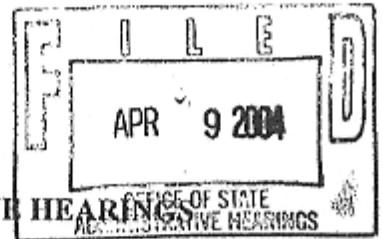


04-0400521



BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS  
STATE OF GEORGIA

FAYETTE COUNTY  
SCHOOL SYSTEM,  
Petitioner,

v.

DOE,

Respondent

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Docket No.: OSAH-DOE-SE-0400521-SWT

FINAL DECISION

I. Introduction

Petitioner initiated a due process hearing request<sup>1</sup> to determine the appropriateness of its educational evaluation in response to Respondent's request for an independent educational evaluation ("IEE").<sup>2</sup> (Pet. T. 4, DT01102). Respondent filed a due process hearing request responding to the School System's request and affirmatively stated a claim that Petitioner was denying ~~DOE~~ a free appropriate public education ("FAPE").<sup>3</sup>

On July 31, 2003, the ALJ issued a prehearing order requiring the parties to exchange, among other things, "a statement of all the legal issues to be pursued by the parties ... at least 5 business days prior to the hearing." The order further stated, "issues not disclosed at least five business days prior to the hearing may be excluded from the hearing." Petitioner filed a statement of legal issues on September 3, 2003.

Respondent filed no statement of legal issues or other document clarifying her issues for hearing or her IEE request that prompted the School System's hearing request. On August 28, 2003, Respondent amended its due process hearing request by deleting its FAPE claims and specifically reasserting a request for an "independent educational evaluation" to be conducted at the Marcus Institute at public expense.

<sup>1</sup> The request was filed on July 10, 2003, and amended on July 11, 2003.

<sup>2</sup> Respondent's June 9, 2003, letter to Petitioner rejected "the FBA and the BIP found in the IEP as inadequate, and, also, the FBA presented at the IEP as inadequate," without specifically identifying the evaluation with which the parent disagreed. The parent also requested an evaluation to be conducted at the Marcus Institute at public expense. (Pet. T. 4, DT01102). Petitioner requested clarification regarding the disputed evaluation; Respondent did not provide this information. Subsequently, Respondent filed its due process claim as indicated.

<sup>3</sup> Respondent filed this request on July 21, 2003. In addition, Respondent requested dismissal of the School System's claim, full reimbursement for all evaluations, and arrangements to provide for an "alternative evaluation and assessment and the development of a FBA/BIP at public expense."

Both parties filed Motions for Summary Determination and responses, as well as Motions Regarding the Burden of Persuasion. An Order on Cross Motions for Summary Determination and Regarding Burden of Persuasion was issued on September 9, 2003. That Order was clarified and amended on September 25, 2003, such that "all matters raised by the parties in their respective motions for summary determination may better be resolved in an evidentiary hearing and are inappropriate for resolution by summary determination ..."

The hearing began on September 10, 2003, and lasted seventeen days, concluding on January 13, 2004.<sup>4</sup> The record closed on January 29, 2004.

Issues for resolution include whether:

- (1) the School System's response to the Respondent's IEE request was timely;
- (2) Dr. B.J. Freeman's evaluation for the School System was appropriate;
- (3) the School System's functional behavioral assessments (FBAs) were "evaluations" under IDEA so as to trigger the parent's right to request an IEE;
- (4) the School System's FBAs, assuming they were evaluations, were appropriate;
- (5) the parent has a right to an IEE at public expense, and if so,
- (6) the Marcus Institute FBA requested by the parent constitutes a change in placement rather than an evaluation.<sup>5</sup>

## II. Findings of Fact

### A. [REDACTED]'s background and pertinent events

1. [REDACTED] is a [REDACTED]-year-old young girl who started receiving special education services from the School System at the age of three, after being identified as significantly developmentally delayed.<sup>6</sup> (Jt. 1 Vol. 1 T. 26, DT00103). [REDACTED] meets the diagnostic criteria for autism. (10-21-03 Tr. 56) (Freeman) At all times relevant to this action, [REDACTED] has been identified as eligible for special education services as a child with disabilities.

2. Some of [REDACTED]'s behaviors may be described as self-injurious.<sup>7</sup> (10-3-03 Tr. 44-45) (Leaf). Since the age of three, [REDACTED] has engaged in intermittent head banging, kicking her heels

<sup>4</sup> During the hearing, Petitioner called Drs. Craig Kennedy, Ronald Leaf, Betty Jo Freeman, Mitchell Taubman and David Rostetter as expert witnesses; Ms. Ramsey, its special education director; Ms. Howard, Ms. Hancock, Kim Pisor, Ms. Bankeris, Ms. Parker, Ms. Soluoga and Ms. Robertson, the classroom teacher. Respondent called Ms. Chaney adversely and then Drs. Robert Babcock, Catherine Trapani and Wayne Fisher, who were admitted as expert witnesses, and Ms. Goode and Drs. T. Kennedy and Leaf were re-called for rebuttal by Petitioner.

<sup>5</sup> Issues, as defined by both parties in their proposed findings of fact and conclusions of law, are noted.

<sup>6</sup> [REDACTED] was born [REDACTED].

<sup>7</sup> Self-injurious behavior ("SIB") can be defined generally as any aggression that is directed towards self.<sup>7</sup> (10-03-03, Tr. 13) (Leaf); (10-20-03, Tr. 115) (Taubman). Using this definition, the SIBs that [REDACTED] was exhibiting in school, as referenced between the points of contact, are "hand to head", "head to floor", "hand to chin", and "hand to thigh." (10-20-03, Tr. 116) (Taubman). [REDACTED] also exhibited some milder forms of those behaviors, such as chin

on the ground, striking her hand to head, bending her fingers back, scratching her body, and rubbing her feet together leaving open sores. (11-24-03, Tr. 183, 185) (Ms. F). G's self-abusive and disruptive behaviors increased in the Spring of 2002. (J-48).

3. On April 22, 2002, an IEP meeting was held to review G's prior IEP and to develop an IEP for the 2002-2003 school year. (Jt. 1 Vol 1 T. 48). With respect to G's behaviors, the team noted that G would throw herself on the floor, kick her feet, scream and occasionally bang her head. (Id. at DT00135). With G's mother's (hereinafter referred to as "Ms. D") permission, a behavior intervention plan (BIP) for G was developed by Clarice Howard, a preschool consultant, and Cathy Denny, G's then-current classroom teacher, outside the context of an IEP meeting. (10-8-03 Tr. 486) (Howard). The document on which the BIP is written is entitled "Functional Behavioral Assessment and Behavior Intervention Plan (FBA/BIP)" (Jt. 1 Vol. 1 T. 48, DT00138).<sup>8</sup> A copy of this FBA/BIP was provided to Ms. D and affixed to the April 22, 2002 IEP, signed by Ms. D. (Jt. 1 Vol. 1 T. 48, DT00138, 145).<sup>9</sup>

4. Shortly after G began school in Fall 2002, she began exhibiting some difficult behaviors. (11-20-03, Tr. 57) (Chaney). To address these concerns, Ms. Howard contacted Mr. Kim Pisor,<sup>10</sup> a behavior specialist contracted by the School System, to work with G and to help intervene with the behaviors. (10-08-03, Tr. 400) (Howard); (11-10-03 Tr. 21) (Pisor).<sup>11</sup> Meanwhile, beginning in August 2002, so that Mr. Pisor would have some information when he arrived, Ms. Chaney developed and began to collect ABC (antecedent, behavior, consequence)

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tapping, that were of such little force that they are not considered SIBs. (10-20-03, Tr. 116-117) (Taubman).

<sup>8</sup> The top half of the document contains a mere summary of Ms. Howard and Ms. Denny's observations of G's behaviors and their discussions with other staff. (10-08-03, Tr. 521) (Howard); (11-20-03, Tr. 40-41, 53) (Chaney). April Chaney, the teacher who would be implementing the IEP for G for the 2002-2003 school year, understood that the document was G's behavior intervention plan ("BIP"). (11-20-03, Tr. 41, 56) (Chaney)

<sup>9</sup> Contrary to Respondent's assertions to the contrary, G's teachers, School System staff, Kim Pisor, a behavioral consultant for the School System, and Autism Partnership utilized that behavior intervention plan (BIP), until August 8, 2003, when a new IEP was written. (11-10-03 Tr. 44, 69, 87) (Pisor); (10-08-03, Tr. 484) (Howard); (10-21-03 Tr. 197-98) (Freeman); (10-07-03 Tr. 202) (Parker); (10-03-03 Tr. 106, 170-71) (Leaf).

<sup>10</sup> Mr. Pisor is knowledgeable of and complied with standards of professional practice in conducting his FBA of G (11-10-03 Tr. 25) (Pisor); (10-1-03 Tr. 196) (Kennedy). Sufficient information was available through a variety of sources to conduct an appropriate FBA. (10-1-03 Tr. 93-94) (Kennedy); (11-10-03 Tr. 110) (Pisor).

<sup>11</sup> Mr. Pisor has been working with children with challenging behaviors for over twenty-five years. (11-10-03 Tr. 10) (Pisor). He holds a master's degree from Western Michigan University and has completed the coursework and internship requirements for a Ph.D. in clinical psychology from Georgia State University. (11-10-03 Tr. 9-10) (Pisor). In order to satisfy the Ph.D. internship requirement, Mr. Pisor worked for a full year at Baltimore's Kennedy Krieger Institute under the supervision of Dr. Wayne Fisher. (11-10-03 Tr. 11-12) (Pisor). His work at Kennedy Krieger consisted of conducting FBAs, primarily analogue functional analyses, and treating children with severe self-injurious behaviors, including training parents and public school service providers. (11-10-03 Tr. 13-14) (Pisor). In his graduate work, Mr. Pisor was trained in the use of psychological instruments and proper assessment. (11-10-03 Tr. 11-12) (Pisor).

data, and recorded behaviors as they occurred. (Jt. 1 Vol. 1 T. 77, DT00559-578, DT00188-196); (11-20-03, Tr. 57) (Chaney).<sup>12</sup>

5. Initially, as part of his FBA, Mr. Pisor interviewed [REDACTED]'s teacher, Ms. Chaney, her paraprofessional, the speech therapist, occupational therapist, and Ms. [REDACTED]. He also reviewed data that Ms. Chaney had been collecting regarding the antecedents to [REDACTED]'s behavior, the occurrence of behavior, and the consequence for the behavior. Further, he observed [REDACTED] directly. (11-10-03 Tr. 21-22, 42) (Pisor); (11-20-03, Tr. 198) (Chaney). The purpose of Mr. Pisor's FBA was to generate hypotheses as to the causal factors of [REDACTED]'s behaviors of tantrums, aggression, and acts of self-injury, then to develop strategies and support techniques to teach her alternative behaviors and ensure her safety. (11-10-03 Tr. 43) (Pisor).

6. Between September 2002, and February 2003, Mr. Pisor communicated regularly once or twice per month with Ms. [REDACTED] to keep her apprised as to the School System's interventions with [REDACTED]'s behaviors and to learn about what Ms. [REDACTED] might be doing with respect to [REDACTED]'s behaviors. (Joint 1, Vol. I, Ex. 91; 11-10-03 Tr. 44, 48, 54) (Pisor); (11-24-03, Tr. 238) (Ms. [REDACTED]); (12-30-03, Tr. 239) (Ms. T.).<sup>13</sup> Most, but not all, of the communications were noted in Mr. Pisor's file regarding [REDACTED] Id.<sup>14</sup> Though Mr. Pisor offered to assist Ms. [REDACTED] with [REDACTED]'s behaviors at home and to visit the home, Ms. [REDACTED] requested only that he visit [REDACTED]'s daycare. He did this and shared behavior recommendations with the daycare staff. (11-10-03 Tr. 60-61, 87) (Pisor) (Pisor Notes; 11-10-03 Tr. 60) (Pisor).

7. On October 1, 2002, Mr. Pisor developed a document entitled "Recommendations for Behavioral Support" to guide teachers and staff in working with [REDACTED].<sup>15</sup> (Jt. 1 Vol. 1 T. 66; 11-10-03 Tr. 22) (Pisor). In the ensuing months, the School System continued to implement the

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<sup>12</sup> In addition to discussing and hypothesizing the possible causes or functions of [REDACTED]'s behavior with Mr. Pisor, the School System took steps to ensure [REDACTED]'s safety such as assigning a one-to-one paraprofessional to [REDACTED] and obtaining a helmet for [REDACTED] to wear. (Jt. 1, Vol. 1, T. 91, DT00364); (10-08-03, Tr. 417) (Howard).

<sup>13</sup> Though he understands that specific consent is not required, Mr. Pisor communicated with Ms. [REDACTED] on September 18, 2002. (Joint 1, Vol. I, Ex. 91; 11-10-03 Tr. 39-40) (Pisor). In his initial contact with the parent, Mr. Pisor introduced himself, explained his role as a support person, and discussed some of his initial observations of [REDACTED]. (11-10-03 Tr. 40) (Pisor). Additionally, during his initial conversation, Mr. Pisor gathered information about the parent's concerns and ideas as to the causes of the child's non-desired behavior. (11-10-03 Tr. 40) (Pisor).

<sup>14</sup> As a result of those communications, the parent was well informed as to what was happening with [REDACTED] and the School System's efforts to intervene with her non-desired behaviors. (11-10-03 Tr. 48) (Pisor). Ms. [REDACTED] never requested a meeting with Mr. Pisor, to indicate dissatisfaction with his work with [REDACTED], or to disagree with what he was doing. (11-10-03 Tr. 49) (Pisor).

<sup>15</sup> Mr. Pisor's Recommendations for Behavioral Support represents his work on his FBA of [REDACTED] up to the point that it was prepared; however, as a true FBA is an ongoing process, Mr. Pisor's FBA continued after the development of the document. (11-10-03 Tr. 22) (Pisor); (11-20-03 Tr. 198) (Chaney). In fact, Mr. Pisor has continued to observe [REDACTED]'s program, review data, and consult with staff regarding interventions throughout the 2002-2003 and 2003-2004 school years. (11-10-03 Tr. 22-23, 66) (Pisor); (11-20-03 Tr. 198) (Chaney); (10-08-03 Tr. 415-16) (Howard).

BIP<sup>16</sup> and employ the behavior support strategies recommended by Mr. Pisor. (11-10-03 Tr. 44, 69, 87) (Pisor); (10-08-03, Tr. 484) (Howard); (10-21-03 Tr. 197-98) (Freeman); (10-07-03 Tr. 202) (Parker); (10-03-03 Tr. 106, 170-71) (Leaf). Mr. Pisor's recommendations were intended to be a flexible document to address the student's changing behaviors. (11-10-03 Tr. 172) (Pisor). The document does not require that such data must be collected on a daily basis. (11-10-03 Tr. 109-110) (Pisor). In fact, those implementing Mr. Pisor's recommendations understood that it was important to collect sufficient data to track trends in [REDACTED]'s behaviors, but that it was not necessary to collect it every day. (10-7-03 Tr. 123-130) (Parker).<sup>17</sup> His recommendations were intended to provide more specificity in terms of teaching strategies, but not to supplant the BIP. (11-10-03 Tr. 44, 87) (Pisor).<sup>18</sup> Throughout the Fall and Winter 2002, Mr. Pisor continued his FBA and worked with the School System to respond to [REDACTED]'s needs appropriately. (11-10-03 Tr. 49-54, 65-68) (Pisor).<sup>19</sup>

8. On October 18, 2002, Ms. [REDACTED] took [REDACTED] to the Marcus Institute for three days as they were "trying to get a diagnosis." (11-24-03, Tr. 216) (Ms. T.). Further, Dr. [REDACTED], [REDACTED]'s long-term pediatrician, recommended that [REDACTED] have blood tests and that she consult another doctor for diagnosis. *Id.* In addition, [REDACTED] was brought to the behavior clinic where "a functional analysis was conducted to identify potential variables maintaining" [REDACTED]'s tantrums and SIB. (Jt. 1 Vol. 1, T. 87, DT00296 Jt. 1 Vol. 1 DT00296). [REDACTED]'s behaviors were recorded on a laptop computer, and graphs and data were generated as a result. (Jt. 1 Vol. 1, T. 87; (11-25-03, Tr. 120) (Fisher)). In this setting [REDACTED] exhibited physical aggression, disruptions, tantrums, and SIB at an average rate of 0.17 target behaviors/minute, though, no data and graphs were ever provided to the School System. (11-25-03, Tr. 127, 230) (Fisher).<sup>20</sup>

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<sup>16</sup> Though he did not participate in its development, Mr. Pisor was familiar with [REDACTED]'s existing BIP developed in April 2002. (11-10-03 Tr. 44) (Pisor).

<sup>17</sup> Notwithstanding Respondent's argument that no data was collected in January 2003, the records reflect that both ABC data and anecdotal data were in fact kept during that time in a manner appropriate for school-based personnel to utilize. (10-01-03, Tr. 214-217) (Kennedy). Further, it is standard to cease collecting data in the absence of behavior. (10-01-03, Tr. 225-226) (Kennedy).

<sup>18</sup> Mr. Pisor reviewed his Recommendations for Behavioral Support verbatim at an IEP meeting on October 3, 2002, where he explained the document to staff and [REDACTED]'s mother. (Jt. 1 Vol. 1 T. 67, DT00167); (11-20-03, Tr. 58) (Chaney) (11-10-03 Tr. 44-45) (Pisor). He also provided Ms. [REDACTED] with a copy. (*Id.*) Mr. Pisor explained in detail--literally line by line--his process and resultant recommendations in order to ensure that all of the staff members and Ms. [REDACTED] understood. (11-10-03 Tr. 47) (Pisor). During the meeting, Ms. [REDACTED] indicated that she understood what was occurring with [REDACTED] and that she was pleased with the progress that [REDACTED] was making in school in terms of her behavior. (11-10-03 Tr. 47-48) (Pisor). Ms. [REDACTED] signed in agreement to the October 3, 2002 IEP. (Jt. 1 Vol. 1 T. 67, DT00173).

<sup>19</sup> For example, upon learning that [REDACTED] was experiencing some difficulties on the bus, Mr. Pisor and Ms. Howard first met with staff to train them in implementing interventions on the bus, then arranged for [REDACTED] to have individual transportation to eliminate triggers for her behaviors. (Jt. 1 Vol. 1 T. 91, DT00365); (11-10-03 Tr. 50-51) (Pisor); (10-08-03 Tr. 418) (Howard).

<sup>20</sup> Dr. Fisher was not generally present for this assessment; however, the standard of practice at the Marcus Institute would be to explain their process to the family. (11-25-03, Tr. 74, 120-121, 129) (Fisher).

9. In mid-November 2002, [REDACTED]'s behavior began to escalate, and on December 1, 2002, [REDACTED] banged her head on the floor at school. (10-08-03, Tr. 416) (Howard). Ms. Chaney informed Ms. [REDACTED] of that incident. (Jt. 1 Vol. 1 T. 96, DT00462); (10-08-03, Tr. 416) (Howard).

10. [REDACTED] returned to Marcus Institute on December 6, 2002, and during this visit, Ms. [REDACTED] discussed "her request to proceed with asking her local school district for [REDACTED]'s placement at the Marcus Institute Behavior Center School." (Jt. 1 Vol. 1 T. 87 DT00712; (11-25-03, Tr. 121) (Fisher)) (Jt. 1 Vol. 1 T. 87 DT00712).

11. During the month of December 2002, Ms. Howard spoke with Ms. [REDACTED] on several occasions about [REDACTED]'s behavior and her program. (Pet. T. 5, DT00757-00764; (10-08-03, Tr. 417) (Howard)).<sup>21</sup> In these conversations, Ms. [REDACTED] told Ms. Howard that she wanted [REDACTED] to go to the severe behavior class at the Marcus Institute. (Pet. T. 5, DT00758; (10-08-03, Tr. 418, 457) (Howard)). Although the Marcus Institute had informed Ms. [REDACTED] that the School System could provide a bus to bring [REDACTED] to Marcus, Ms. Howard explained that the Institute was a private school, and that she would first have to reject the School System's IEP for [REDACTED] to go there. (Pet. T. 5, DT00759; (10-08-03, Tr. 419, 459, 463) (Howard)). Following this conversation, Ms. Howard mailed Ms. [REDACTED] a copy of her parental rights. (Pet. T. 5, DT00759; (10-08-03, Tr. 419, 463) (Howard)).<sup>22</sup> In addition to discussing [REDACTED]'s behavior, Ms. [REDACTED] also specifically requested an evaluation to determine a diagnosis for [REDACTED] (Pet. T. 5, DT00759; (10-08-03, Tr. 418) (Howard)).

12. In January 2003, Ms. Chaney referred [REDACTED] for an evaluation for educational planning purposes. (Jt. 1 Vol 1 T. 78, DT00579); (11-20-03, Tr. 135) (Chaney). On January 29 and 30, 2003, consistent with the parent's request, the School System contacted Dr. Freeman,<sup>23</sup> a

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<sup>21</sup> Also, Ms. Chaney testified that Ms. [REDACTED] told her she wanted the Marcus Institute to evaluate [REDACTED]'s behavior in December, 2002, and that Ms. Chaney subsequently informed Ms. Howard of that. (11-20-03, Tr. 165) (Chaney).

<sup>22</sup> Ms. [REDACTED] was provided a copy of her parental rights on many occasions, and signed that she had received and had them explained to her. She was familiar with and used the term functional assessment at least by November 2002. (Pisor notes 11-4-02; 11-10-03 Tr. 58, 149-50) (Pisor).<sup>22</sup> Parents have a right to rely on these parental rights, and Ms. [REDACTED] testified that she did, in fact, rely on them. (1-13-04 Tr. 89) (Ms. T.).

<sup>23</sup> Dr. Freeman received her Ph.D. in 1969 and is currently a Professor of Medical Psychology and Director of Clinical Autism Services at the University of California at Los Angeles. Over the course of the last thirty years, Dr. Freeman has had extensive national and international experience in the diagnosis, treatment, and educational programming for children with autism. Further, Dr. Freeman has been appointed to the Blue Ribbon Panel for the California State Department of Developmental Services to develop guidelines for the evaluation and treatment of children with autism. (10-21-03 Tr. 4-5) (Freeman). In 1976, Dr. Freeman was asked by the National Society of Autistic Children, now known as the Autism Society of America, to develop a working definition of autism to be used in the Diagnostic and Statistical Manual III, a standard reference source in the medical field. (10-21-03 Tr. 23-24) (Freeman).

Last year alone, Dr. Freeman saw 500 children for evaluation in UCLA's Autism Services outpatient clinic. (10-21-03 Tr. 6) (Freeman). In her career, Dr. Freeman has evaluated and treated approximately 15,000 to 20,000 children with autism, and has been instrumentally involved in the recommendation of treatment for those children. (10-21-03 Tr. 16-17) (Freeman).

psychologist nationally recognized and well-trained in the field of autism, requesting her to re-evaluate [REDACTED], to give a diagnosis opinion, and to ascertain the child's special education needs. (Pet. T. 1, DT01177; Pet. T. 5 DT00759); (10-2-03 Tr. 23-24) (Ramsey); (10-21-03 Tr. 39) (Freeman); (11-24-03 Tr. 230) (Ms. [REDACTED]).<sup>24</sup> At this time [REDACTED]'s temper tantrums were escalating and school personnel had seen her display many autistic-like characteristics. (10-2-03 Tr. 50-51) (Ramsey). Also, the mother wanted to know whether [REDACTED] met the eligibility criteria under the disability category of autism. (Pet. T. 5, DT00759 ) (10-8-03 Tr. 423) (Howard).<sup>25</sup> On January 31, 2003, the School System received signed parental consent from Ms. [REDACTED] for a re-evaluation of [REDACTED]. (Jt. 1 Vol. 1 T. 78, DT00579); (10-2-03 Tr. 25) (Ramsey); (10-21-03 Tr. 39) (Freeman); (11-24-03 Tr. 232) (Ms. T.).

13. Dr. Freeman conducted an evaluation of [REDACTED] in February 2003, in order to determine [REDACTED]'s diagnosis and special education needs. (Jt. 1 Vol. 1 T. 81, DT00228); (10-2-03 Tr. 51) (Ramsey); (10-21-03 Tr. 39) (Freeman). In the process of evaluation, Dr. Freeman reviewed multiple sources of information to evaluate [REDACTED], including her educational records. She also interviewed [REDACTED]'s mother and teacher, did formal testing, and observed [REDACTED] in structured and

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Dr. Freeman has taught courses in applied behavior assessment (ABA) and functional assessment. Currently, she serves as Director of the Autism Training Program at UCLA, a mandatory training program for all child psychiatry and psychology postgraduate fellows at UCLA where students come for six months and learn about what constitutes an evaluation, how to make a diagnostic assessment, and what constitutes appropriate treatment for children with autism. (10-21-03 Tr. 7-8) (Freeman). In addition, Dr. Freeman conducts training workshops for school districts, school psychologists, and teachers on the subject of autism, including the behaviors and characteristics of autism and the impact they have in the educational setting. Her workshops focus on the appropriate treatments for those children, including functional assessments. (10-21-03 Tr. 12) (Freeman). She also conducts training for school psychologists and school staff in the evaluation and assessment of children with autism. (10-21-03 Tr. 30) (Freeman). Dr. Freeman has published extensively in the areas of autism and ABA. See Pet. T. 8; (10-21-03 Tr. 28) (Freeman).

Dr. Freeman developed the behavior observation scale to assist with the diagnosis of children with autism. (10-21-03 Tr. 12-13) (Freeman). Dr. Freeman conducted the first prospective longitudinal study over time of people with autism. As part of that study, she had a twenty-year follow-up study that tracked children with autism, as they got older. (10-21-03 Tr. 13) (Freeman). Dr. Freeman also developed the Ritvo Freeman real life rating scale, a scale that is used frequently to see how children with autism use their skills in the natural environment and to evaluate various medical treatments. (10-21-03 Tr. 14) (Freeman).

Dr. Freeman has served as the psychologist and behavior specialist for a series of research grants on the biological causes of autism. See Pet. T. 8. Currently, she is involved with the START Center funded by the National Institute of Health to serve as a center of excellence for research in autism. At START, Dr. Freeman serves as the clinician associated with the research grant and her clinic conducts the related assessments. (10-21-03 Tr. 14) (Freeman).

<sup>24</sup>Dr. Freeman is a licensed clinical psychologist in California, Illinois and Tennessee. (Dr. Freeman acquired a temporary license in Tennessee, which expired in November 2003, and her application for a permanent license in that state is pending.) (10-21-03 Tr. 23) (Freeman). She also has a license pending in Georgia. (10-21-03 Tr. 127) (Freeman). Under Georgia Rules, a psychologist licensed in another jurisdiction is permitted to administer psychotherapy in the State of Georgia ten days per year, and Dr. Freeman practiced, at most, five days in 2003. (10-21-03 Tr. 128) (Freeman).

<sup>25</sup> Dr. Freeman was asked to do a comprehensive re-evaluation that would include social, emotional and behavioral assessments. (Jt. 1 Vol. 1 T. 78, DT00579); (10-2-03 Tr. 51) (Ramsey).

unstructured settings to ascertain behavioral excesses and the situations in which those occur. (Jt. 1 Vol. 1 T. 81, DT00228); (Pet. T. 36, DT01378); (10-21-3 Tr. 40-43) (Freeman). She administered standardized and normed testing including the Mullens Scale of Early Learning and the Vineland Scale of Adaptive Behavior.<sup>26</sup> (10-21-03 Tr. 9-10) (Freeman). Dr. Freeman's evaluation included an evaluation of [REDACTED]'s behavior. (10-21-03 Tr. p. 41-43) (Freeman); (Pet. T. 36, DT01378, 01379, 01380, 01381, 01382, 01383; Pet. T. 36A, p. 8, 9, 13, 16). Specifically, in her interviews of Ms. [REDACTED] and [REDACTED]'s teacher, Dr. Freeman asked direct questions regarding [REDACTED]'s behavior and how it had changed over time. (Pet. T. 36, DT01378; Pet. T. 36A, p. 7). Dr. Freeman also worked directly with [REDACTED] to determine whether [REDACTED] had interfering behaviors and responded to reinforcement. Finally, Dr. Freeman administered standardized and normed testing to [REDACTED] specifically regarding behaviors. (Jt. 1 Vol. 1 T. 81, DT00228); (10-21-03 Tr. 42-43) (Freeman).

14. Part of Dr. Freeman's purpose in evaluating [REDACTED] was to identify her areas of strength and weakness. (Pet. T. 36, DT01383; Pet. T. 36A, p. 19). One of [REDACTED]'s behavioral strengths was that she came under control very quickly with the use of reinforcers. (Pet. T. 36, DT01383; Pet. T. 36A, p. 17); (10-21-03 Tr. 53-54) (Freeman). Also, with food reinforcers, [REDACTED] is easily redirected to task. (Jt. 1 Vol. 1 T. 81, DT00229). Additional strengths include matching, identification of her own body parts and action words, and labeling certain items. (Id. at DT00230; Pet. T. 36, DT01383; Pet. T. 36A, p. 19).<sup>27</sup> [REDACTED] exhibits a behavioral deficit in the area of communication that hinders [REDACTED] from communicating appropriately and that leads to behavioral difficulties, including behavioral excesses such as self-injurious and self-stimulatory behaviors. (10-21-03 Tr. 55-56) (Freeman).<sup>28</sup> Other areas of weakness include inappropriate and inconsistent use of language, her tendency to be overly dependent and withdrawn, the fact that she is still in diapers, is a picky eater, is impulsive, has poor concentration and attention, is overly active, has tantrums, can be physically aggressive and can be self-injurious. (Id. at DT00230-231).

15. In order to determine whether [REDACTED] was a child with autism, Dr. Freeman examined the diagnostic criteria for autism spectrum disorder. In the areas of qualitative impairment and social interaction, Dr. Freeman found that [REDACTED] failed to use eye contact/gestures to regulate social interaction and to develop peer relationships, and lacked spontaneous seeking to share enjoyment. In the area of communication, [REDACTED] demonstrated a delay in language, as well as stereotypic and repetitive use of language. [REDACTED] further exhibited stereotypic patterns of behavior. (Jt. 1 Vol. 1 T. 81, DT00232-00233; Pet. T. 36, DT01379, 01380, 01381, 01382; Pet.

<sup>26</sup> Standardized and normed tests are tests that allow psychologists to compare a child to other children in their peer group, comparing one child against a standard that has been established statistically. (10-21-03 Tr. 9-10) (Freeman).

<sup>27</sup> Also, [REDACTED] exhibited strengths in that she could pedal a tricycle, climb, build with blocks, cut with scissors, feed herself with a spoon and a fork, dress herself with prompts, dry herself with a towel, pick up her toys, clear her plate from the table, and help with cooking. (Jt. 1 Vol. 1 T. 81, DT00230-231).

<sup>28</sup> Some of the behavioral difficulties, as outlined in Dr. Freeman's report, include covering her ears, staring, inappropriate jargon, repetitive vocalizations, inattention to tasks, running around the school, head banging, kicking and screaming. (Jt. 1 Vol. 1 T. 81, DT00229).

T. 36A, pp. 8, 9, 10, 11, 13, 16); (10-21-03 Tr. 56-60) (Freeman). Based on this information, Dr. Freeman found that [REDACTED] met the diagnostic criteria for autism under the DSM-IV. (10-21-03 Tr. 56) (Freeman); (Jt. 1 Vol. 1 T. 81, DT02331; Pet. T. 36, DT01378-9, DT01411; Pet. T. 36A, p. 7, 92.) see also (10-21-03 Tr. 56).<sup>29</sup>

16. Among other things, Dr. Freeman recommended systematic implementation of the Picture Exchange Communication System to help [REDACTED] develop communication skills. (Jt. 1 Vol. 1 T. 81, DT00234); (10-21-03 Tr. 59) (Freeman). Also, Dr. Freeman recommended development of a systematic behavior management plan in [REDACTED]'s natural environment. (Jt. 1 Vol. 1 T. 81, DT00234; Pet. Supp. T. 36, DT01411, 01412; Pet. T. 36A, p. 93, 94, 97). To accomplish such a plan, she recommended that Autism Partnership work with the classroom teacher to develop a consistent plan for [REDACTED]. (*Id.*) Dr. Freeman recommended Autism Partnership, a group comprised of certain individuals with whom she has worked for over 20 years, because they specialize in both behavior management and autism, and because they have a very successful track record for teaching children in the natural environment. (10-21-03 Tr. 59) (Freeman). Additionally, Dr. Freeman likes Autism Partnership because their approach of ongoing behavioral assessment and intervention in the natural environment for children with autism is consistent with Dr. Freeman's views and conclusions of the National Academy of Science. (10-21-03 Tr. 64-65) (Freeman). Also, Autism Partnership has established a relationship with the School System for purposes of training and staff development. (10-21-03 Tr. 59) (Freeman).

17. Dr. Freeman met with Ms. [REDACTED] after her evaluation of [REDACTED] to explain the results of her evaluation, autism and its characteristics, and her recommendations, including her recommendation that Autism Partnership be involved. (10-21-03 Tr. 60-62) (Freeman); (11-24-03 Tr. 232-233) (Ms. [REDACTED]). Dr. Freeman explained that Autism Partnership would be focusing on teaching [REDACTED] appropriate behaviors, developing reinforcers for her, and working on her communication skills. (10-21-03 Tr. 59, 60-61) (Freeman). Ms. [REDACTED] gave Dr. Freeman the impression that she understood everything that Dr. Freeman had reported to her. (10-21-03 Tr. 63) (Freeman).

18. In February 2003, as a result of a contact initiated by Ms. Ramsey<sup>30</sup> in December 2002, Dr. Leaf<sup>31</sup> from Autism Partnership came to the School System to observe several classrooms

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<sup>29</sup> Although Respondent has challenged the appropriateness of Dr. Freeman's evaluation as a basis for their IEE request, Respondent has never suggested that Dr. Freeman's diagnosis of [REDACTED] was incorrect or improperly determined. Rather, Respondent seems to attack Dr. Freeman's evaluation only with respect to her assessment of [REDACTED]'s behavior.

<sup>30</sup> Ms. Ramsey is Petitioner's special education director.

<sup>31</sup> Dr. Leaf is Co-Director of Autism Partnership, an agency devoted exclusively to the treatment of children with autism using principles of ABA. He received his Ph.D. from UCLA, and has focused his thirty-year career on working with individuals with autism from a behavioral perspective. While at UCLA, Dr. Leaf spent thirteen (13) years working on the Young Autism Project (YAP) with Dr. Ivar Lovaas, a pioneer in applied behavior analysis. (10-03-03, Tr. 4, 7) (Leaf). YAP was a federally funded grant program that studied the treatment of children with autism using intensive applied behavior analysis. (10-03-03, Tr. 5) (Leaf). The focus of YAP was to work with

and provide training to staff in the area of ABA. (10-03-03, Tr. 42-43) (Leaf).<sup>32</sup> During this visit, Dr. Leaf observed [REDACTED] engaging in crying and tantruming behavior, including hitting her head with her closed-fist in a way that was not severe, but still of concern. (10-03-03, Tr. 45) (Leaf).<sup>33</sup>

19. Based on this brief observation, Dr. Leaf hypothesized that the behaviors he observed were caused by [REDACTED]'s desire to escape demand situations. (10-03-03, Tr. 45) (Leaf). He further believed that the functions of [REDACTED]'s behaviors were obvious and that her behavior could be rapidly resolved. (10-03-03, Tr. 45) (Leaf). Accordingly, Dr. Leaf met with Ms. Ramsey to discuss his observation of [REDACTED], and recommended that intervention with [REDACTED] occur immediately. (10-03-03, Tr. 47) (Leaf). Because Dr. Leaf himself could not return immediately, he arranged to have members of his staff come to the School System in order to intervene with [REDACTED]'s behavior problems. (10-03-03, Tr. 47) (Leaf).<sup>34</sup>

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children with behavior problems and self-injurious behavior, resolve those behaviors, and proceed to teach learning readiness skills and skill acquisition. (10-03-03, Tr. 6-7) (Leaf).

Based on the research of YAP, Dr. Leaf wrote chapters in a book by Dr. Lovaas regarding the treatment of children with autism and produced a videotape series on the subject. (10-03-03, Tr. 7) (Leaf). To date, YAP is considered the most scientifically rigorous study on the treatment of children with autism. (10-03-03, Tr. 10) (Leaf).

Following YAP, Dr. Leaf continued to work professionally in providing behavior treatment to individuals with severe behavior problems, including significant work with children with autism. (10-03-03, Tr. 10-12) (Leaf). In 1995, he co-founded Autism Partnership, an agency that works exclusively with children with autistic disorder. (10-03-03, Tr. 14-15) (Leaf). In preparation for his testimony, Dr. Leaf reviewed [REDACTED]'s records, including all documents contained in the parties Joint 1 and 2 exhibits, as well as Petitioner's and Respondent's exhibits. He attended three IEP meetings for [REDACTED], listened to the audiotapes of the IEP meetings, interviewed school staff who work with [REDACTED], conferred with all of the consultants from Autism Partnership who worked with D.T., discussed [REDACTED] with other experts for the School System, and personally observed [REDACTED] on at least two occasions. (10-03-03, Tr. 42-43) (Leaf).

Dr. Leaf was tendered as an expert in the field of the education and treatment of children with autism and children and individuals with behavioral difficulties, including children and individuals with self-injurious behavior. (10-03-03, Tr. 20-21) (Leaf).

<sup>32</sup> On January 30, prior to his arrival in the School System, Ms. Howard contacted Ms. [REDACTED] to inform her that Dr. Leaf, whom Ms. Howard described as a behavior specialist, would be coming in to work with [REDACTED]. Pet. T. 5, DT00765; (10-08-03, Tr. 423) (Howard); (11-24-03, Tr. 230) (Ms. [REDACTED]). That same day, the School System sent to Ms. [REDACTED] a consent for evaluation form, including evaluation of [REDACTED] in the area of behavior, which Ms. [REDACTED] signed. Jt. 1, Vol. 1 T. 78; (10-08-03, Tr. 424) (Howard). Based on these communications with Ms. [REDACTED], the School System recognized that, to the extent any of Dr. Leaf's or Autism Partnership's activities would be considered an evaluation requiring Ms. T.'s consent, it had been obtained. (10-08-03, Tr. 424, 506) (Howard).

<sup>33</sup> Although [REDACTED]'s classroom was not originally one of the classrooms that Dr. Leaf intended to visit, at the request of the School System, Dr. Leaf did visit [REDACTED]'s class. (10-03-03, Tr. 44) (Leaf).

<sup>34</sup> Notwithstanding Dr. Leaf's inability to be personally present during all of Autism Partnership's consultation, he did have ongoing communication with his staff that worked in the School System with [REDACTED]. (10-03-03, Tr. 77) (Leaf).

20. On February 11, 2003, Ms. Howard contacted Ms. [REDACTED] and informed her that two individuals from Autism Partnership would be coming out to work with [REDACTED] and her behavior program. Pet. T. 5, DT00769; (10-08-03, Tr. 426) (Howard) (11-24-03, Tr. 230) (Ms. [REDACTED]); (10-03-03, Tr. 66) (Leaf). Because these consultants would be in town, Ms. Howard asked permission for [REDACTED] to stay late on Wednesday, February 19, which is typically a shortened day. (10-08-03, Tr. 426) (Howard). Ms. [REDACTED] granted this request for [REDACTED] to stay late so that Autism Partnership could work with her. (10-08-03, Tr. 426) (Howard). In the course of this phone call, Ms. [REDACTED] expressed her concern about [REDACTED]'s head banging behavior. Pet. T. 5, DT00770. At no time did Ms. [REDACTED] express concern about Autism Partnership's involvement with [REDACTED] and her program. (10-08-03, Tr. 427) (Howard). On February 18, Ms. Howard again called Ms. [REDACTED] to confirm that [REDACTED] could stay late on Wednesday so that Autism Partnership could work with [REDACTED] and School System staff. Pet. T. 5, DT00772; (10-08-03, Tr. 427-428) (Howard). Dr. Parker, Ms. Baker, and Ms. Howard also personally met with Ms. [REDACTED] for approximately one hour on February 21. (10-07-03, Tr. 68) (Parker); (10-08-03, Tr. 429, 432) (Howard); (10-03-03, Tr. 67) (Leaf).<sup>35</sup>

21. In between visits by Autism Partnership consultants, the School System staff continued to follow the same protocol. (11-20-03, Tr. 86) (Chaney). Similarly, Mr. Pisor continued to have regular involvement in [REDACTED]'s program by observing A.P., implementing its interventions and working with the School System's staff to continue the interventions. (11-10-03 Tr. 61-62)(Pisor).<sup>36</sup>

22. After Dr. Leaf's and Ms. Boehm's<sup>37</sup> initial visit in March 2003, approximately five to six weeks later, Ms. Boehm returned to the School System to work with [REDACTED] and staff. (10-03-03,

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<sup>35</sup> During this meeting, Dr. Parker and Ms. Baker shared with Ms. [REDACTED] some of what Autism Partnership had observed with [REDACTED]; how [REDACTED] used inappropriate behavior to get her needs met, some effective reinforcers that had been identified, IDEA of using reinforcement and how that would operate to reduce [REDACTED]'s behavior, certain functions that [REDACTED]'s behaviors seemed to serve, and how [REDACTED] would learn that her inappropriate behaviors could no longer be used to get what she wanted. (10-07-03, Tr. 70-73, 146) (Parker); (10-08-03, Tr. 429, 510) (Howard). They further talked with Ms. [REDACTED] about the specific things that they were doing with [REDACTED], what they had learned about [REDACTED], and anticipated in terms of the continuing process of working, including the assistance of additional consultants from Autism Partnership who would be helping District staff with [REDACTED]. (10-07-03, Tr. 72-73) (Parker). In this conversation, Ms. [REDACTED] shared some of the difficulties that she had with [REDACTED], and Dr. Parker advised Ms. [REDACTED] to work through those behaviors without giving in to [REDACTED] and allowing her to get what she wanted by engaging in inappropriate behavior. (10-07-03, Tr. 70) (Parker). In addition, Ms. [REDACTED] described her use of punishment with [REDACTED] at home; Dr. Parker explained this procedure was not an effective way of addressing [REDACTED]'s behaviors since it does not teach replacement skills and can lead to more difficult behavior over time. (10-07-03, Tr. 75-76) (Parker). Ms. T. did not ask that Autism Partnership stop their work with [REDACTED], but rather indicated her excitement about their involvement. (10-07-03, Tr. 74-75) (Parker).

<sup>36</sup> Between February and the end of the 2002-2003 school year, Mr. Pisor was on-site between two and five times per month and had an opportunity to observe all of the Autism Partnership personnel. (11-10-03 Tr. 62-63)(Pisor). In addition to observing the Autism Partnership staff and gathering information from the Autism Partnership personnel and the School System personnel working with [REDACTED], Mr. Pisor regularly reviewed the data that was maintained on [REDACTED]'s behaviors. (11-10-03 Tr. 66-67)(Pisor). As such, Mr. Pisor's FBA of [REDACTED] continued throughout his work with [REDACTED]. (11-10-03 Tr. 22-23, 66)(Pisor).

<sup>37</sup> Ms. Marlena Boehm is one of several Autism Partnership employees that worked with [REDACTED]

Tr. 54, 75) (Leaf). Her focus was to make adjustments in both [REDACTED]'s program and staff training. (10-03-03, Tr. 75-76) (Leaf). With respect to [REDACTED], Ms. Boehm focused on developing independent play skills for [REDACTED], working toward the goal of having [REDACTED] play for a few seconds by herself. (10-03-03, Tr. 76) (Leaf). In addition, Ms. Boehm worked on socialization skills with [REDACTED], and made efforts to reduce the structure of [REDACTED]'s day. (10-03-03, Tr. 76) (Leaf). At the end of her week with [REDACTED], Ms. Boehm saw improvement in [REDACTED]'s behavior, play, and social skills, but was concerned with how slowly [REDACTED] was acquiring communication and learning skills. (10-03-03, Tr. 76-77) (Leaf). Further, [REDACTED]'s behaviors had subsided to the point that she was ready to begin learning other ways to get her needs met other than engaging in disruptive behaviors. (10-07-03, Tr. 222) (Soluaga)

23. As a direct result of Ms. Boehm's expressed concern, Dr. Leaf asked Toby Mountjoy, to work with [REDACTED]. (10-03-03, Tr. 76-77) (Leaf).<sup>38</sup> Mr. Mountjoy, who came to the School System during late April and stayed for approximately eight days, has particular expertise in developing children's learning skills. (10-03-03, Tr. 54, 78) (Leaf). Mr. Mountjoy continued the process of conducting a FBA of [REDACTED], with a focus on teaching [REDACTED] the skills that are prerequisite to learning, increasing the demands placed on her, teaching her contingencies, teaching her replacement behaviors, and working on her prompt dependency. (10-03-03, Tr. 78-79) (Leaf); (10-07-03, Tr. 218, 219-220) (Soluaga).<sup>39</sup> As [REDACTED] acquired new skills, Autism Partnership and School System staff would move on to teach her other skills using principles of ABA. Specific ABA strategies included discrete trial teaching (i.e., breaking skills down into minute parts and then teaching them one step at a time), chaining (e.g., removing three pieces of a puzzle for D.T. to complete, then five pieces, then seven, etc., until she could finish the entire puzzle), systematic desensitization, prompts and fading prompts. (10-07-03, Tr. 241-243) (Soluaga). Ms. Soluaga also introduced a token economy system of reinforcement that allowed D.T. to earn tokens for good behavior that she could then "cash in" for a reward of her choice. (10-07-03, Tr. 262) (Soluaga). The use of a token system is distinguished from the use of tangible reinforcers, and is progress toward a more natural form of reinforcement. (10-03-03, Tr. 91) (Leaf).

24. Ms. Soluaga worked with [REDACTED] from May 2-23, consulting for over three weeks on [REDACTED]'s program. (10-07-03, Tr. 213) (Soluaga). During this time, Ms. Soluaga reviewed data that had been collected on [REDACTED] during the prior week, continued the process of conducting a functional assessment, including identifying functions of [REDACTED]'s behavior, conducting reinforcement assessments, and making adjustments to the program, as well as training staff on how to use ABA strategies with [REDACTED]. (10-03-03, Tr. 90) (Leaf); (10-07-03, Tr. 212, 217, 228, 248, 320) (Soluaga)<sup>40</sup>

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<sup>38</sup> Mr. Mountjoy is director of the Autism Partnership Hong Kong office.

<sup>39</sup> Just as demands are related to [REDACTED]'s behavior, prompt dependency is similarly a behavioral issue for [REDACTED] that needed to be addressed in order to effectively deal with her behavior. (10-03-03, Tr. 88-89) (Leaf). [REDACTED] also needed to continue learning how to function in higher demand situations without engaging in inappropriate behavior. (10-07-03, Tr. 225) (Soluaga).

<sup>40</sup> In all of the time that Ms. Soluaga in the classroom with [REDACTED], [REDACTED] was never unmanageable. (10-07-03, Tr. 243) (Soluaga). This does not mean that [REDACTED] was not exhibiting any disruptive behaviors; she certainly was and was expected to because she was still in the process of learning the replacement skills that she needed. (10-07-03, Tr.

25. In terms of programming, Ms. Soluaga picked up where Mr. Mountjoy left off, and directed her focus toward teaching [redacted] replacement skills to use in situations that had previously served as antecedents to [redacted]'s inappropriate behaviors. (10-07-03, Tr. 233-234,) (Soluaga). For example, Ms. Soluaga worked on increasing [redacted]'s ability to wait without exhibiting inappropriate behaviors, which included the introduction of a "wait" program. (10-07-03, Tr. 235) (Soluaga). She further focused on expanding [redacted]'s ability to transition, which had been a trigger to [redacted]'s behaviors in the past. Whereas Mr. Mountjoy had worked with [redacted] on transitioning from preferred activities to other preferred activities, Ms. Soluaga moved to the next step of teaching [redacted] how to transition from a preferred activity to a neutral activity and from a neutral activity to a less preferred activity without exhibiting inappropriate behavior. (10-07-03, Tr. 236) (Soluaga). This process of moving to the next phase through teaching is the very nature of the ABA teaching methodology, which includes breaking skills down into component parts and building on those steps until the skill is learned. (10-07-03, Tr. 237-238) (Soluaga).<sup>41</sup>

26. Beginning on June 9, 2003, when [redacted] returned to school for the summer, Ms. Soluaga was present within the School System for a week to continue staff training and her work with [redacted]. (10-07-03, Tr. 258, 266) (Soluaga). Although Ms. Soluaga anticipated, and in fact saw, an escalation in D.T.'s disruptive behavior as compared to when [redacted] left in May, [redacted] was still not engaging in head banging behavior. (10-03-03, Tr. 94) (Leaf); (10-07-03, Tr. 258-259, 260) (Soluaga); (11-24-03, Tr. 114) (Bankieris). Dr. Leaf testified that this was a result of the two-week break in services that [redacted] experienced, not an indication of cyclic behavior. (10-03-03, Tr. 94-95) (Leaf); (10-20-03, Tr. 121, 216) (Taubman).<sup>42</sup>

27. Because [redacted] exhibited an increase in problem behaviors in June 2003, Autism Partnership adjusted strategies and programming accordingly by reducing her demands, increasing her support staff, and increasing the occurrence of reinforcement for [redacted] throughout the day. (10-07-03, Tr. 265-266) (Soluaga). When Ms. Soluaga left in August, she recommended that the School System work more on building [redacted]'s group skills, integrating her

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248) (Soluaga). At the time Ms. Soluaga left in May, she recommended that staff continue to receive ongoing training and consultation and that [redacted] not experience a break in services at the end of the school year. (10-07-03, Tr. 249-250) (Soluaga).

<sup>41</sup> Similarly, a strategy used within ABA and with [redacted] is the use of prompts, or providing assistance to the child using verbal or physical cues, with the ultimate goal being to fade the prompts so that the child can complete the task independently. (10-07-03, Tr. 238) (Soluaga). Mr. Mountjoy had begun to fade prompts with [redacted], and Ms. Soluaga continued to do so around the skills that [redacted] had acquired. (10-07-03, Tr. 239) (Soluaga). Because [redacted]'s behavior had escalated in the past when she was directed to play independently, Ms. Soluaga began working with [redacted] on building play skills, starting with close-ended activities (e.g., puzzles) while fading out the prompt of having staff present to direct her. (10-07-03, Tr. 240-241) (Soluaga)

<sup>42</sup> Dr. Kennedy has conducted research for the last ten years about the variables contributing to the cyclicality of problem behaviors, and agrees that, if cyclicality is suspected, it is something that should be looked at in a FBA. (10-01-03, Tr. 208-209) (Kennedy). In this case, however, there was a decreasing trend in [redacted]'s behavior from February through September 2003, and [redacted] was continuing to make progress as staff worked with her, which does not suggest cyclic behavior. (10-01-03, Tr. 219) (Kennedy); (10-08-03, Tr. 520) (Howard). Other factors, such as breaks in instruction, can also explain an increase in inappropriate behavior. (10-01-03, Tr. 220) (Kennedy).

more with peers, using discrete trial teaching within a group format, doing more systematic teaching in less isolated settings, and working on skills across a variety of settings in school. (10-07-03, Tr. 273-276) (Soluaga). These things were possible because [REDACTED]'s behaviors had improved and caused less interference with learning than they had in May and June. (10-07-03, Tr. 274-275) (Soluaga).

28. The strategies and approaches used by Autism Partnership did not alter the behavior intervention plan that was in place for [REDACTED] as part of her April 22, 2002 IEP. Jt. 1 Vol. 1 T. 48, DT00138; (10-08-03, Tr. 484) (Howard). Neither did these approaches significantly alter the Recommendations for Behavioral Support that had been written by Mr. Pisor and shared with Ms. [REDACTED] and the daycare, except to enhance the use of certain techniques and refine the manner in which certain strategies were used. (10-07-03, Tr. 63) (Soluaga); (10-07-03, Tr. 63-64, 166, 168-170, 173-174, 195-196) (Parker).<sup>43</sup> This alteration in strategies is not unusual in working with children with autism. (10-07-03, Tr. 197) (Parker). In fact, it is typical for functions, reinforcers, and procedures to change over the course of a functional behavioral assessment. (10-07-03, Tr. 198-199) (Parker); (10-07-03, Tr. 90) (Soluaga).

29. All of the consultants from Autism Partnership engaged in an ongoing functional behavioral assessment of [REDACTED]. (10-03-03, Tr. 60-61, 64-65) (Leaf); (10-07-03, Tr. 93, 19-23) (Parker); (10-07-03, Tr. 36, 90, 93) (Soluaga).<sup>44</sup> The approach used by Autism Partnership is consistent with the position taken by the National Academy of Sciences "that behavioral intervention and ongoing behavioral assessment in the natural environment is the key to treatment of children with autism...breaking things down into small steps, teaching it systematically, identifying the areas we needed to focus on, i.e. primarily social communication skills." (10-21-03 Tr. 65) (Freeman). The process used by Autism Partnership, which often occurred during the course of instruction, included assessing behaviors as they occurred, discussing possible functions of the behavior, assessing the effectiveness of reinforcers with D.T., and modifying instruction accordingly. (10-03-03, Tr. 60-61) (Leaf); (10-07-03, Tr. 90-91) (Parker).

30. The strategies, approaches, and methodologies used by Autism Partnership with [REDACTED] were not reduced to writing for a variety of reasons. First, since Autism Partnership was on-site providing training and feedback to staff, such a report was not necessary in order for School System staff to understand how to work with [REDACTED]. (10-03-03, Tr. 97) (Leaf). In addition, the

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<sup>43</sup> These included enhancing the reinforcement system used with [REDACTED], refining the token system being used, and altering the implementation of certain techniques (such as the use of deep pressure and reinforcers, not requesting eye contact in advance, but reinforcing it when it occurred, waiting three to five seconds instead of ten seconds with regard to initiating activity, not always using a three-step prompt, and not using a visual screen or the quiet chair) (11-10-03 Tr. 56, 63-64)(Pisor); (10-07-03, Tr. 63-64, 166, 168-170, 173-174, 195-196) (Parker). Further, the primary difference was that the procedures used were even less intrusive than those recommended by Mr. Pisor. (10-07-03, Tr. 196) (Parker).

<sup>44</sup> The functional behavioral assessment used by Autism Partnership is the assessment method used in ABA and is an ongoing teaching process. (10-21-03 Tr. 67, 68, 90) (Freeman); (10-07-03, Tr. 207) (Soluaga); (10-03-03, Tr. 27) (Leaf).

strategies employed with [REDACTED] were necessarily dynamic and changed with [REDACTED]'s needs such that any report would need to be rewritten on a weekly or perhaps even daily basis to reflect those alterations. (10-03-03, Tr. 98) (Leaf). When a person is conducting an FBA in real time and is able to share that information with other professionals who are involved in the child's instruction, it is not necessary that the FBA be written down, as it is an ongoing process and will likely change over time. (10-01-03, Tr. 197) (Kennedy). Reducing approaches to writing is not something typically done because altering strategies, as a child changes, is part of the teaching process. (10-07-03, Tr. 254) (Soluaga). Significantly, [REDACTED] was also remaining in the School System, where the staff that would be working with her had been trained on how to teach effectively. (10-07-03, Tr. 255) (Soluaga). Nevertheless, Dr. Leaf expressed his willingness at the IEP meetings to generate a written document for Ms. [REDACTED], but was informed by Respondent's counsel that the FBA needed to be completed by an independent, neutral person. Pet. T. 27a, p. 56; (1-13-04, Tr. 291-292, 301) (Leaf).

31. The focus of Autism Partnership's ongoing FBA was to first target [REDACTED]'s most severely self-injurious behaviors, and then turn to the milder forms of self-injury and other behaviors. (10-03-03, Tr. 46, 51, 183) (Leaf). Hence, although behaviors such as tantrums were a concern, they were not the initial focus of intervention. (10-03-03, Tr. 46, 51) (Leaf). The decision to target [REDACTED]'s most self-injurious behaviors first, such as head banging, was consistent with Ms. [REDACTED]'s continuous focus on addressing [REDACTED]'s head banging behavior. Pet. T. 36, DT1394, 1395, 1396, 1397, 1398, 1399, 1400, 1402, 1402, 1407-1409, 1411, 1423, 1426, 1427; Pet. T. 36A, pp. 21, 47-48, 50-51, 53, 55, 57, 58, 59, 61, 62, 63, 67, 71, 97, 122, 130, 131, 132; (1-13-03 Tr. 129-131) (Ms. T.); (11-25-03, Tr. 190) (Fisher).

32. From February 18-21, 2003, Dr. Tracee Parker<sup>45</sup> and Danielle Baker from Autism Partnership came to the School System to work with [REDACTED]. (10-03-03, Tr. 53) (Leaf). The role of Dr. Parker and Ms. Baker was to start addressing [REDACTED]'s self-injurious behavior, assess possible functions of the behavior, and begin to teach [REDACTED] replacement skills for her inappropriate behavior. (10-03-03, Tr. 57) (Leaf).

33. Prior to arriving in the School System, Dr. Parker had spoken with Dr. Leaf and reviewed historical information relating to [REDACTED], dating back to the year 2000. (10-07-03, Tr. 34, 42) (Parker). Among the records that Dr. Parker reviewed were behavioral data collected on [REDACTED] since August 2002, with a particular focus on those data gathered from December 9, 2002 through February 3, 2003. (10-07-03, Tr. 42-43) (Parker). These records and data provided Dr. Parker with background and historical information about [REDACTED]'s behavior in the past, what form that behavior took, what may have contributed to those behaviors, what might be maintaining those behaviors, what [REDACTED]'s escalation cycle appeared to be, and what things had potentially reinforced [REDACTED]'s behavior both in the past and present. (10-07-03, Tr. 35-36, 54) (Parker).

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<sup>45</sup> Dr. Parker received her Ph.D. from UCLA in 1990 in the area of learning behavior. (10-07-03, Tr. 14) (Parker). Dr. Parker has over twenty years of experience in the area of ABA and has worked with individuals of all ages, including children with autism and with severe behavior problems. She has also supervised programs of students with autism for school districts and individual families. (10-07-03, Tr. 16-21, 28, 100-101) (Parker). During her career, Dr. Parker has conducted over one thousand FBAs. (10-07-03, Tr. 24-25) (Parker).

Based on this information, Dr. Parker hypothesized that the functions of [REDACTED]'s behaviors were: denial of wanted items; attention related, including seeking physical interaction; avoidance; and frustration. (10-07-03, Tr. 44) (Parker).<sup>46</sup>

34. At the school facility, Dr. Parker and Ms. Baker met with Ms. Howard, Ms. Chaney, [REDACTED]'s then-current teacher, Mr. Pisor, paraprofessionals who worked with [REDACTED], and Ms. [REDACTED] to discuss [REDACTED], clarify questions Dr. Parker had, and obtain additional historical information regarding [REDACTED]. (10-07-03, Tr. 45, 59-61) (Parker); (10-08-03, Tr. 429) (Howard). Specifically, Dr. Parker reviewed and spoke with Mr. Pisor about his recommendations for strategies to use with [REDACTED], and in fact, used his protocol along with [REDACTED]'s behavior intervention plan. (10-07-03, Tr. 59, 63, 202-203) (Parker).<sup>47</sup>

35. When [REDACTED] arrived on February 18, Dr. Parker and Ms. Baker first conducted a "reinforcement survey," in which a variety of potential reinforcers were presented to [REDACTED] in a varied manner and then withdrawn to ascertain to which [REDACTED] responded to favorably. (10-07-03, Tr. 45-46) (Parker). These items and activities were then categorized from high-level reinforcers (most preferred items/activities) to lower-level reinforcers (less preferred items/activities), which were used to shape [REDACTED]'s behavior, so that [REDACTED]'s best behaviors were rewarded by using the highest levels of reinforcers. (10-07-03, Tr. 46, 48) (Parker).<sup>48</sup> Simultaneously with their assessment, Dr. Parker and Ms. Baker implemented a program for [REDACTED], in which they provided her the least amount of attention possible, used reinforcement for appropriate behavior, began teaching some skills, and gradually increased demands. (10-03-03, Tr. 58-59) (Leaf).<sup>49</sup> Finally, Dr. Parker and Ms. Baker provided training to School System staff,

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<sup>46</sup> Most children with significant behavioral problems have multiple functions to their behavior, and this is true for [REDACTED] (1-13-03, Tr. 310-311) (Leaf). Because this is a standard occurrence in the field, multiple functions of [REDACTED]'s behaviors did not inhibit Autism Partnership's ability to provide an appropriate FBA to [REDACTED] (1-13-03, Tr. 313-314) (Leaf). It further does not implicate in any way whether a tier one, tier two, or tier three FBA should be used with her. (1-13-04 Tr. 243-44) (Kennedy). See Paragraph 66 below in the Findings of Fact for clarification of the nature of "tiers" in FBA.

<sup>47</sup> As is discussed *infra*, these alterations were not significant. (10-07-03, Tr. 63-64, 166, 168-170, 173-174, 195-196) (Parker).

<sup>48</sup> In addition, Dr. Parker and Ms. Baker would present and withdraw items and/or situations to [REDACTED], either purposefully or as they naturally occurred in her day, in order to ascertain her response and determine whether or not those things were antecedents or triggers to [REDACTED]'s behavior. (10-07-03, Tr. 50-51) (Parker). When triggering events occurred, they would then reinforce [REDACTED] for the absence of disruptive behavior or presence of appropriate behavior. (10-07-03, Tr. 51) (Parker). In this way, they were able to test their hypotheses about the functions or causes of [REDACTED]'s behavior and also determine the effectiveness of reinforcers used with [REDACTED]. (10-07-03, Tr. 52-53) (Parker).

<sup>49</sup> For approximately three days, other children in [REDACTED]'s class were instructed elsewhere while Dr. Parker and Ms. Baker worked with [REDACTED] in her classroom. (10-07-03, Tr. 171-171) (Parker); (11-20-03, Tr. 77) (Chaney). However, [REDACTED] still participated with the class in certain activities such as lunch and snack time, and was included, to varying degrees, in other activities such as circle time, recess, and fine motor time, with her participation in such activities increasing from February through May 2003. (11-20-03, Tr. 77-78, 190-191) (Chaney). In addition, Ms. Howard, also a teacher credentialed to work with [REDACTED], was in the classroom every day with Dr. Parker and Ms. Baker. (10-08-03, Tr. 393, 430) (Howard).

which not only assisted in building the School System's capacity to work with [REDACTED], but also provided an opportunity for [REDACTED] to generalize her behavioral changes with new and different staff members. (10-07-03, Tr. 79-81) (Parker).

36. During Dr. Parker's time with [REDACTED] in February 2003, [REDACTED] exhibited a high rate of behavior problems, was only able to wait for one minute, at most, without engaging in inappropriate behavior, demonstrated little communication, displayed inappropriate eating habits, had begun to make progress in transitions, had lower demands placed on her, would attempt to "dart" outside and inside the classroom, exhibited head banging on padded surfaces, and made little progress in her play skills. (10-07-03, Tr. 82-85) (Parker).<sup>50</sup>

37. On March 3, 2003, Ms. Howard contacted Ms. [REDACTED] to inform her that Dr. Leaf would be in the School System that week to work with [REDACTED], and to ask whether [REDACTED] could stay late on that Wednesday, and inquire as to whether Ms. [REDACTED] would like to meet with Dr. Leaf. Pet. T. 5, DT00774; (10-08-03, Tr. 428) (Howard). That week, Dr. Leaf and Ms. Boehm came to work with [REDACTED] for four days (10-03-03, Tr. 70, 72) (Leaf). Dr. Leaf and Ms. Boehm assumed different roles during this time, with Dr. Leaf working directly with [REDACTED] while Ms. Boehm provided training to staff as to the techniques being used by Dr. Leaf. (10-03-03, Tr. 72) (Leaf).

38. Dr. Leaf's focus was to increase the level of demands placed on [REDACTED], work on her communication system in a more systematic way, expand her reinforcers, and teach [REDACTED] play skills as a replacement skill for engaging in those inappropriate behaviors which were hypothesized to occur as a result of boredom. (10-03-03, Tr. 70-71) (Leaf). During that period of time, [REDACTED] did exhibit some mild to moderate self-injurious behavior, such as heel to heel, and knee tapping, as well as crying and screaming; however, she did not engage in any severe self-injurious behavior. (10-03-03, Tr. 72) (Leaf). Dr. Leaf was also able to increase the number of reinforcers to which [REDACTED] responded, which is significant to children with autism, who need external reinforcers for motivation to behave appropriately and to learn. (10-03-03, Tr. 73-74) (Leaf). As a result of the reduction in her self-injurious behavior and the expansion of reinforcers, [REDACTED] was making behavioral progress. (10-03-03, Tr. 72) (Leaf).

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The ability to increase demands is behaviorally significant because placing demands is often an antecedent to behavior problems, and specifically to some of [REDACTED]'s behavior. (10-03-03, Tr. 59) (Leaf)

<sup>50</sup> The FBA of [REDACTED] was not complete when Dr. Parker left in February, 2003, nor was it complete in August (10-07-03, Tr. 90, 93) (Parker). "...[I]n working with a child like [REDACTED] and working with kids who have skills that they needed to learn and have behavior problems as a result of those skill deficits, you're going to teach them, and as you're teaching them, you have to constantly continue to do a functional behavioral assessment. That's the only way that you can evaluate what's going on in terms of, is this child getting their needs met, and is this child benefiting from this, as well is [sic]...what kind of changes do we need to make to the program? You don't start a program and then continue to implement the exact same program day after day, because that doesn't account for progress. So as you get changes in the child's behavior, and the child makes progress and starts to learn, you're constantly having to revise and revamp your program to continue to meet the needs that the child has, which are going to be ever-changing." (10-07-03, Tr. 90-91) (Parker).

39. On February 11, 2003, Ms. [REDACTED] wrote Ms. Howard asking for an IEP meeting to discuss [REDACTED]'s "educational and behavioral progress." (11-24-03, Tr. 236) (Ms. T.). Ms. [REDACTED] stated the meaning of the letter "was to say that nothing was working and I was at a point now with this letter where I was going to go forward and demand the Marcus Institute because I had read somewhere that if the county could not provide for your child that you had the right to put them elsewhere." (11-24-03, Tr. 236) (Ms. [REDACTED]). Ms. [REDACTED] indicated her concerns regarding [REDACTED]'s head banging to Ms. Howard twice in February. Pet. 5, DT00770, 00772.

40. From March 17-25, 2003, [REDACTED] participated in the Marcus Institute's Outpatient Clinic. (Jt. 1 Vol. 1 T. 87 DT00712). This included a "functional analysis to identify potential variables maintaining inappropriate behaviors," and a "brief analysis to develop interventions for SIB." (Jt. 1 Vol. 1 T. 87 DT00712). The Marcus Institute collected 1260 minutes of direct observation data and identified [REDACTED]'s "most preferred stimuli and activities" that would decrease her problem behaviors and "increase appropriate alternative responses." (Jt. 1 Vol. 1 T. 87 DT00712). The data collected, but never shared with the School System, reveals target behaviors by [REDACTED] at the rate of 2.45 per minute. (Jt. 1 Vol. 1 DT00712; (11-25-03, Tr. 127) (Fisher)).<sup>51</sup>

41. On March 25, 2003, Ms. Ramsey received a letter from the Marcus Institute, signed by Mercedes Ebanks, Catherine Trapani, Henry Roane, and Wayne Fisher, which stated, "[Ms. [REDACTED]] discussed the request to proceed with asking her local school district support [sic] for [REDACTED]'s] placement at the Marcus Institute Behavior Center School." See Joint 1, Vol. 1, T.87, DT00712. In that same letter, the undersigned staff of the Marcus Institute indicated that children like [REDACTED] "have benefited from placement in this program." (Id.)

42. Dr. Freeman presented the results of her evaluation at the March 27, 2003 IEP meeting. (Jt. 1 Vol. 1 T. 88, DT00240-00242; Pet. T. 36, DT01378-1384; Pet. T. 36A pp. 7-21); (10-2-03 Tr. 52-53) (Ramsey); (10-21-03 Tr. 72) (Freeman). The participants at that IEP meeting, including Ms. [REDACTED], Dr. Fisher, and Dr. Trapani, all agreed with the diagnosis of autism. No one challenged the tests Dr. Freeman administered. (Jt. 1 Vol. 1 T. 88, DT00240, 00241, 00246; Pet. T. 36, DT01378, 01383, 01404; Pet. T. 36A, pp. 6, 18, 21); (10-2-03 Tr. 75-77) (Ramsey); (10-21-03 Tr. 73) (Freeman); (11-35-03 Tr. 189) (Fisher)). Although Ms. [REDACTED] was accompanied to the March 27 IEP meeting by parent advocate, Jill Bender, there was no reference to an IEE made by anyone at the meeting. (10-21-03 Tr. 73) (Freeman).

43. Dr. Freeman's evaluation resulted in a diagnosis that was accepted by all members of [REDACTED]'s IEP team. (Jt. 1 Vol. 1 T. 88, DT00240, 00241, 00246; Pet. T. 36, DT01378, 01383, 01404; Pet. T. 36A, pp. 6, 18, 21); (10-2-03 Tr. 75-77) (Ramsey); (10-21-03 Tr. 73) (Freeman); (11-35-03 Tr. 189) (Fisher). Further, Dr. Freeman's evaluation report, including its recommendations, was helpful and assisted the IEP committee as it developed appropriate programming for [REDACTED].<sup>52</sup> (10-8-03 Tr. 470-471) (Howard); (10-2-03 Tr. 53) (Ramsey); (11-20-03

<sup>51</sup> Dr. Fisher, however, was not generally present for any of these sessions, which were under the primary direction of his colleague, Dr. Rome. (11-25-03, Tr. 123, 129) (Fisher).

<sup>52</sup> While Dr. Trapani agreed with Dr. Freeman's diagnosis, she stated that her evaluation report was "very basic" and

Tr. 141, 154) (Chaney). Dr. Freeman's evaluation complied with all standards of acceptable practice in the field, including the requirements of parental consent and involvement and IDEA's evaluation procedures.<sup>53</sup> (11-11-03, Tr. 21-23, 203-04) (Rostetter).

44. At the March 27, 2003, IEP meeting, Ms. [REDACTED] repeatedly referred to her concerns regarding [REDACTED]'s potential for injury from banging her head and wanted to address [REDACTED]'s behavior exclusively. (12-30-03 Tr. 236) (Ms. [REDACTED]); Jt. 1, Vol. 1 T. 88, DT00241; Pet. T. 26, DT01200-1201; Pet. Supp. T. 36A, p. 21) (1-13-03 Tr. 129-131) (Ms. T.); (Pet. Supp. T. 36, DT1394, 1395, 1396, 1397, 1398, 1399, 1400, 1402, 1402, 1411, 1423, 1426, 1427; Pet. Supp. T. 36A, pp. 21, 47-48, 50-51, 53, 55, 57, 58, 59, 61, 62, 63, 67, 71, 97, 122, 130, 131, 132) (11-20-03, Tr. 166-167) (Chaney).<sup>54</sup> Jill Bender, as parent advocate, supported Ms. [REDACTED]'s position. (Pet. Supp. T. 36, DT1407, 1408, 1409; Pet. Supp. T. 36A, pp. 83-84, 87, 89). Any and all concerns that Ms. [REDACTED] expressed were addressed by the School System. (11-10-03 Tr. 49-54) (Pisor). Strategies, including positive behavior interventions to address the interfering behaviors should and, in fact, were discussed at [REDACTED]'s IEP meetings. (10-08-03, Tr. 483-484) (Howard). The meeting was adjourned because Ms. [REDACTED] did not want to proceed with an eligibility determination, the development of goals and objectives, or placement recommendations. (Jt. 1, Vol. 1 T. 88, DT 00251-252; Pet. T. 26, DT01222-1223; Pet. Supp. 36A, pp. 132-135).

45. During the course of the March 27, 2003, IEP meeting, Ms. [REDACTED] expressed concern regarding [REDACTED]'s self-injurious behavior, and indicated her desire for [REDACTED] to be placed in a program at the Marcus Institute.<sup>56</sup> Ms. [REDACTED] informed the IEP team that as [REDACTED] had been under the care of the Marcus Institute for two years and that she wanted the School System to pay for [REDACTED] to attend a behavioral intervention program at the Marcus Institute. Ms. Bender reiterated that

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that it would not allow her to "design more than general recommendations or general goals." (12-30-03 Tr. 142-143) (Trapani). However, Dr. Trapani does not base her critique of Dr. Freeman's report on any standards or requirements under the law. (12-30-03 Tr. 142-143) (Trapani). Moreover, new goals and objectives were not written in the March or the June IEP meetings, and Dr. Trapani did not participate in the August IEP meeting, such that she could ascertain whether the information available to the committee was adequate to develop goals and objectives. (12-30-03 Tr. 190-191) (Trapani).

<sup>53</sup> In fact, Ms. Bender stated that "we've all seen Dr. Freeman's report, and I think that we could all probably agree. I don't think there's going to be a debate as to a category of eligibility." (Pet. T. 36, DT01378; Pet. T. 36A, p. 6).

<sup>54</sup> As a result of a request from Ms. [REDACTED] that an IEP meeting be held to discuss [REDACTED]'s "educational and behavioral progress" in Fayette County, the School System convened an IEP meeting on March 27, 2003. At no time prior to the March 27, IEP meeting did Ms. Chaney inform Ms. [REDACTED] that the School System had predetermined to reject her request for the Marcus Institute. (11-20-03, Tr. 183) (Chaney).

<sup>55</sup> Ms. [REDACTED] was accompanied to the meeting by Jill Bender, a parent advocate from the Zimring & Smith law firm, as well as Drs. Wayne Fisher and Cathy Trapani from the Marcus Institute. In addition, Dr. Freeman and Dr. Leaf were in attendance to discuss their work with [REDACTED] (10-02-03, Tr. 61) (Ramsey).

<sup>56</sup> Although [REDACTED]'s grandmother, [REDACTED], testified that only one side (the School System) was able to speak at the meeting, the transcripts of the meeting reflect that Dr. Fisher spoke at length about the Marcus Institute, reviewed the treatment that they conduct, and made a recommendation for his program prior to leaving the meeting. (11-14-03, Tr. 177).

Ms. [redacted] was requesting placement at the Marcus Institute, and stated that Ms. [redacted] might privately place [redacted] and seek reimbursement from the School System. Dr. Fisher of the Marcus Institute discussed removing [redacted] from her placement in the school setting to an all day program at his institute, which constituted a change in placement. (10-2-03 Tr. 125) (Ramsey); (Jt. 1, Vol. 1, T. 88, DT00247; Pet. Supp. T. 36, DT 1410; Pet. Supp. T. 36A, p. 91).

46. Dr. Fisher<sup>57</sup>, recommended a four-month placement of [redacted] at the Marcus Institute where [redacted] would be treated in a day program. (Resp. T. 13, p. 00053; (11-25-03, Tr. 132) (Fisher)). At no time during the March IEP meeting did Ms. [redacted], or anyone on her behalf, request an independent educational evaluation or a functional behavior assessment of [redacted]. (Jt. 1, Vol. 1, T. 88; Pet. T. 26; Pet. Supp. T. 36; Pet. Supp. T. 36A) (10-02-03, Tr. 75-77) (Ramsey). The School System stated that it would need to review the current IEP and consider a continuum of placement options before making a determination of placement for [redacted] (Pet. T. 36a, p. 134). After Drs. Fisher and Trapani left, Ms. [redacted] elected to stop the meeting because she wanted to continue discussing placement of [redacted] with Drs. Fisher and Trapani present. (See Jt. 1, Vol. 1, T. 88, DT00251-00252; Pet. Ex. T. 26, DT01200-1201; Pet. Supp. T. 36, DT1428; Pet. Supp. T. 36A, p. 135; 12-30-03 Tr. 236 (Ms. T.)) (Jt. 1, Vol. 1 T. 88, DT00251-252; Pet. T. 26, DT01222-1223; Pet. Supp. T. 36, DT01428; Pet. Supp. T. 36A, pp. 132-135). The School System agreed to reconvene the IEP meeting at a later date.

47. Prior to the conclusion of the March IEP meeting, Dr. Freeman cautioned against removing [redacted] from the School District and her natural environment since they were getting her behaviors under control and she was showing acquisition of skills in that environment. Pet. Supp. Ex. T. 36, DT 1411; (10-21-03 Tr. 80) (Freeman). According to Dr. Freeman, placement of [redacted] at the Marcus Institute would be contraindicated. (10-21-03 Tr. 84) (Freeman).

48. Dr. Freeman also opined that it would be contraindicated to remove [redacted] from her program in Fayette County. (10-21-03 Tr. 75, 84) (Freeman). One reason for that opinion is that focusing on behavioral excesses should not be the focus of [redacted]'s program. (10-21-03 Tr. 35, 45) (Freeman). The program at the Marcus Institute focuses on the excesses and reflects of a lack of understanding of how children with autism develop. (10-21-03 Tr. 17) (Freeman). As Dr. Freeman stated, "any treatment for that [hitting head on the floor] just focuses on getting rid of the behavioral excesses is not going to be successful. The treatment has to be on giving her another way of communicating that same point, giving her another way, giving her some control over her behavior, the tantrums, giving her a way to regulate behavior, the focus has to be on teaching replacement behaviors, and that's why we get behavioral excesses in children with autism is because they have these deficits, and you can't talk about one without the other." (10-21-03 Tr. 70-71) (Freeman).

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<sup>57</sup>Wayne Fisher, Ph.D., is the Executive Director of the Kennedy Krieger/Marcus Institute Behavioral Center, a professor at Johns Hopkins and Emory University and editor-in-chief of the Journal for Applied Behavioral Analysis. Dr. Fisher pioneered many of the now-established techniques in functional assessments (FA). He supervised the Marcus assessments to determine the necessity of [redacted]'s needs for a FA. (11-25-03 Tr. 70-71) (Fischer); R-13; R-90.

49. Ms. [REDACTED], as well as advocates on her behalf, asked for placement at the Marcus Institute on a number of occasions. At the March 27, 2003 IEP meeting, Ms. Bender gave the School District notice that it may be necessary to privately place [REDACTED] and seek reimbursement for that placement. (See Jt. 1, Vol. 1, T. 88, DT 00252; Pet. Supp. T. 36, DT 01407, 01409, 01429; Pet. Supp. T. 36A, p. 136).

50. On March 31, 2003, Mr. Zimring, Respondent's counsel, wrote a letter to Fayette County Superintendent Decotis in which he stated that at the March 27, 2003 IEP meeting, the team "sought to secure an immediate intervention through a limited *placement* at the Marcus Institute, Atlanta, Georgia." See Pet. Ex. T.4, DT01163, *emphasis added*. That letter repeatedly refers to the Marcus Institute as a placement. It also indicates that a transition grant would be available to assist in the provision of services at the Marcus Institute. (*Id.*)

51. Subsequently, on April 15, 2003, Mr. Zimring sent a letter to Sam Harben, General Counsel for Fayette County Schools indicating that the Marcus Institute had made a recommendation that the self-injurious behaviors of [REDACTED] be immediately remediated through an appropriate placement. (See Pet. T.4, DT 01145 - 01146).<sup>58</sup> Also on April 15, 2003, Mr. Zimring sent a letter to Mr. Weatherly stating that a previous letter sent by Ms. Fain was accurate in that the letter said that Ms. [REDACTED] sought placement at the Marcus Institute. (See Pet. T. 4, DT 01142). Neither letter written by Respondent's counsel on April 15 expressed disagreement with a School System evaluation or requested an IEE.

52. Then, in a letter to Mr. Weatherly on May 20, 2003, Mr. Zimring wrote, "[W]e believe that the child has been improperly served ... and that the child requires extended school year (ESY) services in the nature of immediate intervention in a strict behavioral reinforcement program. In that regard, we request that the District agree that [REDACTED] receive the services at the Marcus Institute to initiate and/or continue the Behavior Intervention Plan activities and all necessary related services, beginning on June 2, 2003 ..." See Pet. Ex. T. 4, DT 01127-01128. The letter went on to say, "In addition, we identify that we make this request consistent with our earlier and continuing notice that the District provided inappropriate services and we might seek private or substitute services and the District's reimbursement for such services." *Id.* at DT 01128.<sup>59</sup> The School System's counsel responded to Respondent's counsel on May 21, 2003 and May 28, 2003, confirming that Respondent had requested placement at the Marcus Institute. (See Pet. T. 4, DT01125-01126, 01117-01118).

53. On June 2, 2003, the School System received a letter from Mr. Zimring indicating that "Ms. [REDACTED] is willing to consider the Fayette County ESY program in comparison to the Marcus Institute recommendation but must first be provided with the courtesy of having it presented and described. This can be done on an interim or full summer basis. She also wants to have the

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<sup>58</sup> The letter further indicated that the costs of that placement are significantly less than what they have been in the past and the costs of that placement are subject to the grant program from the state. (*Id.* at DT 01146).

<sup>59</sup>In response to Mr. Zimring's letters, Mr. Weatherly's letters sent on May 21, 2003, and May 28, 2003, on behalf of the School District, reiterated that Respondent had requested placement at the Marcus Institute. See Pet. Ex. T. 4, DT 01125-01126, 01117--01118.

Marcus placement considered also on an interim and ESY basis.” 10-2-03 Tr. 96 (Ramsey); Pet. Ex. T. 4, DT 01115. There was no reference in the June 2<sup>nd</sup>, 2003 letter to an IEE. Pet. Ex. T. 4, DT01115-1116; 10-2-03 Tr. 96-97 (Ramsey). Moreover, there was no challenge to any evaluations or assessments done by the school or school system. *Id.*

54. In a letter sent to Petitioner on June 3, 2003; Mr. Zimring stated, “I reference our conversation concerning a meeting and the placement for [redacted].” Pet. Ex. T. 4, DT 01113, emphasis added. He went on to say, “I regret to learn that though the District will allow my client to appear and to hear about the proposed services, and to bring with her individuals from the Marcus Institute to argue for that placement, that this will not occur.” *Id.*, emphasis added. There was no mention of an IEE in this letter. *Id.*; 10-2-03 Tr. 97-98 (Ramsey). Mr. Weatherly’s response, also sent June 3, 2003, included a recollection of the telephone conversation that took place that day in which both parties agreed that “a meeting should be convened to discuss ESY services, including [redacted]’s request for placement at the Marcus Institute for ‘interim placement’ ESY services.” Pet. Ex. T. 4, DT 01111. Mr. Weatherly also reiterated what he said in the telephone conversation, specifically, “I would surmise that it would certainly not be unreasonable for my client to take the position that [redacted]’s placement at Marcus was not necessary given her apparent success in the District’s program.” *Id.*

55. On or around June 2, 2003,<sup>60</sup> Ms. [redacted] provided the School System with a letter from the Marcus Institute providing information regarding the clinical evaluation it had conducted for D.T. and recommending that she attend the Institute’s Severe Behavior Disorders Program.

56. An IEP meeting was held on June 4, 2003, which was audiotaped and transcribed. The purpose of the meeting was to discuss ESY services for [redacted], as well as eligibility.<sup>61</sup> At this meeting, Ms. [redacted] again requested that [redacted] be placed at the Marcus Institute over the summer where a behavior intervention plan (“BIP”) for [redacted] would be developed. ESY services were proposed for 25 hours per week, with transportation provided. In addition, six sessions of parent counseling/training were offered from June 9, 2003, to June 27, 2003, and eight sessions from June 9, 2002, to August 7, 2003. Although not agreeing to the IEP, mom agreed to bring [redacted] to school beginning June 9. At the June 4, 2003 IEP meeting, Mr. Zimring also requested placement for [redacted] at the Marcus Institute and gave notice to the School District that Ms. [redacted] disagreed with the program being provided by the School District and indicated that Ms. [redacted] may seek private services and public reimbursement for them. *See* Joint 1, Vol. 2, T. 112, DT00313; Pet. Ex. T. 27, DT 1259-1260; Pet. Ex. T. 27A, p. 52; P. Ex. T. 27, DT 1279-1280; Pet. Ex. T. 27A, p. 86.

57. At the June 4, 2003 IEP meeting, no request was made by Respondent or her counsel for an IEE. 10-2-03 Tr. 99 (Ramsey); *See also* Joint 1, Vol. 2, T. 112; Pet. Ex. T. 27; Et. Ex. T. 27A. At no point during the March 27, 2003 or the June 4, 2003 IEP meetings did Ms. [redacted] or her attorneys, advocates or other representatives request an IEE or an FBA. Furthermore, Ms. [redacted]

<sup>60</sup> The letter is dated March 25, 2003, but was not provided to the School System until almost two months later.

<sup>61</sup> Attendees at the meeting included: Ms. [redacted]; [redacted]’s grandmother; Mr. Zimring, Petitioner’s attorney; Ms. Fain, Respondent’s attorney; Dr. Leaf; and Dr. Trapani.

never indicated that the School System had conducted an evaluation with which she disagreed. (*Id.*) On June 6, 2003, Mr. Zimring sent a letter to Ms. Fain. (*See* Pet. T. 4, DT 01103). In that letter, Mr. Zimring made no reference to an IEE, nor did he make an objection to any evaluation(s) by the School System. (*Id.*; *See also* 10-2-03 Tr. 100-101 (Ramsey)).

58. [REDACTED] first requested an IEE on June 9, 2003, when Mr. Zimring sent a letter to Ms. Fain, in which he made a request for an IEE. (Pet. T. 4, DT 01102).<sup>62</sup> That was the first time Ms. [REDACTED] or anyone on her behalf first requested an IEE. (10-2-03 Tr. 101) (Ramsey).

59. After reviewing that letter, Ms. Ramsey asked The Weatherly Law Firm to send a letter to Mr. Zimring to clarify which evaluation they were challenging since Mr. Zimring's letter did not identify the evaluation challenged. *See* Pet. Ex. T. 4, DT 01099; 10-2-03 Tr. 102-103 (Ramsey). As such, the letter stated, "My client is unaware of an evaluation that has been conducted that would trigger your client's right to an independent educational evaluation at the Marcus Institute. Further, I dispute your contention that your client has requested an IEE since the Spring. As you well know, your client has been requesting [REDACTED]'s] placement at the Marcus Institute, which provides a minimum three to four month analog [sic] functional analysis and treatment program." (*Id.* at DT 01099).

60. On June 20, 2003, Mr. Zimring, without identifying a contested evaluation, stated "...my client, in the absence of an existing FBA/BIP provided notice of an independent evaluation/FBA to be provided at the Marcus Institute on June 9, 2003." (Pet. T. 4, DT 01095). Mr. Zimring further informed the School District's attorneys that "your client had the option of ensuring the provision of the independent evaluation we sought or seeking due process." *Id.*

61. Having failed to identify the evaluation with which the family was in disagreement, on June 25, 2003, the School District again asked that Mr. Zimring specify the evaluation that he believed was inadequate for [REDACTED]. Otherwise, the School District stated that it had no option but to request a hearing in order to address the legitimacy of [REDACTED]'s request for an IEE and to determine exactly what evaluation [REDACTED] felt was insufficient. (Pet. T. 4, DT 01094). [REDACTED] has never provided any clarity on this point, and the School District had no knowledge or understanding of what evaluation was being challenged on June 25, 2003. (10-2-03 Tr. 187) (Ramsey). Ms. Ramsey authorized Ms. Fain to write a letter on June 25, 2003, requesting a due process hearing. (10-2-03 Tr. 104) (Ramsey); (*See also* Pet. T. 4, DT 01094).

62. On July 10, 2003, in the absence of a response from [REDACTED] identifying the evaluation being challenged, the School District filed a hearing request, which request was amended on July 11, 2003. (Jt. 1, Vol. 2, T. 117, DT 00322 – 00332); Pet. T. 118, DT 00333 – DT 00349).<sup>63</sup>

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<sup>62</sup> Prior to that time, [REDACTED] spoke of the Marcus Institute's program as an educational placement she was trying to secure through the IEP process. The discussions during IEP meetings and in correspondence did not put the School System on notice of a parental request for an IEE. Consistent with standards of acceptable practice in the field, the School District did not interpret the parent's request as one for an IEE until the June 9 letter was received. (11-11-03, Tr. 37, 40-43, 45, 56-57) (Rostetter)

<sup>63</sup> The request was made by Clemene Ramsey, Executive Director of Exceptional Children's Services, on behalf of and with authorization from the School District Superintendent, Dr. John DeCotis. Among the issues identified for

## B. Expert Analysis of Functional Behavioral Assessments (FBA's)

63. While a psychological evaluation is a diagnostic evaluation that compares a child such as ~~63~~ with other children, a functional behavioral assessment is a teaching process that looks at a child in relationship to his own behavior and is not comparative in nature. (10-21-03 Tr. 10, 89-90) (Freeman).<sup>64</sup>

64. A functional behavioral assessments (FBA) is one of the specific approaches and applications derived from the larger methodology of applied behavioral analysis. (11-25-03, Tr. 148) (Fisher). Applied Behavior Analysis (ABA) is an instructional methodology based on learning theory that is used to remediate behavioral difficulties and to teach skills. (10-03-03, Tr. 25) (Leaf). ABA also encompasses a variety of teaching and behavior management techniques, including discrete trial teaching (DTT), chaining, desensitization and prompt fading. (10-07-03 Tr. 241-43) (Parker). ABA has as a fundamental premise that behaviors are learned, and this learning is affected by events that precede and follow behaviors. (10-03-03, Tr. 26) (Leaf). Just as behaviorists believe that behaviors can be learned, they similarly believe that they can be unlearned through changing environmental consequences to the behavior. (10-03-03, Tr. 26) (Leaf).<sup>65</sup> Principles of ABA can be used with individuals of any age, but have specifically been recognized for their effectiveness in the treatment of children with autism. (Pet. Supp. T. 52, DT02107)<sup>66</sup> (10-03-03, Tr. 9-10, 26-27) (Leaf).

65. Use of an FBA<sup>67</sup> is a strategy that synthesizes the ABA practices utilized by behavior analysts and special educators over the last forty-plus years in their efforts to resolve behavioral problems of individuals. (10-01-03, Tr. 45-47) (Kennedy). Specifically, an FBA is the process of looking at the potential functions or causes of problem behavior, developing hypotheses about the causes of such behavior, and augmenting or modifying instructional techniques for the student based on those hypotheses. (10-01-03, Tr. 42-44) (Kennedy). The process is ongoing as one works with the child so as to continuously identify, develop, and provide reinforcers, identify functions of behavior, and systematically teach replacement skills. (10-03-03, Tr. 30-31) (Leaf). Additionally, an FBA involves the development and the implementation of an intervention program, and assessment of the effectiveness of that program and modification of its

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resolution was a determination of what evaluation or FBA was being contested by Respondent. (Jt. 1, Vol. 2, T. 117, DT00327-00328).

<sup>64</sup> Dr. Freeman has had an extensive background in teaching and training professionals, teachers and parents in evaluations of children with autism and the use of FBAs of children with autism.

<sup>65</sup> For example, utilizing principles of ABA, one would provide the least amount of attention to a child when they are engaging in disruptive or self-injurious behavior, remaining as neutral as possible, while keeping them safe. (10-03-03, Tr. 27) (Leaf). During this treatment, reinforcement is also developed and provided, so that inappropriate behavior is stopped and appropriate behaviors are reinforced. (10-03-03, Tr. 27-28) (Leaf).

<sup>66</sup> This exhibit was inadvertently noted as withdrawn in the January 22, 2004 correspondence to the ALJ though the parties had stipulated to its admission.

<sup>67</sup> The term "functional behavioral assessment" was coined by Ralph Horner, a professor at the University of Oregon. (10-01-03, Tr. 46) (Kennedy).

strategies as the individuals' behavior changes. (10-07-03, Tr. 78) (Parker); (10-21-03 Tr. 90) (Freeman); (11-12-03, Tr. 63) (Babcock); (11-25-03, Tr. 164-165) (Fisher); (11-20-03, Tr. 53, 55) (Chaney). In fact, FBAs can be ongoing over a period of years. (11-25-03 Tr. 176-178) (Fisher)

66. There are three tiers of FBA's generally recognized in the field. (10-01-03, Tr. 48) (Kennedy); (11-10-03 Tr. 14-16) (Pisor). During a tier one FBA, the behavior analyst or educator reviews the child's educational records and interviews pertinent staff in order to develop hypotheses about environmental events that might influence the child's problem behavior. (10-01-03, Tr. 48) (Kennedy); (10-03-03, Tr. 40-41) (Leaf). During tier two, also called a descriptive analysis, the analyst or educator expands on the tier one activities to include direct observation of the child's environment in order to determine potential antecedents or triggers to the behavior and to look at the consequences, or things that occur after the child engages in the behavior. (10-01-03, Tr. 48) (Kennedy); (10-03-03, Tr. 41) (Leaf). Tier two FBA's often follow up on the hypotheses that are generated from a tier one FBA. (10-01-03, Tr. 49) (Kennedy). Based on the hypotheses generated from tier one and/or tier two activities, instructional methods are altered for the student in order to determine whether the hypotheses are correct. (10-01-03, Tr. 49) (Kennedy). A tier three FBA, often referred to as analogue functional analyses or experimental analyses, typically occurs in a clinical, artificial setting with which the child is unfamiliar. (10-01-03, Tr. 50) (Kennedy) (10-03-03, Tr. 41) (Leaf). In these analyses, the experimenter directly manipulates certain consequences in relation to the problem behaviors. (10-01-03, T50) (Kennedy).

67. In all levels of FBA's, one is attempting to identify the antecedent to the behavior, develop hypotheses about the functions or causes of the behavior, and test out those hypotheses. (10-03-03, Tr. 41) (Leaf). Despite these commonalities, the more informal, less scientific methods used in tier one and two analyses are contrasted with the procedures used in tier three analogue functional analyses, where experimental precision is often exalted such that, for example, charts are developed to reflect the occurrence of each behavior for each function that is tested in the experiment. (10-01-03, Tr. 137) (Kennedy). For a student with disabilities, tier three FBAs can represent a change in placement because the child must be moved to the clinical setting. (10-01-03, Tr. 210) (Kennedy).

68. Tier one and two analyses have a high degree of ecological validity because they look at the child's behavior in the natural environment in which the behavior occurs. (10-01-03, Tr. 52-53) (Kennedy). However, they have a lower degree of methodological rigor in identifying experimentally the events that might be triggering the problem behaviors. (10-01-03, Tr. 53) (Kennedy). Conversely, tier three analogue functional analyses have a high degree of rigor and methodological precision, but are divorced from the actual environments in which the child is misbehaving. (10-01-03, Tr. 54) (Kennedy). While it can be assumed that valid information is essential to developing sound hypotheses and interventions, the validity<sup>68</sup> and reliability<sup>69</sup> of

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<sup>68</sup> Validity relates to the extent to which what you are measuring is the true phenomenon of interest. (11-25-03, Tr. 46) (Fisher).

<sup>69</sup> Reliability is the accuracy of measurement. (11-25-03, Tr. 45) (Fisher).

information need not reach scientific and publication standards for purposes of FBAs to assist children with disabilities in learning. (10-01-03, Tr. 223) (Kennedy); (11-25-03, Tr. 44-45) (Fisher). For example, professional standards do not require a standardization process or established inter-rater reliability.<sup>70</sup> (10-01-03, Tr. 223) (Kennedy); (11-25-03, Tr. 44-45) (Fisher). Rather, professionals may establish sufficient reliability and validity by “triangulating” information—looking at multiple sources of information such as records review, interviews and direct observations and determining whether that information is consistent across sources. (10-01-03, Tr. 211) (Kennedy).

69. While there is no standard as to the order in which the tiers must be used, the consensus in the field of special educators and behavior analysts is that a tier three analysis is used after tier one and two analyses have been tried without success over time or yield no clear ideas as to why the problem behaviors are occurring. (10-01-03, Tr. 50-51, 54, 208) (Kennedy). There is no literature to support the superiority of one approach over the other; however, there is a large body of literature that supports the effectiveness of FBAs in the natural environment where the behaviors occur, e.g. conducting the FBA in the educational setting in order to address behaviors that occur there. (10-01-03, Tr. 179, 237) (Kennedy); (11-25-03, Tr. 70) (Fisher); (1-13-04 Tr. 236) (Kennedy). Notwithstanding the lower degree of experimental rigor associated with tier one and two analyses, the hypotheses made under any tier, including tier three analyses, are the professional best guess of the educator or behavior analyst. (10-01-03, Tr. 54-55) (Kennedy). A reduction in the behavior problems may indicate that a hypothesis is ultimately correct. (10-01-03, Tr. 55) (Kennedy); (11-24-03, Tr. 92-93) (Bankieris).

70. The FBAs conducted by the School District were a method used to identify target behaviors, their causes, and which reinforcers may be used to extinguish unwanted behaviors.<sup>71</sup> (11-11-03, Tr. 33-34, 95-96) (Rostetter). They involved data collection, through observation and the adjustment and refinement of teaching strategies, based on judgments resulting from the observation. (11-11-03, Tr. 14-20) (Rostetter). This use of FBAs as an educational method is an accepted practice in the field. (11-11-03, Tr. 14-20, 33-34, 95-96) (Rostetter). Educators must be able to engage in this activity to educate children, both with, and without, disabilities. (11-11-03, Tr. 14-20) (Rostetter). As a practical matter, teachers need to be able to modify, adjust, and alter teaching methods on an ongoing basis based upon the impact the teacher is having on the child’s education. (*Id.*) For example, a teacher must be able to change or adjust methods if homework that is returned on Monday morning reveals that the previous week’s instruction was unsuccessful. (11-10-03, Tr. 228) (Rostetter). Similarly, for a child with behavior problems, the teacher must be able to change reinforcers on an ongoing basis, as needed, as conclusions change

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<sup>70</sup> Inter-rater reliability or inter-observer agreement is the extent to which two or more individuals agree on the occurrence or nonoccurrence of particular behaviors. (10-01-03, Tr. 223) (Kennedy); (11-25-03, Tr. 43) (Fisher). Unlike the clinical environment in which analogue functional analyses are completed, there are practical limitations to a school district’s ability to collect inter-observer agreement data. (10-01-03, Tr. 212) (Kennedy). For example, school districts typically do not and cannot have multiple people following around and observing one child throughout the day for purposes of collecting inter-rater reliability data. (10-01-03, Tr. 212) (Kennedy).

<sup>71</sup> It was an intervention, a method that was used to implement [redacted]’s IEP. (11-11-03, Tr. 33-34, 95-96, 207) (Rostetter)

about the antecedents to behavior, or as a reinforcer ceases to have the desired impact on behavior. (Id.)

71. Given the integral nature of FBAs to teaching, it is impractical and not required that school systems secure parental consent for a FBA, a process that teachers engage in on a day-to-day basis. (10-08-03, Tr. 465) (Howard); (11-10-03 Tr. 23) (Pisor). Moreover, professionals must retain flexibility during the various stages of the FBA process, e.g., altering or discontinuing data or interventions, as is consistent with good teaching and standards of acceptable practice in both education and behavior analysis. (10-01-03, Tr. 203-205) (Kennedy). Otherwise, educators would be forced to convene an IEP meeting every time they wanted to change the interventions used with a child, which in [REDACTED]'s case, could require multiple IEP meetings in one day. (10-01-03, Tr. 204) (Kennedy). Further, imposing a prior consent requirement before a behavioral consultant could assist a teacher in identifying strategies to address problem behaviors in the classroom would limit drastically the School Systems' ability to intervene as quickly as possible and would, in cases where a parent might withhold consent, preclude effective intervention. (11-10-03 Tr. 23-24) (Pisor).

72. The FBAs conducted by the School District complied with standards of acceptable practice in the field. They were consistent with the description of FBAs in the literature, they identified and addressed the targeted behaviors, and there was ongoing communication with the parent regarding what was going on. (11-11-03, Tr. 36-37, 203-04) (Rostetter). Further, the ultimate test of whether the information collected as part of the FBA is sufficiently reliable, accurate, and appropriate, is improvement in the child's behavior. (10-01-03, Tr. 212-213) (Kennedy).<sup>72</sup>

73. Dr. Kennedy observed [REDACTED] in person on two occasions, once in the Spring of 2003 and again in late September 2003, and reviewed videotapes of her from the early Fall of 2002. (10-1-03 T. 74-76, 85-86)(Kennedy). He found that, as a result of the School System's FBAs, [REDACTED] is now able to tolerate instruction "impeccably" and work at a much higher level of instructional demand. (10-1-03 T. 74-76, 87-88)(Kennedy). Further, it is evident that [REDACTED]'s behaviors are being resolved in her current placement. (10-1-03 T. 108)(Kennedy). By comparing his observations on these two occasions and based on his extensive background in FBAs and experience in public schools, Dr. Kennedy opined that [REDACTED] was doing "very, very well in her

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<sup>72</sup> Although Respondent has argued that without generalization to all settings, an FBA is inappropriate, the School System's experts disagree: "I do not feel because there's not generalization that treatment's not effective...In an ideal world, I would love generalization across all settings. But often we're not given an ideal world and we don't have the power to make things happen across all settings." (1-13-04, Tr. 348) (Leaf). In this case, an effort to achieve generalization is what drove Autism Partnership's contact with Ms. [REDACTED] including invitations for her to observe, offers to train her in the evenings and to come into her home on weekends, and Dr. Leaf's book was given to her, and observers went into [REDACTED]'s daycare. (1-13-04, Tr. 348, 352-354) (Leaf). The fact that one does not have generalization in the home or other environments over which the School System has no control does not render what occurred in school ineffective or inappropriate. (1-13-04, Tr. 348, 353-354) (Leaf).

current placement" such that there is no rationale for a more intrusive tier three analogue functional analysis at the Marcus Institute. (10-1-03 T. 89, 110)(Kennedy).<sup>73</sup>

### C. Data collection in ABA and expert perspectives and disagreements

74. Data is a fundamental part of ABA including the program that Autism Partnership was using with [redacted] (10-03-03, Tr. 103) (Leaf); (1-13-04, Tr. 305) (Leaf).<sup>74</sup> There are methodical differences in how data is collected, i.e., what kind of data is taken, and when. (10-03-03, Tr. 103) (Leaf); (1-13-03, Tr. 305) (Leaf). Further, there are a variety of forms that data can take. This includes anecdotal data, or written information about the occurrence or nonoccurrence of behavior that is often presented in a narrative or sentence structure. (10-01-03, Tr. 215, 229) (Kennedy); (10-08-03, Tr. 311) (Soluaga).

75. Expert testimony presented reveals a methodological disagreement as to how to conduct a functional behavioral assessment. (01-13-04, Tr. 292) (Leaf). The first difference relates to whether they should be conducted in an artificial setting or in a more natural setting. (01-13-04, Tr. 293) (Leaf). With respect to location, it is Autism Partnership's preference to provide intervention in the most natural setting possible if functions of behavior can be identified and an effective plan developed to address the behavior. (01-13-04, Tr. 293) (Leaf). A second difference relates to the introduction of provoking stimuli, which occurs at the Marcus Institute. (01-13-04, Tr. 293) (Leaf). Finally, there is a methodological difference between data—what kind of data is taken and when. (01-13-03, Tr. 305) (Leaf). While all three tiers of FBAs develop hypotheses and test hypotheses, the methods by which they go about these tasks differ. (01-13-04, Tr. 293-294) (Leaf).

76. For the first eight school days of Autism Partnership's ongoing FBA (Feb. 18-21, 24-27), Dr. Leaf made a professional judgment not to collect systematic data, although Dr. Parker did take notes that included information about the behavior she saw in February. (10-03-03, Tr. 132-133) (Leaf); (1-13-04, Tr. 323) (Leaf); (10-07-03, Tr. 151) (Parker). The primary reason for this decision was to ensure [redacted]'s immediate safety and provide swift intervention rather than using that critical time to develop a data collection system. (10-03-03, Tr. 132-133) (Leaf); (10-20-03,

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<sup>73</sup> Dr. Kennedy reviewed the literature in the field regarding the use of functional behavior assessments in public school settings. (1-13-04 Tr. 188-90) (Kennedy). Although Respondent argued otherwise, there is a very large body of well-known literature in the field, contributed to by dozens of researchers, on the use of FBAs in public schools with children with behavior problems. (1-13-04 Tr. 188-89) (Kennedy). Dr. Fisher is not known to have contributed to this body of literature. (1-13-04 Tr. 189) (Kennedy). There is very strong support in the professional literature for the use of FBAs in the public schools to address the needs of children with behavior problems. (1-13-04 Tr. 189-91) (Kennedy).

Autism Partnership staff has been very effective in its work with [redacted]. They used valid measurement procedures, they worked with [redacted] in the natural setting, and they achieved substantial reductions in the problem behaviors. Their program has been very effective. (1-13-04 Tr. 241-42) (Kennedy).

<sup>74</sup> The information reported by Autism Partnership consultants regarding [redacted]'s behavioral improvement was corroborated by the ongoing data that was being collected and conversations with School System staff. (10-03-03, Tr. 90) (Leaf).

Tr. 89-90) (Taubman); (1-13-04, Tr. 304) (Leaf). Instead, a system was developed and utilized once [REDACTED]'s behavior was at a safer level, and School System staff could be trained and were comfortable with the data collection. (10-03-03, Tr. 132) (Leaf); (1-13-04, Tr. 304) (Leaf). Hence, formal data regarding [REDACTED] was collected beginning February 28. Resp. T. 77, p. 00001; (1-13-04, Tr. 304) (Leaf). This comports with acceptable standards of practice in the field. (1-13-04, Tr. 335, 336) (Leaf).<sup>75</sup>

77. Baseline data "is taken in the absence of intervention and treatment," and is collected before such intervention or treatment begins. (10-20-03, Tr. 87) (Taubman). It exists as a standard in behavioral research that will be presented professionally or disseminated subject to peer-review in the field, and is typically taken in that context in order to reflect experimental control and effectiveness of procedures or interventions. (10-20-03, Tr. 87-88) (Taubman). Autism Partnership did not collect baseline data on [REDACTED] because it was not conducting research that required data collection and because did not need baseline data to understand [REDACTED]'s behavior. (10-20-03, Tr. 89, 91) (Taubman). Further, one of the purposes of baseline data is to establish a sense of what is occurring with the child prior to intervention, which information could be obtained through other sources, including videotapes of [REDACTED] from December 2002, which Dr. Taubman scored using the same observation and scoring system that had been used in the collection of [REDACTED]'s contemporaneous classroom data. (10-20-03, Tr. 90-91-92) (Taubman).

78. The only comprehensive analysis of the data collected by Autism Partnership regarding [REDACTED] was completed by Dr. Mitchell Taubman.<sup>76</sup> Dr. Taubman was qualified as an expert in the utilization of principles of ABA of children demonstrating behavioral difficulties including children with autism, an expert in the use of tier one and tier two functional behavioral

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<sup>75</sup> As Dr. Leaf explained, "...if you are in a self-injurious situation...you are not going to try to develop a data system. You are going to intervene and protect...And at times you have to sacrifice not collecting hard data and take anecdotal data as a way to intervene, to protect...We are not doing research here, we are trying to protect a child's life." (1-13-04, Tr. 335-336, 337) (Leaf)

<sup>76</sup> Dr. Taubman has thirty years of experience in Applied Behavior Analysis, starting with his undergraduate education and continuing through graduate work and professional service and research activities. Pet. T. 13; (10-20-03, Tr. 53-64) (Taubman). Although Dr. Taubman has clinical experience that extends to other groups, the primary population with whom he has worked in the field of ABA has been individuals with autism. (10-20-03, Tr. 61-62) (Taubman).

Dr. Taubman received his Ph.D. in developmental and child psychology in 1980 and serves in several capacities at Autism Partnership, including Psychologist Supervisor, consultant, and Director of Research. (10-20-03, Tr. 53, 56) (Taubman). As a consultant, Dr. Taubman works with school districts and other agencies to assist them *inter alia* in program development, instructional content, and the development of data collection protocols for children with autism. (10-20-03, Tr. 53) (Taubman). In his role as Director of Research, he is responsible for overseeing all of Autism Partnership's research efforts, including the development of research activities, review of the methodology of the research, and the presentation and write-up of that research. (10-20-03, Tr. 53-54) (Taubman). In addition to his clinical work, Dr. Taubman has published in the area of ABA, conducted research in the area of ABA, including specifically the area of data collection and analysis, and has taught classes in such topic areas as ABA, the use of data collection and data analysis, and behavioral assessment generally. Pet. T. 13; (10-20-03, Tr. 62-63) (Taubman)

assessments and the use of data collection systems to measure the effectiveness of utilized assessments and interventions. (10-20-03, Tr. 71-73) (Taubman).<sup>77</sup>

79. Dr. Taubman was involved in the development of [REDACTED]'s data collection system, and spoke with School System staff and Autism Partnership consultants in May 2003 about the system and ways to refine and expand the process. (10-20-03, Tr. 77, 92) (Taubman). Although the School System was collecting both behavioral and instructional data regarding [REDACTED], a staff person recorded the information while instruction was occurring with [REDACTED], and took all of the behavioral data contemporaneously. (10-20-03, Tr. 77) (Taubman).

80. The specific behavioral information recorded included the episodes of problem behavior, the frequency with which those behaviors occurred, the onset of the behavior, the function of the behavior, the duration of the behavioral episode, and the degree of challenge or demand involved in the activities that [REDACTED] was being asked to do. (10-20-03, Tr. 77-78) (Taubman). Although there was no written protocol regarding data collection, there was a protocol that was discussed and agreed upon by the staff, and individuals were trained in the collection of data for [REDACTED], including a discussion as to operational definitions of behavior. (10-20-03, Tr. 241) (Taubman); (11-24-03, Tr. 89-90) (Bankieris); (10-07-03, Tr. 230, 353) (Soluaga). Further, although the School System did not collect inter-rater reliability information in written form, School System staff and consultants from Autism Partnership frequently discussed their observations to check the consistency of what was being observed and recorded. (10-08-03, Tr. 353) (Soluaga); (11-24-03, Tr. 89-91) (Bankieris).<sup>78</sup>

81. Dr. Taubman characterized the data collected as comprehensive and in an amount that exceeds that which is typically collected in school-based programs. (10-20-03, Tr. 80) (Taubman). He further differentiated between the level and intensity of data that would be necessary for experimental scientific research, versus that which is indicated during day-to-day instructional, programmatic interventions such as [REDACTED]'s. (10-20-03, Tr. 81-82) (Taubman). While this distinction creates differing standards of practice, Dr. Taubman testified that the data

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<sup>77</sup> In his career Dr. Taubman has participated in hundreds of FBAs, has specifically taught students about analogue functional analyses, and has studied extensively experimental analysis that involved the presentation and withdrawal of conditions in order to establish a functional relationship. (10-20-03, Tr. 64-65, 69) (Taubman).

In preparation for his testimony, Dr. Taubman had reviewed [REDACTED]'s educational records, reviewed videotapes relating to [REDACTED], interviewed both School System staff and Autism Partnership consultants who worked with [REDACTED], listened to audiotapes of IEP meetings for [REDACTED], consulted with the other School System's expert witnesses, reviewed the raw data that was collected on [REDACTED] from March 2003 through September 2003, and personally observed [REDACTED] on two occasions, May 6-9, 2003 and August 12, 2003. (10-20-03, Tr. 75-76) (Taubman).

<sup>78</sup> In addition to this contemporaneous data, Dr. Taubman, in approximately April, asked the consultants from Autism Partnership to complete a form that rated [REDACTED]'s performance (with 5 being the highest rate of performance, and 0 the lowest) at the time they completed their work with her. Pet. T. 45-46; (10-20-03, Tr. 78-79, 196) (Taubman); (10-08-03, Tr. 333-334) (Soluaga). The rating scales were designed to obtain retrospective information from the individual consultants as to how they felt [REDACTED] had performed in certain areas during the time that they worked with her. (10-08-03, Tr. 336) (Soluaga). The use of such rating scales are recognized adjunctive sources of observational measurement and are supported by literature in the field of ABA. (10-20-03, Tr. 85-86) (Taubman).

collection system utilized with [REDACTED] meets the standards of practice within the field. (10-20-03, Tr. 84-85) (Taubman).

82. Dr. Taubman depicted the behavioral data that was taken in graph form, and personally compiled, collapsed, calculated and entered information into a computer program that generated the graphs.<sup>79</sup> (10-20-03, Tr. 102) (Taubman). These graphs visually represented information that was corroborated by multiple other sources, including records, videotapes, interviews of staff and consultants, and Dr. Taubman's own personal observations of [REDACTED]. (10-20-03, Tr. 117-118) (Taubman). The purposes of graphing data are to see trends over time and to get an accurate, quick summary of the behaviors that are occurring. (11-25-03, Tr. 41-42) (Fisher).

83. In this process of data compilation, Dr. Taubman found some errors; for example, instances in which duration was not recorded, inconsistency in staff records of the level of demands presented, instances in which behavior was recorded but did not occur, and minor human errors in his own calculation. (10-20-03, Tr. 103, 105) (Taubman). "I think that when it comes to behavioral data collection and data compilation that human error is typically part of that. The errors are evenly distributed throughout the entire data. So there's going to be errors when things were higher and there's going to be errors when things were lower. This was not a systematic effort to create errors...It's part of human nature and it's a human factor." (10-20-03, Tr. 270) (Taubman).<sup>80</sup> Based on the comprehensive and contemporaneous nature of the data, his review of records, and reliance on various sources of information, such as his interview of School System and Autism Partnership staff, and personal observations, Dr. Taubman testified that, notwithstanding certain errors that might exist, the data collection system was methodologically sound. (10-20-03, Tr. 98) (Taubman).

84. The data being collected by staff as of March 10, 2003 included a letter coding system of the disruptive behavior that occurred, the duration of the behavior, the activity that [REDACTED] was engaged in at the time, the time of day that the behavior occurred<sup>81</sup>, and hypotheses about the possible functions of the problematic behavior at that time. Jt. 2, T. 7, DATA00051; (10-20-03,

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<sup>79</sup> Although much has been made about whether these graphs were provided to Ms. [REDACTED], Dr. Taubman did not generate depictions of the data until late July or early August 2003. (10-20-03, Tr. 99) (Taubman). This graphical depiction was done for purposes of presentation at the hearing, and was not even available at the time of the March 7 and June 24 IEP meetings. (10-20-03, Tr. 99-100) (Taubman).

<sup>80</sup> Out of 100 days of data collected from March 10 through August 29, Respondent directed Dr. Taubman to 8 days in which errors occurred, four of which days were related to one miscalculation error. (10-20-03, Tr. 208-210) (Taubman). Those errors did not affect Dr. Taubman's expert opinion that the process of data collection, analysis and representation completed here met standards of practice in the field.

<sup>81</sup> Though the time of day in which the behaviors occurred were recorded, (10-01-03, Tr. 136-137) (Kennedy); (10-03-03, Tr. 185) (Leaf), no statistical analysis was conducted as it was not professionally indicated and because "[o]ver time it appeared that there were certain times of day when her behavior clustered at certain periods of the day, but that wasn't consistent throughout and it seemed to be more related to challenges, including occurring during work times or happening from break times to work times. But the time of day was less important. So, I went toward looking at challenges and also examined her schedule for the day." (10-20-03, Tr. 225-226) (Taubman)

Tr. 101) (Taubman).<sup>82</sup> To simplify graphical depiction, Dr. Taubman did not represent on a daily basis every single instance of a behavior, and instead collapsed the data and presented in the graphs what was occurring on a week-by-week basis. (10-20-03, Tr. 104) (Taubman). This process of collapsing data and preparing graphs comports with standards of acceptable practice in the field. (10-20-03, Tr. 104, Tr. 109) (Taubman).<sup>83</sup>

85. [REDACTED]'s data sheets evolved over time, and additional behaviors were added as they arose, while only three behaviors were being recorded in the beginning, ultimately sixteen behaviors were scored. (10-20-03, Tr. 113) (Taubman). This addition of new behaviors is neither unusual nor is it reflective of the fact that [REDACTED]'s behavior was worsening. (10-20-03, Tr. 113) (Taubman). To the contrary, "the new behaviors that were added were of a lesser severity and in some cases were a lesser form of the more severe behaviors." (10-20-03, Tr. 113, 169-170) (Taubman); 10-03-03, Tr. 92) (Leaf); (10-07-03, Tr. 260) (Soluaga). This phenomenon, alternatively called "behavior" or "symptom substitution," is not uncommon and can occur as replacement behaviors are being taught and until the appropriate alternatives are finally learned. (10-20-03, Tr. 114) (Taubman); (12-30-03, Tr. 200) (Trapani). A change in the severity of these behaviors, even an increased frequency in these milder forms of behavior, are common and demonstrate improvement.<sup>84</sup> (10-07-03, Tr. 260) (Soluaga) (1-13-03, Tr. 314-315) (Leaf).

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<sup>82</sup> The School System did not collect formal data on [REDACTED]'s sleep cycles nor potential health issues, nor did Autism Partnership staff, who are trained to identify functions of behavior, report these as significant issues. (10-20-03, Tr. 236-237, 266-267) (Taubman). "I do feel like there are other pieces of information that speak to what improves her behavior. So, I would not tend to look toward her health or sleep." (10-20-03, Tr. 237) (Taubman).

<sup>83</sup> Dr. Taubman did not misrepresent or manipulate the data or their graphical depictions, or selectively choose graphs that were supportive of either side's position in this matter. (10-20-03, Tr. 106-107, 259) (Taubman). Rather, the goal was to accurately represent what occurred, recorded and graphed. (10-20-03, Tr. 106-107) (Taubman).

Dr. Taubman prepared graphs that represent, *inter alia*, the frequency of behavior, the duration of behavior, their intensity and severity, and contextual information about the demands that were occurring, the instructional environment in which [REDACTED] was able to participate, the degree of independence with which [REDACTED] was able to transition, etc. Pet. T. 30, DT01347-1368; (10-20-03, Tr. 109-110, 112) (Taubman). Because each graph presents only one dimension of [REDACTED]'s behavior, it is important that they be reviewed not in isolation, but in conjunction with one another so that a complete picture of [REDACTED]'s behavior is appreciated. (10-20-03, Tr. 111) (Taubman).

<sup>84</sup> Respondent suggests that the addition of new behaviors somehow reflects on the effectiveness of the FBAs done by the School System. However, it shows that the School System went beyond the head-banging behavior that Ms. [REDACTED] focused upon in the March and June IEP meetings and addressed many other behavioral difficulties.

Although Ms. [REDACTED] reports a host of behaviors exhibited by [REDACTED] at home and/or daycare (e.g., smearing feces, bending fingers, pulling hair, scratching body, etc.), these were not reported by her or the daycare to the School System and were not behaviors otherwise observed or noted as problematic by the School System. (1-13-04, Tr. 384-386) (Skinner-Robertson). Consequently, they were not addressed in the ongoing FBA. The only behavior noted by Ms. [REDACTED] that had been observed by the School System was the use of the word "fuck." Over the summer [REDACTED] was saying a word that sounded like "fuck," although it was not clearly articulated, and did not occur with a frequency that merited its recordation. (11-24-03, Tr. 65) (Bankicris). As [REDACTED]'s use of the word continued in the Fall, Ms. Skinner-Robertson began to address it and is teaching [REDACTED] a replacement skill by offering her communication temptation. (1-13-04, Tr. 384-386) (Skinner-Robertson); (1-13-04, Tr. 323) (Leaf). The fact that formal data is not

86. Sixteen of [redacted]'s problematic behaviors recorded were: crying, kicking of feet, hitting her head with her hand, hitting her head to the floor, being out of her chair (e.g., "bolting") when staff were working with her, throwing things, spitting, hitting her hand to her chin, flopping on the floor, biting, fussing, using her head to hit staff persons, hitting her hand to her thigh, scratching another, shoes off, hitting staff with her hands. (10-20-03, Tr. 115-116) (Taubman).

87. The frequency counts represent how often [redacted]'s sixteen problematic behaviors occurred on an average daily basis. Pet. T. 30, DT1350-1353; (10-20-03, Tr. 119) (Taubman).<sup>85</sup> Hence, Dr. Taubman calculated the total number of each behavior for the week, and divided by five. (10-20-03, Tr. 119-120) (Taubman). To reduce any confusion and for ease of representation, the frequency of these behaviors were depicted across a series of four graphs. (10-20-03, Tr. 251) (Taubman). With respect to crying, kicking feet, hand to head, and head to floor behaviors, the graph reflect variability in their frequency from March 10 through August 29, 2003, but with an overall decreasing trend in frequency. Pet. T. 30, DT1350; (10-20-03, Tr. 117) (Taubman). The head to floor behavior, which was the focus of Ms. [redacted]'s concern, never occurred after the week of March 31-June 4.<sup>86</sup>

88. Many of the accelerations or spikes in these behaviors occurred after [redacted] returned from school breaks when [redacted] was not in the classroom. (10-20-03, Tr. 121) (Taubman). For example, there were breaks from April 4-14, May 23-June 9, June 27-July 7, and a break from August 1-11. (10-20-03, Tr. 121, 125) (Taubman). Even those effects, however, have diminished over time. (10-20-03, Tr. 122) (Taubman). These breaks were also accompanied "with an increase in the challenges that were presented to [redacted] over time, a more provocative, more challenging educational day," as well as a general reduction in the severity of the inappropriate behaviors. Pet. T. 30, DT1368; (10-20-03, Tr. 121, 126) (Taubman). An increase in demands is behaviorally significant because the more challenging the demands, the more one would expect to see disruptive behavior as a result, particularly where, as here, inappropriate behavior has historically occurred for purposes of avoiding challenges and tasks. (10-20-03, Tr. 128) (Taubman). Hence, if problem behavior stays the same or decreases in the face of increasing challenges, one would consider that progress. (10-20-03, Tr. 127-128) (Taubman). In D.T.'s case, data reflects that the level of demands placed on D.T. increased proportionally over

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being collected and a written product generated, does not mean that the behavior is not being addressed. (1-13-04, Tr. 333) (Leaf).

<sup>85</sup> While [redacted] left early on many Wednesdays, this did not affect Dr. Taubman's opinion about the propriety of averaging across five days rather than using a weighted average: "I think that weighted averages are done oftentimes for statistical analysis within the industry. But for graphing it is not uncommon for there to be different periods of intervention, school days, etcetera. And most often actually when you're graphing behavioral data you would not use weighted averages. Do people use weighted averages? Absolutely. But is it the standard? Once again, there is different practices and this is a practice that is certainly used." (10-20-03, Tr. 207-208) (Taubman).

<sup>86</sup> Although an incident of head to floor behavior was recorded during the week of June 23-27, School System staff confirmed to Dr. Taubman that it was scored incorrectly and in fact never occurred. (10-20-03, Tr. 122-123) (Taubman).

time, with far more challenging demands being placed on her in August 2003 than February 2003. Pet. T. 30, DT1360; (10-20-03, Tr. 129) (Taubman).<sup>87</sup>

89. From April through August 2003, the severity of [redacted]'s inappropriate behavior at school decreased from more severe to less severe. Pet. T. 30, DT01368; (10-20-03, Tr. 134) (Taubman). Similarly, the overall demands placed on [redacted] were increasing from April through August. Pet. T. 30, DT01360; (10-20-03, Tr. 134) (Taubman). Further, the degree of independence with which [redacted] was able to transition increased from June through August 2003. Pet. T. 30, DT01348. The ability to transition well is important, particularly in a school setting, and "is at least an indirect measure of one's behavioral performance because if one is making transitions more independently, which is a goal unto itself, it is evident of the fact that we are being managed in a better sense behaviorally speaking, too." (10-20-03, Tr. 135) (Taubman).<sup>88</sup>

90. At all times during Autism Partnership's involvement, [redacted] received intervention in her special education classroom. (10-20-03, Tr. 137) (Taubman); (10-08-03, Tr. 328) (Soluaga). Although initially that instruction occurred largely in a one-to-one format, the graph reflects [redacted]'s increased ability to be integrated into classroom routine and included in the regular education environment. Pet. T. 30, DT01349; (10-20-03, Tr. 137, 188) (Taubman).<sup>89</sup>

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<sup>87</sup> Frequency counts of the problematic behaviors of hand to chin, spitting, throwing things, and bolting reflect variability and, at times, acceleration in these behaviors. Not only are these behaviors less severe in nature, but also a review of other measures reflects that challenges were increasing and the severity of behaviors is decreasing over time. Pet. T. 30, DT1351, DT1368; (10-20-03, Tr. 123-124) (Taubman).

A graphical depiction of the duration of [redacted]'s problem behavior was also created, and reflects another dimension of [redacted]'s behavior. Pet. T. 30, DT01347; (10-20-03, Tr. 123-124) (Taubman). Duration information was recorded and reflected as a weekly average, such that thirteen episodes that occurred for a total duration of twenty minutes would be calculated as twenty divided by thirteen. (10-20-03, Tr. 132) (Taubman). Nevertheless, the graph depicts a reduction over time in the average duration of [redacted]'s disruptive behavior, which reduction continued through September. Pet. T. 30, DT01347; (10-20-03, Tr. 133) (Taubman).

Information collected with respect to [redacted]'s response to demand situations was created as a result of the consultant's retrospective recording of [redacted]'s performance during their consultation. Pet. T. 30, DT 01361; Pet. T. 46. This data reflects the consultant's perception of [redacted]'s response to demands that range from little or no demands to high demand circumstances. (10-20-03, Tr. 133) (Taubman). The graph reflects a, "... very good response to moderate and low demands and improved response to high demands as well." (10-20-03, Tr. 133) (Taubman).

<sup>88</sup> This information is corroborated by the other sources of information, including the testimony of several other witnesses. (10-07-03, Tr. 225)(Soluaga); (10-03-03, Tr. 108-110) (Leaf).

Similarly the amount of time that [redacted] spends in various types of instructional settings is a consideration in determining the effectiveness of behavioral interventions. (10-20-03, Tr. 136) (Taubman). This is the case because "it shows that with an improvement in behavior, there was able to be an expansion of the kind of instruction she was getting, the kind of arrangement that surrounded that instruction...But certainly there is an expansion here in how it's happening and where it's happening as evidence again at least indirectly of the behavioral gain. It is also related to that in that if that continues to be maintained or increased one would expect that behavioral gains are being maintained and/or increased so that they can continue to pursue those kinds of instructional arrangements as well." (10-20-03, Tr. 137) (Taubman).

<sup>89</sup> Based on the data, graphs, and other multiple sources of information that corroborated his opinions, Dr. Taubman

#### D. The Marcus Institute

91. The school at the Marcus Institute is a private school accredited by the Georgia Department of Education, which allows school districts to place children there and to apply for the state reintegration grant to recoup some of the expenditures associated with that placement. (11-25-03, Tr. 153) (Fisher); (12-30-03, Tr. 47) (Trapani).<sup>90</sup> Placement in the severe behavior unit, which has been recommended for [REDACTED], is similarly approved and is part of the school program. (11-25-03, Tr. 155) (Fisher). The Marcus school program is part of the Behavior Center, which is under the direction of Dr. Fisher. (12-30-03, Tr. 21) (Trapani). The Marcus Institute conducts only tier three functional analyses. (11-25-03, Tr. 80) (Fisher) As a matter of general practice, the Marcus Institute conducts an initial assessment of a child, which includes an interview of the primary caregiver, including questions about the frequency, duration, and severity of the child's problem behaviors, as well as observations of the child. (11-25-03, Tr. 31-33) (Fisher). After the interview, staff at the Marcus Institute test out common reinforcers for the problem behavior (e.g., escape from demands, access to preferred items) by placing the individual in analogue conditions and systematically isolating all other variables except for the test condition (identifying functions of behavior), and then proceed to treatment in order to test various strategies that might work for the student. (11-25-03, Tr. 17-20, 47, 163-164) (Fisher).

92. The test conditions in which Marcus Institute staff is attempting to evoke the child's problem behaviors typically involve a team of three people working with the child. (11-25-03, Tr. 40) (Fisher). During these sessions, the child is put in a padded treatment room with a one-way mirror so that parents and Marcus staff can observe. (11-25-03, Tr. 40) (Fisher). In addition, there are typically one or two individuals collecting data on laptop computers from behind a one-way mirror. (11-25-03, Tr. 40-41) (Fisher). This data is then graphed so that staff can look at the trend in behaviors that occurred over many sessions. (11-25-03, Tr. 41) (Fisher). ). In addition, "in order to safely conduct a functional behavioral analysis or to safely implement the treatment that's the result of the analysis," padded treatment rooms are used. (11-25-03, Tr. 40) (Fisher); (12-30-03, Tr. 41-42) (Trapani). Dr. Fisher has testified that the procedures used at the Marcus Institute are consistent with what would be considered "best practices." (11-25-03, Tr. 22) (Fisher). He further stated that once an effective treatment intervention is found for the students, the Marcus Institute is able to generalize that treatment across the child's entire day. (11-25-03, Tr. 23-24) (Fisher).

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testified that the functional behavioral assessments conducted by Autism Partnership were appropriate. (10-20-03, Tr. 138-139) (Taubman). "Taking these graphs, all of the information, the different sources of information together, they are in my opinion indicative of [REDACTED]'s progress in her disruptive behaviors. The functional behavioral assessments were a part and parcel of those efforts and, therefore, the progress, or therefore, the effects or effectiveness of those efforts include the effectiveness of the functional behavioral assessment element. ongoing element." (10-20-03, Tr. 139) (Taubman).

<sup>90</sup> Since August 2000, Dr. Trapani has been the Director of Education at the Marcus Institute, which includes responsibility for the day-to-day operation of its school program. (12-30-03, Tr. 18, 22) (Trapani). The school program is part of the Behavior Center, which is under the direction of Dr. Fisher. (12-30-03, Tr. 21) (Trapani).

93. The philosophy of Marcus is “to be a short-term evaluation and treatment facility.” (12-30-03, Tr. 44) (Trapani). This characterization is consistent with Dr. Fisher’s recommendation at the March 27, 2003 IEP meeting for a four month course of treatment at a program such as Marcus for five days per week, from 9 a.m. to 3 p.m. (Pet. Supp. T. 36, DT01410; (12-30-03, Tr. 180-181) (Trapani)). In point of fact, however, four months is merely an estimate of time that [REDACTED] could be in Marcus, and in [REDACTED]’s case could be more or less than that. (12-30-03, Tr. 174) (Trapani).

94. Whether there for “evaluation” or “educational placement,” all children at Marcus receive a functional analysis. (12-30-03, Tr. 188) (Trapani). Dr. Fisher’s recommendation for [REDACTED] was “that she come to the Marcus Institute for a period of roughly three to four months to conduct a functional behavioral assessment that would include analogue functional assessments, descriptive assessment—direct observation assessments as necessary to identify the functions of behavior and then try out interventions until we develop something that would be effective for that problem and then to train the parents and school personnel to implement the treatment.” ((11-25-03, Tr. 98) (Fisher); see also (12-30-03, Tr. 180-181) (Trapani). Dr. Fisher described the analysis for [REDACTED] as involving [REDACTED] spending her entire day in a school program, “she’d be in the school all day, half the day in behavior therapy sessions; half the day in classroom activities.” (11-25-03, Tr. 155-156) (Fisher).

95. Although Dr. Trapani testified that Marcus’ recommendation for [REDACTED] was solely for assessment and not for “a school placement,” even those children who attend for “evaluation” purposes receive treatment intervention, which includes implementing at least portions of the students’ IEP in the Marcus classroom setting. (12-30-03, Tr. 152, 178) (Trapani).

96. The school at Marcus consists of nine classrooms, two play rooms, two playgrounds, a life skills center, and an art studio. (12-30-03, Tr. 35) (Trapani). In addition, “in order to safely conduct a functional behavioral analysis or to safely implement the treatment that’s the result of the analysis,” padded treatment rooms are used. (11-25-03, Tr. 40) (Fisher); (12-30-03, Tr. 41-42) (Trapani).<sup>91</sup> The ultimate goal at Marcus “is to identify the function, design a treatment, and to teach people across settings to implement that treatment to 90 percent reliability.” (12-30-03, Tr. 203) (Trapani). As part of the generalization, Marcus would want the family to participate in observing and understanding the proposed treatment plan. (11-25-03, Tr. 134-135) (Fisher).

97. The parties stipulated that David Rostetter, Ed.D. is an expert in the standards of acceptable practice under IDEA, in the identification, evaluation, placement, and provision of a free appropriate public education for children with disabilities and the use of functional behavior assessments in that process. (11-10-03, Tr. 217-18).<sup>92</sup> He testified that it would be contrary to

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<sup>91</sup> While Dr. Trapani qualified as an expert in “educational psychology, assessment, special education, special education planning and administration, including children who have autism or are on the autism spectrum,” Dr. Trapani is not a licensed clinical psychologist, or a certified or credentialed school psychologist, and is not qualified to diagnose autism under the DSM-IV. (12-30-03, Tr. 120-121) (Trapani). Dr. Trapani does not have expertise in the area of ABA or FBAs and was not qualified as an expert in those areas. Although she observes functional assessments at the Marcus Institute, performing them is not her function. (12-30-03, Tr. 105) (Trapani).

<sup>92</sup> Dr. Rostetter has almost 30 years of experience in the field of special education interpreting, applying, and

acceptable practice in the field to move a child with a disability to a more restrictive environment for an extended period of time without going through the IEP team decision-making process for a change in educational placement. (11-11-03, Tr. 57-58, 76, 80-81, 162-63, 203-04) (Rostetter). This would be the case even if the change was to facilitate an evaluation of the child. *Id.*

98. Indeed, as explained by Dr. Rostetter, the ramifications of viewing the Marcus Institute's program proposed for ~~98D~~ as an evaluation and not a placement are profound. (11-11-03, Tr. 77) (Rostetter). Federal law provides that a parent has the right to consent to an initial special education evaluation while withholding consent for initial placement in a special education class. (11-11-03, Tr. 77-78) (Rostetter). Interpreting the Marcus Institute's program here as an evaluation, and not as a placement, has ramifications for a parent's ability to withhold consent for placement and has ramifications that go to the heart of IDEA. Essentially, it would mean that schools could bypass a parent's right to withhold consent for an initial placement by simply obtaining consent to evaluate (as part of the eligibility determination process, for example), and unilaterally place a child in a facility such the Marcus Institute for months on end, under the theory that it is an "evaluation" and not a "placement." (11-11-03, Tr. 77-78) (Rostetter).<sup>93</sup>

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monitoring the application of IDEA to special education practices. (11-10-03, Tr. 175-80) (Rostetter); (Pet. T. 10). Dr. Rostetter was employed by the U.S. Bureau of Education for the Handicapped (now the Office of Special Education Programs), part of what is now the U.S. Department of Education, from 1975 to 1986, serving as Branch Chief and later as Director of the Division of Assistance to States, where he had responsibility for implementation and monitoring of IDEA. (11-10-03, Tr. 175-78) (Rostetter). During his time with the Department of Education, Dr. Rostetter was the lead person responsible for developing the manuals, standards, and procedures used by federal monitors in reviewing states' compliance with Public Law 94-142, the predecessor to IDEA. (11-10-03, Tr. 177-80, 193-94) (Rostetter). The federal monitoring framework developed by Dr. Rostetter is still in use today. (11-10-03, Tr. 180, 194) (Rostetter). He also participated in drafting the federal regulations and federal guidance issued pursuant to Public Law 94-142. (11-10-03, Tr. 176-77, 186-87) (Rostetter). As part of the implementation of Public Law 94-142, Dr. Rostetter worked as a federal monitor, visiting approximately 42 states and many local school districts to review their practices for compliance with federal statutory and regulatory requirements. (11-10-03, Tr. 181-82) (Rostetter). After leaving the Department of Education, Dr. Rostetter has continued his professional work in the field of special education as a consultant to families, school districts, state departments of education, and the U.S. Department of Education. (11-10-03, Tr. 194-97, 200, 204-08, 210-17) (Rostetter). He has worked as a federal court monitor in special education class action lawsuits, as a special master for a federal district court judge in a special education class action, and as a federal court Rule 706 expert in a special education class action. (11-10-03, Tr. 204-08, 210-17) (Rostetter). Additional information regarding Dr. Rostetter's credentials and expertise is reflected in his curriculum vitae. (Pet. T. 10).

<sup>93</sup> [T]here are only two consents required. When the people gave up their right to the government to allow school districts to take children with disabilities and do things to them, they withheld that right or that obligation from the school districts in two areas, initial consent for evaluation, that is you may not touch my child without my permission, and if I don't give it we're going to fight about it, and number two is you may not place my child, that is place my child in a special education program that limits their rights in any way without my consent. So if I bypass that consent in the name of evaluation and conceptually it's unacceptable, and it doesn't matter to me what other people think about it....But secondly to do so with a child who is already receiving services in the program and receiving benefit is really frightening. I mean this is exactly the stuff that precipitated the passage of this statute with two and a half million children in this situation being evaluated for years, never achieving the criteria to get out of these damn places. Okay. We pass a law to get the kids in, and now we're saying before we decide them eligible we can put them back in there, and according to the Marcus program she has to earn her way out. She has to do well enough in that program to get back into the regular setting before hypothetically she's eligible for special ed. That is inconceivable to me. (11-11-03, Tr. 77-78) (Rostetter).

99. Rostetter further testified that the proposed Marcus Institute evaluation constituted an educational placement rather than an evaluation. (11-11-03, Tr. 77-78, 162-63) (Rostetter). Federal law provides that a parent has the right to consent to an initial special education evaluation while withholding consent for initial placement in a special education class. (11-11-03, Tr. 77-78) (Rostetter). As Dr. Rostetter explained during his testimony, interpreting the Marcus Institute's program here as an evaluation and not a placement has ramifications for a parent's ability to withhold consent for placement and has ramifications that go to the heart of IDEA. (11-11-03, Tr. 77-78) (Rostetter).

100. The state reintegration grant is only available for school districts that first concede that they cannot serve the student in his/her existing educational placement. (Pet. T. 4, DT01162); (12-30-03, Tr. 160-161, 163-164) (Trapani). The grant form application requires the School System to specify the needs of the student that require his/her placement in the private program, and that those needs be documented in IEP placement minutes. (12-30-03, Tr. 164) (Trapani). Accordingly, [REDACTED] would have to have an IEP written for that placement. (12-30-03, Tr. 165) (Trapani).<sup>94</sup> Indeed, the only possible avenues for children being at the Marcus Institute is "through an IEP process," or "because a parent has chosen [them] as an alternative placement on their own." (11-25-03, Tr. 160) (Fisher). While students are placed at Marcus, IEPs must be developed and/or followed, and Marcus must comply with the Individuals with Disabilities Education Act. (12-30-03, Tr. 147, 170-171) (Trapani). Among those requirements that Marcus must follow is the least restrictive environment (LRE) mandate. (12-30-03, Tr. 173) (Trapani). A placement at Marcus would clearly constitute a more restrictive placement than the Fayette County School District.

101. Another factor indicating that Marcus is a placement is that in describing the Marcus program, both Drs. Trapani and Fisher emphasized that the purpose of their interventions with D.T. would be to provide her with interventions that would teach her to generalize skills across settings, including her performance in the home, community, daycare, and school. (12-30-03, Tr. 195) (Trapani). Dr. Fisher explained that once an effective treatment intervention is found for the students, the Marcus Institute is able to generalize that treatment across the child's entire day. (11-25-03, Tr. 23-24) (Fisher).<sup>95</sup> As Dr. Trapani explained, "[i]f you cannot demonstrate the safe change across people, places, and things, then one would have to question the efficacy of that assessment or that intervention. That's standard scientific practice." (12-30-03, Tr. 90, 98) (Trapani). Our ultimate goal "is to identify the function, design a treatment, and to teach people

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<sup>94</sup> Although Dr. Trapani testified that Marcus' recommendation for [REDACTED] was solely for assessment and not for "a school placement," even those children who attend for "evaluation" purposes receive treatment intervention, which includes implementing at least portions of the students' IEP in the Marcus classroom setting. (12-30-03, Tr. 152, 178) (Trapani).

<sup>95</sup> Although Dr. Fisher testified that 95% of the time the Marcus Institute is able to design interventions for children that reduce their problem behaviors by 80% or more under the conditions in which the behavior is most likely, he admitted that even in those situations, that does not mean the child never has behavior problems again. (11-25-03, Tr. 24, 239) (Fisher). (1-13-04 Tr. 219-21) (Kennedy). In such instances, the Marcus Institute would look at the program interventions being used with the child and make adjustments to the program. (11-25-03, Tr. 24-25) (Fisher).

across settings to implement that treatment to 90 percent reliability.” (12-30-03, Tr. 203) (Trapani).

102. The Marcus Institute’s program proposed for [REDACTED] is a more restrictive placement than that being provided in accordance with her IEP. (11-11-03, Tr. 204) (Rostetter). A placement in a special education classroom in a regular school is a less restrictive placement, along the continuum of placement options, than a placement in a private separate school for children with disabilities. (11-11-03, Tr. 204) (Rostetter). Thus, where [REDACTED] is benefiting from her IEP in a less restrictive setting, a change in placement to a more restrictive setting (particularly one that is contraindicated for a child such as [REDACTED]) would be inappropriate. It would be contrary to acceptable practice in the field to move a child with a disability to a more restrictive environment for an extended period of time without going through the IEP team decision-making process for a change in educational placement. (11-11-03, Tr. 57-58, 76, 80-81, 162-63, 203-04) (Rostetter). This would be the case even if the change was to facilitate an evaluation of the child. (Id.)<sup>96</sup> The position of the National Academy of Science maintains that children with autism should receive their treatment in the natural environment - school. (10-21-03 Tr. 20, 29, 35, 59, 65, 66, 75, 84, 174) (Freeman).

### III. Conclusions of Law

#### A. IDEA and its purpose

1. This hearing arises out of [REDACTED]’s request for an independent functional behavioral assessment from the Marcus Institute, brought pursuant to IDEA’s “independent educational evaluation” (“IEE”) provision. IDEA provides that parents have the right to seek an IEE at public expense “if the parent disagrees with an evaluation obtained by the public agency.” 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(b); Ga. DOE Rule 160-4-7-.05(4)(a).

2. IDEA was enacted “to ensure that all children with disabilities have available to them a free appropriate public education....” 20 U.S.C. §1400(d)(1)(A). The “free appropriate public education” (“FAPE”) provided by IDEA is defined as special education and related services that: (1) have been provided at public expense, under public supervision and direction, and without charge; (2) meet the standards of the State educational agency; (3) include an appropriate preschool, elementary, or secondary school education in the State involved; and (4) are provided in conformity with an Individualized Educational Program. 20 U.S.C. § 1401(8).

3. IDEA’s procedural safeguards and requirement that state and local educational agencies receiving IDEA funds establish and maintain such procedures are for the purpose of ensuring

<sup>96</sup> As Dr. Rostetter opined “It’s wrong to lift [REDACTED] out of school, isolate her from her peers, put her in an extraordinarily restrictive intrusive setting absent the decision-making process that’s supposed to occur in the school district, which is can [REDACTED] be educated in a regular class, can [REDACTED] be educated successfully in a resource room, can she be educated successfully, and the words are achieve education satisfactory [sic] in a special class, or must we further limit her interaction with her nondisabled peers by moving her to a treatment institution, Marcus Institute, and per se limiting her access to anything which approaches normal in her daily routine.” (11-11-03, Tr. 58) (Rostetter)

“that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies.” 20 U.S.C. § 1415(a)(emphasis added).

4. The IEE is one of those procedural safeguards required to protect FAPE. 20 U.S.C. § 1415(b)(1)(listing the right to an IEE as a “procedure...to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education...”); 34 C.F.R. § 300.502 (identifying the right to request IEE as a “due process procedure for parents and children”); Georgia DOE Rule 160-4-7-.05 (including the right to request IEE in rule entitled “Procedural Safeguards/Parents Rights”). Other procedural safeguards include access to educational records, the right to receive written notice of proposed changes in the IEP, the right to an impartial due process hearing, and the right to bring a civil action in state or federal court. *Id.* These procedural safeguards protect the child’s right to FAPE by providing for the “full participation of concerned parties throughout the development of the IEP.” Board of Educ. v. Rowley, 102 S.Ct. 3034 (1982); see also Doe v. Alabama State Dept. of Educ., 915 F.2d 651, 661 (11<sup>th</sup> Cir. 1990).

5. In Rowley, the Supreme Court was called upon to establish a standard for determining when a school system has satisfied its obligations to provide FAPE to its students with disabilities. In so doing, the Supreme Court made plain that compliance with the Act’s procedural safeguards is the first question in the FAPE analysis. *Id.* at 3051 (“First, has the State complied with the procedures set forth in the Act? And second, is the Individualized Education Program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits?”).

6. In considering this FAPE analysis, the Eleventh Circuit has established clearly that procedural defects are actionable as part of a FAPE case if the defect is found to deprive the student of FAPE. Weiss v. Sch. Bd. of Hillsborough County, 141 F.3d at 990, 994 (11<sup>th</sup> Cir. 1998)(“[i]n evaluating whether a procedural defect has deprived a student of FAPE, the Court must consider the impact of the procedural defect, and not merely the defect per se.”); Doe v. Alabama State Dept. of Education, 915 F.2d at 661-62; see also Devine v. Indian River County Sch. Bd., 249 F.3d 1289 (11th Cir. 2001).

#### i. D.T.’s procedural allegations

7. ~~000~~ contends that she is entitled to an IEE because, *inter alia*, the School System violated her procedural safeguards relating to notice, consent and confidentiality. These complaints are misplaced, because the “procedures” relevant to the IEE inquiry are only those regulatory requirements designed to protect the reliability of the evaluation (e.g. that the evaluation is administered in the child’s native language, uses a variety of tools and strategies to gather relevant information, uses standardized tests appropriately), not the procedural safeguards designed to protect the right to FAPE. 34 C.F.R. § 300.532 (evaluation procedures); Ga DOE Rule 160-4-7-.07(3); Holmes v. Millcreek Township Sch. Dist., 205 F.3d 583 (3d Cir. 2000).

8. No authority exists to support Respondent's argument that procedural violations entitle a parent to an IEE. In fact, in Holmes, the Third Circuit found a school system's evaluation appropriate (and thus denied the parents' request for an IEE) even where the school system violated the parent's rights by evaluating the student without consent. There, the parents expressly refused to allow the school system to "perform any testing, evaluating or other procedures that would result in a written report that could be incorporated into [the student's] multi-disciplinary team ("MTD") report," and refused to allow their child to be evaluated using a sign language interpreter, believing that she should only be assessed by people who could communicate directly with her by sign language while she was being tested. Id. at 586. Notwithstanding this refusal, the school system compiled an evaluation report including data from evaluations and from an interview by the school psychologist using a sign language interpreter. Id. at 587. The Court of Appeals disregarded any alleged procedural violations and denied the parent's request for an IEE as a matter of law based on its finding that the school district's evaluation was appropriate. Id. at 592.

9. Consequently, [redacted]'s allegations that she is entitled to an IEE because of alleged violations of the parental notice or consent requirements are inapposite. Such violations, assuming they occurred, would be actionable only to the extent that they resulted in a denial of FAPE, something that has not been addressed here. Weiss, supra; Doe v. Alabama, supra; Devine, supra. In any event, the ALJ finds no evidence of such violations.

10. With respect to Ms. [redacted]'s suggestion that she is entitled to an independent FBA because she never consented to the Autism Partnership FBA, her argument fails for a number of reasons. First, as found below, the Autism Partnership FBA was not an evaluation that would require parental consent, but rather was a teaching methodology used to implement [redacted]'s IEP. Second, assuming *arguendo* that the FBA was an evaluation requiring consent, in January 2003 Ms. [redacted] executed a consent form that gave the School System permission to, *inter alia*, conduct a behavioral evaluation. Thus, the parent expressly consented to a behavioral assessment and that consent encompassed the activities of Autism Partnership. In addition, the evidence is undisputed that Ms. [redacted] had *actual* knowledge and approved of Autism Partnership's interventions on [redacted]'s behalf. Thus, Ms. [redacted] has demonstrated no procedural violation with respect to notice or her ability to participate in the development of [redacted]'s programming. See, e.g., Gonzalez v. Puerto Rico Dept. of Educ., 969 F.Supp. 801, 809-810 (D. Puerto Rico 1997) (document signed by mother showed that she received written notice of rights under IDEA, and parents participated in development of child's education, including mother's signing each IEP as a participant); Livingston v. DeSoto County Sch. Dist., 782 F.Supp. 1173, 1178 (N.D. Miss. 1992); Smith v. Indianapolis Pub. Schs., 916 F.Supp. 872, 876 (S.D. Ind. 1995) (Parent signed a document acknowledging that a "notice of parent's rights has been explained and offered in writing"); Gregory M. v. State Bd. of Educ., 891 F.Supp. 695, (D.Conn. 1995) (parents were notified of their due process rights under IDEA, and even if parents didn't receive procedural safeguard documents, they attended meetings regarding appropriate educational placement of their child). In other cases, courts have disapproved of a parent's lack of notice allegation even assuming that the parents did not receive notice where no prejudice to the right of the parent and no educational

harm to the student resulted. See K.M. v. Portland Sch. Comm'ce, 2003 WL 21180814, \*22 (D.Me. 2003); SAD #22, 104 LRP 1859 (SEA ME 2003).

11. With respect to **000**'s allegation that the School System improperly disclosed her educational records, the Family Educational Rights and Privacy Act ("FERPA") specifically allows disclosure of educational records to school officials, including consultants, who have a legitimate educational interest in the student. 34 C.F.R. § 300.571; 34 C.F.R. § 99.31(a)(1)<sup>97</sup>; Calaveras Unified Sch. Dist., 32 IDELR 101 (FPCO Ca. 1999)(school officials include teachers, therapists, consultants, and other professionals that a school may retain to provide services for the student); Letter to Garvin, 30 IDELR 541 (OSEP 1998) (permitting disclosure of information to an outside physician who is under contract with the district); In Re Amanda R., 25 IDELR 484 (SEA N.H. 1997)(permitting disclosure to a psychiatrist hired as an expert witness by the school district without parental consent); Letter to Diehl, 22 IDELR 734 (OSEP 1993)( prior written consent requirement does not prevent institutions from disclosing educational records to outside persons performing professional services as part of the operation of the institution); Letter to Presto, 213 IDELR 121 (OSEP 1988) (disclosure can be made to expert witness without prior parent consent). School System staff, consultants, attorneys, etc. are all within the circle of persons permitted to share information about **000**. Otherwise, school districts would be precluded from defending their programming through the use of expert testimony,<sup>98</sup> a form of testimony clearly contemplated by the law. See, e.g., Town of Burlington v. Dept. of Educ., 736 F.2d 773, 791 (1<sup>st</sup> Cir. 1984); School Bd. of Collier County v. K.C., 285 F.3d 997 (11<sup>th</sup> Cir. 2002). Thus, no evidence supports **000**'s contention that the School System committed a procedural violation with respect to handling her educational records.

12. With respect to Ms. **000**'s argument that an IEE is warranted because of the School System's "abandonment" of a behavior intervention plan based upon the FBAs, her argument again fails. There is no evidence that this occurred. Moreover, this is not an issue that relates to the appropriateness of the evaluations, but to FAPE, which Respondent has abandoned as an issue in this case. See CJN v. Minneapolis Public Schools, 323 F.3d 630 (8<sup>th</sup> Cir. 2003)(analyzing issue of behavioral supports provided for disabled student as a FAPE question); Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022 (8<sup>th</sup> Cir. 2003)(denial of FAPE claim analyzed with regard to academic benefits *and* whether behavioral supports were sufficient to allow academic advancement).

13. FAPE claims are not at issue in this hearing, and Respondent may not litigate such claims in this hearing by recasting them as aspects of an IEE claim. Moreover, assuming that a violation relative to consent, notice or educational records occurred in the implementation of **000**'s IEP, the violation would have to result in a denial of FAPE in order to be actionable.

<sup>97</sup> IDEA incorporates the standards set out in FERPA.

<sup>98</sup> This would be a patently absurd result. Indeed, no parent in a due process hearing would consent to the release of records to be used by an expert that might testify against them. If such consent were required, school systems could never hire expert witnesses.

Weiss, supra; Doe v. Alabama, supra. Not only has there been no showing that these alleged violations resulted in educational harm to [REDACTED], but [REDACTED] has excluded expressly any FAPE claim, and any concomitant consideration of educational harm, from this proceeding.

#### B. The School System's response to the IEE request

14. In order for a parent's right to request an IEE to be triggered, the parent must identify an evaluation conducted by the school system with which the parents disagree. 34 C.F.R. § 300.502; see also Bd. of Educ. of Murphysboro Community Unit Sch. Dist. No. 186 v. Illinois State Bd. of Educ., 41 F.3d 1162, 1169 (7<sup>th</sup> Cir. 1994)(parents "had the right to an independent educational evaluation performed at public expense if they disagreed with an evaluation performed by the school district"). Once a parent makes a request for an IEE, the school system must either ensure that the IEE is provided at public expense or initiate a due process hearing to prove that its own evaluation was appropriate. 34 C.F.R. § 300.502(b)(2)<sup>99</sup>; Evans v. Dist. No. 17, 841 F.2d 824, 830 (8<sup>th</sup> Cir. 1988)(parents had right to IEE because they disagreed with school system's evaluation and school did not request hearing defending the evaluation). Clearly implicit in this language is the assumption that the School System is informed as to what evaluation is in dispute.

15. As an initial matter, [REDACTED] claims that she is entitled to an IEE as a matter of law because her IEE request was pending for over 100 days and the School System unreasonably delayed in responding to her request. This claim is not supported in fact or law.

16. In the event that a school system chooses not to fund the requested IEE, there is no specific time frame within which a school system must request a due process hearing.<sup>100</sup> See

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<sup>99</sup> Also, upon request, school systems are to provide parents with information about where an IEE may be obtained and the school system's criteria for reimbursement. Ga. DOE Rule 160-4-7-.05(4)(a)(emphasis added); 34 C.F.R. §300.502(a)(2). Respondent has never requested this information (even in the June 9, 2003 letter), such that the duty to provide it has never been triggered. Assuming the School System was required to provide this information, the failure to do so would be a procedural violation that, to be actionable, would have to result in some harm or prejudice to [REDACTED]. In this case, [REDACTED] has identified no harm flowing from any lack of information regarding where to obtain an independent evaluation or what criteria would apply. Regardless of whether the School System here provided such information, it is clear that the parent had sufficient information in that she knew the entity whom she wanted to provide the service and no issue has been raised that the parent's request would be barred by any agency criteria applicable to evaluations (only that the Institute is offering a placement, not an evaluation). Consequently, any contention that this alleged deficiency *per se* entitles Respondent to an IEE is unsupported by any specific legal authority and at odds with the Eleventh Circuit's established case law that refuses to exalt the form of IDEA's procedures over the substance for which they are intended – the provision of FAPE. See COL ¶ 7.

<sup>100</sup> Respondent, in previous pleadings, has relied upon a number of cases that do not support her suggestion that the School System's response to her IEE request was unreasonable. For example, Hampden-Wilbraham Regional School District, 37 IDELR 20 (SEA MA 2002), involved a specific Massachusetts regulation that has no bearing on this proceeding. Manhattan School District 114, 37 IDELR 23 (SEA IL 2002), actually supports the School System's position because in Manhattan, the parent's IEE request was not in objection to a specific evaluation and was therefore denied. A.S. v. Norwalk Board of Education, 183 F.Supp.2d 534, is distinguishable because the

Letter to Anonymous, 30 IDELR 821 (OSEP 1998). A school district may request a hearing before the IEE has taken place, or *after* the IEE has been performed to show that its evaluation is appropriate. See Letter to Wessels, 16 IDELR 735 (OSEP 1990). Indeed, if the parents feel that the school district is delaying and denying them an IEE, the parent should request a due process hearing or file a complaint under 34 C.F.R. §§ 300.660-300.662 with the SEA. Letter to Anonymous, *supra*, 30 IDELR 821. The standard is one of “reasonableness” that must be assessed on a case-by-case basis. *Id.*

17. The record does not support **Q**’s assertion that her IEE request has been pending since February of 2003. Until Respondent’s attorney’s June 9 letter, there was no IEE request to which the School System could have or should have responded. Respondent never requested an evaluation<sup>101</sup> (either by the School System or an independent evaluation) at any point prior to her attorney’s June 9, 2003 letter (and even that letter is vague on this point). The June 9 letter does not identify any School System evaluation with which the parent disagrees and thus does not satisfy the prerequisite for requesting an IEE. The request for the Marcus Institute was characterized as a request for placement or treatment, not for an assessment to “determine whether a child has a disability and the nature and extent of the special education and related services that the child needs.” 34 C.F.R. § 300.500(b)(2).

18. The School System took reasonable steps to clarify this confusion by twice requesting that Respondent identify the School System evaluation with which it disagreed, but Respondent refused to respond to this request. Thereafter, the School System initiated the due process hearing.

19. In a pre-hearing conference call, this ALJ, at the request of the School System’s counsel, asked Respondent’s counsel to identify the evaluation being challenged. That identification did not occur.

20. The timeliness of the School System’s hearing request must be considered in light of the specificity of Respondent’s request and the uncertainty of that request in light of discussion at two IEP meetings on March 27 and June 4 that did not include a request for an IEE.<sup>102</sup> The School System cannot be accused of unreasonable delay in response to an IEE request that was never properly made, and where the School System took reasonable steps to clear up the

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parent in that case, unlike Ms. T., promptly expressed dissatisfaction with the school district’s evaluations. Thus, Respondent’s authority is not instructive or helpful.

<sup>101</sup> It is important to note that even if the parent had requested an evaluation earlier than June 9, the School System’s responsibilities to respond to a request for an evaluation are distinct from those in response to a request for an IEE. Only an IEE request, as defined by IDEA (based upon a parent’s disagreement with a school system evaluation) must be met with either payment for the evaluation or a hearing request defending the school’s evaluation.

<sup>102</sup> At the hearing, Ms. **Q** was clear that she had relied upon the procedural safeguards given to her on numerous occasions. Further, she has been represented by counsel highly experienced in IDEA issues. Had Respondent wanted an independent educational evaluation, she should have so requested at a time and with sufficient clarity to allow the School System to respond.

confusion created by Respondent's vague communications. Accordingly, the ALJ finds that the School System's response to § 122's IEE request was timely and did not violate IDEA.

**C. § 122's challenges to the assessments**

21. Though not clearly articulated at any point in this case, Respondent apparently has contended that her IEE request: i) is not based upon disagreement with an evaluation/FBA, but rather "the absence of an existing FBA/BIP"; ii) is in response to the School System's FBA as represented in § 122's April 2002 IEP; iii) is in response to Kim Pisor's FBA in 2002-2003; iv) is in response to Autism Partnership's FBA beginning in February 2003; and, v) in response to Dr. B.J. Freeman's psychological evaluation conducted in February 2003.

**i. Absence of an evaluation**

22. To the extent that Respondent seeks an IEE request to remedy the School System's alleged failure to evaluate § 122, her request fails as a matter of law. IEE requests are not made "in the absence of" existing evaluations. 34 C.F.R. §300.502(b)(1); see Cartwright v. District of Columbia, 39 IDELR 94 (D.D.C. 2003)(remedy for failure to evaluate was school system evaluation); Colvin v. Lowndes County, Miss., 144 F.Supp.2d 504 (N.D. Miss. 2000)(remedy for failure to evaluate was for school system to evaluate student). The appropriate remedy for an allegation that the School System failed to evaluate § 122, would be an order that the School System conduct the evaluations; that order would come only from a FAPE hearing. Lincoln County Sch. Dist. v. A.A., 39 IDELR 185 (D. Ore. 2003)(failure to evaluate student deprived him of FAPE); Sch. Bd. of Indep. School Dist. No. 11 v. Pacht, 36 IDELR 263 (D. Minn. 2002); Monterey Peninsula Unified Sch. Dist. v. Giammanco, 22 IDELR 1041 (N.D. Cal. 1995); Krista P. v. Manhattan Sch. Dist., 255 F.Supp.2d 873, 889 (N.D. Ill. 2003)("Parents had not met the prerequisite for requesting an IEE" because the school had not conducted its own evaluation with which the parents disagreed); Mount Greylock Regional Schs., 26 IDELR 1238, 1247 (SEA MA 1997)("state and federal law regarding a school committee's financial obligation for the costs of independent evaluations [were] not applicable" where parents refused to permit the school system to evaluate student prior to requesting an independent evaluation); West Contra Costa Unified Sch. Dist., 28 IDELR 802, 803 (SEA CA 1998); Bd. of Educ. of Shenendehowa Central Sch. Dist., 28 IDELR 670, 676 (SEA NY 1998); Colchester Sch. Dist., 30 IDELR 221, 231 (SEA VT 1999)(parents who obtained evaluation to help them decide which program was appropriate for student, rather than in response to a school system evaluation which with they disagreed, were not entitled to IEE reimbursement).

**ii. Nature of the challenged FBAs**

23. One of the central issues in this case has been whether a "functional behavioral assessment" as conducted by the School System in this case constitutes an "evaluation" that

would trigger the parent's right to request an IEE.<sup>103</sup> Under the plain language of the statute and regulations, to activate the right to an IEE, any FBA conducted by the School System would have to be an evaluation. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(b); GA. DOE Rule 160-4-7-.05(4)(a).

24. FBAs are not defined by the federal or Georgia law as evaluations. In fact, an analysis of the federal state and regulations shows that the terms are distinct. The federal definition of "evaluation" does not reference FBAs, nor are FBAs defined or described as evaluations. 34 C.F.R. § 300.12, 34 C.F.R. §300.500(2).<sup>104</sup>

25. The federal regulations promulgated pursuant to IDEA, define the term "evaluation" as "procedures used in accordance with [34 C.F.R.] §§ 300.530-300.536 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs." 34 C.F.R. § 300.500(b)(2). Georgia's provisions mirror the federal definitions. Ga. DOE Rule 160-4-7-.01(3)(k)(defining "initial evaluation") and Rule 160-4-7-.07 (setting out the requirements for initial evaluations, re-evaluations and eligibility determinations).

26. Accordingly, by definition, an IDEA evaluation is one that uses the "procedures" established by 34 C.F.R. §§ 300.530 to 300.536. The "procedures" referenced in this regulatory provision describe requirements relating to the selection and administration of "tests and other evaluation materials," the use of a variety of "assessment tools and strategies," the use of "validated," "standardized tests" "tailored to assess specific areas of educational need," the use of "technically sound instruments," and comprehensively assessing the child in all areas related to the suspected disability. 34 C.F.R. § 300.532.

27. Not only are IDEA evaluations characterized by the use of procedures governed by federal regulations, they are for the specific purposes of enabling the child's IEP team to determine whether a child has a disability and, if so, to define in the IEP the nature and extent of special education and related services the child needs. 20 U.S.C. § 1414(b)(3); 34 C.F.R. §300.532(b). This defined role of evaluations in IDEA process serves to distinguish evaluations from other procedures or activities relating to a child with a disability.

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<sup>103</sup> For purposes of this case, it is not necessary to decide whether or not an FBA can ever be an evaluation. Rather, this decision reaches only the facts of this case.

<sup>104</sup> The only reference in the federal law to a FBA is found in IDEA provisions dealing with disciplinary actions contemplating a change in placement. 20 U.S.C. § 1415(k)(1)(B)(i); 34 C.F.R. § 300.520 (b)(1) (requiring the school system to "conduct a functional behavioral assessment and implement a behavioral intervention plan" either before or not later than 10 business days after removing the child for more than 10 school days or commencing a change in placement). ~~699~~ has consistently cited to commentary on the amendments to IDEA's disciplinary regulations as being applicable to her argument that the FBAs in case were evaluations. 64 Fed. Reg. 12620 (1999). The application of IDEA's disciplinary provisions, which specifically require the IEP team to address a student's behaviors in considering a change in a student's placement, are inapposite here where no challenge is made to the appropriateness of ~~699~~'s IEP or placement.

28. The mere fact that an activity provides information that an IEP team finds useful, however, does not transform that activity into an evaluation. For example, teacher observations, parent observations, student work samples, and grade reports, all provide information that may be essential to the IEP team's ability to develop appropriate programming. These activities do not involve the use of IDEA's evaluation procedures and their usefulness does not transform the daily activity of teaching (or parenting) into an evaluation. As a matter of good practice, schools and teachers must be authorized on an ongoing basis to engage in these activities, e.g. considering a child's performance and adjusting instructional approaches accordingly. To consider these activities evaluations and thereby "require parental consent for collection of this type of information would impose a significant burden on school districts with little discernable benefit to the children served under these regulations." 64 Fed. Reg. 12610 (March 12, 1999); see also Bartlett Sch. Dist., 103 LRP 56211 (SEA NH 2003) (hearing officer determined that ABA consultant retained by school district did not need parental consent because his "assessment was more akin to a review of existing data, for which parental consent would not be required."); Eric H. v. Judson Indep. Sch. Dist., 37 IDELR 280 (W.D.Tex. 2002) (district court agreed with hearing officer's decision, including determination that parental consent was not necessary to allow a school consultant to observe the student in class); Rogers v. Madison County Sch. Dist., No. 3:98CV505LN (S.D. Miss. Sep. 21, 2000), aff'd No. 00-60777 (5<sup>th</sup> Cir. Nov. 28, 2001) (classroom observation of student by outside consultant was not evaluation requiring parental consent)(attached).

29. In contrast to the federal and state definition for "evaluation," Georgia defines an FBA as the:

"process for analyzing the cause of a specific behavior exhibited by a student. This technique records observed events that take place before (antecedents) and after the behavior occurs (consequence). Also recorded in a systematic data collection method are environmental components that could contribute to the occurrence of the target behavior. The purpose of the FBA is to determine the reasons for the behavior and to develop a comprehensive behavior treatment plan as part of the IEP for students with disabilities."

Ga. DOE Rule 160-4-7-.01(3)(g); see also Ga. DOE Rule 160-4-7-.14(2)(f).

30. Consistent with this definition, the FBAs conducted by the School System did not include the use of standardized instruments or measures or application of the other "evaluation procedures" that are defining characteristics of IDEA evaluations. Rather, the School System's FBAs consisted of professional educators and consultants working in 000's classroom to identify and refine effective teaching methods based on the student's reaction to classroom stimuli. These FBAs were not requested by the IEP team to identify a disability or to formulate special education and related services to be provided in 000's IEP.<sup>105</sup> Instead, the School

<sup>105</sup> 000 argues that the U.S. Department of Education's Letter to Scheinz at 34 IDELR ¶ 34 (OSEP 2000) has "ruled that the FBA is an evaluation." First, though the Department's interpretive letters are entitled to "some deference" under Chevron v. National Resources Defense Council, 467 U.S. 837 (1984), such letters are not binding on hearing officers or courts, as they "simply state[] what the administrative agency thinks the [underlying] statute means ..."

System conducted FBAs in order to help her service providers implement D.T.'s IEP. See also (11-11-03, Tr. 14-17, 33-34, 95-96, 207) (Rostetter).

31. The School System's FBAs were applications of applied behavioral analysis ("ABA") involving the observation of ~~OP~~'s behaviors in the educational environment in order to develop hypotheses as to the causes of certain behaviors and to identify strategies for decreasing problem behaviors, all of which occurred within the classroom setting. ABA is judicially recognized as an educational methodology for educating autistic children. Renner v. Bd. of Educ. of Ann Arbor, 185 F.3d 635, 645 (6th Cir. 1999)(parents request for "Lovaas" ABA was a request for a particular educational methodology, which determination is left to discretion of educators); Adams v. Oregon, 195 F.3d 1141 (9<sup>th</sup> Cir. 1999); (T.B. v. Warwick Sch. Dept., 2003 WL 22069432 at p. \*1 (D.R.I.)(describing ABA as "a method of educating autistic children that uses a stimulus-response-consequence model to reinforce appropriate behavior and discourage inappropriate behavior"); Sanford Sch. Comm. v. Mr. and Mrs. L., 2001 WL 103544 at fn. 6 (D. Me)(same); Deal v. Hamilton County Dept. of Educ., 259 F.Supp.2d 687, 693 (E.D. Tenn. 2003)(ABA is a methodology for educating autistic children that is a "psychological approach based on behaviorism, and operates on the premise that people learn from their environment"); L.B. v. Nebo Sch. Dist., 214 F.Supp.2d 1172 (D. Utah 2002)(analyzing ABA as an educational methodology); Pitchford v. Salem-Keizer Sch. Dist. No. 24J, 155 F.Supp.2d 1213, 1216-17 (D. Or. 2001)("ABA consists of breaking down activities into discrete individual tasks and rewarding the child's accomplishment. The child eventually learns to integrate the information and associate instruction with a given activity"); Mr. X v. New York St. Educ. Dept., 975 F.Supp. 546, 548 (S.D.N.Y. 1997); CM v. Henderson County, 184 F.Supp.2d 466 (W.D.N.C. 2002).

32. The uncontroverted law establishes that choices regarding the implementation of an IEP, including educational methodology, are left to those best equipped to make them—namely professional educators. Rowley, 458 U.S. at 208; Renner, 185 F.3d at 645 (parents have no procedural right to prescribe or require a specific desired methodology); Tucker v. Calloway Co. Bd. of Educ., 136 F.3d 495 (6th Cir. 1998); Rettig v. Kent City Sch. Dist., 720 F.2d 463, 466 (1983)(courts are "not free to choose between competing educational theories and impose that selection upon the School System"); Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 (7th Cir. 1988), cert. denied, 488 U.S. 925 (1988) ("[P]arents, no matter how well-motivated, do not have a right under [IDEA] to compel a school district to provide a specific program or employ a specific methodology....").

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Metropolitan Sch. Dist. v. Davila, 969 F.2d 485, 489 (7<sup>th</sup> Cir. 1992). OSEP cannot create new law, rights, or duties without going through the formal rulemaking process required of "legislative" rules. Id. Courts should rely upon OSEP's interpretations where they are "well-reasoned and persuasive [by comporting with] IDEA's statutory and regulatory scheme and with precedent interpreting that scheme." Michael C. v. Radnor Township, 202 F.3d 642, 650 (3d Cir. 2000). Letter to Scheinz is not entitled to deference where IDEA provides no basis for including FBAs in the definition of "evaluation" and where there is no authority supporting that interpretation. Furthermore, Scheinz must be read in conjunction to OSEP's comments to its regulations, which specify that an FBA "may" be an evaluation, not that it is so by definition. 64 Fed. Reg. 12620 (1999).

33. Indeed, many of these disputes (regarding methodology) have explicitly dealt with disputes between parents and agencies over the appropriate methodology for educating children with autism. Parents cannot choose ABA as a method if the district's program is appropriate, and courts have consistently rejected parents' claims that some version of ABA treatment for autism is necessary. See Adams v. State of Oregon, 195 F.3d 1141 (9<sup>th</sup> Cir. 1999); Burilovich v. Bd. of Educ., 208 F.3d 560 (6<sup>th</sup> Cir. 2000); Dong v. Bd. of Educ., 197 F.3d 793 (6<sup>th</sup> Cir. 1999); Renner v. Bd. of Educ., 185 F.3d 635 (6<sup>th</sup> Cir. 1999); Popson v. West Clark Schs., 230 F.Supp.2d 910 (S.D.Ind. 2002); Deal v. Hamilton County Dept. of Educ., 259 F.Supp.2d 687 (E.D.Tenn. 2003); School Bd. of Henrico County v. Palkovics, 285 F.Supp.2d 701 (E.D.Va. 2003)(parents not entitled to their choice of ABA methodology where school system's program was appropriate and individually tailored to child's specific needs).

34. The ALJ finds that the FBAs at issue in this case were not evaluations as defined by IDEA. Therefore, D.'s request for an IEE in response to the April 2002 FBA, Mr. Pisor's FBA, and Autism Partnership's FBA fails as a matter of law.

35. In addition, with specific regard to the April 2002 FBA, the federal regulations preclude a finding that this FBA constituted an evaluation. Parental consent is required before an evaluation or re-evaluation. 34 C.F.R. § 300.505(a)(1)(i). Parental consent is specifically not required prior to reviewing existing data. 34 C.F.R. §300.505(a)(3); Ga. DOE Rule 160-4-7-.05(6)(g)(2); see also Santa Fe Public Schs., 36 IDELR 52 (SEA NM 2001) (Parental consent is not necessary for a functional behavioral assessment when it is a review of existing data); East Penn Sch. Dist., 103 LRP 28842 (SEA PA 2003); Kenston Local Sch. Dist., 102 LRP 19204 (SEA OH 2002); Letter to Anonymous, 35 IDELR 218 (OSEP 2001); Dallas Sch. Dist., 102 LRP 5940 (SEA PA 1999). Accordingly, the simple process of educators reviewing existing data, without more, cannot constitute an evaluation. *Id.* No evidence adduced at hearing demonstrates that the process by which the School System prepared the April 2002 FBA consisted of anything other than reviewing existing data. Therefore, the April 2002 FBA was not an evaluation that may trigger the parent's right to request an IEE.

### iii. Timeliness of D.T.'s challenge

36. Furthermore, even if the April 2002 FBA or Mr. Pisor's FBA could be considered "evaluations" as defined by IDEA, Ms. Q.'s consent to and the School System's completion of subsequent evaluations moots the parent's right to challenge the previous evaluations through the IEE process. IDEA claims, including requests for IEEs, must be brought in a timely manner to protect the school district from prejudice and to assure that children with disabilities are given appropriate educational programs without long delays. See, e.g., Berger v. Medina City Sch. Dist., 348 F.3d 513 (6<sup>th</sup> Cir. 2003)(parents not entitled to private tuition reimbursement where they failed to provide adequate notice of dissatisfaction with IEP); Bernardsville Board of Educ. v. J.H., 42 F.3d 149, 158 (3d Cir. 1994)(parents IDEA claims were unreasonable where they waited over two years to initiate IDEA hearing)<sup>106</sup>; see also Nieuwenhuis v. Delavan-Darien

<sup>106</sup> When Congress reauthorized IDEA subsequent to Bernardsville, *supra*, it codified the notice requirement as a prerequisite to reimbursement claims. 20 U.S.C. § 1412(a)(10)(C). Indeed, in addition to barring reimbursement for

Sch. Dist. Bd. of Educ., 996 F. Supp. 855 (E.D. Wisc. 1998)(parent barred from contesting IEP which has been superceded by subsequent agreed-upon IEP on mootness and waiver grounds); Powers v. Indiana Dept of Educ., 61 F.3d 552, 556 n.3 (7<sup>th</sup> Cir. 1995)(“the general policy under IDEA is to resolve educational disputes as quickly as possible”); Dell v. Township High Sch. Dist. 113, 32 F.3d 1053, 1060 (7<sup>th</sup> Cir. 1994)(short limitations period should apply to IDEA actions because statute requires “prompt rather than protracted resolution of disputes concerning the disabled student’s education”); Garland Indep. Sch. Dist. v. Wilks, 657 F.Supp. 1163 (N.D. Tex. 1987) (“the burden of compliance with [IDEA] procedures falls equally on parents as well as school districts.”).

37. To the extent that Ms. [redacted] contends that the school system “evaluation” with which she disagrees is the April 2002 and/or Mr. Pisor’s FBA that began in August of 2002, her request for an IEE could not be timely because she participated in IEP meetings and consented to evaluations and IEPs subsequent to those FBAs, effectively superceding complaints regarding the previous assessments. See Nieuwenhuis, supra. Ms. [redacted], through her conduct and failure to bring contemporaneous challenges to the assessments, forfeited any right to do so now.

#### **D. Appropriateness of challenged assessments**

38. Assuming *arguendo* that the FBAs are evaluations and thus subject to challenge in an IEE hearing, all FBAs conducted by the School System, as well as the evaluation conducted by Dr. Freeman, were appropriate.

39. If a school system chooses to defend its evaluation at a hearing, the relevant inquiry is restricted to the appropriateness of the evaluation. 34 C.F.R. § 300.502(b)(2)(i); see also Holmes v. Millcreek Township Sch. Dist., 205 F.3d 583 (3d Cir. 2000); see Grapevine-Colleyville Ind. Sch. Dist. v. Danielle R., 31 IDELR 103 (N.D. Tx. 1999). The standards governing this determination are found in the regulations that set forth the procedures governing evaluations. 34 C.F.R. § 300.532 (evaluation procedures); Ga DOE Rule 160-4-7-.07(3).

40. In conducting an evaluation, tests must be administered in the child's native language, must be validated for the specific purpose for which they are used and must be administered by trained personnel in conformance with the instructions provided by their producer. 34 C.F.R. § 300.532(a). The tests must include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligent quotient. The tests must measure accurately the child's aptitude or achievement level. No one procedure should be used as the sole criterion to determine an IEP.

41. Standardized tests that are given to a child as part of an evaluation must be validated for the specific purpose for which they are used and must be administered by trained and

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failure to provide timely notice, parents may also be denied reimbursement upon a finding “of unreasonableness with respect to actions taken by the parents.” 20 U.S.C. 1412(a)(10)(C)(iii).

knowledgeable personnel in accordance with instructions provided by the producer of the test. 34 C.F.R. § 300.532(c)(1); Ga. DOE R. 160-4-7-.07(3)(c)(ii).

42. Once a School System's evaluation has been shown to satisfy the required evaluation procedures set forth in the federal and state regulations, the standard has been met and the evaluation must be considered appropriate. 34 C.F.R. § 300.502; Grapevine-Colleyville Independent School District v. Danielle R., 31 IDELR 103 (N.D. Tex. 1999).

#### **i. B.J. Freeman's evaluation**

43. Dr. Freeman's evaluation was appropriate under the relevant standards. Dr. Freeman is qualified<sup>107</sup> to assess students with autism and was qualified to administer the two standardized instruments she administered. See Deal v. Hamilton County Bd. of Educ., 259 F. Supp. 2d 687, 693 (E.D. Tenn. 2003)(describing Dr. Freeman as a "highly qualified expert"). With regard to the specific evaluation procedures, the tests that Dr. Freeman used were validated for the specific purposes for which she used them. Dr. Freeman drew from multiple sources in conducting her evaluation. See 34 C.F.R. § 300.532(d); Ga. DOE R. 160-4-7-.07(3)(c)(v). Furthermore, Dr. Freeman selected appropriate instruments to ensure that D.T.'s limited verbal skills did not result in inaccurate results. See 34 C.F.R. § 532(e); Ga. DOE R. 160-4-7-.07(3)(c)(vi). A copy of the evaluation report was given to Respondent's mother, and the IEP team convened to determine eligibility, in accordance with 34 C.F.R. § 300.534(a)(2) and Ga. DOE R. 160-4-7-.07(3)(d)(2).<sup>108</sup>

44. Respondent has presented no evidence demonstrating that Dr. Freeman's evaluation was inappropriate or that it did not meet the standards of IDEA. Respondent's expert, Dr. Trapani, attempted to challenge the appropriateness and usefulness of Dr. Freeman's evaluation. However, Dr. Trapani is not a licensed clinical psychologist and her challenges to the report (that it was "basic" and would not assist in drafting IEP goals and objectives) were not based on legal requirements or standards imposed by IDEA or Georgia law.<sup>109</sup> Moreover, Dr. Freeman's expertise must be deferred to as it clearly exceeds that of Dr. Trapani's in the area of evaluating and diagnosing children with autism (indeed, Dr. Trapani has no such expertise).

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<sup>107</sup> Though Respondent did not challenge Dr. Freeman's qualifications or licensure at the hearing, it bears noting that Dr. Freeman, as a psychologist licensed in California and Illinois, is authorized to practice as a psychologist in Georgia for up to 10 days a year. Ga. Bd. of Examiners of Psychologists Rule 510-9-.03.

<sup>108</sup> Under Georgia law, an evaluation report is defined as "a summary of evaluation results obtained in the process of collecting information to determine if the student is a student with a disability. The evaluation report(s) will vary from student to student, depending upon the type of assessments completed, i.e., psychological evaluation report, occupational therapy evaluation report, speech/language therapist's evaluation results reflected in the eligibility report, etc." Ga. DOE R. 160-4-7-.01(3)(d). Dr. Freeman's report complied with this definition and requirements.

<sup>109</sup> The only IEP meetings attended by Dr. Trapani were on March 27 and June 4, and neither involved the development of an IEP. The IEP was not actually written until August 8, 2003, and the uncontroverted testimony was that the evaluation by Dr. Freeman was used to determine eligibility and to identify [redacted]'s special education needs.

45. Having established that Dr. Freeman's evaluation satisfied the required evaluation procedures set forth in the federal and State regulations, the standard has been met and the evaluation must be considered appropriate. Accordingly, the parent does not have a right to an additional evaluation at public expense. 34 C.F.R. § 300.502(b)(3); Ga. DOE R. 160-4-7-.05(4)(a).

## ii. School System's FBAs

46. As noted above, the FBAs in this case did not involve the administration of standardized tests or specific evaluation procedures. In an apparent recognition of the dearth of applicable standards, Respondent argued that outside sources, such as ethical guidelines for certified behavior analysts, establish standards by which to judge the appropriateness of FBAs. These ethical guidelines do not have the force of law.<sup>110</sup> Holmes, 205 F.3d at 591 (state department of education guidelines recommending certain evaluation procedures do not have the force of law and are not dispositive of whether a school system's evaluation is appropriate). In any event, to the extent a determination of appropriateness is to be made, the School System's FBAs were appropriate by any relevant standard.

47. Although IDEA does not specify who is qualified to conduct FBAs, the un rebutted evidence here showed that the FBAs were conducted by persons experienced and competent to conduct them. Mr. Kim Pisor, Dr. Ron Leaf, and the staff from Autism Partnership are knowledgeable of, and complied with standards of professional practice in the field, for conducting the functional behavior assessments of [REDACTED].

48. IDEA also fails to specify standards for conducting FBAs and it is precisely because these FBAs were not IDEA evaluations that applying the standards applicable to evaluations is problematic. Every witness that testified regarding FBAs agreed that there are different "levels" or "tiers" of FBAs, and that the School System's FBAs constituted "tier 1" and "tier 2" assessments. The testimony demonstrated that the activities undertaken by the School System and Autism Partnership staff in furtherance of these FBAs were performed in a competent and professional manner consistent with applicable standards of practice.

49. As with any teaching methodology, a student's success is evidence of its appropriateness.<sup>111</sup> Here, the evidence established that the FBAs resulted in hypotheses regarding [REDACTED]'s unwanted behaviors and in teaching strategies that reduced those behaviors. [REDACTED]'s unwanted and self-injurious behaviors have decreased markedly from the fall of 2002 to the present. Furthermore, [REDACTED] exhibits increasing self-control over her non-desired behaviors,

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<sup>110</sup> Any challenges based on ethical standards of various professional associations have been determined by this ALJ to be outside the scope of this inquiry. (11-12-03 Tr. 226).

<sup>111</sup> IDEA is clear in requiring that school system's efforts on behalf of students with disabilities must be reasonably calculated, but are not required to guarantee any particular outcome. Rowley, *supra*, 458 U.S. at 192. Thus, this decision should not be read to *require* that FBAs result in progress in order to be appropriate; however, where, as here, the evidence is compelling that the student has made progress, this determination establishes the adequacy of an FBA.

and she has made meaningful gains in academic skills and social development. Based upon this progress, the only conclusion that can be reached is that the FBAs were appropriate.<sup>112</sup>

50. Respondent's witnesses attempted to criticize the FBAs by attacking perceived inconsistencies in the data and by offering testimony of their understandings of [redacted]'s behaviors.<sup>113</sup> However, it is only the School System's witnesses and experts (all of whom spoke with school personnel, and reviewed all of his school records) who possessed *actual* knowledge of the educational programs available to [redacted], and of her actual performance in the public school program. None of Respondent's experts reviewed all of [redacted]'s educational records, interviewed any school personnel or observed in her educational setting. Accordingly, the School System's witnesses are to be given deference. See, Chris D. v. Montgomery County Bd. of Educ., 753 F. Supp. 922 (M.D. Ala. 1990) (the court relied, in part, on expert testimony from specialists with first-hand knowledge of the student and of the school district's program in determining that the district failed to provide an appropriate program); see also, Bd. of Educ. of East Windsor Regional Sch. Dist. v. Diamond, 808 F.2d 987 (3d Cir. 1986) (the court credited testimony of parents' witnesses who had observed student personally in the school setting rather than testimony of school district's witnesses who testified based only on reports submitted by representatives of the program); Lenn v. Portland Sch. Comm., 1992 WL 510895 (D. Me. 1992), aff'd on other grounds, 998 F.2d 1083 (1st Cir 1993)(court relied on the opinions of teachers and special educators consulted in IEP formulation in determining that student could benefit meaningfully from district's proposed IEP because they interacted with the student daily in the public school environment and were in a better position to determine the appropriateness of the IEP than independent evaluators who had met with student during isolated incidents of short duration).

51. Moreover, as in many areas of the law, cases are often decided based upon a "battle of the experts." See, e.g., Troy School Dist. v. Boutsikaris, 250 F.Supp.2d 720, 736 (E.D.Mich. 2003); Oberti v. Board of Educ., 789 F.Supp. 1322, 1335-1336 (D.N.J. 1992). In making a determination of credibility of expert witnesses, it is important to review the witness' testimony in light of that witness' expertise as it relates to the issues in the case. Kumho Tire Co. v. Carmichael, 119 S. Ct. 1167 (1999)(courts must assess the reliability of the expert's principles and methodologies used to reach the expert opinion or conclusion); see also Daubert v. Merrill Dow Pharmaceuticals, 113 S. Ct. 2786 (1993). In this case, the testimony has focused on the

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<sup>112</sup> It is also important to recognize that, in fact, the School System's FBA done by Autism Partnership should be measured only by the behaviors that were at issue in the March and June IEP meetings -- head banging. At the March 27<sup>th</sup> IEP meeting, Ms. [redacted] repeatedly states that her focus at the meeting is [redacted]'s SIB of head banging. It is not even disputed that there is absolutely no evidence that any incidents of this SIB occurred after the March meeting. However, the School System has gone beyond this one behavior and demonstrated [redacted]'s success in all areas of her problem behaviors.

<sup>113</sup> Respondent further suggests that an identification of functions must be documented in writing for a FBA to be adequate. No legal requirement exists that an FBA be recorded in writing. See, e.g., Board of Education of the Akron Central School District, 28 IDELR 909 (SEA NY 1998). Respondent's argument with respect to the Autism Partnership FBA is disingenuous because Ms. T., in response to the School System's offer to prepare a written document, specifically instructed that it not be done.

ultimate issue of whether the functional behavior assessment done by the District on [REDACTED] was an evaluation and if so, whether it was effective. Although there has been abundant testimony from experts whose careers have addressed principles of applied behavior analysis and functional behavioral assessments as the component assessment of ABA, there has been only one witness with significant scientific expertise in the area of [REDACTED]'s disability – autism. Dr. Freeman has evaluated 15,000 to 20,000 children with autism in her thirty-year career. She has taught, published prolifically in the area of the assessment of children with autism, and in the area of applied behavior analysis and functional behavior assessment. Further, she has conducted extensive research on diagnosis, treatment and interventions for children with autism, and has conducted longitudinal studies of outcomes of children with autism. Therefore, as it relates to [REDACTED]'s disability and her special education needs, Dr. Freeman's testimony must be afforded greater weight than the testimony of other witnesses in this case on the issue of interventions with children with autism, including behavioral interventions.

52. Following Dr. Freeman in terms of expertise as to [REDACTED]'s needs is Dr. Ron Leaf, who has spent virtually his entire thirty-year career applying principles of applied behavioral analysis to children and individuals with autism. Early in Dr. Leaf's career, he worked on the Young Autism Project, referenced in the seminal text, Educating Children with Autism, as one of the most scientifically based studies on appropriate interventions for children with autism. Thus, Dr. Leaf has extensive background in both principles of applied behavior analysis, including functional behavioral assessments, and autism.

53. In contrast, there are other witnesses whose background and expertise has been exclusively in the area of applied behavior analysis and, in the case of Dr. Wayne Fisher, the almost exclusive use of one type of functional behavioral assessments – the tier three assessment or analog functional analysis. Dr. Fisher was clear that he has never published on the diagnosis of and treatment of children with autism, has no editorial appointments or peer review responsibilities on any journals dealing exclusively with children with autism, and acknowledged that he does not use Educating Children with Autism as part of his work. Dr. Fisher's background has been exclusively in institutional settings, such as Kennedy Krieger and the Marcus Institute, a day treatment program utilizing functional analysis – a tier three analysis. Further, none of his publications address the use of such assessments and their implications specifically as they relate to the diagnosis and treatment of children with autism.

54. It is somewhat difficult to discern the area of expertise of Dr. Robert Babcock, though it is clear that Dr. Babcock's background is in ABA. He has never, however, published in a book or peer-reviewed journal that relates specifically to children with autism including preschool children with autism. Further, Dr. Babcock, though attempting to back away from his prior testimony, has acknowledged that he has virtually no experience in dealing with children less than six years of age. Dr. Babcock's expertise, such as it is, is in the general area of functional behavioral assessment.

55. Dr. Catherine Trapani, on the other hand, is neither a licensed clinical psychologist nor a certified or credentialed school psychologist. She has had no involvement with journals, associations, societies, publications, etc., addressing children with autism. At most, it appears

that Dr. Trapani has had some general experience with and exposure to children with autism and has recently been involved in operating classrooms at Marcus that may include children with autism.

56. Dr. Craig Kennedy, who is also an expert in applied behavior analysis and the use of behavioral assessments, has significantly more experience in dealing with children with autism than Drs. Fisher and Babcock. However, Dr. Kennedy was very candid in stating that he did not consider himself to be an expert in the area of autism, but that he simply had extensive expertise in working with that population. Like Dr. Fisher, Dr. Kennedy has myriad publications in the area of applied behavioral analysis, though not specific to children with autism. Dr. Kennedy's expertise is in the area of tier 1 and tier 2 assessments, which occur in the natural environment.

57. The only conclusion that can be drawn from the dramatic improvement in ~~OPP~~'s behavior is that the FBAs conducted by Petitioner were effective in assessing and treating ~~OPP~~'s behavior. Accordingly, even if these FBAs were interpreted to be IDEA evaluations, Respondent would not be entitled to an IEE at public expense arising from any disagreement she may have with them. See 34 C.F.R. § 300.502(b)(3).

58. Nevertheless, Respondent challenges the effectiveness of the School System's FBAs by asserting that they have failed to benefit ~~OPP~~ in the home environment – an objective Respondent asserts would be accomplished by the Marcus Institute's program – and they have failed to maximize the potential gains that could be accomplished by the Marcus Institute's program. Though this is not a FAPE case, the analysis is instructive to this point. The “centerpiece” of IDEA—the provision of a FAPE through a child's IEP—requires only an education that is reasonably calculated to provide “some” or “adequate” educational benefit. J.S.K. v. Hendry County School Board, 941 F.2d 1563, 1572 (11<sup>th</sup> Cir. 1991). Maximum improvement “is never required.” Id. at 1573. Moreover, the Eleventh Circuit “has specifically held that generalization across settings is not required to show an educational benefit.” Devine v. Indian River County School Board, 249 F.3d 1289, 1293 (11<sup>th</sup> Cir. 2001); see also J.S.K., 941 F.2d at 1573.

59. As IDEA's central FAPE standard does not require more than the provision of services that are reasonably calculated to provide “some” or “adequate” educational benefit, and specifically does not require generalization of progress across settings, Respondent's contention that an FBA must exceed this standard must fail. See J.S.K. v. Hendry County School Board, 941 F.2d 1563, 1572 (11<sup>th</sup> Cir. 1991); Devine v. Indian River County School Board, 249 F.3d 1289, 1293 (11<sup>th</sup> Cir. 2001). Respondent's arguments would require more of evaluations under IDEA than the entire educational program is required to provide. There simply is no precedent for Respondent's “FAPE plus” standard for evaluations, and such an interpretation would undermine the statutory interpretations provided by the Eleventh Circuit in Devine and J.S.K., as well as the Supreme Court's analysis in Rowley.

### E. The Marcus Institute placement

60. Even assuming that the evaluations conducted by the School System were inappropriate, the Respondent is not entitled to the relief she seeks here. On the last day of hearing, Respondent revealed that what she seeks is not merely an evaluation or an FBA but a "placement for evaluative purposes" at the Marcus Institute. (1-13-04 Tr. 95)(Ms. T). The placement in question would entail [REDACTED]'s enrollment at the Marcus Institute for an intensive four-month (minimum) treatment program including classroom instruction and therapy.

61. A change in placement occurs when the composition of a child's educational program or services is substantially or materially altered. See Sherril A.D. v. Kirby, 975 F.2d 193, 206 (5<sup>th</sup> Cir. 1992) (a change in placement occurs where there is a fundamental change in a basic element of the educational program); Doe by Gonzales v. Maher, 793 F.2d 1470, 1487 (9<sup>th</sup> Cir. 1986), modified on other grounds sub nom Honig v. Doe, 484 U.S. 305 (1988)(significant change in placement means significant change in program or services); DeLeon v. Susquehanna Community Sch. Dist., 747 F.2d 149 (3<sup>rd</sup> Cir. 1984) ("given the remedial purposes of [IDEA], the term 'change in educational placement' should be given an expansive reading, at least where changes affecting only an individual child's program are at issue.). Whether a change in placement has occurred is determined by considering the following factors:

- i. Whether the educational program set out in the child's IEP has been revised;
- ii. Whether the child will be able to be educated with nondisabled children to the same extent;
- iii. Whether the child will have the same opportunities to participate in nonacademic and extracurricular services;
- iv. Whether the new placement option is the same option on the continuum of alternative placements.

Letter to Fisher, 21 IDELR 992 (OSEP 1994).

62. As referenced in the factor test, IDEA regulations contemplate the maintenance by public school systems of a "continuum of alternative placements." 34 C.F.R. § 300.551. The regulations describe the consideration that must begin on the continuum with the least restrictive alternative and moving to the most restrictive as follows: "instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions." 34 C.F.R. § 300.551(b)(1). Placement in a special education classroom clearly falls on the less restrictive side of the continuum than placement in a day treatment program. Id. Where, as here, the requested relief would shift the student to a more restrictive educational setting on the continuum, it is axiomatic that a change in placement occurs. Id.; 34 C.F.R. 300.550.

63. Indeed, before Respondent recast her request on June 9 as one for an IEE, at the March 27, IEP meeting – attended by Drs. Fisher and Trapani of the Marcus Institute – the family gave the School System notice of its intention to remove [REDACTED] from the School System, to privately place her at the Marcus Institute, and to seek reimbursement. As Respondent well knows, this notice is specifically contemplated by IDEA as a requirement when parents unilaterally remove their children from public schools in order to place them in private facilities. 34 C.F.R. § 300.403(d).

64. Respondent's insistence that she seeks "placement for evaluation purposes" does not alter the fact that the Marcus Institute FBA is an educational placement that is not appropriate relief in an IEE case. Even where an educational placement is recommended for diagnostic or evaluative purposes, such placement decisions must nonetheless be made by the IEP team and that the school system must continue to provide FAPE. See, e.g., Reese v. Bd. of Educ. of Bismarck R-V Sch. Dist., 225 F.Supp.2d 1149, (E.D. Mo. 2002) (issue before hearing panel was whether the District failed to provide an IEP for the plaintiff during his diagnostic placement); Sanford Sch. Comm. v. Mr. L., 2001 WL 103544 (D. Me. 2001) (district court agreed with hearing officer's determination that the diagnostic placement and the January IEP and placement violated the student's right to FAPE in the least restrictive environment); Manchester Sch. Dist. v. Charles M.F., 1994 WL 485754 (D.N.H. 1994) (Court found that the diagnostic placement offered by the school district must be analyzed to determine whether it provided FAPE in accordance with IDEA); Clark County Sch. Dist., 102 LRP 18798 (SEA NV 2000) (hearing officer determined that the school system did not prevail with the burden of proof that the diagnostic placement was reasonably calculated to provide educational benefit); Dade County Sch. Sys., 103 LRP 17358 (SEA GA 2001); M.S.D. of Martinsville, 102 LRP 10661 (SEA IN 1997). Accordingly, regardless of the fact that the Marcus Institute FBA will involve some level of assessment or evaluation, it is still a "placement" as defined by IDEA, and can only be provided at public expense through an IEP meeting or a FAPE hearing.

65. Further, any argument by Respondent that the "treatment" to be provided by the Marcus Institute takes the Marcus FBA outside of IDEA's definition of "placement" is without merit. It is well-settled that "[t]he concept of education under the [IDEA] clearly embodies both academic instruction and a broad range of associated services traditionally grouped under the general rubric of 'treatment.' Any attempt to distinguish academics from treatment when defining 'educational placement' runs counter to the clear language of the Act." Tilton v. Jefferson County Bd. of Educ., 705 F.2d 800, 803 (6<sup>th</sup> Cir. 1983); see also Ms. B. v. Milford Bd. of Educ., 103 F.3d 1114 (2d Cir. 1997)(educational placement included treatment provided by residential facility); Seattle Sch. Dist. No. 1 v. B.S., 82 F.3d 1493, 1502 (9<sup>th</sup> Cir. 1996); Babb v. Knox County Sch. Sys., 965 F.2d 104, 109 (6<sup>th</sup> Cir. 1992); Clevenger v. Oak Ridge Sch. Bd., 774 F.2d 514 (6<sup>th</sup> Cir. 1984). Thus, D.T.'s casting of her request as one for "treatment" in no way alters the fact that the Marcus Institute FBA constitutes an educational placement under IDEA.

66. Under the IEE provision, a parent who disagrees with a school system evaluation may request an independent educational evaluation at public expense. 20 U.S.C. § 1415(a); 34 C.F.R. § 300.502. If the school system fails to demonstrate that its own evaluation is appropriate, then the relief to be awarded to the parent is a publicly funded evaluation. Id. There is no authority for the Respondent's position that, assuming the School System's FBAs were inappropriate, this ALJ may order relief in the form of a new placement at the Marcus Institute at the School System's expense.

67. The Respondent has suggested that the details of the Marcus Institute FBA are irrelevant to the instant inquiry. Respondent argues that parents are entitled to the independent evaluation of their choice, such that, in defense of an IEE request, a school system may not argue that the

parent's choice of independent evaluation is infirm. Respondent's argument ignores the fact that she herself has affirmatively placed the Marcus Institute in issue by confirming throughout this case that she seeks to enforce her right not only to an independent FBA but specifically to an FBA *at the Marcus Institute*.<sup>114</sup> Her argument also ignores the fact that the Marcus FBA is not an "evaluation" but rather a placement and is thus not proper relief in an IEE case.

68. Respondent has also argued that she is entitled to choose an FBA at the Marcus Institute because the School System did not supplement the state or federal rules regarding evaluations to impose additional criteria on IEEs. According to Respondent, this means that *no* criteria at all were in place save for those relating to the qualifications of the Marcus Institute staff, such that as long as they were properly qualified or credentialed to conduct an FBA, Respondent may obtain an FBA at Marcus via the instant IEE hearing. Again, Respondent's argument fails. Whatever criteria would be applicable to an evaluation obtained by the parent pursuant to an IEE request, and regardless of whether the School System supplemented the state and federal evaluation criteria, the relief obtained by the parent must still meet the basic criteria of constituting an evaluation, rather than a placement. School systems are not required to promulgate IEE criteria specifying that independent evaluations *must actually be* evaluations, in order to avoid being saddled with the expenses of a parent's choice of a private placement couched in "evaluation" terminology.

69. While parents may choose an institution or examiner to conduct a legitimate IEE, the child's placement (as defined by the IEP) must be created by the IEP team according to the procedures established by IDEA and implementing state law. See 20 U.S.C. § 1414; 34 C.F.R. § 342-347; Ga. DOE Rule 160-4-7-.09. Parents are important members of the IEP team and participate in the IEP process, but they do not dictate the child's placement nor is parental consent required to implement an IEP (except for the initial provision of services). See 34 C.F.R. § 300.345 (role of parents in IEP meetings); 34 C.F.R. § 300.505 (parental consent); Ga. DOE Rule 160-4-7-.05(3) and (6) (same). In fact, at the end of the day, it is only the School System that has an obligation to ensure that FAPE is offered.

70. Parents are not entitled to public funding for their unilaterally change or "choice" of their child's educational placement outside of the IEP process unless a hearing officer or court ultimately determines that the school placement did not offer a free appropriate public education ("FAPE") *and* that the private placement was proper. Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 (1993); Burlington v. Dept. of Educ., 471 U.S. 359 (1985); M.C. v. Voluntown Bd. of Educ., 226 F.3d 60 (2d Cir. 2000); Doe v. Metropolitan Nashville Pub. Schs., 133 F.3d 384 (6<sup>th</sup>

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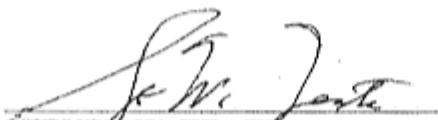
<sup>114</sup> If Respondent now seeks only an order declaring her right to an IEE generally (without reference to the Marcus Institute), that would represent a drastic departure from her long-held position in this case. Furthermore, it would unquestionably prolong what has already been tortuously protracted litigation. If the parent were awarded an IEE in general, but not the FBA she seeks at Marcus in particular, then when the parent sought reimbursement from the School System for the Marcus placement, the School System would be forced to request yet another hearing to litigate the question of whether the Marcus FBA is an "evaluation" covered by the IEE provision or a "placement." That issue has been litigated here and is ripe for decision, and to prolong it further would be an inordinate waste of time and resources for all involved.

Cir. 1998); Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245 (5<sup>th</sup> Cir. 1997). Of course, a parent objecting to their child's placement has the right to request a due process hearing, but any change in placement effected as the result of a hearing would not be by unilateral choice but rather via the procedures established by law. 20 U.S.C. § 1415(b)(6) and (f); 34 C.F.R. § 300.507-511. Of course, such a hearing would relate to whether the IEP offered the child FAPE. Respondent withdrew her FAPE claims before the hearing began.

#### IV. Decision

The School System's evaluation by Dr. Freeman and the FBAs conducted were appropriate. Accordingly, while Ms. [redacted] has the right to secure private evaluations and have those considered by the IEP team, she does not have the right to an independent evaluation at public expense. 34 C.F.R. § 300.502(b)(3).

SO ORDERED this \_\_\_\_ day of April 2004.

  
STEVEN W. TEATE  
Administrative Law Judge