Bernstein saw [REDACTED] for a "brief assessment." This was the second and final time that she saw [REDACTED]. The purpose of the visit was to conduct an emotional evaluation, due to [REDACTED]'s report to Dr. Tomaski of [REDACTED]'s increased depression. It was not an ADHD evaluation at that time. Dr. Bernstein created a report, summarizing her assessment, but ADHD was not the focus of the report. At the end of this report, she made several recommendations concerning [REDACTED], but the only recommendation directly pertaining to the school setting was that [REDACTED] receive preferential seating in the front of the classroom. Dr. Bernstein's April 27, 2004, report did not indicate that [REDACTED] needed a 504 plan, and school personnel did not receive a copy of this report until the 2004-2005 school year (SY).<sup>1/</sup>

21. Dr. Tomaski testified by deposition that he was interested in one particular test that Dr. Bernstein had administered, the Thematic Apperception Test. That test assessed [REDACTED]'s ability to organize [REDACTED]self and [REDACTED] thought processes, and its results indicated [REDACTED] was doing better than Dr. Tomaski had thought [REDACTED] was doing in April-May 2004.

22. [REDACTED]'s grades began to fall in the fourth quarter of

the 2003-2004 SY. During that quarter of ■■■ ninth grade year, ■■■ received a B-minus in Biology I Honors, a C in Individual/Dual Sports II, a D in Geometry Honors, and a D in English Honors I.

23. ■■■'s mother became concerned about ■■■ fourth-quarter grade slump, despite that for the ninth grade SY as a whole, ■■■ had received final average grades of four As, one A-minus, one B, one B-minus, and three Cs.

24. At ■■■'s urging to write requesting that ■■■ receive accommodations under Section 504, Dr. Bernstein wrote the following, "To Whom It May Concern" note, on her professional letterhead, dated June 14, 2004.

■■■ has been seen in our office and diagnosed with Attention Deficit/Hyperactivity Disorder. Mark Tomaski, M.D., is currently treating him for this disorder in our office. Given this diagnosis, ■■■ qualifies for a 504 plan through the school system to address issues related to ADHD in the classroom. It is strongly recommended that part of this plan include frequent contact between the parent and the teacher to update the parent on the student's progress throughout the semester.

25. In her March 7, 2006, deposition in evidence, Dr. Bernstein could not remember what "issues" prompted the foregoing June 2004, request for services, although she thought ■■■ had been concerned with ■■■'s dropping or fluctuating grades, forgetting to hand in homework, and a problem with

organization. She could not remember making any recommendation concerning how frequently communication should occur, what type of communication should occur, or exactly what kind of communication was needed.

26. Dr. Bernstein has never observed [REDACTED] in the classroom and has expressed no opinion on whether [REDACTED] is substantially limited in learning or substantially limited in a classroom setting.

27. [REDACTED] sent a letter dated July 30, 2004, to Ms. Faye Bell, a [REDACTED] School guidance counselor, requesting that [REDACTED] be approved for a Section 504 plan. In it, [REDACTED] suggested 17 accommodations, most of which she has acknowledged were not applicable to the school setting or which were no longer sought by the time of the hearing in this cause.

28. [REDACTED] began [REDACTED] tenth grade year at [REDACTED] in August 2004.

29. During the first few months of the 2004-2005 SY, Dr. Tomaski was working with [REDACTED] and [REDACTED] to find an appropriate balance of psychotherapeutic medications for [REDACTED]. Dr. Tomaski saw [REDACTED] seven times between July 2004 and January 2005. On several occasions, medications were adjusted, mostly between September 10, 2004, and January 2005. The fact that an appropriate balance took awhile to find could have impacted [REDACTED]'s ability to stay awake in the tenth grade classroom setting during that period.

30. A reason for the shift in medications in 2004-2005, was that ■■■ was, according to ■■■, evidencing greater signs of stress and depression. ■■■ indicated that in approximately July 2004, ■■■'s only friend "outgrew" ■■■, thereby separating the two families who had been very close. Dr. Tomaski specified that in September 2004, ■■■ reported that ■■■ had become inappropriately aggressive toward ■■■ little sister. Dr. Tomaski recommended that ■■■ not play with children more than two years ■■■ junior.

31. There was a delay in school personnel responding to ■■■'s July 30, 2004, request for a Section 504 eligibility determination. This was probably because her request was made at the end of the 2003-2004 SY, (see Finding of Fact 27), and Section 504 evaluations were deferred until teachers returned under new contracts for the 2004-2005 SY.

32. ■■■ met with several of ■■■'s teachers during the first months of the 2004-2005 SY to alert them to the fact that ■■■ might be sleepy due to ■■■ medications. She did not press for a Section 504 assessment at that time. No request has ever been made of the District or school personnel to assist in ■■■'s medication management. There is no evidence that school personnel have ever penalized ■■■ for falling asleep in class.

33. During the first quarter of the 2004-2005 SY, that is between August and mid-October 2004, ■■■ was passing all ■■■

subjects. ■■■ received an A-minus in Materials & Processes Technology II, a C in French I, a C in AICE Algebra II Honors, a C-minus in AP World History, and a D in AICE English Honors II.

34. Sometime in October 2004, ■■■ again requested Section 504 services through ■■■ School's guidance office

35. On October 15, 2004, Ms. Faye Bell, a ■■■ school guidance counselor, prepared the paperwork to initiate a referral to a Section 504 Intervention Assistance Team. This team is made up of the student's teachers, a school representative (usually the guidance counselor assigned to the child), the school psychologist, and the parent(s).

36. Patrick Hughes, a certified school psychologist assigned to ■■■, received the paperwork, and a meeting was scheduled.

37. Prior to the meeting, Mr. Hughes reviewed ■■■'s grades, ■■■ cumulative folder, ■■■ attendance records, ■■■ standardized test results, and the June 14, 2004, memorandum from Dr. Bernstein. (See Finding of Fact 24.) Dr. Bernstein's April 27, 2004, psychological assessment was not in ■■■'s cumulative folder at that time.

38. In approximately January 2005, Dr. Tomaski determined that the correct balance of medications for ■■■ had been reached. Even by November 2004, when ■■■ medications were fairly stabilized, some of ■■■'s teachers had noticed ■■■ was no



longer falling asleep in class.

39. Probably about November 11, 2004, Dr. Tomaski suggested that the parents seek a Section 504 evaluation, but in his January 20, 2006, deposition in evidence, Dr. Tomaski essentially deferred to educational personnel to make the assessment of whether ■■■■ qualifies for a Section 504 plan and if ■■■■ qualifies, what that plan should be and whether accommodations are even feasible for the District. Dr. Tomaski had input from some teachers before November 2004, but, like Dr. Bernstein, he has never observed ■■■■ in any classroom setting.

40. In his deposition, Dr. Tomaski acknowledged that many of ■■■■'s uncommunicative behaviors are identical to those of every teenage ■■■■.

41. Dr. Tomaski offered as a possible Section 504 accommodation "extended testing time," but ■■■■ testified that extended testing time generally was not necessary and was, in fact, irrelevant to these proceedings. Based on her testimony and Petitioner's consistently high FCAT scores, it is found that extended testing time is not necessary at this time for Petitioner to succeed in school.

42. Dr. Tomaski offered as another possible accommodation, "keeping [■■■■] in the front of the room and that ■■■■ teachers encourage ■■■■ to make eye contact, those types of things so ■■■■ can follow along and read her." He also recommended

communication between [REDACTED] and the teachers and between the teachers and the parents. Again, he did not offer any specifics on how that communication should be accomplished.

43. On November 18, 2004, a Section 504 team meeting was convened by Mr. Hughes. In attendance were [REDACTED], Patrick Hughes, Faye Bell, Barbra Brown ([REDACTED]'s tenth grade French teacher), Cynthia Conteh ([REDACTED] tenth grade AICE Algebra II teacher), Kevin Sacerdote ([REDACTED]'s tenth grade AP World History teacher), Joanne Philpot ([REDACTED]'s tenth grade AICE English teacher), and Wayne Perpall ([REDACTED]'s tenth grade Woodshop teacher). The purpose of the meeting was to discuss any concerns that any of the participants had and to determine if anything more needed to be done to receive Section 504 services.

44. At the November 18, 2004, meeting, [REDACTED] orally described [REDACTED]'s problems at home; emphasized homework problems and [REDACTED] perceived need for teachers to notify [REDACTED] about homework and projects; and stated her concerns with [REDACTED]'s declining grades. [REDACTED] testified that the teachers and Mr. Hughes were receptive to [REDACTED] concerns. [REDACTED] believes that [REDACTED] gave Dr. Bernstein's April 27, 2004, evaluation to Mr. Hughes at this meeting, but conceded that many of Dr. Bernstein's recommendations in it were not school-related.

45. At the November 18, 2004, meeting, the teachers also related what they had observed in the classroom.

46. Mr. Hughes' notes from this meeting reflect the following: Ms. Conteh noted that ■■■ had problems staying focused, did not do homework, and ■■■ grades were dropping. Mr. Sacerdote noted that ■■■ was barely managing; that the class was doing extensive reading; that ■■■ was struggling with writing a thesis statement; and although ■■■ seemed to grasp the material that interested ■■■, ■■■ lacked energy. Mr. Sacerdote felt that ■■■ usually turned in ■■■ assignments. Ms. Philpot noted that her class had the same routine every week, but ■■■'s weekly assignments were missing; that ■■■'s grades were sporadic with some 80's and some 90's; that ■■■ put forth minimal effort; that ■■■ often played with a GameBoy (a hand-held computer game) or a graphing calculator; and that ■■■ was no longer falling asleep in class. Mr. Perpall found ■■■ to be doing very well in his class and that the tasks were geometry-tasks. At the time of this meeting, ■■■ had a C in French, a C in Algebra II Honors, a C-minus in AP World History, a D in English, and a B-plus in Woodshop.

47. At the hearing, Ms. Philpot, Ms. Conteh, and Mr. Sacerdote either recognized that Mr. Hughes' foregoing notes had correctly recited their comments about ■■■ made on November 18, 2004, or they ratified that ■■■. notes correctly represented their overall experience with ■■■. (See also Findings of Fact 85-90.)

48. Based on the foregoing input from [REDACTED] and the teachers and the data he had reviewed prior to the November 18, 2004, meeting, Mr. Hughes decided to do a Section 504 assessment.

49. Dr. Bernstein, as a licensed clinical psychologist gathers many sources together, and, by a preponderance of that evidence, makes a clinical psychological diagnosis of ADHD. Mr. Hughes, as a certified school psychologist, uses a preponderance of the evidence he assembles to diagnose if a clinical psychological diagnosis of ADHD is inhibiting the student's major life activity of learning. If Mr. Hughes finds that a child's disability is inhibiting [REDACTED] learning, then Mr. Hughes, with input from parents and teachers, will devise accommodations for that disability. The two types of psychologists diagnose different conditions. A medical physician's or clinical psychologist's diagnosis is a preferred threshold step to diagnosing impaired ability to learn, but not an essential one. Frequently, a child will have no clinical diagnosis, but a parent or teacher will spot behaviors that suggest [REDACTED] has a learning handicap. Indeed, an inability/disability to learn, as perceived by a teacher or parent, may trigger an evaluation for ADHD by Mr. Hughes for the District, and Mr. Hughes' Section 504 assessment may or may not result in a parent seeking outside psychiatric or psychological advice. Mr. Hughes' Section 504 assessment may result in

accommodations, if they are feasible, but does not necessarily do so.

50. This standard, to look for a preponderance of what the evidence shows, is utilized by nationally recognized experts in the field of school psychology and is followed by other school districts. The school psychologist does not diagnose medical conditions but determines whether a child is substantially limited in learning compared to an average student in regular education classes. (See Conclusions of Law.)

51. A medical diagnosis of ADHD does not automatically mean a child is disabled under Section 504, and the District is required to conduct an independent analysis of a child's learning limitations to determine whether the impairment substantially limits the student's ability to learn.

52. Herein, [REDACTED] claims that at the November 18, 2004, meeting, she provided Mr. Hughes with a copy of Dr. Bernstein's April 27, 2004, psychological evaluation (see Finding of Fact 44), but it is probable that Mr. Hughes did not consider that item in the course of his initial 504 assessment of [REDACTED]. Mr. Hughes' testified that he did not have this item; if he had it, he would have reviewed it; and even if he had it and reviewed it, it probably would not have made any difference, due to the different goals of his and Dr. Bernstein's different types of analysis.

53. Petitioner's Proposed Recommended Order faults Mr. Hughes for not considering Dr. Bernstein's April 27, 2004, evaluation. However, Mr. Hughes' consideration of Dr. Bernstein's June 14, 2004, diagnosis of ADHD and recommendation on her letterhead of a Section 504 assessment for [REDACTED] is sufficient to comply with the District's procedures in place for 504 assessments. Further, Dr. Bernstein's April 27, 2004, evaluation, which, incidentally, did not focus on ADHD, may have been considered by other District psychologists and counselors before the final denial of 504 services in January 2005, (see Finding of Fact 95), and Mr. Hughes and the other counselors were familiar with both Dr. Bernstein's and Dr. Tomaski's professional standing in the community throughout their several subsequent assessments/evaluations. (See Findings of Fact 94-97, and 120-123.)

54. The current State of Florida Department of Education Guide (Florida DOE Guide) clearly provides that the Section 504 assessment may be less formal than an ESE evaluation pursuant to IDEA.

55. This School District's Section 504 assessment of an ADHD student includes use of ratings scales and productivity scales.

56. Productivity scales are forms the District uses to solicit information from teachers concerning a student's

academic performance and behavioral functioning. They ask the teacher to indicate whether a student almost always, frequently, sometimes, or hardly ever contributes to discussions, completes work carefully, and turns-in class/homework.

57. Historically, the District has used productivity scales completed by teachers, rather than a single 30-45 minute classroom evaluation by the school psychologist to evaluate high school students because it is believed that the productivity scales provide more relevant and useful information.

58. Certainly, a compilation of the observations of all the child's classroom teachers over a period of time presents the school psychologist with more in-depth information on a high school student's behavior in several subject classrooms than would the school psychologist's sole 35-40 minutes of observation on a single day, in a single classroom.

59. Although the District's 2002 Section 504 Manual, previously authored by Mr. Hughes, required a timed classroom evaluation, the District was in the process of revising its Manual, and Mr. Hughes was told by District personnel that a productivity scale could be used in place of a classroom observation of a high school student.

60. The District's revised 2005 Section 504 Manual, which was in use by the time of the hearing herein, provides that productivity scales must be used in a high school setting and

that observations must be used in an elementary school setting.

61. The 2002 District 504 Manual showed an "academic performance rating scale," (R-23, page 31), devised by Dr. Russell A. Barkley and a "productivity scale" (R-23, page 33). It provided that either scale could be used by the District to assess ADHD (R-23, page 11). Mr. Hughes used the "productivity scale" in the 2002 manual. This was also the productivity scale published in the 2005 District 504 Manual, bearing the words "Revised October 2005" (R-24, page 51).

62. The productivity scales Mr. Hughes actually distributed to the teachers bore the words "Revised 8/25/04" (R-7), and were typically used by school psychologists in this District. This revised productivity scale form had been designed to appeal to teachers so that they would fill it out and return it in a timely fashion, instead of ignoring it. The productivity scale form had also been designed to avoid teachers arguing with, or being confused by, the format or language used in it.

63. The evidence conveys the sense that the purpose of this form revision was to ensure consistency in how teachers listed their observations; avoid the psychologist/guidance counselors having to spend a lot of time explaining to the teachers the meaning of the form's questions; keep the teachers' comments in a uniform vocabulary; and get the teachers' actual



observations without imputing some of the psychologist's/counselors' own biases into how the teachers reported their own observations.

64. The productivity scales used by Mr. Hughes are similar to other productivity scales used in other school districts of Florida.

65. The productivity scales used by Mr. Hughes are acceptable pursuant to the current Florida DOE Guide.

66. Mr. Hughes had authored the 2002 District 504 Manual. Mr. Hughes is a devotee of Dr. Barkley. (See Finding of Fact 61.) Dr. Barkley is a psychologist widely recognized for his methods of identifying children afflicted with ADHD. Indeed, Dr. Bernstein also recognizes Dr. Barkley as an expert psychologist in this field. Therefore, it is Petitioner's position that Mr. Hughes' ultimate assessment of [REDACTED] as ineligible for Section 504 accommodations in the classroom was fallacious, because it did not precisely follow Dr. Barkley's format or utilize his academic performance rating scale form.<sup>2/</sup> This argument is rejected, and it is here specifically found that Mr. Hughes' assessment in this case met federal, state, and local guidelines, all of which are permissive, as opposed to mandatory, of many patterns and components of inquiry during a Section 504 assessment.

67. Dr. Barkley's overall premise is that multiple sources

should be inquired-of; there should be classroom observations when possible; and that follow-up with teachers should occur to ensure that the forms they have filled out are representative of what the teachers actually meant to convey. Petitioner's position that by not adhering precisely to certain parts of the Barkley premise, Mr. Hughes' diagnosis of Section 504 ineligibility was fallacious is rejected for the reasons given in Findings of Fact 94-97, and 120-123.

68. Also, the process identified by Petitioner as Dr. Barkley's process for evaluation of children with ADHD only anticipated that multiple types of information should be obtained from multiple sources, including parents, children, and teachers; that when time and resources permit, direct observation of ADHD behaviors in the classroom should be made by school personnel; and that "at the very least" subsequent contact should be made with an ADHD child's teacher to follow-up on his or her responses to the child behavior rating scales and to obtain more details about the child's classroom behavior problems. This last component was addressed by Mr. Hughes' use of a more teacher-friendly form that greatly limited any possibility for his erring in interpreting what the teachers meant. Further, all the stated Barkley requirements have been fulfilled, if not by Mr. Hughes, by the several evaluation processes leading up to the evidentiary hearing herein (see

Findings of Fact 94-97 and 120-123) and by the totality of the evidence presented at the hearing.

69. The current Florida DOE Guide clearly provides that parents may be part of the 504 assessment team. The Petitioner faults the District's 504 assessment because rating scales from [REDACTED] were not considered.

70. Rating scales are normed reference instruments that the District uses to measure behavior in many different areas. They allow psychologists to compare a specific child's traits with the national population so as to determine whether that child's traits are significantly impairing his or her major life activities.

71. As part of his ADHD assessment of [REDACTED], Mr. Hughes utilized two types of rating scales: the Behavior Assessment System for Children-Teacher Rating Scales-Adolescent (BASC) and the Attention Deficit Disorders Evaluation Scale-Secondary Age Version (ADDES-S).

72. The BASC is a multi-trait rating scale that provides a broad view of the child. The ADDES-S is a single-trait rating scale that looks specifically at ADHD behaviors/traits. Each instrument uses a nationally standardized form that asks the individual filling out the form whether the child being rated never, sometimes, often, or almost always exhibits a particular trait or behavior. The raw data obtained from these worksheets

is fed into a computer program which provides the school psychologist with a list of "scores" in several different areas. These scores, in turn, indicate whether a particular trait is clinically significant, borderline significant, or average/not significant. Because the rating scales are normed, they help distinguish between normal behaviors (such as the majority of adolescent males may display) and genuine ADHD behaviors. Both BASC and ADDES-S are approved for use in the District and by Florida's DOE for evaluating students. Both BASC and ADDES-S are valid information-gathering tools, created by nationally recognized school psychologists, and their accuracy has been professionally validated by numerous studies.

73. Mr. Hughes did not ask Mr. Perpall, the Materials & Technologies II (Woodshop) teacher, to complete any productivity or rating forms, because [REDACTED] was doing very well in his class, but he asked that the [REDACTED] guidance department distribute the productivity scales and the two types of rating scales to all [REDACTED]'s academic teachers and also provide the rating scales to [REDACTED].

74. Mr. Hughes received back completed productivity scales from only three of the four tenth grade academic teachers, but he got back completed rating scales from four academic teachers.

75. The evidence is not clear whether [REDACTED] ever received the rating scales to fill out, but it is clear that Mr. Hughes

did not receive completed ones back from her. Based upon the evidence as a whole, including the candor and demeanor of the witnesses, it may be inferred that if ■■■ had received the appropriate forms, she would have filled them out and returned them. However, ■■■ had already given oral input as to all she had observed.

76. Certainly, in the context of whether the child requires 504 accommodations in the classroom with regard to completing and turning in ■■■ homework, the home environment is relevant, material, and a significant factor, and the "best practice" goal Mr. Hughes was trying to achieve would have been to standardize ■■■'s input on a rating form, but doing so was not mandatory by either federal or state law or regulations. While it is permissible to use the rating form with the parents, and preferable to have the parent rating scales returned, the District does not require that a parent rating scale be utilized in order to determine Section 504 eligibility. This is in accord with the 2005 Florida DOE guidelines.

77. Mr. Hughes did consider ■■■'s prior oral input as set out supra.

78. Mr. Hughes testified that he did not think receiving the rating forms from ■■■ would have affected his evaluation, because he already had her input, and his focus was on classroom observations by the teachers, but since these scales were

normed, and since computerized scores were to be obtained from them, had ■■■'s rating scales been input into the computer, they may have had some undetermined effect.<sup>3/</sup>

79. Tenth grade teachers Ms. Philpot, Ms. Conteh, and Mr. Sacerdote, all three of whom completed the productivity scales, acknowledged at hearing that the responses on the forms were accurate as to what they had observed of ■■■ in their classrooms, although Ms. Conteh suggested that when she had filled in a form that ■■■ was "disruptive," she had only meant that he needed prompting not to shout out answers in class instead of raising ■■■ hand and waiting to be called upon. The scales collectively reflected age appropriate social and behavioral functioning, but that ■■■ "sometimes or hardly ever turns in class/homework."

80. The analysis of the raw data obtained from four teachers via the BASC rating scales indicated as follows:

- (a) Ms. Philpot had no significant or borderline concerns;
- (b) Ms. Conteh had borderline concerns on the hyperactivity and attention problem scales;
- (c) Mr. Sacerdote indicated borderline concerns on the attention problems, social skills, leadership, and study skills scales;
- (d) Ms. Brown indicated significant concerns on the hyperactivity, attention problems, and aggression scales and borderline concerns on the atypicality,

social skills, leadership, and study skills scales.

81. The analysis of the raw data obtained from the ADDES-S rating scales indicated as follows:

- (a) Ms. Philpot, Ms. Conteh, and Mr. Sacerdote indicated average scores on both the inattentive and hyperactive-impulsive sub-scales;
- (b) Ms. Brown indicated significant concerns on the hyperactive-impulsive sub-scales and borderline concerns on the inattentive sub-scale.

82. It would not be valid to draw conclusions by looking at a few pieces of the raw data (e.g. answers to specific questions). The validity of the rating scales derives from the statistically calculated process that compares the total accumulation of comments with the normative population. The individual responses are captured in the T-score (mean score), which results from analyzing the raw data. In evaluating the rating scale data, the District looks at the total T-score and compares across all teachers.

83. Mr. Hughes summarized the T-scores from the teachers' rating scales in a document dated December 8, 2004, and entitled ADHD Assessment Summary. After reviewing the rating scales, Mr. Hughes concluded that [REDACTED]'s "difficulties were not showing up consistently across each teacher." For example, on the ADDES-S, three rating scales showed no difficulties and only one came back significant. On the BASC, the same teacher had

significant results while all the other results indicated either no concerns or borderline concerns.

84. Mr. Hughes also concluded that the productivity scales did not provide "strong evidence of disability."

85. At the hearing herein, tenth grade teachers, Ms. Philpot, Ms. Conteh, and Mr. Sacerdote testified about their overall experiences with ■■■, also without demonstrating compelling evidence of disability.

86. Ms. Philpot is clearly an excellent teacher, and her classes are clearly geared to high-achiever college-preparatory students, but the undersigned has discounted her opinion that ■■■ was not happy in the AICE program and that ■■■ was over-medicated, because she readily admitted that she felt the amount and types of medication ■■■ was taking were inappropriate for any child ■■■ age and that ■■■ could best relieve ■■■ stress and improve ■■■ grades by attending mainstream classes, which does not seem to be an option for ■■■ at this time. (See Finding of Fact 101.)

87. However, in the following respects, Ms. Philpot's testimony was consistent or compatible with that of the other teachers, and is accepted: She testified credibly and convincingly that she had a fairly good rapport with ■■■ but had the impression that ■■■ did not like her class; that ■■■ was interested in some topics in her class more than others; and



that when ■■■ was interested, ■■■ would participate, raise ■■■ hand before speaking, and complete ■■■ assignments. She conceded that ■■■ sometimes needed to be prompted to raise ■■■ hand. Ms. Philpot stated that ■■■ did not act inappropriately in her class, that sometimes ■■■ would contribute wry comments, and that she enjoyed ■■■ participation. When ■■■ was less interested, ■■■ might put ■■■ head on ■■■ desk or play with a hand-held computer game. However, she conceded that ■■■ sleeping in class had ceased to be a problem after the first few months. ■■■ also frequently read books for pleasure that ■■■ brought to class rather than reading the assigned items. Students were permitted to play with hand-held computer games or to read their own books if all their work was done, but ■■■ was apparently not finished with ■■■ assigned work and was taking advantage of Ms. Philpot when ■■■ was playing or reading in her class. The majority of the writing assignments she assigned were to be done in class, and these were the ones she weighed most heavily for grading purposes. ■■■ tended to give non-thorough answers and to rush through the in-class work to get it done so that he could do what he wanted to do, instead of putting forth the effort needed to get good grades. Under these circumstances, an improvement in the quality of ■■■ homework assignments or consistently turning them in, as opposed to forgetting some, would have made little difference in ■■■'s

over-all grade in her class.

88. Ms. Philpot observed no unusual behaviors such as tics, eye rolling, throat-clearing, or sniffing things, but concluded ■■■ was under stress from the amount of time ■■■ was putting in on "make-up work for prior grades."

89. Ms. Conteh, ■■■'s tenth grade AICE Algebra II teacher, testified that she has taught ■■■ three different math subjects over two school years. She testified that ■■■ was not consistent in doing homework in ninth or tenth grade but that it did not "catch up with ■■■" until the tenth grade pre-calculus class. In ninth grade, ■■■ would read if ■■■ was bored in class and she got the impression that ■■■ was frequently bored. She recalls saying at the November 18, 2004, meeting that ■■■ was not doing the homework she assigned. Like most math teachers, Ms. Conteh believes that frequent practice of the problems and formulas is what leads to good test grades, and ■■■ should have practiced at home. She had recommended that ■■■ look over ■■■ classwork before ■■■ turned it in, but obviously, ■■■ did not do so. She observed some attention problems, but she felt ■■■ would profit from being prompted at home to do ■■■ homework only in the same sense that any student would.

90. Mr. Sacerdote (■■■'s tenth grade World History teacher) testified that ■■■ frequently spoke with ■■■ before and after class, and that ■■■ was interested in those topics ■■■ was

allowed to choose, and when [REDACTED] was interested in topics like medieval history and pyramids, [REDACTED] would participate more. [REDACTED] noted [REDACTED]'s lack of attentiveness the first semester during the drug adjustment period, but not thereafter. [REDACTED] was never a behavior problem, and [REDACTED] did not blurt out things in Mr. Sacerdote's class. Mr. Sacerdote opined that [REDACTED]'s grade problems were primarily attributable to the quality of [REDACTED] in-class writing, not to missed homework assignments and that accordingly, an improvement in the quality of [REDACTED]'s homework assignments or greater consistency in turning in homework assignments, as opposed to forgetting to turn some in, would have made little difference in [REDACTED]'s over-all grade from Mr. Sacerdote. Mr. Sacerdote never saw [REDACTED] sniffing [REDACTED] fingers or rolling [REDACTED] eyes. He never overheard [REDACTED] repeatedly clearing [REDACTED] throat.

91. As part of his 504 assessment, Mr. Hughes took a look and [REDACTED]'s grades for the second quarter of the 2004-2005 SY. These would have covered the period approximately mid-October 2004 to January 2005. During this period, [REDACTED] received a B in French I, a B in Materials & Processes Technology II, a C in AICE Algebra II Honors, a C in AP World History, and a D-plus in AICE English Honors II. Mr. Hughes concluded that [REDACTED] was doing average in honors courses, which suggested that there was no substantial limitation in [REDACTED] major life activity of learning.

92. Mr. Hughes concluded that ■■■ was not showing a substantial limitation in the school environment or with learning.

93. Mr. Hughes would have determined ■■■ eligible for a 504 plan if the data had shown ■■■ to be eligible, but it is unethical for a psychologist to recommend a 504 plan unless one is clearly indicated by the data. Petitioner did not demonstrate any benefit to the District in denying ■■■ the accommodations requested.

94. Rather than relying exclusively on his own education, training, and experience as a certified school psychologist for his 504 assessment of ■■■, Mr. Hughes went a step further and conferred with Dr. Camilla Sims-Stambaugh, the District's Section 504 Program Manager.<sup>4/</sup>

95. Dr. Sims-Stambaugh also reviewed ■■■'s cumulative file, history of grades, FCAT scores, attendance records, and teachers' comments on ■■■'s actual report cards from kindergarten to tenth grade, which, incidentally, were consistent with the results on the rating scales, although comments on the current year's reports included that ■■■ did not complete ■■■ assigned work and that ■■■ had attention problems. She also reviewed the medical records available to her, rating scale data, and productivity scales. She may have reviewed Dr. Bernstein's April 27, 2004, evaluation at this point, but that

is not clear.

96. Primarily because ■■■ had been able to earn average or better grades in a competitive setting (high-achiever, gifted, college-prep classes), Dr. Sims-Stambaugh saw nothing that indicated that ■■■'s opportunity to achieve educational benefit had been interfered with, even though there were problems at home that ■■■ had concluded were manifestations of ■■■ combined ADHD-dysthemia-Asperger traits/conditions. Although ■■■'s grades were slipping in such classes, Dr. Sims-Stambaugh's experience was that similar deterioration of grades was not unusual for students in those advanced placement programs. Like Mr. Hughes, Dr. Sims-Stambaugh also concluded that ■■■ was not substantially limited in the ability to learn.

97. Dr. Sims-Stambaugh testified as an expert in psychological assessment and evaluation of children in the school setting, that Mr. Hughes' evaluation of ■■■ was appropriate.

98. On January 20, 2005, Mr. Hughes again met with ■■■, Dr. Sims-Stambaugh, Ms. Bell, Ms. Philpot and possibly some other teachers. If there were other teachers present, it is not clear in the record. Mr. Hughes and Dr. Stambaugh expressed to ■■■ their mutual conclusion that ■■■ was not eligible for 504 accommodations. Petitioner asserts that all guidelines were not followed if all the teachers were not present and because

persons from other disciplines were not included in this second meeting. The various guides suggest there may be inclusiveness of other disciplines at this stage of the Section 504 assessment process, but it is not mandatory. The purpose of including teachers a second time is to be sure that their observances of the child were accurately reported. Herein, use of a teacher-friendly productivity form seems sufficient both for getting accurate teacher feedback and for doublechecking what the teachers intended to convey. Also, any procedural lack of teacher input in the second meeting has been made up for by the extensive teacher testimony at the hearing herein.

99. ■ came away from this meeting with the impression that Dr. Sims-Stambaugh had taken the position that no student in high-achiever, Honors, AICE, etc. classes could ever qualify for 504 benefits. Clearly, this could not be the case, because if that were the District's position, no such students, including ■, would ever even be assessed.<sup>5/</sup>

100. It probably was suggested at this meeting that ■ might get better grades in a regular class where there would be less stress. Certainly, that was Ms. Philpot's suggestion at the hearing herein. (See Finding of Fact 86.)

101. However, ■ does not want to return to regular (non-accelerated) classes, and both ■'s psychiatrist, Dr. Tomaski, and ■ psychologist, Dr. Bernstein, have concluded that ■

probably would have the same organizational and completion problems in regular classes. Dr. Tomaski's testimony is less than clear, and is somewhat contradictory to the effect that on the one hand, he feels that removal of ■■■ to regular classes could be detrimental to ■■■'s progress due to the frustration level it would present to someone as bright as ■■■, while ■■■ has also stated that the stress of bad grades in ■■■ existing classes could require ■■■ to be educated via a homebound program.

102. Although in January 2005, the District denied Section 504 benefits, Dr. Sims-Stambaugh suggested a formal ESE evaluation to determine if ■■■ had a learning disability. At that time, ■■■ did not challenge the 504 determination and stated that she would consider the ESE evaluation and get back to them.

103. While awaiting the District's determination of 504 eligibility, and afterwards, ■■■ frequently tried to communicate with ■■■'s tenth grade teachers in an effort to remediate ■■■ grades. ■■■ received some cooperation, but the responses were inconsistent and sometimes short-lived. All the teachers wanted her to initiate specific inquiries by e-mail or to make appointments through the school guidance department, which was standard operating procedure for all live parent-teacher meetings, but ■■■ could not always initiate contact. (See

Finding of Fact 128.) One teacher had inadvertently given out the wrong e-mail address and this frustrated ■■■'s communication with ■■■. Other teachers assumed that syllabuses, progress reports, and written assignments were sufficient. ■■■ was understandably frustrated with the situation during this period.

104. While homework problems occurred from January 2005 to the end of the 2004-2005 SY, they do not appear to account for ■■■'s bad grades. (See Findings of Fact 87, and 89-90).

105. During the third quarter of the 2004-2005 SY, tenth grade, ■■■ received a C in Pre-calculus, a C in Chemistry I Honors, a C in AP World History, a D-minus in English Honors II, and a D-minus in French II.

106. ■■■ enrolled ■■■ in safety net (free tutoring) and "grade recovery," and ■■■ D-minus in English Honors II was changed to a C.

107. ■■■ scored a five in reading and a five in mathematics on the FCAT administered in Spring 2005.

108. During the fourth quarter of the 2004-2005 SY, tenth grade, ■■■ received a B-minus in French II, a C-minus in AP World History, a D in Pre-calculus, an F in English Honors II, and another F in Chemistry I Honors.

109. ■■■'s tenth grade, 2004-2005 SY averages were one B, four Cs, and three Ds.

110. According to Dr. Tomaski, in June 2005, Petitioner



was having social problems again.

111. At the start of the 2005-2006 SY, ■■■ met with ■■■'s teachers and other school personnel. ■■■ was explicit this time that ■■■ wanted more communication concerning ■■■'s homework assignments.

112. Much of ■■■'s continuing frustration is that ■■■ did not know that ■■■ was doing so poorly until too late in the 2004-2005 SY for ■■■ to get ■■■ the "safety net" of another tutor and because "grade recovery" is only available for one grade per period.

113. During the current 2005-2006 SY, ■■■ is being required by ■■■ parents to raise ■■■ grades in many or all of last year's classes (tenth grade) via completing on-line computer exercises (virtual school), while simultaneously keeping up with ■■■ current daily grade-level (eleventh grade) classwork and homework. As of the date of hearing, ■■■ was averaging 98 or better in ■■■ on-line courses, as well as doing well in ■■■ regular eleventh grade classes (see Findings of Fact 115, and 132-133), but the grind leaves ■■■ very little time to do anything except study. (See Finding of Fact 9.)

114. ■■■ conceded that the current constant strain of making up prior class work for grades, plus ■■■ not permitting ■■■ to continue in the two activities ■■■ has actually participated in and enjoyed in the past: a church youth group

and Boy Scouts, may contribute to [REDACTED] current stress levels. However, [REDACTED] feels it is necessary that [REDACTED] devote [REDACTED] time to the several "catch-up" methods available for improving [REDACTED] past grades of record in addition to doing [REDACTED] current homework.

115. [REDACTED] testified that [REDACTED] is getting all A's in [REDACTED] virtual classroom classes, because [REDACTED] gets immediate notices from the virtual classroom if [REDACTED] fails to timely complete a lesson. However, it is also possible that [REDACTED] does better in a virtual classroom simply because the virtual classroom classes are computer, instead of live, classes; because they are more focused than regular classes; or because [REDACTED] is repeating work with which [REDACTED] is already familiar.

116. Petitioner's attorney made a formal request for a due process hearing to challenge the District's determination that [REDACTED] was not eligible for services under Section 504.

117. Petitioner also submitted a written grievance to the District, dated September 16, 2005, stating as follows:

[REDACTED] has been diagnosed with ADHD and certain co-morbidities. [REDACTED] and [REDACTED] parents requested during the 2004-2005 school year that [REDACTED] receive certain accommodations for [REDACTED] condition. [REDACTED] and [REDACTED] family have requested accommodations in the form of notice of assignments, specific communications to ensure that [REDACTED] completes [REDACTED] assignments on time, and progress reports to assist them in ensuring that [REDACTED] completes [REDACTED] assignments on time, and progress reports to assist them in ensuring that [REDACTED]'s work is completed.

These accommodations were denied in the 2004-2005 school year and as a result [REDACTED]'s grades dropped significantly. [REDACTED]'s family has again requested that the school provide services and had been diligent in requesting services from the school. However, the school has refused to reply to the parent's [sic.] request for discussion and accommodation.

118. The grievance sought "implementation of reasonable accommodations," with no further specificity of what the parents wanted the teachers or the District to do, and requested "compensatory education."

119. At the hearing herein, [REDACTED] acknowledged that to the date of the 2006 hearing(s), the family had incurred no expenses for compensatory education.

120. Also in the fall of 2005, [REDACTED]'s father requested, and the District initiated an evaluation to determine whether [REDACTED] was eligible to receive services through ESE.

121. As a part of the ESE process, District psychologist Amy Winters conducted an evaluation of [REDACTED]. Ms. Winters testified as an expert in psychological assessment in the evaluation of children in the school setting. The results of her evaluation are summarized in two reports, the first processed on November 3, 2005, and the second processed on December 2, 2005. Ms. Winters reviewed the data collected by Mr. Hughes during the 2004-2005 SY. Among other things, Ms. Winter asked [REDACTED] and several of [REDACTED]'s teachers to complete

evaluation tools, including new productivity scales, the Behavior Assessment System for Children, Second Edition (BASC-2), the Gilliam Asperger's Disorder Scale (GADS) and the Conners' ADHD/DSM-IV Scales (CADS). The results of these instruments and other data collected by Ms. Winters were consistent with those of Mr. Hughes. Ms. Winters' assessment caused her to conclude that [REDACTED] was having borderline to significant attentional difficulties in some of his classes. However, she also determined that those difficulties did not meet the criteria for clinical significance. Even though there is a remote financial benefit for the District for each child Ms. Winters places in ESE, she concluded that [REDACTED] was not, at that time, either "at risk" or demonstrating substantial limitation in the classroom setting so as to render him eligible for ESE.

122. Ms. Winters' testimony as a whole shows that her ESE assessment was performed with greater formality than the Section 504 assessment had been; that it had garnered written input from [REDACTED], like a rating scale would have; and that her ESE assessment had thoroughly assessed any learning problems with ADHD, dysthemia, or Asperger's traits that Mr. Hughes' assessment might have missed.

123. Dr. Sims-Stambaugh then reviewed Ms. Winters' reports evaluating [REDACTED] to determine if there were significant

indications of attention problems in the classroom. She saw nothing in Ms. Winters' evaluation that demonstrated significant limitation in the classroom setting, and her conclusions did not differ from those of Mr. Hughes and Ms. Winters.

124. Petitioner's Proposed Recommended Order phrases the parental demands slightly differently (see Conclusions of Law), but as of the date(s) of hearing herein, the thrust of ■■■'s testimony was that she wanted ■■■ to carry a coursework planner to each class and leave it open on ■■■ desk; to require that each of ■■■'s teachers daily write, or determine that ■■■ has written, in this planner, what assignments are due to be turned in on the respective days they are required to be turned in; and to require that each teacher provide in the planner a complete, detailed explanation of how each assignment may be broken down into manageable portions (■■■ calls them "chunks"), so that ■■■ can plan and focus on getting the assignments completed correctly and in a timely manner. ■■■ also wants each teacher to daily check ■■■'s planner for parental initials beside each listed assignment, on the day the specified work or project is required to be submitted. This proposed process of checking parental initials, by every teacher, is intended to promote two additional activities: (1) The teacher, alerted by parental initials that the homework or other assignment written in the planner has been completed, will then prompt ■■■ to bring the

completed material from [REDACTED] backpack or from [REDACTED] locker and put the assignment into the respective teacher's hands or teacher's "in-basket" on time, and (2) The teacher will alert [REDACTED] when [REDACTED] has failed to turn in an assignment [REDACTED] has shown as completed, so that [REDACTED] can prompt [REDACTED] to complete that assignment, and/or find it, and/or turn it in the following day.

125. [REDACTED] also wants one teacher to check [REDACTED]'s backpack at the end of each school day to be sure the planner and everything [REDACTED] needs for completing each homework assignment is in the backpack when [REDACTED] leaves the school.

126. The evidence as a whole provides the sense that many of the educators who testified assumed that learning to figure out how to approach assignments (by breaking them into "chunks," or otherwise) was part of what is expected of a high school student taking advanced or accelerated classes. [REDACTED] acknowledged that middle school teachers had systematized projects for [REDACTED] but that she had expected a distinction between high school work and middle school work.

127. No educator was asked at hearing about the feasibility of one teacher holding [REDACTED] after school each day until that teacher had compared the contents of [REDACTED]'s backpack with every other teacher's assignment written in the planner.

128. The tenth grade teachers who testified agreed that after the 504 request was turned down, [REDACTED] could have achieved

the same effect as she now expects from the planner if she had only e-mailed each teacher each day so that each teacher could e-mail back to her what assignments would be due the next day or within a three-day period. ■ would be satisfied if each teacher initiated an e-mail to her each day, but related that, due to her employment commitments, e-mail situation, and travel commitments, she cannot initiate contact with the teachers each day. She wants the teachers to initiate contact with her.

129. Some teachers were asked about whether the planner, itself, could be utilized as ■ requested. One teacher, Ms. Philpot (2004-2005 SY), said that when asked to use a planner that way in the past for other students she had done it, and Ms. Devoe (2005-2006 SY), said she has done it in eleventh grade for ■ (See Finding of Fact 138.)

130. Other teachers confirmed that the planner could be utilized as ■ requested, but it was clear that each teacher already sends home frequent syllabuses, other written communications, and/or e-mails, and that all of these means of parent-teacher communication, including initialing or putting notes in a cumulative planner, are available to every child in the District, whether impaired or unimpaired, without discrimination.

131. ■'s testimony and Petitioner's Proposed Recommended Order acknowledge that adequate communication is currently being

applied to Petitioner in his eleventh grade, 2005-2006 SY classes. (See Findings of Fact 129, 134, and 137-139).

132. During the first quarter of ■■■ eleventh grade year, the 2005-2006SY, a period which encompassed approximately August through October 2005, ■■■ received an A in Computer Applications I, an A in AP Statistics, and an A in Physics I Honors. ■■■ received a B-minus in Advanced Placement American History, a B-minus in AP English Language Composition, and a C- minus in AP Calculus-AB.

133. During the second quarter of the 2005-2006 SY, a period of approximately November 2005, to just before the January 23, 2006, hearing herein, ■■■ received an A in Computer Applications II, an A in Physics I Honors, a B in Advanced Placement Statistics, a C plus in AP American History, a C in AP English Language Composition, and a C in AP Calculus AB.

134. Petitioner's Proposed Recommended Order contends that the reason Petitioner is doing "so much better" in the 2005-2006 SY is due to the added use of e-mails and teachers writing in the planner as ■■■ has requested. (See Findings of Fact 137-139.)

135. The 2005-2006 SY teachers confirm that what they are doing for Petitioner is just what they do for every student, or at least for every student who requests it; that their actions do not represent any special "accommodation" of Petitioner; that



they are feasible processes; and that they have agreed to continue them because they are available to all students.

136. Therefore, it is found that all of the accommodations that ■■■ seeks, with the exception of requiring an individual teacher to oversee ■■■'s backpack at the end of each day, are feasible for the District.

137. James Otis, ■■■'s eleventh grade Honors Physics teacher, described ■■■ as working at a high level; exceptional when working in groups; inclined not to pay attention if ■■■ understood (or thought ■■■ understood) the material; the type of student who could read the chapter and understand what was going on; eager to try the challenge of building an airplane without the instructions; and able to solve problems with Mr. Otis's computer that the District's IT department could not. Mr. Otis often wrote items on the board that were not contained in the syllabus and found that ■■■ had no problem knowing the material. Mr. Otis e-mailed ■■■ regularly but only one e-mail gave her notice of an upcoming assignment. All his other e-mails simply notified her that ■■■ was doing excellent work.

138. Ms. Devoe, ■■■'s eleventh grade AP Physics teacher, characterized ■■■ as a very sharp student. She had signed ■■■ planner on a regular basis at the beginning of the SY to ensure that ■■■ had written the homework assignment down, but had done it only once or twice in the spring semester because ■■■ was

doing [REDACTED] work. She had not had any communications with [REDACTED] lately, but [REDACTED] got an A in the class and had turned in all [REDACTED] homework assignments.

139. Apparently, Ms. Robertson, [REDACTED]'s eleventh grade AP English teacher attempted many communications with [REDACTED], as did [REDACTED] with her, but the testimony is irreconcilable, and the attempted communications appear to have been like ships that pass in the night. [REDACTED] believed that in December 2005, they were communicating via [REDACTED]'s student planner; "not so," said Ms. Robertson. Ms. Robertson testified that she sent home a syllabus each month; [REDACTED] never saw one. Despite these contrary perceptions of mother and teacher, [REDACTED] still correctly completed and turned in [REDACTED] homework. Ms. Robertson thought [REDACTED] had matured during the year.

140. No teacher who testified volunteered ever observing [REDACTED] evidencing tics, eye rolling, inappropriate throat clearing, or finger or object sniffing. None commented on any personal hygiene problems [REDACTED] may have. Some thought [REDACTED] had some societal problems like all teenagers, but overall, [REDACTED] seemed to have a few friends and got along all right with classmates on projects.

141. Dr. Tomaski opined that in January 2006, [REDACTED] was doing "very well" and that many of [REDACTED] traits were "better than they were. [REDACTED] looks at me much more than [REDACTED] used to. And if

we treat ■■■ dysthemia effectively those symptoms go down too.”

142. There is expert opinion of record that dysthemia comes and goes with life events and stress; that ADHD symptoms may get less troublesome with adulthood; and that Asperger’s traits require minute-by-minute attention. There also is expert opinion of record that, although with ADHD, attention may wax and wane within shorter periods, like a single class period or an evening of homework with ■■■, ADHD is not a cyclical condition spreading over a large period of time, like a grading period.

143. It seems pretty obvious from the entire history of ■■■’s high school grade pattern up to the 2006 hearing(s) herein that ■■■ is, in layman’s terms, “good” in most math, computer science, and physics courses; “not as good” at calculus; and simply has to struggle in English and literature courses. It also does not take specific education credentials to see from the evidence as a whole that in the early part of each SY, when review is the major thrust of each course, ■■■ does better than he does after the winter holidays, when almost all new material is being presented in every course. ■■■’s grade pattern is not an uncommon high school pattern for any student, with or without attention deficit challenges.

#### CONCLUSIONS OF LAW

144. DOAH has jurisdiction of this proceeding solely by

virtue of a contract between Respondent School Board of Duval County and DOAH, pursuant to Section 120.65, Florida Statutes.

145. The legal issues to be determined herein are set out under the "Statement of the Issues" supra. The specific relief that Petitioner seeks (for which he also seeks attorney's fees and costs as discussed infra) is that the Respondent School Board be required to:

"[F]ormalize a 504 plan which includes the following services and accommodations: prompt, frequent, direct communication between \*\*\*'s teachers and \*\*\* parents that ensure[s] the parents are informed as to specific assignments and specific expectations for \*\*\*'s performance, including but not limited to the following:

(a) a written daily planner upon which all out-of class assignments are written legibly and reasonably in advance of the time that they are due, and, unless it is otherwise obvious, sufficient instructions to inform \*\*\*'s parents as to what the assignment consists of;

(b) a teacher must directly assisting [sic] \*\*\* at the end of the school day to ensure that \*\*\* has in \*\*\* backpack all of the materials \*\*\* needs to complete the day's homework assignments;

(c) \*\*\*'s teachers must assist \*\*\* in breaking down extended assignments (those that take more than 3 days to complete) into smaller chunks, and must supervise \*\*\* in regard to these assignments to ensure that \*\*\* is making sufficient progress toward the final product;

(d) \*\*\*'s teachers must contact \*\*\* parents promptly if the above accommodations seem to

be ineffective; and

(e) ■■■'s teachers must provide written progress reports to the parents every two weeks and require that the progress reports be signed and returned to the teacher the following day. If the progress reports are not returned on time, the teachers must promptly telephone or e-mail the parents to that effect.

146. Petitioner has not requested or proposed any private alternative educational options. Therefore, such options will not be considered as an option or remedy in this Recommended Order.

147. Petitioner has presented no evidence of any monetary damages. Therefore, no monetary damages will be considered in this Recommended Order.

148. Petitioner's attorney timely moved for fees and costs. Due to resolution of this controversy in favor of the Respondent School District, it is not necessary to address fees and costs. In the event that the School Board does not enter a final order in line with the findings of fact, conclusions of law and recommendation herein, the Final Order should remand the case to the undersigned for determination of entitlement and, if appropriate, the amount of attorney's fees and costs.

149. Petitioner alleges that ■■■ is eligible to receive services under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

150. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, provides:

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . .

151. For purposes of Section 504, the term "individual with a disability" is defined to include any person who "has a physical or mental impairment which substantially limits one or more or such person's major life activities." 29 U.S.C § 705.

152. To determine whether an individual has a disability for purposes of Section 504, one should apply the three-step inquiry set forth in Bragdon v. Abbott, 524 U.S. 624, 631 (1998) and Toyota Motor Mfg. v. Williams, 534 U.S. 184, 194-195 (2002). See also Weixel v. Bd. Of Education of the City of New York, 287 F.3d 138, 147 (2nd Cir. 2002). First, a claimant must prove that he has a physical or mental impairment. Toyota Motor Mfg. v. Williams, 534 U.S. at 194. Second, the claimant must demonstrate that the impairment limits a major life activity. 534 U.S. at 195. Third, a claimant must show that the limitation on the major life activity is substantial. Id. Only if a claimant proves these three elements can he or she demonstrate Section 504 eligibility.

153. The District basically accepted that [REDACTED] meets the

threshold of having an impairment, but Petitioner also presented evidence that ■■■ has an impairment (ADHD, primarily inattentive type, together with dysthemia and Asperger's features), which inhibits ■■■ ability to complete school assignments. Petitioner is seeking a Section 504 plan that requires specific types of communication among ■■■, teachers, and parents.

154. From a legal standpoint, Petitioner is contending that ■■■ is substantially limited in the major life activity of learning. See 34 C.F.R. § 104.3(j)(2)(ii) ("Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.") The relevant inquiry then, is to consider whether the major life activity of learning is substantially limited by ■■■'s impairment.

155. Although the Rehabilitation Act does not define the term "substantially limits," this term is used in the Americans With Disabilities Act, 42 U.S.C. § 12101, et seq. (ADA), and is defined in the E.E.O.C. regulations interpreting the ADA, 29 C.F.R. § 1620.2(j). The pertinent portion of 29 C.F.R. § 1630.2(j) reads:

- (1) The term "substantially limits" means:
  - (I) Unable to perform a major life activity that the average person in the general population can perform; or
  - (ii) Significantly restricted as to the condition, manner or duration under which an

individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity. (emphasis added.)

156. Under this definition, courts compare an individual's impaired functioning with the functioning of the average person. Costello v. Mitchell Public School District 79, 266 F.3d 961, 923-924 (8th Cir. 2001) (concluding that student's impairments were only "moderately limiting," when compared to the general population); Wong v. Regents of the Univ. of California, 410 F.3d 1052, 1064-1067 (9th Cir. 2005) (affirming judgment that medical student failed to demonstrate substantial limitation in learning); Betts v. Rector, 191 F.3d 447 (4th Cir. 1999) ("When the major life activity at issue is learning, therefore, an individual is not disabled unless his ability to learn is significantly restricted. An individual's ability to learn is significantly restricted if it is limited in comparison to most people."); Price v. Nat'l Board of Medical Examiners, 966 F. Supp. 419, 426-428 (S.D. W.V. 1997) (concluding that, where there was "a complete lack of evidence that plaintiffs cannot learn at least as well as the average person," the students did not "suffer from an impairment which substantially limits the life activity of learning in comparison with most people").

157. Courts determining whether a child is substantially



limited in learning for the purposes of Section 504 have applied the definition in 29 C.F.R. § 1630.2(j)(1), and compared a child's learning ability to that of the average student. T.J.W. v. Dothan, 26 IDELR 999, 26 LRP 4350 (M.D. Ala. 1997). The student must be compared to the average student population, and not to his "hyper-achieving" peers in an intensive academic program. Montgomery County Public Schools, Maryland State Educational Agency, 40 IDELR 24 (September 23, 2003). For 504 purposes, the standard is not whether a student's potential is being maximized, but whether ■■■ is substantially limited in the major life activity of learning. Id. As the Office of Civil Rights has concluded, "[b]y definition, a person who is succeeding in regular education does not have a disability which substantially limits the ability to learn." Saginaw City (MI) School District, 352 IDELR 413 (OCR Feb. 23, 1987). Further, the "Rehabilitation Act does not guarantee an individual the exact education experience that he may desire, just a fair one." Knapp v. Northwestern University, 101 F.3d 473, 482 (7th Cir. 1997)

158. In addition, a person is not disabled as defined in Section 504, if mitigating measures, such as medication, prevent the impairment from substantially limiting any life activity. Block v. Rockford Public School District, 2002 WL 31856719, \*2 (N.D. Ill. Dec. 20, 2002).

159. For the reasons set out in the foregoing Findings of Fact, it is concluded that the 504 assessment herein was adequate under the circumstances. In no sense was it a gross departure from acceptable educational standards.

160. Mr. Hughes and Dr. Sims-Stambaugh concluded that ██████ was not substantially limited in learning based upon their review of information from a variety of sources. ██████'s FCAT scores were consistently high. ██████ was obtaining average or better grades in a competitive environment, and neither the rating scales nor the productivity scales indicated clinically significant difficulties in more than one teacher's classroom. Mr. Hughes and Dr. Sims-Stambaugh's conclusions were reaffirmed by Ms. Winters' more formal ESE evaluations conducted in the Fall of 2005.

161. Even if the District's 504 assessment conducted from November 2004 to January 2005, had not been sufficient, the totality of the evidence in the instant case clearly shows that ██████ does not currently meet the legal standards set forth supra. If anything, the evidence herein shows that ██████ had one bad academic year but is currently doing average or better-than-average work in an accelerated class. Doing average or better-than-average work in an accelerated class represents even higher functioning than merely doing average work in an average class, which is the benchmark for 504 eligibility.

162. Petitioner has failed to present sufficient evidence to demonstrate that ■■■ is, at this time, substantially limited in the area of learning. Therefore, ■■■ is not entitled to a 504 plan.

163. Dr. Tomaski opined that ■■■'s disabilities could "substantially limit" ■■■ ability to engage in self-care, but the District is not being asked to assist ■■■ in engaging in self-care. For example, Petitioner is not asking someone to make ■■■ brush ■■■ teeth every day after lunch. Dr. Tomaski opined that ■■■ does not read people well, yet ■■■ is not asking for a modified curriculum that would release ■■■ from the obligation to do group projects. Dr. Tomaski opined that ■■■ might be missing information in the classroom because ■■■ is not sitting in the front row or looking at the teacher, but ■■■'s biggest problem seems to be knowing the answers, or thinking ■■■ knows the answers, and blurting them out, without raising ■■■ hand.

164. It is possible that what Dr. Tomaski witnesses in a clinical setting when ■■■ sees ■■■ approximately once a month is different than what ■■■'s teachers see in the classroom setting on a daily basis. Similarly, several of the numerous odd behaviors, including throat clearing and smelling ■■■ fingers, that concerned ■■■ were not observed in the school setting.

165. Petitioner put great emphasis and reliance upon

Dr. Bernstein's April 27, 2004, evaluation, but for the reasons stated in the findings of fact, that report is of little significance. Dr. Bernstein's testimony does not support a finding that ■■■ was substantially limited in learning. Her primary conclusion seemed to be that there was sufficient data in the District's assessment to support a provisional diagnosis of ADHD, but that is not the pertinent inquiry, and Dr. Bernstein has never made a finding that ■■■ was substantially limited in learning.

166. It is possible that Dr. Tomaski's finding the right balance of medications led to ■■■'s current school success after ■■■ unhappy tenth grade year. Yet, "[a] person who experiences no substantial limitation in any major life activity (i.e. learning) when using a mitigating measure does not meet the definition of a person with a disability under Section 504." See the 2005 District 504 Manual and Block v. Rockford Public School District, supra. In other words, if the condition that inhibits learning can be medically controlled so that learning is not substantially limited, there is no 504 eligibility.

167. The IDEA and ESE assistance constitute enabling legislation and affirmative action. The ADA and Section 504 plans only seek to prevent discrimination against the disabled student. Manecke v. School Board of Pinellas County, Fla., 762 F.2d 912 (11th Cir. 1985). Cf. Doe v. Alabama State Dept. of

Educ., 915 F.2d 651 (11th Cir. 1990). The District here has correctly determined ■■■ is not disabled in learning, because ■■■ is not substantially limited in learning.

168. No student is entitled, under Section 504, to have a school district "ensure" that he is making sufficient progress toward a final product, including superior grades. At most, if a student is found eligible for ADA accommodations, that student is only entitled to feasible accommodations, so that the student, himself, can make progress toward a reasonable educational goal. What the District has provided to ■■■ thus far amounts to the reasonable assistance available to every student. With that assistance, ■■■ currently is making progress in ■■■ eleventh grade classes while simultaneously re-taking and doing well in some of ■■■ tenth grade classes at night. The parents, on the other hand, seem to be seeking a guarantee that ■■■ will get high grades at all times in all subjects.

169. ■■■ has intelligent, caring, parents who have striven to get him every imaginable type of help so that ■■■ can excel in his advanced and accelerated classes. They have demonstrated love and persistence that any child should applaud. That said, it has not been proven that ■■■ is eligible for a 504 plan at this time.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED: that the School Board of Duval County deny Petitioner's request for a Section 504 classification and plan.

DONE AND ENTERED this 29th day of June, 2006, in Tallahassee, Leon County, Florida.

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Filed with the Clerk of the  
Division of Administrative Hearings  
this 29th day of June, 2006.

ENDNOTES

<sup>1/</sup> The report does suggest the parents maintain appropriate contingencies for study and successful completion of homework.

<sup>2/</sup> Petitioner asserts that, having adopted a Barkley form, the District could not depart therefrom, because any other form did not meet the 34 CFR Section 104.35(b) requirements that "tests and other evaluation materials have been validated for the specific purpose for which they have been used." Likewise, Petitioner contends that any other form did not conform to Dr. Barkley's requirements and therefore, the form and assessment are invalid.

<sup>3/</sup> Petitioner submits that ■■■'s rating scales could have tipped all the teachers' borderline concerns into the "significant" category, but since ■■■ has never observed ■■■ in the classroom,

what over-all Section 504 significance could reasonably be attached to her observations on the rating scales of only ■■■'s behavior at home or in the community is speculative.

<sup>4/</sup> Contrary to Petitioner's assertion in ■■■ Proposed Recommended Order, the undersigned does not infer from Dr. Sims-Stambaugh's early participation in this evaluation and the ambiguous language employed in the District 504 Manual, that there was a dispute among the professionals evaluating ■■■. Rather, Dr. Sims-Stambaugh's participation represents collaboration of a colleague with Mr. Hughes, or a fail-safe procedure Mr. Hughes added to his assessment, so as to ensure ■■■'s best interests.

<sup>5/</sup> The legal test for Section 504 eligibility is the one expressed in the conclusions of law. However, it appears that the psychologists and counselors herein also believe that any student is entitled to a 504 assessment, including ■■■ in ■■■ high-achiever classes; that they accept that learning is a major life activity; and that ■■■'s ADHD, dysthemia, and Asperger traits constitute one or more "disabilities" as recognized by law and by the educational community. Mr. Hughes testified that the child being assessed is accepted as having a clinical disability, as compared to the "hypothetical average student" in a regular classroom (TR-221), but the child being assessed is then measured for a learning limitation.

As a practical matter, average students simply are not assigned to honors classes, so average students are not measured against honors class grade averages and honors students are not measured against average class grade averages. However, if an honors student is doing average work in ■■■ honors classes, Mr. Hughes considers it probable that there is no substantial limitation on that honor student's ability to learn. (TR-235) ■■■ was performing at an overall average level among other high achievers, not just performing at an average level among average students. Therefore, ■■■'s ability to learn was measured against ■■■ high-functioning intellectual peers across every category of actual course performance (their follow-through), instead of merely measuring whether ■■■ could do average work in an average class. Not only was ■■■ performing above the hypothetical average child in an average classroom; ■■■ also was performing at the average level or above-average level in ■■■ high achiever classroom.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.