

FINDINGS OF FACT

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██████████ is a ██████████ and a ████████ year old student in the Cherokee County School System who is eligible for special education services under the Individuals with Disabilities Education Act (IDEA). ██████████ was diagnosed at age 5 with an inherited neuromuscular disorder which results in mild weakness in his face, upper and lower extremities. ██████████ is able to participate in school activities, including P.E., but is allowed rests breaks throughout the day and during activities as necessary. (P-23).

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██████████'s school records indicate that his problems go back to school entrance. (Testimony of Barnes, Exh. C). He was described as capable but unproductive early on. He worked at a slow rate of speed and was very distractable. ██████████ exhibited a lack of interest in school and often refused to do his work during kindergarten and first grade. He was referred to the school counselor during kindergarten in 1994 for social and academic problems. By the time ██████████ was in the second grade, his records indicated that he had repeated kindergarten, attended school irregularly, and had several school transfers, having been enrolled at ██████████

which the undersigned heard by telephone conference with Respondent and counsel for Petitioner on Monday, May 21, 2001. Respondent's primary objection was that the exhibits were hearsay, since he contended, in essence, that a sufficient foundation had not been established for their admission. The undersigned permitted Petitioner to submit by telephone conference on May 22, 2001 the testimony of the special education director for Petitioner, who is the custodian of all the special education files and records of students receiving special education in the Cherokee County School District, including those documents tendered as evidence by Petitioner. Following that testimony, Exhibits P-1 through P-101, except for Exhibits P-2 and P-99, which were withdrawn by Petitioner. Respondent did not submit any exhibits or any other evidence for consideration by the ALJ.

Elementary, ██████████ Elementary, and ██████████ Elementary, all in Cherokee County. (P-8).

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██████████ was initially referred to ██████████ Elementary School's Student Support Team (SST) in the fall of 1996 by his second grade classroom teacher due to his significant academic and behavior problems. (P-1, 3, 4, 8). ██████████'s academic skills had declined since the beginning of the year, especially in the area of reading. Per the school counselor's report, "██████████ was not interested in school and found it 'hard'. ██████████ stated that he did not know how to do his work and that he did not have any friends. ██████████ presented as a loner in the classroom and isolated himself from group activities." (P-8).

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██████████ was referred for testing to determine his eligibility for special education services in March, 1997 when he was in the second grade because of difficulty in reading and writing, lack of initiative, and temper tantrums which interfered with his learning. (P-5). Results of testing performed in April, 1997, indicated that ██████████ had overall average to low average ability and had a severe discrepancy between ability and achievement in the area of written language. (P-8). An educational team determined that ██████████ was eligible to receive services under the category of specific learning disability (SLD) in the area of written expression. (Testimony of Barnes, Exh. C; P-9).

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A committee met on May 13, 1997 to review with Mr. ██████████ the results of ██████████'s evaluation and to discuss appropriate placement for him. (P-13). The committee recommended that ██████████ be assigned to a special education resource classroom for one segment daily for assistance in written expression. The committee developed a proposed Individualized Education

Plan (IEP) for [REDACTED] with Mr. [REDACTED]'s input during the meeting. The IEP included objectives for [REDACTED] to receive help in the areas of spelling, word attack skills, and basic sentence construction and grammar.(P-14).

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Mr. [REDACTED] did not give permission for [REDACTED] to receive SLD services. (Testimony of Barnes, Exh. C; P-12).

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[REDACTED]'s avoidance of school work graduated into threats to harm others in school during the fourth and fifth grades and teachers expressed concern over [REDACTED]'s attachment and love for guns. (Testimony of Barnes, Exh. C; P-24, 28). His grades also plummeted, failing the majority of his classes in the fourth and fifth grades. (P-87). Several parent conferences were held to discuss [REDACTED]'s problems and to devise strategies to help him. Mr. [REDACTED] still refused special education services but agreed to work with outside professionals, arranging for [REDACTED] to see a private psychologist in Canton once a week during the 1999-2000 school year when [REDACTED] was in the fifth grade. (P-26). There was some question as to whether [REDACTED] had a sleep disorder because he slept so much at school. (Testimony of Barnes, Exh. C).

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[REDACTED]'s difficulties during the 1999-2000 school year when he was in the fifth grade included gun posturing, verbal threats, threatening to bring a real gun to school and use it, fighting on the bus, blurting out comments (often profanity) in class, rolling on the floor and general disruptions of the school routine for himself and his classmates. (Testimony of Barnes, Exh. C; P-28).

The school system utilized numerous alternative strategies to assist [REDACTED] in improving his academic, social, and behavioral functioning. Such strategies included: teaching work habits, one-on-one assistance when possible, modified tests, using positive reinforcement, computer use as a reward, longer time to complete assignments, providing peer assistance when possible, parent conferences, repetition, and referral to the school counselor. (Testimony of Barnes, Exh. C).

[REDACTED]'s behavior continued to deteriorate to the point where more formal discipline action was required. He was sent to the office for administrative discipline offenses and was seen by the campus police. (P-86). He was suspended from the bus and from school. No formal charges were filed through juvenile court at that time, but he did have incident reports on file at the campus police office. After minimal improvement was seen as a result of interventions, the IEP crisis placement committee members concluded that a formal referral to special education was warranted. (Testimony of Barnes, Exh. C).

[REDACTED] was again referred in November 1999 to special education by his fifth grade teacher after a crisis situation at his school involving escalating, uncooperative and violent behaviors. (P-27, 28, 29, 30, 31). [REDACTED]'s behaviors involved both teachers and other students and included threats of hurting others, excessive use of profanity, academic failure, a lack of work production, refusal to do work at times, sleeping in class on a regular basis, socialization problems, bus problems, withdrawal, isolation, and an appearance of unhappiness. [REDACTED] was described as angry and unmotivated. He appeared very pale, tired and sleepy. He often went to

the office to call someone to get him and attendance became a slight problem. (Testimony of Barnes, Exh. C; P-32).

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Justin's father agreed for him to be placed in special education on a crisis basis in November 1999 for a period of no more than 20 school days pending a complete evaluation and determination of service eligibility. (P-27). Justin was referred for evaluation of hearing, vision, motoric, academic, cognitive, emotional and behavioral problems. Mr. [redacted] requested that Justin's private psychologist, Dr. [redacted], conduct the personality/projective parts of the social/emotional evaluation. (P-30). Dr. [redacted] concluded that Justin was experiencing a serious mood disorder that was either Major Depression or Bipolar Disorder, in addition to strong oppositional tendencies and adjustment problems to his parents' divorce and family situation. (P-35). Dr. [redacted] recommended that school personnel seriously consider Justin for eligibility for special education services as a student with emotionally disturbed/behavior disorder. Dr. [redacted]' report further stated that he had consulted with Mr. [redacted] who had agreed to consult with a child psychiatrist to help determine if Justin would benefit from medication. (Testimony of Barnes, Exh. C; P-33, 35). Justin was referred by school personnel on November 18, 1999 to the [redacted] Center to determine if he was eligible for their program. (P-34).

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Mr. [redacted] agreed on December 7, 1999 for Justin to receive special education services at [redacted] Elementary School. (P-43). After Justin's special education placement was finalized and Justin became eligible for both learning disability (LD) and emotional/behavioral disorders (EBD) support, (P-38, 39), his performance improved for a brief period of time as he worked on

the goals of his first IEP and behavior intervention plan. His IEP contained goals for improvement in the areas of math, reading comprehension, written expression, and behavior. (P-41, 45). "[REDACTED] seemed to like the small group and more individual attention for part of the day. He enjoyed being rewarded with computer time on the Internet. He completed some work in a small group if individually guided by a teacher or paraprofessional. He continued to be in trouble several times for minor offenses but seemed to have curbed the threats of aggression and extreme resistance at that time." (Testimony of Barnes, Exh. C).

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"By January of 2000, [REDACTED] had begun to revert to some of his old behavior patterns. He gradually became more passively aggressive and began to sleep through many of his regular education, morning classes. (P-49, 51, 53, 55, 57, 59, 61). He became more and more withdrawn and resisted learning in both regular and special education classes despite positive incentives, increased structure, parent communication, resource special education classes, and disciplinary actions." (Testimony of Barnes, Exh. C).

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Dr. Robert Montgomery, a consulting clinical psychologist who provides contractual services to the school system as needed, was contacted in January 2000 and asked to provide an analysis of [REDACTED]'s behavior to help the school system devise other ways to assist [REDACTED]. Dr. Montgomery observed [REDACTED], spoke to his teachers, and provided further advice on techniques to use with [REDACTED] to help him succeed. (Testimony of Barnes, Exh. C). Dr. Montgomery concluded with a recommendation that [REDACTED] be served through a self-contained EBD classroom or through the [REDACTED] Center. (Testimony of Montgomery, Exh. A; P-66).

During the year, [REDACTED] began to make more self-defeating statements and self-destructive actions considered evidence of possible suicidal thoughts. (Testimony of Barnes, Exh. C).

At the beginning of the 2000-2001 school year, [REDACTED]'s behavior continued to deteriorate as a sixth grader at [REDACTED] Elementary School. There were numerous referrals to the office. (Exh. D., P-80). Behavioral interventions for threats of aggression included removal from the regular classroom, referral to office or campus police, positive awards, and positive rewards. To address [REDACTED]'s lack of independent work habits, behavior interventions included giving specific directions, encouraging [REDACTED] to ask for help when needed, and reinforcement for staying awake. It soon became evident that [REDACTED]'s behavior could not be appropriately monitored at [REDACTED] Elementary School. According to Ms. Thurman, "[W]e were in constant fear that [REDACTED] would harm himself or others. We also feared that [REDACTED] would flee from school again. I, as [REDACTED]'s main academic teacher, did not feel that [REDACTED]'s academic potential could be met due to his behavior. It became obvious that [REDACTED] needed a more contained placement. His father had repeatedly opposed the idea of placing [REDACTED] in the self-contained EBD classroom." (Testimony of Thurman, Exh.D).

In October 2000, [REDACTED] ran away from school, the police were involved in looking for him, and subsequently Dr. Montgomery met with [REDACTED]'s father to discuss special education service options and safety concerns along with school system personnel. (P-70). Dr. Montgomery testified that he suggested, as he had in his earlier report, that [REDACTED] Elementary School was not equipped to most effectively meet [REDACTED]'s needs. Dr. Montgomery explained to

Mr. [REDACTED] his reasoning and the information he used in arriving at his conclusions, that his earlier recommendations continued at that time to apply to [REDACTED] and he sought Mr. [REDACTED]'s input and comment on his recommendations. At that time, Dr. Montgomery continued to maintain that [REDACTED] would be better served in a self-contained classroom for emotionally and behaviorally disturbed students or at the county's psychoeducational center. (Testimony of Montgomery, Exh.A).

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A decision for a more structured placement was reached by the IEP committee in October, 2000, to which Mr. [REDACTED] did agree. [REDACTED] was moved to [REDACTED] Middle School to be served on a trial basis in a self-contained EBD program. (P-72, 73). [REDACTED] was placed in the seventh grade at [REDACTED] because he repeated kindergarten and would be back with his original same age peers. The school district implemented a trial placement at [REDACTED] to see if [REDACTED] would benefit from the services there with the understanding that a more restrictive placement would be pursued if his problems continued to escalate. (Testimony of Barnes, Exh. C; P-73).

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[REDACTED] was placed at [REDACTED] Middle School in a self-contained class for students with emotional and behavioral disorders on October 30, 2000. [REDACTED]'s behavior initially showed improvement in an environment in which he was supervised 100 percent of the time. (Exh. E). A parapro or a teacher escorted him to P.E., exploratory classes and lunch every day. As with all students in the EBD program, [REDACTED] was placed in regular education classes on a trial basis. During [REDACTED]'s time at [REDACTED], the school attempted to include him in both a life science and a social studies class, but neither placement was successful. [REDACTED]'s placement was extended through February, 2001 due to behavioral problems. [REDACTED]'s disciplinary referrals increased

from January, 2001 resulting in out-of-school and alternative school suspensions. (P-84). [REDACTED] also had been referred to the school police on November 8, 2000 for a report by a paraprofessional that she overheard [REDACTED] tell a classmate he huffed gasoline before he came to school. (P-86)

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[REDACTED] became increasingly defiant to school personnel and abusive to peers, frequently telling either to "fuck off." (Exh. E). [REDACTED]'s conversations revolved around sexual matters and he made sexually inappropriate and vulgar remarks to teachers and classmates. Body odor became a problem because of poor hygiene. According to Ms. Stockman, [REDACTED]'s behaviors had progressed to the point that his "social and emotional issues are so severe that he is interfering with the other students' right to learn. He is not making progress on his IEP goals and is failing all his classes for the fourth marking period. [REDACTED] is supervised 100 percent of the day and is requiring an inordinate amount of staff time and resources." (Testimony of Stockman, Exh. E; P-90).

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Dr. Montgomery continued to be involved with school system personnel to assist them in meeting [REDACTED]'s needs. According to Dr. Montgomery, "Dr. [REDACTED] and Ms. Stockman each requested to meet with me and each had a variety of concerns regarding meeting [REDACTED]'s needs at [REDACTED]. I reviewed by report from May 2000 with Ms. Stockman, addressed her questions, and explained what had been tried at [REDACTED] Elementary School. We discussed which interventions had worked (however briefly) and which had not had any impact on [REDACTED]'s behavior or school performance. Additionally, we discussed how to modify her classroom incentive system to individually tailor it to [REDACTED]. In speaking with both Ms. Stockman and Dr.

[REDACTED], I attempted to make it clear to them that the review of [REDACTED]'s history, observations, and the functional assessment data collected by previous teachers all indicated that [REDACTED]'s two main motivators were to escape from demands and to embarrass his father and/or get him into trouble in an attempt, as [REDACTED] reportedly put it to his counselor at [REDACTED], to force child protective services to place [REDACTED] with his mother. My follow-up visits with Ms. Stockman indicated to me that she had incorporated many of my suggestions into her program for [REDACTED] and that she was using a broad array of interventions in her attempts to keep him a) awake, b) engaged, c) learning, and to d) help him process any underlying emotional disturbances that were contributing to his behavior problems at school." (Testimony of Montgomery, Exh. A).

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An annual review of [REDACTED]'s progress on his IEP goals was held on March 15, 2001 at which time the recommendation was made to place [REDACTED] at [REDACTED] Center. Rationale for the decision was based on [REDACTED]'s lack of progress on his IEP goals, his anger, poor self-concept, and need for a more comprehensive, therapeutic environment. (Testimony of Haisten, Exh. B; P-76, 77, 78).

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[REDACTED] is one of twenty-four programs that comprise the Georgia Psychoeducational Network. Students with severe emotional and behavioral problems qualify for the program. The Georgia State Department of Education funds the program with some federal support monies. According to testimony of Dr. Paul Baker, Coordinator of [REDACTED], "[REDACTED]'s general profile is that of a student who has historically benefitted from placement within models such as [REDACTED]. The nature of this type of delivery model provides an increased opportunity for therapeutic interaction between staff and students.

Alternative approaches to learning and behavioral intervention are built naturally into daily school operations. These options are not typical of regular education programs, even with appropriate modifications.” (Testimony of Baker, Exh. G).

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According to Dr. Montgomery’s testimony, “[W]hile I realize that the psychoeducational centers are more restrictive school environments, the psychoeducational centers also provide a more comprehensive approach to providing treatment to seriously involved students. In my opinion, having worked with several psychoeducational centers in Georgia, the two main advantages of the ██████████ Center is that all the staff, from the principal to the secretaries, are trained in the treatment intervention protocols used to provide support to the emotionally and behaviorally disturbed students and doctoral-level psychologists and a board certified psychiatrist are onsite weekly in order to provide the highest level of non-residential care available in the schools. In this case, ██████’s own private psychologist (Dr. ████████) has routinely provided services at ██████████ which can afford him two distinct advantages over traditional out-patient treatment provision. The psychologist can observe the student in the actual environment and thereby be significantly better informed on the specifics of that student’s issues within the school and, by having become familiar with the specific school setting and personnel, is better equipped to make focused and potentially more effective recommendations to the school’s staff.” (Testimony of Montgomery, Exh. A).

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██████’s level of needed educational care matches that of the level provided through the psychoeducational, separate school model. ██████’s needs are significant and most likely require intensive intervention in order to transform self-defeating behaviors into more pro-social,

productive behaviors. Given [redacted]'s developmental stage, time is of the essence in regard to therapeutic intervention. (Testimony of Baker, Exh. G).

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Mr. [redacted] refused permission for [redacted]'s placement at [redacted]. The school district filed the due process hearing request which gave rise to this proceeding on May 18, 2001 seeking [redacted]'s placement in the [redacted] Center for the 2001-2002 school year.

CONCLUSIONS OF LAW

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The Petitioner bears the burden of proof as to this issue, since it is Petitioner who seeks a more restrictive placement for [redacted]. Petitioner, therefore, must establish by a preponderance of the evidence that the [redacted] placement provides [redacted] with a free, appropriate public education in the least restrictive environment for [redacted]. See, Hall v. Freeman, 700 F.Supp. 1106, 1111-1112 (N.D.Ga. 1985); Tracy T. v. McDaniel, 610 F.Supp. 947 (N.D.Ga. 1985); Burger v. Murray County Sch. Dist., 612 F.Supp. 434 (N.D.Ga. 1984).

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The sole issue raised by the Petitioner and Respondent is one of appropriate placement for [redacted]. There is no contention that Petitioner has committed a procedural violation in developing [redacted]'s proposed IEP and placement at [redacted], and there is no evidence to suggest a violation. Therefore, the task for the ALJ is to determine whether the proposed assignment of [redacted] to the [redacted] Center is the appropriate placement to provide [redacted] a free, appropriate public education (FAPE) in the least restrictive environment.

In Hendrick Hudson District Board of Education v. Rowley, 458 U.S. 176 (1982), the Supreme Court adopted a two-pronged test regarding compliance with IDEA:

First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedure reasonably calculated to enable the child to receive educational benefit? If these requirements are met, the State has complied with the obligation imposed by Congress and the courts can require no more.

Id. at 206-07.

The evidence is without dispute that [REDACTED]'s behaviors are severe, pervasive and disruptive in the schools and classrooms where [REDACTED] has been assigned and is currently enrolled. The undersigned concludes from all the evidence that the Petitioner has established by a preponderance of evidence that [REDACTED] not only has been verbally abusive of other students, his teachers and school administrators, but increasingly has directed vulgarities and profanity toward others during class. [REDACTED] also has slept through many of his classes. In spite of the efforts of [REDACTED]'s teachers and administrators and of his father as well, [REDACTED]'s behaviors are so disruptive and interfere with his and other students' opportunity to learn so that he clearly requires a more restrictive placement with greater intervention and supervision than his current [REDACTED] Middle School placement permits. Petitioner therefore has carried its burden of proof in establishing that [REDACTED]'s current placement is no longer appropriate.

Petitioner also has established by a preponderance of the evidence that [REDACTED] will provide [REDACTED] with the psychiatric and psychological services he must have in order to make educational progress. [REDACTED] also offers [REDACTED] a program that is reasonably calculated

to enable [redacted] to advance academically, socially and emotionally. [redacted] also will provide services to [redacted]'s parent to assist him in managing [redacted]'s behaviors. [redacted] is the least restrictive placement for [redacted] in that the evidence is conclusive that [redacted] has not been successful in less restrictive placements made available to him since he has been a student in the Cherokee County School District.

CONCLUSION

It is the conclusion of this Tribunal that the individualized educational program developed by the Cherokee County School System on March 15, 2001 satisfies all the requirements of the IDEA and is reasonably calculated to enable [redacted] to receive a free appropriate public education in the least restrictive environment. It is further the conclusion of this Tribunal that the Petitioner has carried the burden of proof that [redacted] should be assigned to the [redacted] Center beginning immediately and for the 2001-2002 school year.

This 31st day of May, 2001.


JUDGE MICHAEL M. MALIHI