



proposed 2003-2004 IEP, and that the [REDACTED] School meets the standards for reimbursement and placement.

## II. Findings of Fact

### A. Procedural History

1. Petitioner [REDACTED] is now [REDACTED] years old and eligible for the 9<sup>th</sup> grade. In the late 7<sup>th</sup> grade, the last CCSD program, she had been served in a middle school class for the mildly mentally handicapped ("MID"). This is the type of placement recommended in the challenged IEP. J-88. For CCSD, her school eligibility was other health impaired (OHI) and speech. Petitioner has never been considered for educationally behaviorally disturbed or behaviorally disturbed (EBD/BD) or severely emotionally behaviorally disturbed (SEBD) eligibility by CCSD. Segarhammer, I at 76,78. See, e.g., GDOE Rule § 160-4-7-.02(d) and Appendix D; GDOE Rule § 160-4-7-.1 (2000) (SEBD).

2. In late-April, 2002, [REDACTED] was psychiatrically hospitalized in Atlanta, Georgia. P-18. Thereafter, she was placed at the [REDACTED] Treatment Center in [REDACTED], through August 10, 2003. J-67, 68, 69, P-2.<sup>4</sup> [REDACTED] was identified as an emotionally disturbed student as her primary eligibility for special education by [REDACTED] staff. J-68, 000502; J-70, 000507; P-39 at 2, 00286; and P-34, 0024 ("ED/BD"). The [REDACTED] School also recognizes this disability. P-48, 0308-9; P-66.

3. Prior to the conclusion of the [REDACTED] placement, Respondent convened an IEP meeting on May 16, 2003, at [REDACTED] High School to recommend an IEP and placement for the 2003-2004 school year. J-88, P-2. Subsequently, on May 28, 2003, Respondent convened a second IEP meeting<sup>5</sup> at which time Respondent completed the IEP and recommended a MID self-contained placement at [REDACTED] High School.<sup>6</sup> [REDACTED]'s parents objected and pursuant to 34 C.F.R. § 300.403, gave notice that they may seek private services and public reimbursement for such services. J-88, 0799.

4. After the conclusion of the May 28, 2003 IEP meeting, and on the recommendation from [REDACTED]'s treatment team at the [REDACTED] Treatment Center, Petitioner began to look for an

<sup>4</sup> This resulted in an agreement wherein Respondent paid for the costs of the evaluation and the parties convened an IEP meeting in the Summer of 2002. P-2. At this IEP, Respondent recommended a placement for the mildly mentally handicapped ("MID") in a Cobb County middle school. This was rejected by the parents as [REDACTED] needed more intensive behavioral services. The parties negotiated and then agreed to place [REDACTED] at the [REDACTED] Treatment Center in [REDACTED] through August 10, 2003.

The parties entered into a stipulation as to the legal impact of this agreement for the purposes of any future hearing, and said stipulation has been read by the Court, is accepted and no weight is given to the act of that placement by CCSD.

<sup>5</sup> The meeting was conducted at Respondent's attorney's office.

<sup>6</sup> The placement was designated as "Ms. [REDACTED] class."

alternate or "step-down" placement. [REDACTED] applied to a number of residential programs and several programs were found that [REDACTED] met their placement criteria. P-40, 41, 42, 43, 44.<sup>7</sup> [REDACTED] was accepted at the [REDACTED] School and enrolled on August 26, 2003. E.g., P-44, 49, 50.

## B. [REDACTED]'s Disability and Behavioral Needs

5. [REDACTED] has attention deficit hyperactivity disorder ("ADHD").<sup>8</sup> Rust at 22; P-39. She is eligible as a language-disordered and OHI student, as the OHI is related to her congenital cytomegalovirus (CMV).<sup>9</sup> These eligibilities do not specifically account for her borderline

<sup>7</sup> The hearing took place over four days. Transcripts restart page numbers and are cited by witness, volume no., and page. The depositions are cited by name and page number.

<sup>8</sup> [REDACTED] was born on [REDACTED]. CMV was transmitted from [REDACTED]'s birth mother. [REDACTED] was subsequently neglected by her birth mother and adopted by her parents. J-67. From an early age, she had educational and behavioral difficulties. She repeated the first grade and was found as having problems attending to tasks and demonstrated difficulties in academics and with peers. J-1; J-3. [REDACTED] was initially evaluated by Respondent in November 1994. J-4. She had speech difficulties and was noted as being inattentive, withdrawn and having organizational difficulties, but was not found eligible for special education. J-6, 7.

<sup>9</sup> In January 1995, a speech and language evaluation that addressed auditory processing found her to have a significant communication disorder. J-9. At school, [REDACTED] continued to exhibit social and emotional difficulties and had difficulties attributable to ADHD. E.g., J-11; J-12. [REDACTED] continued to have academic difficulties and difficulties in school generally. *Id.*; J-14. An additional academic evaluation was administered in February 1995, which concurred with her having deficits in memory skills and auditory processing. J-15. Also in February of 1995, [REDACTED] was found eligible as an "Other Health Impaired" student ("OHI") and was staffed into resource. J-20. Problems with [REDACTED]'s behaviors at school and with her lack of learning. *See*, J-41, 43, 47, 53, 54 and 55.

[REDACTED] was at [REDACTED] Middle School by the 7<sup>th</sup> grade. P-54. Mr. [REDACTED] accompanied her on CBI trips as the class did not have enough support, and as she was a risk as she would steal in stores. E.g., *Id.* at 171-174. She had multiple disciplinary charges during this year. J-66; Mr. [REDACTED], IV at 205-208. These began with the early part of school and ranged from theft, to disorderly conduct, to use of vulgarity and profanity, to school bus problems, to assault and then sexual battery when she grabbed a student by the genitals. *Id.* Respondent's behavioral specialist observed her that winter. J-14. A token behavioral point system in the MID placement was inadequate to manage or to alter her behaviors as her conduct and discipline continued. J-55

During this time, [REDACTED]'s parents retained Ms. [REDACTED], a licensed counselor, for private therapy sessions with [REDACTED] to work on [REDACTED]'s inappropriate behaviors including aggression. [REDACTED], III at 201, 207-8. Ms. [REDACTED] opined that [REDACTED] deteriorated throughout that school year, that more structure and support, and that [REDACTED] required residential services. *Id.* at 212-213. Ms. [REDACTED] opinions are consistent with those of Dr. [REDACTED], a child psychiatrist, who saw [REDACTED] in 2002. P-17.

Dr. [REDACTED] neuro-psychologically evaluated [REDACTED] on April 25, 2002, and concluded her psychiatric and behavioral issues impacted her ability to learn. J-60. He saw psychological issues which "need to be addressed within the home, academic and social settings." *Id.* Dr. [REDACTED] further recommended intensive psychotherapy and placement to address behavior and medications. *Id.* This evaluation recognized she was an emotionally disturbed child with brain abnormalities. *Id.* *See*, e.g., Rust at 13. During a suspension from special education, on April 27, 2002, [REDACTED] had a crisis at home and that required psychiatric hospitalization. P-18. She was seen as "bizarre at times," and with her attention and mood swinging drastically. *Id.* at 0198. She had rages and quickly became agitated. *Id.* Mr. and Mrs. [REDACTED] consulted with an educational consultant who agreed with [REDACTED] staff that residential placement was necessary. [REDACTED] was released from hospitalization to [REDACTED] Treatment Center in

intellectual functioning, her diagnosis of PDD-NOS (Pervasive Developmental Disability), or [REDACTED]'s behavioral and emotional difficulties. Segarhammer, I at 72, 76.

6. Further, [REDACTED] has a mood disorder. [REDACTED] at 38-40; P-39, 0289. Her mood is unstable and she has difficulty in anger control. [REDACTED] at 21, 28. She still plays with dolls, [REDACTED] at 13-14, and Pooh Bear and Beanie Babies. Mrs. [REDACTED], IV at 12. Large groups and a large campus can make her anxious and upset. She has problems with boundaries. [REDACTED] at 28. She fantasizes and has difficulties with peers. At [REDACTED], she worked on recognizing these internally and has made some progress. *Id.* at 29-30, 40-41.

7. [REDACTED] has brain damage, unusual brain wave pattern, and very immature brain cell development. Dr. [REDACTED] at 14-16. This results in scattered abilities, short and long term memory impairments and learning disabilities. *Id.*; P-39. She has "PDD" or Pervasive Developmental Disorder-NOS. [REDACTED] at 18; P-39. This is shown on her left temporal lobe abnormalities. *Id.* at 15. Her brain waves are slower and immature and this makes processing material difficult and can lead to her misinterpreting stimuli. [REDACTED] at 14. This impacts her ability to learn, and that in turn is impacted by her behavioral difficulties and disorders. *E.g.*, [REDACTED] at 20-23, 25; [REDACTED] at 18.

8. [REDACTED] also has characteristics of an intermittent explosive disorder and carries a diagnosis of impulse control disorder. [REDACTED] at 16; P-39. She will steal as she does not understand or how to control this behavior. She can become anxious and then aggressive, or react when she perceives people are invading her space. She curses and becomes abusive with others. Mr. [REDACTED], IV at 177-8, 208; [REDACTED] at 20-21. She has difficulty environmentally and in spatial relationships. She has no insight. [REDACTED] at 40. She cannot find her way around large campuses or from place-to-place without assistance. *E.g.* Mr. [REDACTED], IV at 177, 179; [REDACTED] at 25, 70-72; [REDACTED] at 27, 46-47, 88. She could not understand her own behavior, although she has improved at [REDACTED], and again while at [REDACTED] School. [REDACTED] at 38-39, 40-41, 45. She is afraid of insects and bugs. Mrs. [REDACTED], IV at 184. She will scream at objects and noises such as a vacuum cleaner. [REDACTED] at 88; P-39. She picks at sores until she bleeds. *E.g.*, Mr. [REDACTED], IV at 183-184.

9. [REDACTED] tracks behavior and emotions in a regulated system that follows the student throughout classes into campus activities, such as the ropes program, and in the dorm and living environment.<sup>10</sup> *E.g.*, [REDACTED] at 9-12. It notes what it calls critical behaviors and adverse behavioral manifestations including angry/hostile, anxious, dependency, impulsivity, mood swings and others.<sup>11</sup> *E.g.*, P-37 at 0268. P-56 is a description of this program. Contrary to

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[REDACTED] P-18, 0198. Dr. [REDACTED] and [REDACTED] staff also believed that she had borderline intellectual functioning. P-60; Rust at 17. Without input from anyone licensed to interpret test instruments, Ms. [REDACTED] thought this was mental retardation and then testified she was not sure. *See*, [REDACTED], II at 82-83. She was not familiar with [REDACTED]'s eligibility, her testing or I.Q., or her diagnosis. *Id.*, at 82, 83, 85, 87-88.

<sup>10</sup> [REDACTED] was limited to a very sparse academic program at [REDACTED] that first and always split her day between school and therapy. *E.g.*, [REDACTED], II at 12; [REDACTED] at . She later improved in her participation and behavior during the academic sessions. *Compare*, P-19 (her first school progress report) with P-33.

<sup>11</sup> This data is reinforced by the daily average scores, also on the Behavioral Enhancement Program Scores chart at the bottom of the tally page on the monthly summaries. *See*, *e.g.*, P-38, 0278. A rating of good requires an average  
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Respondent's assertions at the IEP meeting, the critical manifestations continued well into the late fall and winter. Ms. [REDACTED], IV at 133-4; [REDACTED] at 46-50; P-7, 8 at 113. See, Ms. [REDACTED], IV at 133.

10. For the May IEP meeting, Respondent reviewed the report completed in late April 2003, that shows 120 inappropriate behavioral manifestations and 36 affective incidents. *Id.*; J-86. The next report, completed after the first IEP meeting, shows 354 inappropriate behavioral manifestations, the highest daily rate after the three-month evaluation phase. J-89; P-36. The May to June 2003, report shows 295 inappropriate behavioral manifestations occurring in a reporting period.<sup>12</sup> The next months' data shows 188 behavioral manifestations in a reporting period of ten (10) less days than the ordinary 28 due to [REDACTED]'s trips to see step-down schools. J-90; P-37.<sup>13</sup>

11. The daily incidence of these behaviors were not significantly diminished from the early fall and do not show significant improvement in a highly structured setting with significant support. Respondent only relied on a summary paragraph and also failed to review difficulties in home visits.<sup>14</sup> *Id.* at 63-64, 66-68. Further, the Discharge Summary from [REDACTED], that was not available or used by the Respondent's IEP team, identifies continuing and serious manifestations of behavior summarizing [REDACTED]'s condition at discharge as "[m]oderate improvement (50-74% of treatment objectives completed)." P.39.

12. [REDACTED] had spikes in behaviors at the time of the IEP meetings and continuing thereafter in May and June of 2003. P-36 (April to May), P-37 (May to June), and P-38 (June to July); [REDACTED] 28, 47-8. See also, P-39(Discharge Summary). [REDACTED] "continued to require consistent supervision and support. She demonstrated difficulty in situations that had multiple stimulus.. . [she] continued to require support in her social interactions. She appears to [REDACTED] limited awareness of appropriate boundaries ... [s]he consistently had difficulty getting along with roommates." *Id.* at 0288. She was seen as in need of continued residential services, in a "step-down," or less restrictive and structured program than offered by [REDACTED]. E.g., [REDACTED] at 23-24, 25, 35; [REDACTED] at 38-39, 45; P-39.

13. [REDACTED] staff saw [REDACTED] as ultimately in need of a step-down facility prior to community or home placement.<sup>15</sup> E.g., P-39; [REDACTED] at 25-27, 35. Throughout [REDACTED]'s placement at

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score over 2.71, a rating of very good requires an average score over 3.71. *Id.* at 0279, No. 4 (explanation of rating scale). [REDACTED]'s scores over the last three months never reached the "good range," which itself is a relative score for a student in a highly structured residential program. P-36, 0258, P-37, 0268; P-38, 0278.

<sup>12</sup> There are actually five (5) less calendar days in this report than in the prior reporting period.

<sup>13</sup> The missing days can be identified by the zero scores on the "Behavioral Enhancement Program Scores" chart on these reports.

<sup>14</sup> Respondent did not note an incident where [REDACTED] was found banging her head in a wall when she could not reach her family by telephone. Leal at 47

<sup>15</sup> At [REDACTED], [REDACTED] was stabilized and evaluated. A behavioral intervention program addressing the full 24-hour day was instituted. Dr. [REDACTED] reviewed the neuropsychological evaluations, the EEG, BEAN studies, and altered her

the goal of the treatment and IEP plans was to prepare [REDACTED] for a step-down facility. E.g., P-38, 0283 (aftercare - "less intensive RTC."); [REDACTED] at 23-24. These services and recommendations were identified for Cobb County staff personally and in the records provided. See, J-68, 69, 78. Dr. [REDACTED] and Ms. [REDACTED] were not sure that [REDACTED] would ever be independent or learn to control or behavior so she would not require 24-hour support. [REDACTED] at 12; [REDACTED] at 39-40. Her behavior still required such support and services. [REDACTED] at 23-24, 68; [REDACTED] at 39-40, 41, 45, 48. Dr. [REDACTED] testified that he "would find it difficult to imagine [REDACTED] in anything else but a 24-hour environment." [REDACTED] at 99. [REDACTED] does not generalize, and generalization does not take into account the injuries to her cerebral tissue functions. *Id.* at 80. See also, [REDACTED] at 53.

14. Even though Respondent had not spoken with [REDACTED] staff and appeared not to have all the records for the IEP meeting, Respondent contended that data was inconsistent with the need for residential services despite [REDACTED] staff's recommendations and despite admission that [REDACTED] would have increased behaviors in transitions and changes. [REDACTED], II at 117. Further, it was clear that [REDACTED] became oppositional and disorganized on many trips even though she was not returned to [REDACTED]. [REDACTED] at 46-51, 63-64, 65-66, 67, 68; [REDACTED] at 81, 83-85.

15. On August 26, 2003, Petitioner enrolled in the [REDACTED] School, a residential facility located in [REDACTED].<sup>16</sup> [REDACTED], T(23/3/03) at 141; 174-75). [REDACTED] has obtained adequate or passing grades in modified curricula, though her behavior continued to be less than satisfactory. P-66, 0575. The December 2003 monthly and winter quarterly reports from [REDACTED] show workable strengths but also continued needs, problems and aggressive behaviors. P-67. [REDACTED]'s behaviors in a structured 24-environment at the [REDACTED] School included assault and aggression on peers, though these were dealt with in a therapeutic environment, rather than a more generalized setting in which suspension might be a more routinely utilized. See, Mr. [REDACTED] at 107-208; [REDACTED] I at 165-67.

### C. [REDACTED]'s Eligibilities and Evaluations

16. Children must be considered for eligibility in all areas of suspected disability at least

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medications. A strict and regimented 24-hour levels system was used. [REDACTED] at 9-12. She received individual and group therapy, as often as daily, and she received family therapy. [REDACTED] at 40, 42-43, 74-75, 77; [REDACTED] at 7-8, 10-12, 20. In therapy she would discuss, practice and work on how to deal with people and issues she encountered. [REDACTED] at 57-59; [REDACTED] at 40-42. On the living unit, trained mental health workers and nurses provided support. She attended school with an aide, slowly increasing her time and participation. [REDACTED] participated in a ropes course for self-esteem and social and recreational skills. She was allowed to participate in campus activities, though she required assistance in getting from place to place. She would get lost on the campus and react to the many "doors" or become angry at the bugs and cracks on the side walk. [REDACTED] at 88-89; [REDACTED] at 13-15, 70, 71-2.

<sup>16</sup> The Initial Plan of Care was introduced as P-49. The admission evaluation by Ms. [REDACTED], [REDACTED]'s chief therapist, is P-48. [REDACTED] completed comprehensive testing for school and other needs. P-50.

every three years. *E.g.*, [redacted], I at 63-65. Eligibility must be resolved before writing the goals and objections since eligibility can alter goals. *Id.*, I at 64-5. A student can have more than one eligibility. *Id.* at 72. Documentation of the needs and characteristics of the child is required. *Id.* Children also are assessed in all areas of potential need. *Id.* 62. This includes psychologically, medically, and in all indicated related services areas. *Id.* at 62-63. This process leads to the IEP and its measurable goals and objectives that regulate the student's services and must be in the IEP. *Id.* at 58-59.

17. In addition to a description of the services, the IEP must identify the scope, frequency, duration and location of services. *Id.* at 59-60. Children who have a need for a behavioral intervention plan (BIP) must have a functional behavioral assessment (FBA) done. *Id.* at 67-68. This is done systematically by a psychologist or trained specialist and includes direct observations of the student and interviews of those who work with her or have observed her. *Id.*, at 68-69, 71-2. People who work with the child are interviewed to identify the target behaviors. *Id.* at 69-70. Failure to understand the function of the behaviors, may result in a BIP that is not effective. *Id.* Placement cannot be addressed until after the IEP is written. *E.g.*, [redacted] I at 60.

18. Although [redacted]'s need for comprehensive psychological re-evaluation was noted as early as the January 2002 IEP meeting, such evaluation did not occur prior to the contested 2004 IEP plan under which [redacted]'s eligibility for special education services arose under the OHI category.<sup>17</sup> CCSD never considered whether [redacted] was eligible as behaviorally disturbed or educationally behaviorally disturbed ("EBD") or even as severely emotionally disturbed or "SEBD." [redacted], I at 76.<sup>18</sup>

19. The eligibility process is supported through documentation of the services, evaluations,

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<sup>17</sup> In the January, 2002 IEP meeting, the Respondent team agreed that [redacted] should have a comprehensive psychological re-evaluation. This arose from her behavioral deterioration in school. *See*, J-59, 63. [redacted] continued to exhibit behavioral difficulties at school throughout the Winter and into the Spring of 2002. [redacted], I, 36, 37-8; [redacted], II at 68. She was disciplined repeatedly and removed from class. J-60. She stole, cursed and hit others. [redacted], I at 36. At a March, 2002 IEP meeting Respondent stated that there had been an error, as [redacted]'s evaluation referral had "slipped through the cracks" as the evaluation and FBA were not done. [redacted], I at 96. There was a general consensus that her behavior at school was becoming worse. J-59 and 60; Mr. [redacted], IV at 57.

Dr. [redacted] characterized these behaviors, the suspensions and discipline and the need for additional evaluation and a FBA as not out of the ordinary or typical adolescent behavior. [redacted], I, at 36, 96-97, 118. Ms. [redacted] also used this characterization at the IEP. *See*, Mrs. [redacted], at 98.

Further, At the August 8, 2002 IEP meeting, it was recognized that the most recent speech and language eligibility report for her was from the third grade, although she was then an eighth grade student. J-88; [redacted], II at 227.

<sup>18</sup> Although the Court takes official notice of all GDOE regulations as indicated in its notice of hearing, Petitioner requested and the Court acknowledged official notice of ED/BD eligibility criteria under GDOE Rule § 160-4-7-.02 (Appendix D).

reports of behavioral observations, social history and documentation of the duration, frequency and intensity of one or more of the characteristics described. *Id.* [REDACTED]'s admitting and discharge diagnoses identify conditions that meet these eligibility criteria. These include the DSM-IV Axis I diagnosis of mood disorder and impulse control disorder. These are supported by her Axis III diagnoses of cerebral dysrhythmia, which may or may not have been caused by congenital cytomegalovirus. P-39 at 00289.

20. Witnesses for CCSD were questioned concerning whether or not their data and information concerning [REDACTED] demonstrated that she met ED/EBD eligibility. *See*, GDOE Rule §160-4-7-.02, Appendix D. E.g., [REDACTED] at 76, 77-80; [REDACTED], II at 79, 82-83, 87-88, 100-102, 106. Other witnesses who said the MID services were appropriate also knew little about [REDACTED]'s behavior, *see*, [REDACTED], II at 195, or her history, *id.* at 187. Ms. [REDACTED] who wrote the instructional program for her MID class admitted that instruction is different for the ED/EBD student and the training and skills of the teacher are different. [REDACTED], II at 101-102. Further, the impulse control disorder and mood swings were not part of the BIP considerations in J-88, 0765. [REDACTED], I at 77-80.

21. The 2003-2004 IEP repeats that [REDACTED] is eligible for speech and language services and has goals but without current information. The goals were developed prior to the IEP meeting at the direction of Ms. [REDACTED]. [REDACTED], II at 216-218. Ms. [REDACTED], the speech therapist at the meeting, made a placement recommendation for delivery through a small group setting, with additional time in a classroom setting. *Id.* at 221. Ms. [REDACTED] recommended a re-evaluation to "get a more current functioning or current idea of the level she is at." *Id.* at 222. "It was time to get an update." *Id.* at 222. Her testimony was that testing should occur every three (3) years, but it does not have to happen, and it can be avoided if there is information from the classroom teacher, parents and family on the progress of goals and objectives, the current functioning in the classroom and "things like that determine that no further testing is needed." *Id.* 223. There is no such evidence in this case. Ms. [REDACTED] made her recommendations knowing that she would have to write new goals and objectives. *Id.*

22. Ms. [REDACTED] acknowledged that evaluation provides necessary information to write goals and objectives, and identify strengths and weaknesses. *Id.* at 224. There is a danger from solely utilizing information from non-speech and language pathologists, as it can be misleading. *Id.*

23. At the IEP meeting, Ms. [REDACTED] concluded that [REDACTED] needed speech and language services as of May 28, 2003, and that there was no reason to delay.<sup>19</sup> *Id.* at 229-230. [REDACTED]'s parents requested a language evaluation by CCSD at [REDACTED] over the summer so goals and objectives based upon that evaluation would be available as the year began. However, CCSD declined and then [REDACTED]'s parents then requested that an evaluator be obtained near [REDACTED]

<sup>19</sup> [REDACTED] was nine (9) years old at the time of the last language evaluation. This meeting was taking place when [REDACTED] was fifteen and a half (15 ½) years old, and the last evaluation was six and a half (6 ½) years old. *Id.* at 225-26. The previous speech and language pathologists had left the county. *Id.*

to conduct the assessment, with subsequent review of the evaluation by a CCSD professional. *Id.* at 230-232. Ms. ██████ admitted there was no reason the assessment needed to be conducted by a Cobb County employee. *Id.* at 232-234.

24. ██████ argued at the IEP meeting that an assistive technology evaluation can be conducted through a complete evaluation, looking at her needs and making service and technological recommendations. P-7 and 8; J-88 at 0797-8(Addendum). Ms. ██████ stated that approach was contrary to the practice in CCSD and that it was not the procedure recommended by the Georgia Project on Assistive Technology ("GPAT"). P-7 and 8. The GPAT evaluation guidelines demonstrate that GPAT provides consulting services for specific evaluations, has a protocol for such evaluations and contains consent and information to make sufficient observations or direct hands-on assessments and then recommendations through the provision of an evaluation report. P-55. These are then addressed at IEP meetings.<sup>20</sup> *Id.* at 0375-6.

#### D. Adequacy of Services

25. In the May 2003 IEP, ██████'s academic subject areas are identified, comprising a fully self-contained MID placement with lunch provided in small group special education classroom settings in which ██████ receives group speech and language services with everyone in her class. J-88 at 0750. However, out of concerns for ██████'s behavior, Respondent proposed a placement restricting ██████ from going on community-based instruction, ("CBI") and restricting her from taking lunch with her peers. *E.g.*, ██████, I at 54, 98, 123; Mrs. ██████, IV at 71-73. CBI is a vital and basic part of the MID program at ██████ that requires participation to obtain its benefits. *E.g.*, ██████, II at 169. *Id.* Ms. ██████ opined that CBI was very appropriate and that it was consistent with ██████'s need for generalization. ██████, II at 34-5. The IEP does not include: (1) family therapy, (2) individual therapy, (3) group therapy, (4) group social instructions as a part of the IEP, or any integrated, interactive activities. *E.g.*, ██████, I at 107, 109, 122, J-88 at 0750.<sup>21</sup>

26. Children who have behaviors that interfere with their education should have a Behavior Intervention Plan or BIP. *E.g.*, ██████, I at 67-69. Prior to the May 16, 2003 IEP meeting, several CCSD employees, including the teacher of the self-contained MID class at ██████ High School, drafted proposed goals and objectives and a proposed BIP. J-86, 88; testimony of S. ██████, T (Dec 5, 2003) at 9-13.<sup>22</sup> Subsequently, prior to the May 28 meeting,

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<sup>20</sup> The United States Department of Education has issued a policy letter defining the AT assessment as an evaluation. *See, In re: Letter to Fisher (IEE/Assistive Technology Devices)*, 23 IDELR 565, 2 ECLPR § 169 (OSEP 1995).

<sup>21</sup> While the IEP provides for the use of a social worker, such use is restricted to facilitating communications between school and home, not for therapeutic purposes. J-88 at 750; ██████, II at 69.

<sup>22</sup> A behavior specialist who was not invited to the IEP meeting participated in preparing the proposed drafts. *Id.*; ██████ at 92.

~~\_\_\_\_\_~~ the special education lead teacher at ~~\_\_\_\_\_~~, prepared a draft behavior levels system for Petitioner similar to the one used at ~~San Marcos~~ to present to the IEP committee to help transition Petitioner from the residential facility. Testimony of ~~\_\_\_\_\_~~, T (Dec. 4, 2003) at 191-192. The proposed draft of the BIP was written without the development of a functional behavior assessment. *E.g.*, Mrs. ~~\_\_\_\_\_~~, IV at 51; ~~\_\_\_\_\_~~, I at 101. The parents were not interviewed concerning the adverse behaviors, nor were current teachers or any persons with current, personal knowledge concerning ~~\_\_\_\_\_~~ Mrs. ~~\_\_\_\_\_~~, IV at 51.

27. At the IEP meeting, Mr. and Mrs. ~~\_\_\_\_\_~~ objected to this BIP as they were concerned with its appropriateness for ~~\_\_\_\_\_~~, its restrictiveness and that it might be punitive, using existing disciplinary procedures.<sup>23</sup> *E.g.*, P-7 and 8; P-88 at 0796-0797 (Addendum). The IEP does not provide an individually-based behavior intervention plan (BIP) and it was not individualized at the IEP meeting. Mrs. ~~\_\_\_\_\_~~, IV at 52. It does not address diagnosis and conditions of ~~\_\_\_\_\_~~. *E.g.*, ~~\_\_\_\_\_~~, I at 76, 78, 80. The BIP incorporates the behavior management plan generally designed for the MID class of Ms. ~~\_\_\_\_\_~~. J-88, O-765. The BIP addresses matters such as giving ~~\_\_\_\_\_~~ replacement behaviors, without an analysis of the existing behavior, and without an assessment of the appropriate replacement behavior. It also incorporates the "administrative procedures" of the school disciplinary code without modification. *E.g.*, P-7 and 8; P-88 at 0796-0797 (Addendum).

28. ~~\_\_\_\_\_~~ still exhibits behavior that violates the code inasmuch as she has had assaults at ~~\_\_\_\_\_~~<sup>24</sup> P-49, 66A and 67; ~~\_\_\_\_\_~~ at 165-6; Mr. ~~\_\_\_\_\_~~, IV at 208. While ~~\_\_\_\_\_~~ has proposed goals and objectives that recognize she will have behavior which will violate the disciplinary rules, Respondent declined to modify how it would handle predictable events, such as cursing, acting out, adversely reacting to authority, which will arise during the course of the school year. P-7 and 8; J-88 at 0797. At the May 28, 2003 IEP meeting, Respondent indicated that it would follow "its policies" and suspend ~~\_\_\_\_\_~~. *Id.*

29. The proposed BIP includes a classroom management plan that has certain punishments, including lunch detention that would occur in the same room where ~~\_\_\_\_\_~~ was eating her lunch and a penalty a "time for time" sanction.<sup>25</sup> J-88 at 750. ~~\_\_\_\_\_~~ would feel the stigma of eating

<sup>23</sup> Respondent's behavior improvement program (BIP) provided that ~~\_\_\_\_\_~~ sit on a rug with a box taped out for her and then carry that around with her. J-88, 0765. Although she cannot understand space, ~~\_\_\_\_\_~~ feels stigmatized by such a restriction and becomes anxious and lashes out. Mrs. ~~\_\_\_\_\_~~, IV at 81-82; ~~\_\_\_\_\_~~ at 29. She would be stigmatized by special transportation and isolation. Mr. ~~\_\_\_\_\_~~, IV at 218; Mrs. ~~\_\_\_\_\_~~, at 61-2. She will know that at ~~\_\_\_\_\_~~ she was eating lunch in the same way that others were in detention. *See*, J-88, 0765; Mrs. ~~\_\_\_\_\_~~, IV at 7-12.

<sup>24</sup> When ~~\_\_\_\_\_~~ was in a MID class her last year in middle school in Cobb County, she was removed from class, subjected to in-school suspension, alternative school suspension, out-of-school suspension and other punishment on multiple occasions for behavior related to her disability which otherwise breaches or violates the existing disciplinary code. J-60.

<sup>25</sup> In preparation for the IEP meeting, CCSD personel drafted some proposals for discussion that were not discussed at the IEP meeting. Mrs. ~~\_\_\_\_\_~~, IV at 53-54; P-24. Ms. ~~\_\_\_\_\_~~ said she was directed to write goals and a BIP to "transition [~~\_\_\_\_\_~~] back to ~~\_\_\_\_\_~~" ~~\_\_\_\_\_~~, II at 188, addressing P-64 at 0561. ~~\_\_\_\_\_~~ stated this level system

with others being punished and she does not understand time and would feel unduly punished by this with resulting frustration and anger. *See*, Mr. B., IV at 202-3.

30. While in a residential placement emergency or serious events can be handled through the 24-hour structure and availability of professionals throughout the day, additional behavioral goals for transition were necessary in the proposed IEP. Mr. B., IV at 210-11; J-88, 0798. These would have also been necessary generalization goals. Mrs. A., IV at 81. The safety or emergency planning was rejected. Mr. B., IV at 217-18; J-88, 0798. Ms. [redacted] indicated that when [redacted] had a crisis or serious event that the plan was to hold her at school and then call 911. *See*, Mr. B., IV at 218.

31. [redacted] receives support services including "non-academic services" at the [redacted] School. Access to such services and use of such services to assist in her behavioral stabilization was one of the reasons the [redacted] staff and the parents recommended a step-down facility. And one of the factors why Mr. and Mrs. B. chose the [redacted] School. Respondent indicated no non-academic services in the IEP at all and they were not discussed. [redacted] I at 121, 123. J-88, 0750. The community-based instruction or CBI, typically part of the IEP for MID students was also eliminated. [redacted] I at 98. Ms. A. was very concerned that the program isolated [redacted], and that this would anger and frustrate her. Mrs. B., IV at 69-72.

32. Respondent acknowledged that [redacted] needed support services to be successful and that [redacted] could get FAPE with "proper supports," including carry-over into the home. *E.g.*, [redacted] II at 149. Supports and related services must be in the IEP. [redacted] II at 63. The proposed IEP does not provide [redacted] therapy of any kind. *Id.* at 76; [redacted] II at 174. *See*, J-88, 0750. She is not to get social skills as was in the IEP in 2002. *Id.* at 78. A parent can only consent to what is in the IEP. *Id.* at 182. These support services were not considered, nor provided to [redacted] by Respondent. *See*, J-88, 0750; [redacted] I at 107, 121, 123. In addition, the necessary transition into a six-hour program was not done. [redacted] I at 98. A new IEP would be needed to provide this. [redacted] I at 98-99.

33. While MID goals routinely include electives, the proposed IEP for [redacted] included no electives.<sup>26</sup> *E.g.*, [redacted] II at 201; [redacted] I at 54. The IEP must be specific for consent and must identify the actual services and their frequency, duration and location. *e.g.*, [redacted] II at 182 .

34. Recreational services and recreational therapy were part of the recommendation for a step-down facility. They allow practice and generalization of skills. These services are provided

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was appropriate for [redacted] to be successful, *id.* at 188, but it was not part of the IEP. *See*, J-88 (addendum); Mr. B., IV at 204. BIP changes were made at the IEP. *Id.*

<sup>26</sup> Ms. [redacted] for CCSD said she was not sure, and then testified that the IEP team was not specific about the electives, *id.* at 164-5, and then rejected that the IEP eliminated electives, *id.* at 181, and then finally conceded there were no electives for [redacted] *Id.* at 208-9.

to [REDACTED] at [REDACTED] and they are necessary. *E.g.*, 43-44; [REDACTED], II at 155, 167, 168-9. These services are not in Respondent's special education manual and they were not assessed, discussed or offered by Respondent. [REDACTED], I at 122-123; [REDACTED], II at 123, 126. These services are part of an appropriate program for [REDACTED] but were not offered in the CCSD IEP, nor considered by the IEP team. J-88, 0750.

35. There was no discussion or setting of criteria which is a significant inadequacy in the program and creates a risk of harm in implementing the program. [REDACTED], I at 107; *See*, 34 C.F.R. § 300.552(d). [REDACTED] was not provided any designed transition services from a residential to a school program. There was no planning for how she would make this transition and no specialized support provided to her. *E.g.*, Mrs. [REDACTED] at 53-54 (levels), 55, 64-65, 69-70. In the IEP meeting, CCSD stated that they would need to develop this program as that was a specialized need. *See*, P-7 and 8 at 143; Mr. [REDACTED], IV at 103, *citing*, P-7 and 8 at 143; [REDACTED], II at 148.

36. [REDACTED] is unable to travel by herself, and, therefore, requires the supervision and assistance of an adult. *See*, Mr. [REDACTED], IV at 164-165.

37. At the IEP meeting, Ms. [REDACTED] objected to the renewed use of the Alpha Smart, identifying that [REDACTED] could not type and that the Alpha Smart trial had failed before. She also objected to the delays, noting that it had simply been taken away from [REDACTED] in the past. Mrs. [REDACTED], IV at 72-74. This objection was not considered by the committee, and, in the absence of anyone with expertise concerning assistive technology (AT), Ms. [REDACTED] simply ordered a renewed AT trial. *See*, P-7 and 8; Mrs. H., IV at 74-75; J-88.

38. The IEP does not provide parent training and support as an identified related service. J-88 at 750.

39. The August, 2002 and May, 2003 IEP and offer of services have remarkable differences. *Compare*, J-77 with J-88, 0590, 0750. In the August IEP meeting, prior to the school year at [REDACTED] [REDACTED], a number of necessary services were offered to [REDACTED], including family therapy. *See* Sections 300.24(b)(9)(v) and 300.24(b)(13). In addition, psychological services for individual and group therapy were provided in August, 2002. *See*, 34 C.F.R. § 300.24(b)(9) and (13). These were all provided as an integral part of the education, special education and treatment program at the [REDACTED] Center. These services are also part of the program offered to [REDACTED] at the [REDACTED] School. Mrs. [REDACTED] at 65, 66, 68. *See also*, P-49, 50, 66A, 67. Each service allows [REDACTED] to work on and understand her behaviors, manage and practice the response to her behaviors and are otherwise appropriate activities. *E.g.*, [REDACTED] at 20-23.

40. Although all related services must be in the IEP, the challenged IEP does not have therapeutic services by any certified or licensed personnel. [REDACTED], II at 63. The provision of direct therapeutic services was not discussed at the IEP meeting, P-7 and 8; [REDACTED], I at

106-107.<sup>27</sup> There was no provision of counseling or psychological services for [REDACTED] [REDACTED], I at 106-107.

41. Throughout her residential treatment at [REDACTED] and at [REDACTED], [REDACTED] continued to demonstrate significant problem behaviors. These ranged from hitting, fighting, vulgarity and lying. [REDACTED] made progress in a structured and residential treatment centers. [REDACTED] at 13-14, 20-21. Although Ms. [REDACTED] suggested that residential treatment is not an appropriate program, she did not adequately explain this contention and ultimately had to admit that there were children placed residentially by Respondent. [REDACTED], II at 44.

42. [REDACTED]'s parents also objected to the large size of the [REDACTED] campus as related to [REDACTED]'s disorientation and inability to function in that environment. [REDACTED] would become disoriented and anxious from the noise. Mr. [REDACTED], IV at 179-180.

43. In its program design, Respondent does not provide [REDACTED] with the structure she requires to continue to make reasonable academic progress. [REDACTED]'s needs exceed the six (6) hour school day and exceed those offered to her in the CCSD program. [REDACTED] needs a 24-hour structured environment with adequate and appropriate support services, including individual, group, family and recreation therapy.

#### F. The Right to Reimbursement and Placement

44. [REDACTED] has four (4) primary goals in her plan of care at the [REDACTED] School that are appropriate goals for her and designed to meet her needs. [REDACTED] at 43, 44, 97-99. See also, P-48 (initial evaluation) at 303, 308-9; P-49 (initial plan of care); P-65; P-66; P-66A; and, P-69. The [REDACTED] School has implemented this plan of care. *Id.* [REDACTED] also attends academic classes and electives such as home economics and outdoor education as part of her overall necessary services at the [REDACTED] School.<sup>28</sup> *E.g.*, P-66 (report card). Despite the continual need to improve behavior, [REDACTED] is receiving passing grades and has shown progress. *Id.* See also, P-66A and 67.

45. [REDACTED] receives necessary therapy services, recreational therapy, non-academic services, and a 24-hour structured environment at the [REDACTED] School. Services are provided by certified teachers and licensed therapists. [REDACTED] receives speech and language services. In the plan of care and the behavioral and therapeutic aspects of her program, [REDACTED] is also making

<sup>27</sup> Dr. [REDACTED] was not aware that social work services were related services, nor that these allowed assessment and therapy. [REDACTED], I at 104-106.

<sup>28</sup> P-66 is a report card and fall semester educational progress report from the [REDACTED] School. It attaches portions of CCSD's IEP, designating mastery in some areas, progress in others and the lack of progress and/or the lack of implementation of certain goals. A review of these documents at P-66, 0578, shows a number of goals designated with an "N" or "Not Introduced." This is particularly true in the math program. See also, [REDACTED] at 199.

reasonable progress. P-49, 50, 66, 66A, 67; Mr. B., IV at 227.

46. [REDACTED]'s family incurred transportation costs for trips: (1) on August 20-27, 2003, [REDACTED]'s transfer from the [REDACTED] Treatment Center to the [REDACTED] School that required her family's transportation to [REDACTED], and then her and her family's transportation from [REDACTED] to the [REDACTED] School, and then her family's return home and (2) from July 14-25, 2003, that included transportation and related costs to and from the [REDACTED] School, the [REDACTED] School in [REDACTED] and the [REDACTED] facility in [REDACTED] all for the purpose of finding and applying to an appropriate program. Mr. B., IV at 225-227; P-53-4.

47. The cost incurred for this transportation and found appropriate by this Court is Two Thousand One Hundred Thirty-Four Dollars and Sixteen Cents (\$2,134.16). The initial care plan meeting and staff meeting at the [REDACTED] School required a family visit from September 24-28, 2003. The Court finds the cost for this trip to be Nine Hundred Twenty-Eight Dollars and Seventy-One (\$928.71) Cents. [REDACTED] traveled to and from Atlanta over the Thanksgiving holidays at a cost of One Thousand Seventeen Dollars and Twenty-Two Cents (\$1,017.22). [REDACTED] traveled to and from Atlanta for the Christmas/New Year's break at a cost of Nine Hundred Forty-One Dollars and Eight Cents (\$941.08). The Court finds the cost of such trips to be Three Thousand Three Hundred Thirty-Four Dollars and Six Cents (\$3,334.06) and related to and appropriate for interviewing at such facilities and for making a determination as to the step-down placement. *E.g.*, Mr. B., IV at 225-227. These travel costs are reasonable, were related to and/or necessary in the provision of FAPE, and qualify as either a related service or, in the context of the family visitation, necessary to ensure the Family's full participation in the development and implementation of [REDACTED]'s program.

48. Based on the evidence presented up to the conclusion of the hearing, that is, through February 10, 2004, the Court finds that [REDACTED] has a right of reimbursement in the amount of Eight Thousand Three Hundred Fifty-Five Dollars and Ninety-Five Cents (\$8,355.95). [REDACTED] has a further right of ongoing reasonable transportation to and/or from the facility, including the costs of adult supervision to ensure appropriate transportation and also reasonable family visitation at the facility, including visitation for development and/or amendment of treatment plans. P-58A contains the [REDACTED] School 2003-2004 school schedule. The Court finds transportation to and/or from the facility for all identified school breaks, and as further identified in the treatment plan and/or monthly plan of care, for family visits and/or home visits, to be appropriate and necessary for [REDACTED].

### III. Conclusions of Law

1. Respondent bears the burden of proof to establish that the IEP is appropriate and provides FAPE. GDOE Rule § 160-4-7-.18(g)8. Under *Florence Co. Sch. Dist. Four v. Shannon Carter*, 510 U.S. 7(1993), the petitioner has the responsive burden to demonstrate that the program which is sought is proper to support the reimbursement claims. *See also*, *Burlington Sch.*

*Comm. v. Mass. Dept. of Ed.*, 471 U.S. 359 (1985); *Breen v. Jefferson County School System*, 853 F.2d 853 (11<sup>th</sup> Cir. 1988).

2. ~~QED~~ has a right to a free appropriate public education ("FAPE"). 20 U.S.C. § 1401(a)(18); GDOE Rule § 160-4-7-.04(a)(2000); *Hendrick Hudson School District v. Rowley*, 458 U.S. 176, 203 (1982). "The fundamental objective of the IDEA is to empower disabled children to reach their fullest potential by providing a free education tailored to meet their individual needs." *Cory D. v. Burke County Sch. Dist.*, 285 F.3d 1294 (11<sup>th</sup> Cir. 2002).

3. "Although IDEA reflects a structural preference in favor of providing special education in public schools, it recognizes that certain public schools are unable or unwilling to provide appropriate special education services." *Loren F. v. Atlanta Independent Sch. Sys.*, 349 F.3d 1309, 1312 (11<sup>th</sup> Cir. 2003). A court may order reimbursement for the costs of private school if it did not make FAPE available in a timely manner. *Id.* See also, *Burlington Sch. Comm. v. Mass. Dept. of Ed.*, 471 U.S. 359 (1985); 20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.403 (1999).

4. FAPE is accomplished through the timely and collaborative development and implementation of an individualized education program ("IEP") tailored to meet the needs of each particular child. *Loren F.* at 1312-13; *Doe v. Alabama State Department of Education*, 915 F.2d 651, 654 (11<sup>th</sup> Cir. 1990). The "IEP is more than a mere exercise in public relations, it forms the basis of the handicapped child's entitlement to an individualized and appropriate education." *GARC v. McDaniel*, 716 F.2d 1565, 1571 (11<sup>th</sup> Cir. 1983). To determine whether a student has been denied FAPE, the Supreme Court has developed a two-part test: First, has the state complied with the procedures set forth in the Act? And second, is the individual education program developed through the Act procedures reasonably calculated to enable the child to receive educational benefits? The court relies on adherence to procedures as the mechanism from which a substantively appropriate education should result. *Rowley*, 458 U.S. at 206-07. A "yes" answer to both questions ends judicial review. *Loren F.* at 1312, citing, *White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 378 (5<sup>th</sup> Cir.2003) (citing *Rowley*, 458 U.S. at 206-207, 102 S.Ct. 3034). "A 'no' answer to either question means no FAPE was provided (due to, for example, a deficient IEP), thus enabling the student to resort to private school and seek reimbursement from the school district under 20 U.S.C. § 1412(a)(10)(C)(ii)." *Id.*

5. "The [IDEA] contains a detailed procedural component." *Manecke v. Sch. Bd. of Pinellas Cty, Fla.*, 762 F.2d 912, 917 (11<sup>th</sup> Cir. 1985). The "elaborate and highly specific procedural safeguards embodied in IDEA is the mechanism from which a substantively appropriate education results." *Rowley* at 205-06. Procedural compliance with IDEA "is critical to the efficient operation of the Act, and serious procedural noncompliance can by itself support a finding that the child has not been provided with in FAPE." *Hudson by and through Tyree v. Wilson*, 828 F.2d 1059, 1063 (4<sup>th</sup> Cir. 1987).

6. "The Act imposes upon the school district the duty to conduct a meaningful meeting with appropriate parties." *W.G. v. Bd. of Trustees of Target Range Sch.*, 960 F.2d 1479, 1485 (9<sup>th</sup> Cir. 1992). "The IEP is to be developed jointly by a school official qualified in special education, the child's teacher, the parents or guardian, and, where appropriate, the child. In several places, the Act emphasizes the participation of the parents in developing the child's educational program and assessing its effectiveness. See, §§ 1400(c), 1401(19), 1412(7), 1415(b)(1)(A), (C), (D), (E) and 1415(b)(2); 34 CFR § 300.345 (1984)." *Burlington* at 368.

7. Section 300.501(b) regulates the parent's right of participation in meetings:(A) General. Parents who have a child with a disability must be afforded . . . an opportunity to —(2) participate in meetings with respect to --(I) The identification, evaluation and educational placement of the child; and, (ii)The provision of FAPE to the child.(B) Parent participation in meetings: (1) Each public agency shall provide notice . . . to ensure the parents of children with disabilities have the opportunity to participate in meetings described [above] (2)A meeting does not include informal or unscheduled conversations involving public agency personnel and conversations on issues such as teaching methodology, lesson plans or coordination of service provisions if those issues are not addressed in the child's IEP. The meeting also does not include preparatory activities undertaken to develop a proposal or response to a parent's proposal that will be discussed at a later meeting. *Id.*

8. Contrary to Petitioner's assertions, Respondent's activities in preparation for the IEP meeting constituted reasonable preparation rather than impermissible predetermination and do not constitute a procedural violation with regard to parental participation.

#### **Substantive FAPE Timelines, Completeness and Special Education**

9. IDEA also "confers upon disabled students an enforceable substantive right to education," *Honig v. Doe*, 484 U.S. 305, 108 S.Ct. 592, 597 (1988), as "the Act . . . imposes significant requirements . . . [and as to FAPE] such instructional services . . . must meet the state's educational standards." *Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982). Thus, the second prong from *Rowley* is to determine whether the program is reasonably calculated to allow the child to achieve educational benefit in all areas of need. "The statutory definition of 'free appropriate public education,' in addition to requiring that states provide each child 'specially designed instruction' expressly requires the provision of 'such . . . supportive services . . . as may be required to assist a handicapped child to benefit from special education.'" *Rowley*, at 200-201. See also, 20 U.S.C. § 1401(17)(emphasis in original); GDOE Rule § 160-4-7-.04(b).

10. The test is whether the educational benefits "are adequate based on surrounding and supporting facts." *JSK v. Hendry County School Board*, 941 F.2d 1563, 1573 (11<sup>th</sup> Cir. 1991). Progress is demonstrated by "positive academic and *non-academic benefits*." *Collier Co. Fla. v. K.C.*, 285 F.3d 977, 982 (11<sup>th</sup> Cir. 2002)(emphasis supplied). Each case should be reviewed

upon its merits rather than attempting to articulate any particular formula for determining the adequacy of any given IEP. *JSK* at 1573, text and n. 4.

11. The GDOE has established several specific standards for Georgia's educational programs under IDEA and state special education laws. GDOE Rule § 160-4-7-.01(2)(f)(2000) provides as to FAPE that the program and procedures must "meet all requirements of the Individuals with Disabilities Education Act (IDEA) and state law." This is repeated in GDOE Rule § 160-4-7-.04(1).

12. Georgia has eligibility criteria for EBD and programs for the severely behaviorally disturbed, and IDEA recognizes the need to address these disabilities.

13. The IEP must contain a specific statement of the supplementary aids and services to be provided the child and all program modifications or supports that will be provided for the child to advance toward attainment of goals and participate with non-disabled peers. 20 U.S.C. §1414(d)(1)(A)(iii). Other essential parts of the IEP include statements of the frequency, scope and duration of services and an indication of how a child's parents will be informed of progress. 20 U.S.C. § 1414(d)(1)(A)(vii) & (viii); GDOE Rule § 616-4-7-.09(6)7. The IEP must be explicit and contain the program offered, ~~Georgia~~, I at 58, and the parent can only consent to what is in writing in the IEP. ~~Georgia~~, II at 182.

14. CCSD must ensure "the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs. . ." 34 C.F.R. § 300.532(h). Thus, CCSD was required to conduct all necessary evaluations to determine eligibility and placement prior to conducting the IEP meeting. 34 C.F.R. § 300.531(1999). At the IEP, CCSD was required to ensure that the professionals that conducted those examinations or who could assess the evaluations were present to "interpret the instructional implications of evaluation results." 34 C.F.R. § 300.344(a)(5)(1999). Pursuant to 20 U.S.C. § 1415(a)(1)(1997) and 34 C.F.R. § 300.342(b)(1)(i)(1999), the system must assure that "an IEP - (i) is in effect before special education and related services are provided to an eligible child."

15. The special education regulations require that all evaluations be completed timely. Each public agency shall conduct a full and individual initial evaluation, in accordance with §§300.532 and 300.533, before the initial provision of special education and related services to a child with a disability under Part B of the Act. 34 C.F.R. § 300.531 (1999) (emphasis added). See, GDOE Rule § 160-4-7-.07(1)(b)(1)(2000). An IEP can only be developed following consideration of "the results of the initial or most recent evaluation of the child." 34 C.F.R. § 300.346 (a)(1)(ii) (1999); GDOE Rule § 160-4-7-.09(3)(f)(2000). Moreover, an IEP must be in effect "at the beginning of each school year." 34 .F.R. § 300.342(a)(1999).

16. Pursuant to 34 C.F.R. § 300.532(b), the school system shall ensure that, at a minimum, "a variety of assessments tools and strategies are used to gather relevant functional and developmental information about the child . . . that may assist in determining . . . the content of

the child's IEP." GDOE Rule § 160-4-7-.07(3)(c)(2000). The school system must also meet requirements under 34 C.F.R. § 300.532: (g) The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.(h) In evaluating each child with a disability under Secs. 300.531-300.536, the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.*Id.* See, GDOE Rule § 160-4-7-.07(3)(c)(2000).

17. In *Myles S. v Montgomery Bd. of Ed.*, 824 F. Supp. 1549 (M.D. Ala. 1993), the court explained the substantive and procedural infirmities of a "preparatory" or incomplete IEP, holding that IDEA directs schools to have a final program on the first day of school. The court reasoned that since the statute makes no mention of a "preparatory" IEP, that the law required an "actual" IEP, even if this requires meeting ... during the summer." *Id.* at 1555.

18. Related services are "an integral part of what Congress intended by 'appropriate education' as defined in [IDEA], and it is an essential part of [the student's] education." *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182 (3<sup>rd</sup> Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989). Failure to provide related services can delay FAPE and can support a reimbursement claim. *E.g.*, *Polk*, 853 F.2d at 182-184; *Rapid City School Dist. v. Vahle*, 922 F.2d 476 (8<sup>th</sup> Cir. 1990); *Das v. McHenry Sch. Dist.*, No. 15, Westlaw 10008, 20 IDELR 979, *aff'd*, 41 F.3d 1510 (7<sup>th</sup> Cir. 1994)(table)(reimbursement for private O.T.)(appeal on fees questions). The "related services" definition broadly encompasses those supportive services that "may be required to assist a child with a disability to benefit from special education." *Cedar Rapids Com. Sch. Dist. v. Garrett F.*, 526 U.S. 66 (1999), *citing*, § 1401(a)(17). Congress required schools to hire various specially trained personnel to help handicapped children, such as "trained occupational therapists, speech therapists, psychologists, social workers and other appropriately trained personnel." *Tatro v. Irving Ind. Sch. Dist.*, 468 U.S. 883 (1984), *citing*, S.Rep. No. 94-168, at 33, U.S. Code Cong. & Admin.News 1975, p. 1457.

19. Related services that are relevant to this case include: counseling services;<sup>29</sup> parent counseling and training;<sup>30</sup> psychological services;<sup>31</sup> recreation;<sup>32</sup> social work services;<sup>33</sup> speech and language services,<sup>34</sup> and transportation.<sup>35</sup>

<sup>29</sup> This refers to services of qualified social workers, psychologists, guidance counselors or other qualified personnel See Section 300.24(b)(2).

<sup>30</sup> Section 300.24(b)(7).

<sup>31</sup> This includes administering tests and procedures, interpreting assessment, interpreting information about child behavior, consulting, managing a program of psychological services, including counseling, and assisting in developing positive behavior intervention strategies. Section 300.24(b)(9).

<sup>32</sup> This includes therapeutic recreation, assessment and recreation programs. Section 300.24(b)(10).

20. Disabled students have rights related to the non-special educational aspects of their programs when such programs and services are therapeutic and/or appropriate for their needs, making them part of the special education entitlement. Sections 300.306 and 300.553 address "non-academic" services and settings. As to the settings, the students have a right to non-academic and extra-curricular services and activities. Student services must be provided in a manner that gives them an equal opportunity for participation and be provided counseling, athletics, transportation, recreational activities, special interest groups or clubs and employment or training related activities. This right also exists under Section 504, pursuant to 34 C.F.R. § 104.37 (non-academic services).

21. Students also must be considered, assessed and provided assistive technology services and devices. Sections 300.5, 300.6 and 300.308. This includes an evaluation, including a "functional evaluation of the child in the child's customary environment," the selection, designing and customizing of assistive technology, the coordination of this technology with other therapies, the training and assistance of the student and the student's family and the training of staff. Section 300.6(a)-(f).

#### **CCSD Violated [REDACTED]'s Procedural Rights**

22. This Court finds the actions of CCSD delayed the IEP process in that it concedes it had to conduct more evaluations and then modify the program. The Court concludes further that this process led to the failure to discuss many material issues such as goals requested by the parents, supplemental services and aids to allow electives, lunch or CBI, transition into a less structured environment and the necessary related services. These actions also led to an IEP that is restrictive and isolating, missing key components of an appropriate program. CCSD provided a process which did not allow a "thorough analysis of the various educational approaches available to meet the unique educational needs" of [REDACTED] *Doe*, 915 F.2d at 661. Thus, the procedural violations produced the harmful effects the 11<sup>th</sup> Circuit contemplated in *Doe. Id.*

#### **CCSD Denied Substantive FAPE**

23. IDEA, Section 504 and State law all provide for direct therapeutic services necessary to enable a disabled child to benefit from and participate in education. There was no explanation offered for why CCSD would offer substantial therapeutic services in August, 2002, and delete these or fail to offer or even discuss them in May, 2003, despite evidence of their propriety,

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<sup>33</sup> This includes group and individual counseling with the student and family. Section 300.24(b)(12).

<sup>34</sup> Speech and language services can be either a related service or a special education service through a speech and language eligibility determination under Georgia law. See, GDOE Rule § 160-4-7-.02(i)(j) and Appendix J. This includes identification, assessment and direct referral.

<sup>35</sup> See Section 300.24(b)(15).

§ 87(2)(b)'s progress with such services, and the uniform professional recommendations that such services were still necessary. There was no testimony by any licensed professional that § 87(2)(b) did not require the therapy. The failure to offer transition services to a day program, individual therapy in counseling, family therapy and group therapy and counseling by certified and qualified personnel are each material needs of § 87(2)(b) and each is a breach of FAPE which independently and collectively combine to make the IEP inappropriate.

24. The placement offered § 87(2)(b) by CCSD also fails to take into consideration her non-academic needs and her recreation and recreational therapy needs, which drove, in part, the step-down placement at the § 87(2)(b) School and which have been implemented effectively at the § 87(2)(b) School as part of § 87(2)(b)'s overall special education program.

25. CCSD also failed to adequately explain the application and workings of the MID placement it designed for § 87(2)(b). It restricted § 87(2)(b) from interaction with her peers, placed her in the classroom for lunch, restricted her from electives, and limited and prohibited her from community-based instruction. The latter were identified to her family and to the Court as critical components of the MID program it was offering. These actions were taken without consideration of the supplemental supports and aides that may have allowed § 87(2)(b) to participate. CCSD also failed to present adequate or sufficient evidence that § 87(2)(b) could continue to make educational progress in the six hour per day program it offered.

26. The Court rejects the assertion made by CCSD that § 87(2)(b) was an ordinary adolescent and that her behaviors are reflective of normal adolescents. Such a position cannot be reconciled with the restrictions on her program, her diagnosis, her prior behavior and CCSD's prior responses to that behavior.

27. The Court concludes the educational placement offered § 87(2)(b) was not "an education . . . specifically designed to meet the child's unique needs, supported by services that will permit [her] to benefit from the instruction." *Loren F.* at 312, n. 1, quoting, *Pace v. Bogalusa City Sch. Bd.*, 325 F.3d 609, 618-19 (5<sup>th</sup> Cir. 2003). In addition, even if this burden was not assessed against CCSD, the evidence demonstrates the inappropriateness and insufficiency of the placement and services offered.

28. The CCSD IEP and placement was also deficient on a number of additional independent grounds. CCSD failed to conduct and complete evaluations necessary to develop an appropriate program for § 87(2)(b) at the beginning of school. It had the ability and opportunity to do so, and the Court concludes its failure to act in the assistive technology area and in speech and language services denied FAPE. CCSD failed to bring critical individuals to the IEP process and included no one with expertise in behavior. Thus, CCSD failed to offer a timely and complete IEP which would provide FAPE with the beginning of the school year.

29. The IEP was incomplete. Necessary assessments and evaluations had not been completed which should have been done in advance of the process. The IEP also did not have

the assistance or participation of individuals from CCSD with knowledge, certification and experience in behavior, and the failure to develop an adequate behavior intervention program, as required by CCSD in regard to its general approach to programs, through the development of a functional behavior assessment are all glaring inadequacies in the program.

### **1.2.'s Right to Placement and Reimbursement**

30. [REDACTED] presented evidence concerning her placement at the [REDACTED] School in [REDACTED], [REDACTED]. This includes the educational program, treatment/educational goals and objectives, periodic reports, and the testimony of Mr. [REDACTED] of the [REDACTED] School, her parents, and Dr. [REDACTED] and Ms. [REDACTED] from the [REDACTED] Treatment Center as to the [REDACTED] goals. [REDACTED] is an approved private school as well as a treatment center. It offers a multi-faceted placement for [REDACTED] which includes the necessary structured environment, non-academic and recreational therapy, appropriate individual, group and family therapies, a special education program and a residential living environment. [REDACTED] has demonstrated the appropriateness and the necessity of this placement, beginning with her admission to this program on August 26, 2003. In addition, under IDEA, [REDACTED] has a right to transportation. It is also equitable to reimburse reasonable expenses for trips to private schools, especially where this was a duty of CCSD which it refused. The reimbursement for transportation sought by the Family in the amount of Eight Thousand Three Hundred Fifty-Five Dollars and Ninety-Five Cents (\$8,355.95), through the date of the testimony of Mr. [REDACTED], is necessary and appropriate and subject to reimbursement. [REDACTED] has a right to continuation at the [REDACTED] School and a continuation of her related services, including transportation, as directed by the schedule of the school, so she may travel home or visit her family, and as supplemented by other necessary parental visits for the purposes of family therapy and family vacations. Transportation shall include escorted transportation, as supported by the evidence.

31. Children have a right to be educated in a variety of settings. *See, e.g.*, 34 C.F.R. § 300.551 (1999). Parents may contest the placement and/or FAPE offered by seeking a residential placement and seeking public reimbursement. 34 C.F.R. § 300.403 (1999). In a case where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for placement in a public school was inappropriate, it seems clear beyond cavil that "appropriate" relief would include a prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school. *Burlington Sch. Com.*, 471 U.S. at 370. In *Burlington*, the Supreme Court identified that the standard for the private program is whether the program is "proper." *Id.* at 371. In *Carter*, the Court expounded: Congress intended that IDEA's promise of a "free appropriate public education" for disabled children would normally be met by an IEP's provision for education in the regular public schools or in private schools chosen jointly by school officials and parents.

32. In cases where cooperation fails, however, "parents who disagree with the proposed IEP are faced with a choice: go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement." *Id.*, at 370. For

parents willing and able to make the latter choice, "it would be an empty victory to have a court tell them several years later that they were right but that these expenditures could not in a proper case be reimbursed by the school officials." *Ibid.* Because such a result would be contrary to IDEA's guarantee of a "free appropriate public education," we held that "Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case." *Carter* at 1145 S.Ct. at 364-5. To receive reimbursement, the parent need only show that the private school education is "reasonably calculated to enable the child to receive educational benefits." *Florence*, 114 S.Ct. at 364-65.

33. Under *Carter*, parents are not held to the same standards of FAPE as may be enforced against an educational agency. These requirements do not make sense in the context of a parental placement. In this case, as in *Burlington*, the parents' rejection of the school district's proposed IEP is the very reason for the parents' decision to put their child in a private school. In such cases, where the private placement has necessarily been made over the school district's objection, the private school education will not be under "public supervision and direction." Accordingly, to read the § 1401(a)(18) requirements as applying to parental placements would effectively eliminate the right of unilateral withdrawal recognized in *Burlington*.

34. Moreover, IDEA was intended to ensure that children with disabilities receive an education that is both appropriate and free. *Burlington, supra*, at 373, 105 S.Ct., at 2004. To read the provisions of § 1401(a)(18) to bar reimbursement in the circumstances of this case would defeat this statutory purpose. *Id.* As we have noted, § 1401(a)(18) requirements, including the requirement that the school meet the standards of the state educational agency, § 1401(a)(18)(B)--do not apply to private parental placements.

35. Compensatory services for past educational deficiencies are "appropriate relief" under IDEA and may be awarded in an administrative hearing. Compensatory education involves discretionary, prospective injunctive relief crafted by a court to remedy an educational deficit created by a school district's failure to provide FAPE over time. *Jefferson County Bd. of Educ. v. Breen*, 853 F.3d 853, 857-58 (11<sup>th</sup> Cir. 1988). See also, *G. v. Fort Bragg Dep. Schools*, 324 F.3d 240 (4<sup>th</sup> Cir. 2003); *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238 (3<sup>rd</sup> Cir. 1999); *Bd. of Ed. of Oak Park v. Ill. St. Bd. of Ed.*, 79 F.3d 654 (7<sup>th</sup> Cir. 1996). Damages are not available before this tribunal and need not be pled or provided. Thus, IDEA's "grant of equitable authority empowers an administrative law judge" to order school authorities to reimburse the family for their expenditures of the private placement. *Burlington*, 471 U.S. at 369. The hearing officer has the power to "order any educational program for the child." *Department of Education, State of Hawaii, v. Katherine D.*, 727 F.2d 809, (9<sup>th</sup> Cir. 1983); citing, 42 Fed. Reg. 42,476, 42,512 (1977). The right exists if the "hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to the enrollment." 20 U.S.C. § 1412(a)(10)(c)(ii). This right is secured by Georgia law: Parents ... involved in a hearing have a right to obtain such as the ALJ determines appropriate. This includes the right to have the IEP or placement altered and to have FAPE an/or LRE resolved. This also includes the

right to obtain payment for independent evaluations, for reimbursement for services, as permitted under law, and for compensatory services. GDOE Rule § 160-4-7-.18(1)(g)(11)(2000).

#### IV. Decision

Respondent failed to provide FAPE, violating both the procedural and substantive components of FAPE. [REDACTED] has demonstrated the appropriateness of the private placement and transportation subject to reimbursement.

Respondent is directed to provide reimbursement in the amount of \$8,355.95. Further, [REDACTED] has a further right of ongoing reasonable transportation to and/or from the facility, including the costs of adult supervision to ensure appropriate transportation and also reasonable family visitation at the facility, including visitation for development and/or amendment of treatment plans. Respondent shall also reimburse transportation to and/or from the facility for all identified school breaks, and as further identified in the treatment plan and/or monthly plan of care, for family visits and/or home visits, to be appropriate and necessary for [REDACTED]. Further, Respondent shall provide and cover all costs of placement at the [REDACTED] School for the entire 2003-2004 academic year.

SO ORDERED, this 25<sup>th</sup> day of May 2004.

  
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STEVEN W. TEATE  
Administrative Law Judge