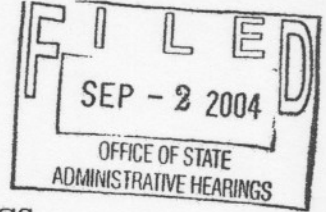


04-0415315



IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS  
STATE OF GEORGIA

DOE	)	
Petitioner,	)	
	)	Administrative Action No.:
v.	)	OSAH-DOE-SE-0415315-60-Gatto
	)	
FULTON COUNTY SCHOOL DISTRICT,	)	
Respondent.	)	

**FINAL ORDER**

**COUNSEL:** Jonathan Zimring, Esq., Zimring & Smith, for Petitioner.

Sylvia G. Eaves, Esq., Brock, Clay, Calhoun, & Wilson, P.C., for Respondent.

**OPINION BY:** GATTO

GATTO, Judge.

**I. INTRODUCTION**

This matter came before the administrative court<sup>1</sup> pursuant to DOE's complaint under the Individuals with Disabilities Education Act claiming that Fulton County School District had not provided a free appropriate public education (FAPE). DOE seeks compensatory services, reimbursement for all private services his parents have provided, reimbursement for evaluations, and placement in a private school for the 2004-2005 school year. The administrative court has jurisdiction to hear this matter pursuant to Article 2 of the Georgia Administrative Procedure Act. For the reasons indicated below, DOE's requests for relief are DENIED.

<sup>1</sup> The "administrative court" refers to the Office of State Administrative Hearings.

## II. FINDINGS OF FACT

§ 87(2)(b) is a minor child who lives with his mother, Dr. § 87(2)(b) and his father, Mr. § 87(2)(b), within the jurisdiction of the Fulton County School District ("FCSD"). § 87(2)(b) is a disabled child under IDEA with an unusual composite of significant disabilities that impact his sensory and social abilities, his attention and his behavior. § 87(2)(b) was diagnosed with attention deficit hyperactivity disorder (ADHD), anxiety disorder, and Kallmann's Syndrome, a genetic condition that causes anosmia (inability to smell), a lack of depth perception, and synkinesis (mirror movements). § 87(2)(b)'s own evaluation also indicated that he has Asperger's Syndrome (an Autism Spectrum Disorder),<sup>2</sup> Posttraumatic Stress Disorder (PTSD), Obsessive Compulsive Disorder (OCD) and a sensory integration disorder. § 87(2)(b)'s perception and understanding of daily events often does not correspond with reality. § 87(2)(b) has limitations because of his nonverbal learning disability. However, § 87(2)(b) has above-average intellectual abilities, has the ability to stay on grade level, and has the ability to achieve academically. His IEP does not provide for academic goals and objectives but consists of support, supplemental services and aides, interventions, some limited related services, and behavioral responses.

§ 87(2)(b) first entered FCSD in the 2000-2001 school year. Prior to entering FCSD, § 87(2)(b) was home-schooled for his entire educational experience, first by a nanny and then by his mother, a child, adolescent, and adult psychiatrist in private practice. During the 2000-2001 school year, § 87(2)(b) was served at FCSD's § 87(2)(b) Elementary School in a combined FCSD and § 87(2)(b) program. § 87(2)(b) is an arm of the § 87(2)(b) Psychoeducational network, operated

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<sup>2</sup> In the Spring of 2003, § 87(2)(b)'s parents, through his treating psychiatrist, requested FCSD evaluate for Asperger's. Asperger's is within the autism eligibility category. The IEP team did not discuss or provide for this evaluation and FCSD did not undertake such an evaluation. FCSD does not dispute that § 87(2)(b) has Asperger's.

through the Regional Education Service Agency. FCSD sought the services of [REDACTED] because of [REDACTED]'s aggressive behaviors in the classroom.

During the 2001-2002 school year, [REDACTED] was served at FCSD's [REDACTED] Middle School. [REDACTED] was mainstreamed with his nondisabled peers for lunch, homeroom, physical education, and math. In January 2002, [REDACTED] also began attending music, chorus, and science in regular education classes. Ms. Phyllis Fantozzi, an aide in the [REDACTED] program, assisted [REDACTED] in his inclusion classes.

[REDACTED]'s 2002-2003 school year started off poorly. He had significant anxieties with school. He was afraid of certain peers and expressed concerns associated with [REDACTED] or [REDACTED] [REDACTED]. He had difficulty in transitions and had anxiety about academics and how he would be perceived if he did not succeed. After a series of meetings in the fall of 2002, it was established that [REDACTED] would be provided a full-time aide for the entire day. Although this intervention permitted the use of a single aide, the aide would change between two (2) people, Linda Force and Will Rooney, a mother and son team, on different days in the week where they job-shared the categorical assistant position. The aides learned appropriate interventions. [REDACTED] had a successful winter and spring. He moved into more regular educational classes and out of [REDACTED] [REDACTED] classes. He made academic progress and he stabilized behaviorally.

During the present 2003-2004 school year, [REDACTED] was in his second year at [REDACTED] Middle School. He was again enrolled jointly in FCSD and in [REDACTED]. An IEP was developed over three (3) meetings in May through July, 2003. Ms. Pettes, an administrator for FCSD, attended those meetings, along with [REDACTED]'s then-treating staff. Ms. Novak, who had worked with [REDACTED] at [REDACTED], came for a short time and was introduced as the new



coordinator for the ~~Special Education~~ program at ~~Union Station~~. The Family provided significant information concerning ~~John~~ and his disabilities. They undertook an effort to share with staff and establish a thorough statement of current levels of functioning and of the activities that had been successful in the past. Mr. and Dr. ~~John~~ presented additional goals to the IEP team, requesting that the committee address emotional needs through goals and objectives. Mr. ~~John~~ stated that the primary barrier for ~~John~~ to general education was his anxiety. The parents were requesting goals and objectives that addressed triggers to his anxiety and reactions to his stressors. FCSD personnel expressed concerns regarding some of the goals and objectives provided by the parents since they addressed instructional strategies as opposed to the behaviors ~~John~~ should exhibit.

After extended discussions on May 22 and July 9, the IEP committee agreed that ~~John~~'s goals for the 2003-2004 school year should be to improve his social interaction with others, increase his on-task behavior in all settings, and increase his ability to manage his stress and anxiety. All goals recognized that ~~John~~'s present performance was prompt dependent and that the IEP team desired to move him to independence.

The short-term objectives for ~~John~~'s IEP goal to improve social interaction with others included ~~John~~ recognizing social cues to end a conversation, demonstrating active listening/appropriate turn-taking, recognizing when to change a topic, initiating greetings with peers, initiating situationally appropriate conversation, responding to peers' comments in an appropriate manner, and maintaining appropriate volume and distance when speaking to others.

The short-term objectives for ~~John~~'s IEP goal to increase on-task behavior in all setting included being attentive to the teacher when he or she is speaking, following the routine of the classroom for the beginning and end of each class, maintaining an agenda/file in a portable word



processor by copying assignments as written on the board or as provided by the teacher, and putting all paperwork in appropriate sections of an organizational system.

The short-term objectives for [REDACTED]'s IEP goal to increase his ability to manage his stress and anxiety included teacher assistance through independent use of strategies as defined by the behavior intervention plan (BIP), and identification and labeling of internal stressors, triggers, and patterns. However, a new BIP was not developed at the IEP meetings. At the third IEP meeting, Ms. Pettes committed that the BIP would be developed prior to the beginning of the school year. Mr. [REDACTED] made a series of contacts to designated staff throughout June, July and into August seeking the BIP material. However, a draft BIP was not sent to Mr. [REDACTED] for review until September 2, 2004.

The IEP team, including Mr. and Dr. [REDACTED], agreed to placement in all general education classes with only five (5) hours per week of consultative services from [REDACTED]. Those classes included language arts, pre-algebra, Spanish, team-taught social studies, and science. The team agreed that [REDACTED] would start off the school year with a full-time assistant as he had during the previous school year for the first nine weeks. Prior to the second nine weeks, the IEP team would meet to begin setting up a transitional plan for [REDACTED] to be independent of the aide. The ultimate goal for [REDACTED] was that he would basically be on his own by the fourth nine weeks of the school year. In the team-taught classes, the special education teachers were responsible for the goals and objectives, and the general education teachers were responsible for implementing the accommodations in the IEP. The IEP committee agreed that [REDACTED]'s social interaction goals and objectives should be worked on with the speech therapist as they addressed his pragmatic

language deficits. Therefore, [REDACTED] was to receive two (2) hours of speech services weekly to be provided in daily segments.

At the July 9 segment of the IEP meeting, Mr. and Dr. [REDACTED] presented an extensive list of proposed accommodations for [REDACTED], which the committee discussed in detail. The twenty-two (22) accommodations that the IEP committee agreed to were: (1) providing instructions for assignments in writing (not simply aloud) including main points, due dates, page numbers, format, expected length, and required materials; (2) breaking complex directions into short, sequential steps; (3) dividing work into smaller, mini-assignments; (4) asking [REDACTED] to repeat directions to be sure he understood them; (5) permitting the use of a word processor for assignments requiring lengthy writing; (6) providing [REDACTED] an extra set of textbooks for home use; (7) maintaining [REDACTED]'s school textbooks in each classroom; (8) providing [REDACTED] extra time to take quizzes, tests, exams, if necessary; (9) permitting the use of a word processor if tests/exams required extensive writing; (10) permitting [REDACTED] to take tests/exams, or study, in a less-distracting environment, if necessary; (11) providing [REDACTED] with specific information in writing about the information that will be covered on quizzes, tests, or exams; (12) providing [REDACTED] with pre-tests or study guides the day before the actual test; (13) asking [REDACTED] to repeat instructions before beginning a test; (14) monitoring [REDACTED] during tests for difficulty, confusion, and distraction; (15) giving [REDACTED] advanced warning if a pop quiz is being given; (16) permitting [REDACTED] to record answers in test booklets; (17) eliminating the use of scantron answer sheets; (18) providing [REDACTED] with teachers' notes; (19) seating [REDACTED] in a low-distraction work area in the classroom with proximity controlled by teachers; (20) placing [REDACTED] near and participating in small groups with model peers in order to encourage positive socialization and ease distraction from students with





~~See page~~ Mr. [redacted]'s compliments of Ms. Bouldin continued two days later in a correspondence to Mr. [redacted] in which he stated that [redacted] had had a couple of very good days with Ms. Bouldin.

On August 14, Mr. [redacted] wrote Mr. [redacted] that Jim Griffin, the categorical assistant, was unacceptable because in one day he had caused [redacted] to go from being well-organized, well-managed, and on top of everything to utter chaos. While this was Mr. Griffin's first day with [redacted], Mr. [redacted] made it clear that he and Dr. [redacted] did not want [redacted] to continue another day with Mr. Griffin as his assistant. On the same day, Mr. [redacted] sent an email to each of [redacted]'s general education teachers expressing his displeasure with the performance of Mr. Griffin.

Ms. Novak also communicated with Mr. and Dr. [redacted] on August 14 and informed them that the school would provide a home/school communication checklist daily. The checklist would be completed at the end of each class period. She also indicated that they would receive a weekly report. Mr. [redacted] expressed anger over the use of a checklist, once again stating that the IEP committee had determined that he would be the individual involved with the assistant in developing a communication log because he was the one who had the most experience using it and he would be the one to use it every day.

On August 15, Ms. Novak wrote Mr. [redacted] asking that communications with staff be sent to her, Mr. [redacted], and Dottie Pettes, so that they would be able to follow-up and keep abreast of his concerns and obtain answers that he requested. Ms. Novak stated that it was important to keep the lines of communication open in a consistent, efficient, and effective manner. On that same date, Mr. [redacted] requested from Ms. Novak a complete copy of [redacted]'s cumulative and confidential education records. Ms. Novak obtained the records, and Mr. [redacted] received them on August 24.

In the second week of school, school personnel organized [REDACTED]'s notebooks to coincide with each half of his school day. Mr. [REDACTED] returned the notebooks to school having reorganized them as they had been before. School staff also developed an agenda specifically to meet [REDACTED]'s fine motor needs so that he could actually write in it himself rather than depend on his assistant to do it for him. The agenda was not acceptable to the family and Mr. [REDACTED] informed Ms. Fantozzi that it did not work for [REDACTED]. During the second week of school, [REDACTED]'s case manager was changed from Mr. [REDACTED] to Ms. Novak. Mr. [REDACTED] was sending a large amount of communications to the school concerning [REDACTED] that was causing Mr. [REDACTED] to take time away from his classroom and FCSD was concerned about the loss of instruction time for students in his class.

Since [REDACTED] was receiving consultative services only from [REDACTED], Ms. Novak did not provide direct services to [REDACTED]. She met with his one-to-one assistants twice a week to discuss his progress and problems, if any. She made sure that his accommodations were given to his teachers, helped his assistants in answering questions that arose from Mr. [REDACTED], assisted with ideas to help make [REDACTED]'s organization, work habits, and point sheets positive and helpful, and gave general support to [REDACTED]'s assistants.

On September 4, 2003, Liz Novak and Dottie Pettes met with Mr. and Dr. [REDACTED] to discuss Mr. and Dr. [REDACTED]'s concerns regarding the first few weeks of school. Ms. Pettes and Ms. Novak discussed with the parents their concerns regarding emails to staff. Mr. and Dr. [REDACTED] agreed not to email staff excessively and Ms. Pettes and Ms. Novak agreed that the family could email teachers directly as long as they were copied on the emails. At that meeting, FCSD also agreed to change [REDACTED]'s categorical assistant. The new assistants were Phyllis Fantozzi and Rebekah Bouldin. Ms. Bouldin had already been working with [REDACTED] at the beginning of the year. FCSD

brought Phyllis Fantozzi over from ~~Wynn Apple~~ Elementary School where she had worked successfully with ~~MS~~ during the fifth grade. The position was a job share between the two individuals as Ms. Fantozzi had prior contractual responsibilities and had to leave ~~Wynn Apple~~ by 2 P.M. Ms. Bouldin worked with ~~MS~~ for the last two periods of the day. One of these classes was team-taught.

Ms. Fantozzi has a bachelor's and master's degree in education. She is a former schoolteacher and has been a teaching assistant in Fulton County for many years. Ms. Fantozzi has experience successfully transitioning ~~MS~~ students into general education settings at ~~Wynn Apple~~ Middle School. She has attended numerous training and staff development sessions regarding working with special education students during her years in Fulton County. She is a licensed paraprofessional.

Ms. Bouldin is currently enrolled in a special education college program. She received on-the-job training with Ms. Fantozzi; Jody Lovett, the lead teacher in applied behavioral analysis programs at ~~Wynn Apple~~, and Drs. ~~Janet and Coby Lind~~ behavioral consultants in applied behavioral analysis for Fulton County. She also received training through the ~~ASD~~ Asberger's training videos. In addition, Ms. Fantozzi followed Ms. Bouldin for several weeks as she worked with ~~MS~~ so that Ms. Fantozzi could model appropriate interactions and strategies with ~~MS~~.

~~MS~~'s categorical assistants were very involved in his daily routine. Ms. Fantozzi met ~~MS~~ each morning in homeroom and talked with him for a few minutes about his morning and generally what was going to happen during the day, especially if anything different was going on as transitions were difficult for him. She accompanied him to each of his classes until Ms.



Bouldin took over at 2 P.M. She assisted [REDACTED] in being successful and appropriate in each of his regular education classes. [REDACTED] typically needed help in getting his materials organized by using his AlphaSmart (and later his laptop) appropriately, staying focused in class, finding his assignments and getting them turned in, and transitioning from one situation to another. Ms. Fantozzi would also interact with [REDACTED]'s teachers if he needed more time or he was stressed to ensure that they were aware of his needs in the class.

[REDACTED], a [REDACTED] staff member, drafted a BIP for the 2003-2004 school year after returning to her duties following surgery. Ms. [REDACTED] had developed [REDACTED]'s BIP in the preceding school year, and the 2003-2004 BIP was similar to the prior one. [REDACTED]'s BIP was discussed at a September 4 meeting and Mr. and Dr. [REDACTED] stated that they found the proposed BIP unacceptable, that they were getting private assistance regarding the BIP, and that they would forward their revisions to FCSD. However, FCSD never received any proposed revisions to the BIP. At the September 4 meeting, Mr. and Dr. [REDACTED] and FCSD agreed to an emergency protocol that could be used until a BIP was agreed upon. [REDACTED] now asserts that a letter from [REDACTED] of [REDACTED] Consultants dated November 20, 2003 to [REDACTED]'s advocate, [REDACTED], was the Parent's response to the BIP. However, FCSD was never informed this was the Parent's proposed BIP. The letter appears to be four pages of general suggestions from a book Ms. [REDACTED] wrote. It is not specific to [REDACTED], and there is no evidence that she ever observed [REDACTED] in a school setting.

Communication between the school and the parents consisted of the daily behavior sheets. The two categorical assistants completed these sheets. The daily behavior sheet identified ten positive instructional behaviors [REDACTED] was to exhibit in class. The assistants would

record how [REDACTED] performed on each task each class period. The recordings were done by symbols indicating whether his behavior for each category was satisfactory, improving, or not performing/completing satisfactory. If the behavior was not applicable to the particular class period, an "N" was placed on the sheet. On the back of the sheet, the assistants recorded comments for each class period. Mr. and Dr. [REDACTED] would respond each day with written comments or questions. Mr. Fantozzi would also call Mr. [REDACTED] from time to time during the school day if [REDACTED] were ill, to clarify assignments, or answer any questions he might have. During the school year there were over 900 pages of communication, including emails, between Mr. and Dr. [REDACTED] and school staff.

[REDACTED] began the first semester of the 2003-2004 in a Spanish class accompanied by his assistant. [REDACTED] immediately began having difficulties with the abstracts of the foreign language. [REDACTED] became overwhelmed and anxious as the difficulties of the class increased for him. The parents requested and FCSD agreed to allow [REDACTED] to drop the class and remove the grade from his transcript. In order to further assist [REDACTED] in organizing his materials, completing tests and homework assignments, and discussing with his assistant behavioral issues in class and how to respond appropriately later, half the time [REDACTED] had been in Spanish class was thereafter devoted to these activities. During the other half, he received speech therapy that had been provided at the beginning of the school day.

A parent-teacher conference regarding [REDACTED] took place on September 18, 2003. Each of [REDACTED]'s teachers came to the meeting individually to talk to Mr. [REDACTED] about [REDACTED]'s progress. At that meeting, FCSD and Mr. [REDACTED] agreed to meet monthly. The next monthly meeting occurred on October 10, 2003. Mr. [REDACTED] requested a conference with Ms. Pettes, Principal Vivian Bankston,

and Ms. Novak regarding teacher lesson plans. Mr. [REDACTED] requested but was denied copies of the lesson plans each week so that he could work with [REDACTED] and prepare him for class. At that meeting, Ms. Novak discussed with Mr. [REDACTED] her concern about the large amount of pressure [REDACTED] was experiencing because of his desire to excel. She informed Mr. [REDACTED] that [REDACTED] was concerned about making all A's. When she explained that the school staff had told [REDACTED] that it was all right to make B's, Mr. [REDACTED] became angry and told her to never tell his son that it was okay to make B's, that B's were not acceptable and that [REDACTED] had to have A's in order to be accepted by Georgia Tech. Also at that meeting, Ms. Fantozzi discussed how well [REDACTED] was doing in class and how he had handled having a string of substitutes. Because [REDACTED] had difficulties with transitions and change and it was significant that he handled these changes appropriately.

After the first nine weeks, Ms. Novak, Ms. Fantozzi, and Ms. Bouldin developed some instructional strategies that they wanted to start using with [REDACTED] to help him become less dependent on his assistants and move him toward more independence. On October 30, 2003, Ms. Novak and Ms. Fantozzi met with [REDACTED] to discuss these strategies. Mr. and Dr. [REDACTED] were provided a written description of the strategies and were told that it would be a gradual step-up toward independence at school. On November 4, 2003, Mr. and Dr. [REDACTED] and [REDACTED] met with school staff to discuss the strategies. At that meeting, school staff explained that these were instructional strategies meant to teach [REDACTED] to be more independent. However, Mr. and Dr. [REDACTED] objected to the strategies since they were not developed in an IEP meeting. Since [REDACTED]'s parents objected to the instructional strategies, they were never implemented.

The family also demanded that Ms. Novak be removed as [REDACTED]'s case manager. They stated that she was no longer acceptable to them, that they had not agreed that she be the case



manager, and that they did not want her anymore. In addition, they referred to Ms. Novak's procedures as "stupid management policies" and stated that her leadership by "decree and inform" was not going to work with them, that they would not be eliminated from the process, and that they would not be told what to do. Mr. [REDACTED] stated, "The only person that I am aware of that I have difficulties with is Liz." At no time in this meeting did Mr. or Dr. [REDACTED] or their advocate state that [REDACTED] had a problem with Ms. Novak or that he was afraid of her. It was clear at this meeting that any problems with Ms. Novak were the parents' open displeasure and hostility to her and were not related to any alleged problems that [REDACTED] had with her. Mr. [REDACTED] stated that [REDACTED] had had more meltdowns in the last several weeks than he had in the last year. However, [REDACTED] was able to perform academically in the superior range even with these alleged meltdowns.

On November 20, 2003, [REDACTED] left physical education class during the class time. Ms. Fantozzi who was in the class as his assistant followed him and found him sobbing in a hallway. He told her that he was on a basketball team and had gotten thrown off because he could not shoot. He told her that he was tired of being teased, that he had no life, that he didn't want to go to school anymore, that he really had no friends, that they were just pretending to be his friends because he had a disability, that he was weird, and that weird people did not have friends. He made statements about having no reason to live and how his disabilities would limit his activities in life. [REDACTED] explained in detail in a very calm manner how he would take his life including the instrument he would use. Mr. [REDACTED] was contacted and he immediately picked up [REDACTED] from school. Dr. [REDACTED] met with [REDACTED] that afternoon and assessed his mental state, although she testified that the general standard in the psychiatric community is that psychiatrist do not generally evaluate their

own family members because of problems with being objective. That evening, [REDACTED]'s treating psychiatrist, Dr. [REDACTED], assessed him. He was never hospitalized for this suicide ideation.

On the day following the incident, [REDACTED] notified Dottie Pettes that [REDACTED]'s treating psychiatrist had recommended that [REDACTED] not return to school until December 1, 2003. The family requested that [REDACTED]'s work be provided to them. FCSD agreed to provide the makeup work. Ms. [REDACTED] also asked that upon [REDACTED]'s return in December, that Ms. Novak and Rebekah Bouldin be removed from providing services to [REDACTED]. FCSD declined this request, as it believed the request was based on Mr. and Dr. [REDACTED]'s personal feelings toward these employees and not because of their performance. [REDACTED] did not return for the remainder of the semester. His assignments continued to be provided for him. His parents picked up the assignments and returned them to school and [REDACTED] came to school to take his tests. The collection of homework and administration of the tests were overseen by Ms. Fantozzi. When [REDACTED] came to school to take tests, Ms. Fantozzi testified that he appeared calm but did not want to stay long.

An IEP meeting was set for December 3, 2003. However, the meeting was cancelled on December 1 by [REDACTED] stating that the family was awaiting word from [REDACTED]'s treating psychiatrist as to whether or not he was emotionally capable of returning to school. The IEP meeting was rescheduled for December 15. Dr. [REDACTED], a licensed psychologist and long-time friend of [REDACTED]'s attorney, conducted a psychological evaluation of [REDACTED] on October 29. [REDACTED]'s treating psychiatrist, Dr. [REDACTED], and [REDACTED]'s attorney suggested the evaluation. One of the purposes of the evaluation was to determine whether [REDACTED] was receiving necessary and appropriate school services. FCSD did not receive a copy of the evaluation until December 11, one school day prior to the December 15 IEP meeting. Dr. [REDACTED] never observed [REDACTED] at

\_\_\_\_\_ or in FCSD. At the time of her evaluation, the only FCSD staff member from whom she obtained a rating scale concerning \_\_\_\_\_ was Ms. Fantozzi. Dr. \_\_\_\_\_ had not provided any questionnaire or assessment survey to any of \_\_\_\_\_'s academic teachers. FCSD's concerns regarding this failure to obtain information from the individuals who actually taught \_\_\_\_\_ was brought to the attention of the parents and their advocate at the November meeting when FCSD was informed that the parents were having a private evaluation done by Dr. \_\_\_\_\_. As of the December 15 meeting, \_\_\_\_\_'s teachers still had not received any request for information from Dr. \_\_\_\_\_ and in fact did not receive a packet until January 9, 2004, after her report was done. In addition, Dr. \_\_\_\_\_ had not discussed the November 20 suicide ideation with the staff members who were actually with \_\_\_\_\_ at the time.

Based on her evaluation, Dr. \_\_\_\_\_ found that \_\_\_\_\_'s profile was consistent with the following: diagnoses: Kallmann's Syndrome, specific learning disorder in written expression, obsessive compulsive disorder, and Asperger's Syndrome. She identified the latter three by their category in the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition* (DSM-IV.) Dr. \_\_\_\_\_ testified that at the request of \_\_\_\_\_'s attorney, she added the information regarding Asperger's to her evaluation report. Dr. \_\_\_\_\_ recommended continuation of speech language therapy, especially for the pragmatic aspects of language; a sensory diet; exploration of a home program that would be helpful in teaching \_\_\_\_\_ to recognize when his arousal is up-regulating; recognition of the circumstances that impact \_\_\_\_\_'s anxiety and frustration; transition of \_\_\_\_\_ out of handwriting as much as possible; giving \_\_\_\_\_ warning prior to change in school schedules or routines; praising him for tolerating changes in schedule; rehearsing unexpected changes in the rules; having a special or secret signal for \_\_\_\_\_ when it is



time to follow authority figures without question; and praising him when these rehearsals are negotiated well. Dr. ~~\_\_\_\_\_~~ also recommended that ~~\_\_\_\_\_~~ increase his nonverbal understanding of social situations. ~~\_\_\_\_\_~~'s IEP provided for speech and language therapy in which the emphasis was on pragmatic aspects of language. Ms. Patel, his speech language pathologist, worked with ~~\_\_\_\_\_~~ one-to-one and in a small group. She used social scripting, role-playing, and life stories to help ~~\_\_\_\_\_~~ improve his social skills. She observed him during lunch to assess how he applied what he had learned. FCSD provided ~~\_\_\_\_\_~~ an AlphaSmart and then a laptop for handwriting activities. He also received, as part of his IEP, information regarding changes in schedule and praise for his ability to tolerate changes with substitutes. The speech therapist worked on helping him understand nonverbal social information in the environment in which he participated.

On December 15, 2003, an IEP meeting was convened to review goals and objectives and plan for ~~\_\_\_\_\_~~'s return to school. At the beginning of the meeting, the committee discussed what exams and assignments were needed to complete the semester. The committee also discussed what was required for ~~\_\_\_\_\_~~ to return to school. Principal Bankston requested information from ~~\_\_\_\_\_~~'s treating psychiatrist regarding his current emotional state and whether he was ready to go to school. Copies of Dr. ~~\_\_\_\_\_~~'s evaluation were made at the meeting, and ~~\_\_\_\_\_~~'s classroom teachers reviewed it at the meeting. The parents requested that ~~\_\_\_\_\_~~ have only one assistant instead of two and again requested that Ms. Novak be removed as ~~\_\_\_\_\_~~'s case manager, alleging that ~~\_\_\_\_\_~~ was not feeling safe at school and was afraid of her. In response, FCSD offered to assign Rebekah Bouldin as ~~\_\_\_\_\_~~'s sole assistant, but the parents disagreed. They wanted Ms. Fantozzi. However, Ms. Fantozzi was not available because of contractual requirements after 2:00. FCSD refused to remove Ms. Novak as ~~\_\_\_\_\_~~'s case manager. The meeting ended with an

agreement that a smaller group of the committee would meet by a telephone conference on January 5 to discuss plans for [REDACTED]'s return to school, giving the family more time to provide information from the treating physician.

[REDACTED] completed the first semester of the seventh grade with A's in all academics and Connections classes. [REDACTED]'s math teacher and special education teachers in his science and social studies class stated that [REDACTED] performed the same work as all other students in the classes and was performing at an A level, even while he had behavioral issues in class. He did so well in math, that his teacher, Ms. Alley, testified that she expected that he would be in the algebra class in the eighth grade at [REDACTED] for which he could earn a high school Carnegie unit under FCSD policy

On December 23, 2003, Dr. [REDACTED] wrote a letter to school administrators regarding [REDACTED]'s return to school following his November suicide ideation. This letter was provided to the [REDACTED] Middle School on January 5, 2004, at the time of the telephone conference. Dr. [REDACTED] stated that [REDACTED] was denying any suicidal thinking and he felt confident that those thoughts were behind [REDACTED]. However, Dr. [REDACTED] felt that [REDACTED] was still fragile. It was his clinical impression that [REDACTED] was safe to return to school as long as he was supervised. He stated that [REDACTED] should be within eyesight of his aide at all times, that he was not considered a threat to run, and that no objects needed to be kept from him. This was Dr. [REDACTED]'s last meeting with [REDACTED], as his psychiatric care continued under Dr. [REDACTED]. Dr. [REDACTED] thereafter deferred to Dr. [REDACTED] and the rest of [REDACTED]'s treatment team for more specific information.

Dr. [REDACTED], a child and adolescent psychiatrist, began seeing [REDACTED] on December 17, 2003. Dr. [REDACTED] met on December 15 with Mr. and Dr. [REDACTED] prior to his first session with [REDACTED]

On January 5, 2004, after only one visit with [REDACTED], Dr. [REDACTED] wrote a letter regarding [REDACTED]. In the letter, he stated that he had been asked to be involved in relation to [REDACTED]'s "recent educational flap". At the time Dr. [REDACTED] wrote the letter, he had not observed [REDACTED] in his educational setting or with Ms. Novak, nor had he spoken to any teachers or staff members who worked directly with [REDACTED]. In addition, Dr. [REDACTED] had not spoken with the individuals who were with [REDACTED] at the time of his suicide ideation. However, he blamed the suicide ideation on [REDACTED]'s being unduly criticized and threatened by school staff. He provided no evidence of any criticism or threats, nor did he indicate what part [REDACTED]'s peer relationships played in the suicide ideation. Dr. [REDACTED] stated that [REDACTED] required an "embracing and warm touch," and he recommended a change in personnel and that a part-time schedule be provided to [REDACTED]. He stated that [REDACTED] did not need to be within eyesight at all times at school. This last statement contradicted both the parents' request and the statement from Dr. [REDACTED] regarding the supervision of [REDACTED]. Dr. [REDACTED] saw [REDACTED] on January 9 and January 30 but then not again until March 8.

On the morning of January 5, 2004, FCSD was also provided a copy of Dr. [REDACTED]'s report. Dr. [REDACTED] recommended that Ms. Fantozzi be [REDACTED]'s only aide because she was positively consistent and someone he trusted. She based this statement on parent reports. She recommended that when Ms. Fantozzi left at 2:00, [REDACTED] be compensated for missing his two classes by homebound schooling. She further recommended communication throughout the day with his parents and that [REDACTED] rejoin his old group of friends at lunch with supervision of an aide in eyesight. Finally, she recommended a system for [REDACTED] to use in class to notify school staff when meltdowns occurred and inform staff whether he could handle the situation or whether he needed help.



The January 5 telephone conference was attended by Principal Bankston, Ms. Pettes, Ms. Novak, Ms. Fantozzi, Ms. Bouldin, Mr. and Dr. [REDACTED], and counsel for both parties. The reports from Drs. [REDACTED] and [REDACTED] were discussed. FCSD stated that [REDACTED]'s assistant would have him in eyesight during class, class changes, and when going to and from lunch as Dr. [REDACTED] suggested. This supervision would not occur in the bathroom because Dr. [REDACTED] raised a concern about privacy. FCSD agreed to implement the card system that Dr. [REDACTED] recommended that would allow [REDACTED] to communicate his feelings and his need for assistance. The plan would be drafted and sent to the parents for their review. FCSD would notify the family of the schedule it proposed for [REDACTED]'s day with the aides. The card system was developed and sent to [REDACTED]'s attorney on January 9. FCSD agreed to a safety plan for [REDACTED]'s return consistent with Dr. [REDACTED]'s suggestions. At no time did the family indicate that any suicide prevention protocol was required to be followed before [REDACTED] could return.

[REDACTED]'s parents again requested only one assistant for [REDACTED], and their preference continued to be Ms. Fantozzi. FCSD again offered Ms. Bouldin, and the parents again refused and requested that FCSD hire another assistant if Ms. Fantozzi could not work all day with [REDACTED]. The parents indicated that [REDACTED] was not comfortable with Ms. Bouldin. They then suggested that if Ms. Fantozzi left at 2:00, they wanted homebound instruction for math and social studies as recommended by Dr. [REDACTED]. The parents also again asked that Ms. Novak be removed as [REDACTED]'s case manager. When FCSD again refused these requests, Mr. [REDACTED] stated that [REDACTED] would not return to school until Ms. Novak was removed. The parents thereafter requested full-day homebound instruction. Ms. Bankston agreed to send a homebound services request form to

④'s attorney by facsimile. The homebound request form was provided to ④'s attorney on January 6, 2004.

On January 7, 2004, Petitioner's counsel forwarded to FCSD a copy of its homebound request form requesting services for ④. The parents did not sign the form, and the only reason given for the homebound request was that ④ had Asperger's. Through counsel two days later, FCSD notified ④'s counsel of the lack of signature and requested specific information regarding why ④'s Asperger's prevented him from attending school and what changes had occurred since Dr. ④'s letter of December 23 stating that it was safe for ④ to return to school. FCSD serves numerous Asperger's students in school, and an Asperger's diagnosis on its own does not indicate an inability to attend school.

On January 14, Dr. ④ met with ④'s classroom teachers, the principal of ④, his two assistants, his speech language pathologist, occupational therapist, Ms. Novak, Ms. Pettes, Mr. and Dr. ④ and their advocate to discuss her evaluation. The teachers felt that Dr. ④ provided helpful information but were concerned that she did not know ④ in the school setting where he performed. They informed Dr. ④ that they believed ④ would not use the card system she recommended in her December 30 memorandum, as it would embarrass him. Embarrassment in front of peers was a significant issue with ④.

On March 9, 2004, FCSD received from ④'s counsel an explanation in response to its request for further clarification of the request for homebound services. FCSD received the March 9 correspondence from Dr. ④ where for the first time it was alleged that ④ had post-traumatic stress disorder. Dr. ④ claimed that the PTSD was caused by ④'s belief that Ms. Novak was the source of his difficulties and stress, that he was convinced that he could

not handle a program managed by her, and that he held her responsible for making him feel unsafe at school. In addition, Dr. [REDACTED] claimed that [REDACTED] also had fears of Rebekah Bouldin. He stated that [REDACTED] should not be returned to a school program in "which either he or his parents have to deal with the staff personnel." Dr. [REDACTED] recommended that [REDACTED] be assigned a new case manager and new aide and until that it was done, that [REDACTED] receive homebound services. The two personnel changes requested by Dr. [REDACTED] were the same changes that Mr. and Dr. [REDACTED] requested because of their ongoing disagreement with Ms. Novak.

On March 19, 2004, FCSD received through [REDACTED]'s counsel a new homebound request form signed by the parents and by Dr. [REDACTED]. The reason for their request continued to be Asperger's diagnosis, without further clarification. The request form also requested that [REDACTED] be allowed to attend chorus and get help from teachers as needed. The form did not explain why [REDACTED] was unable to attend a full day of school but was able to attend chorus. At trial, [REDACTED] presented as evidence a March 22, 2004 unsigned letter from Dr. [REDACTED] to FCSD's hospital/homebound office supplementing his request for homebound services. However, there is no indication in the record that FCSD ever received this letter. In the letter, Dr. [REDACTED] stated that [REDACTED] showed signs and symptoms consistent with PTSD. However, he did not identify PTSD on the hospital/homebound request form as a condition requiring homebound services. In the March 22 letter, Dr. [REDACTED] again asserted that [REDACTED]'s traumatic and emotionally threatening experiences at [REDACTED] related to his contact with Ms. Novak. He stated that [REDACTED] could return to school if the factors that existed in his sixth-grade year were reestablished and that he could not attend until such program changes were made



Dr. [REDACTED] testified that in his opinion the criteria for PTSD in the DSM-IV do not have to be strictly adhered to. He also testified that while [REDACTED] does not meet the strict criteria of DSM-IV for PTSD, he believed that he does meet the spirit of that criterion. However, Dr. [REDACTED] could not identify an actual traumatic event that was an actual or threatened death or serious injury to [REDACTED] or that [REDACTED] witnessed, nor was he able to identify a threat to the physical integrity of [REDACTED] or others as required in the DSM-IV for PTSD. Despite Dr. [REDACTED]'s response in March expressing concerns regarding [REDACTED]'s safety with staff at [REDACTED] Middle School, on March 26 he wrote a letter to FCSD's student placement office supporting Mr. and Dr. [REDACTED]'s request for a medical hardship transfer from their home school to [REDACTED]. Dr. [REDACTED] stated that [REDACTED] suffered from Asperger's and Kallmann's Syndrome but did not mention the PTSD from which he alleged [REDACTED] suffered as a result of staff at [REDACTED]. He further stated that a transfer out of his present educational environment would place him at risk. To further support [REDACTED] remaining at [REDACTED], Dr. [REDACTED] indicated that [REDACTED] had established a group of friends at school, that he had never before had such peer acceptance, and that his friendships at school provided him with great solace. A transfer, he opined, out of [REDACTED] would cause [REDACTED] harm psychologically. Dr. [REDACTED]'s letter does not reference [REDACTED]'s difficulties with his peers and the belief that he does not have friends at [REDACTED], which was a part of his suicide ideation on November 20, 2003.

As [REDACTED] received only consultative services with [REDACTED], his case manager, Liz Novak, had very little direct contact with him. During the 2003-2004 school year, she saw [REDACTED] probably less than seven times the entire semester he was in school. She saw him on several occasions when he was frustrated and needed a safe place to de-escalate. Generally, her role was

to listen and reassure him. When he was having difficulties, his assistant would ask him whether he wanted to go to the clinic, the media center, or Ms. Novak's office. Therefore, anytime he came to her it was of his own choice. She never met with [REDACTED] alone. Ms. Fantozzi who was present during several meetings with Ms. Novak stated that [REDACTED] was very comfortable and talked openly with her without apprehension. She further stated that [REDACTED] had never had a reaction to Ms. Novak that she witnessed at [REDACTED] or at [REDACTED] Elementary School when she was involved with his program there. The parents did not dispute the possibility that [REDACTED] was also mimicking conversations he had overheard at home concerning the parents' unhappiness with Ms. Novak.

On Friday, March 12, 2004 Mr. [REDACTED] notified Ms. Novak in writing that [REDACTED] would return to school on Monday morning, March 15. Mr. [REDACTED] directed Ms. Novak not to have contact with [REDACTED] personally but that daily written reports were to be sent to Dr. [REDACTED] regarding [REDACTED]'s emotional state and that the family was to be called if [REDACTED] showed signs of unusual stress or depression or emotional turbidity. Mr. [REDACTED] again asked that all the recommendations in Dr. [REDACTED]'s reports for [REDACTED] be implemented. That same day Ms. Novak responded to Mr. and Dr. [REDACTED] stating that the staff at [REDACTED] were eager to have [REDACTED] returned to school. She responded to the requests in his letters by stating that FCSD would continue to complete the daily communication forms that provided information on [REDACTED]'s academic and emotional progress that the family could fax to Dr. [REDACTED]. She indicated that she would remain as [REDACTED]'s case manager and that if she had direct contact with him she would document this on the communication sheet. [REDACTED] would be allowed to use a phone in a private area to call if he requested it and the personnel would monitor very closely [REDACTED]'s emotional and/or academic stress related to his return to school and contact the

parents immediately. Ms. Novak also requested a meeting for Tuesday, March 16, at 8:30 a.m. to discuss a break plan for [REDACTED].

On March 15, Mr. [REDACTED] brought [REDACTED] to school. His assistants, Miss Fantozzi and Ms. Bouldin met him at the front of the school. While Ms. Bouldin walked [REDACTED] to his room, Ms. Fantozzi spoke to Mr. [REDACTED] about the use of the card recommended by Dr. [REDACTED] and Mr. [REDACTED] indicated that [REDACTED] would prefer to just tap on the desk with his finger if he needed help. [REDACTED]'s first day went well. On March 16, [REDACTED]'s day started well but there was a mix up regarding his teacher for team time. [REDACTED] handled the situation without any stress and Ms. Fantozzi informed him that she would straighten it out before the next school day. Later that day, [REDACTED] left the lunchroom without permission when he tried to sit in the seat at a table belonging to another student. When he was informed the seat was not available, he left the cafeteria. Later, Ms. Novak went to the library and found [REDACTED] on a couch with a librarian assistant standing near him. As they got up and walked toward the hallway, Ms. Fantozzi arrived and Ms. Novak left him with her. Ms. Fantozzi discussed with him what had happened in the cafeteria. Several times she asked if he wanted to call his father, and later he stated that he did. Mr. [REDACTED] spoke to Ms. Fantozzi and told her that he was coming to get [REDACTED]. When Mr. [REDACTED] arrived, he was upset and said that this was just a recurrence of what happened before. [REDACTED] did not return to school after March 16.

Around April 12, 2004, [REDACTED] entered The [REDACTED] School in Alpharetta, Georgia, on a part-time basis. He was emotionally able to attend a full day, but did not only because of the lack of staff at The [REDACTED] School. [REDACTED]'s family has signed a contract with [REDACTED] for attendance at the school during the 2004-2005 school year. In addition, the family entered a contract with [REDACTED] Learning Centers to provide individual mentoring services to [REDACTED] for



a total of twelve (12) hours. Those services included organization, tutoring in all core academic subjects, and music. They also obtained a proposal from Academic Solutions to instruct ~~\_\_\_\_\_~~ in language arts and math four (4) times a week for a one (1) hour session each day for a total of 162 instructional hours for the 2004-2005 school year. ~~Academic Solutions~~ specifically works with students who have significant skill gaps and those who are LD, ADD, and ADHD. There is no indication that the instructors at ~~Academic Solutions~~ work with students with Asperger's, OCD's, or anxiety disorders, nor is there evidence that ~~\_\_\_\_\_~~ has significant skill gaps requiring ~~Academic Solutions~~ intervention. The ~~Gifted~~ program has been in existence for only two years.

The director of the middle-upper school program at ~~\_\_\_\_\_~~ has no educational background regarding teaching. He has an M.B.A. and a Masters in counseling. He holds no teaching certifications. The only certified teacher at ~~\_\_\_\_\_~~ in the middle-upper program will be a special education certified teacher who will begin working at the school during the 2004-2005 school year. There are no certified teachers in academic subject areas at ~~\_\_\_\_\_~~, and the academic instruction is not based on a structural curriculum but is on a student's interests. The school days at ~~\_\_\_\_\_~~ begin at 9:00 a.m. and end at 2:30 p.m., Monday through Thursday. The school has a shortened day on Friday beginning at 9:30 a.m. and ending at 1:30 p.m. ~~\_\_\_\_\_~~ uses a methodology developed by Dr. ~~Stanley D. Ferguson~~ known as the "developmental individual difference relationship model" (DIR). There were no empirical, peer review studies of the effectiveness of DIR entered into evidence in this hearing.

There are no typical, nondisabled children at ~~\_\_\_\_\_~~. ~~\_\_\_\_\_~~ has not attempted to transition any of its middle-upper program students into a less restrictive educational

environment. ████████ does not provide daily communication logs to parents. Communication regarding how the student performs will be provided weekly next school year. The school does not collect data on students, preferring to use observation notes. It reports formally on a student's progress only two times a year. ████████ does not administer a Georgia Criterion Referenced Competency Test, or any standardized test, to determine whether their students are achieving academically.

On March 29, 2004, Petitioner filed a due process complaint seeking compensatory services, reimbursement for all private services his parents have provided, reimbursement for evaluations, and placement in a private school for the 2004-2005 school year.

### III. CONCLUSIONS OF LAW

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, *et seq.*, requires that FCSD provide a free appropriate public education (FAPE) to children with disabilities. 20 U.S.C. § 1412(a)(1). 20 U.S.C. § 1401(8) states:

The term "free appropriate public education" means special education and related services that:

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standard and direction, and without charge;
- (C) include an appropriate preschool, elementary, or secondary education in the State involved; and
- (D) are provided in conformity with the individualized education program under Sec. 614(d)

The federal regulations use almost identical language in defining FAPE. 34 C.F.R. § 300.13 (1999) states:

As used in this part, the term free appropriate public education or FAPE means special education and related services that:

- (a) Are provided at public expense, under public supervision and direction, and without charge;
- (b) Meet the standards of the SEA, including the requirements of this part;
- (c) Include preschool, elementary school, or secondary school education in the State; and
- (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Secs. 300.340-300.350.

The Georgia Board of Education Rule 160-4-7-.04 (2000) definition of FAPE also tracks the wording of IDEA and the federal regulation. It states:

The term free appropriate public education (FAPE) means special education and related services that are provided at public expense under public supervision and direction and without charge; meet the requirements of the Individuals with Disabilities Act (IDEA); include preschool, elementary school, or secondary education in the state; and are provided in conformity with an individualized education program (IEP) that meets all the requirements of the IDEA and state law, *including these regulations*. (Emphasis added)

#### Procedural Requirements

The United States Supreme Court in Hendrick Hudson Central School district v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982), considered the meaning of the IDEA's requirement of FAPE and held that an appropriate education is one which (1) is provided pursuant to an IEP that has been developed in compliance with the procedural requirements of IDEA, (2) is designed to meet the student's specific needs, and (3) is calculated to enable the student to receive educational benefit.

In determining whether a procedural defect has deprived a student of FAPE, the Eleventh Circuit Court of Appeals concluded that a court must consider not merely the defect per se but whether the procedural violation caused demonstrable harm. Harm occurs only if the violation causes the student the loss of educational opportunity or denies parents the opportunity to



participate effectively in the IEP process. Sch. Bd. of Collier County v. K.C., 285 F3d 977 (11th Cir. 2002); Weiss v. Sch. Bd. of Hillsborough County, 141 F3d 990 (11th Cir. 1998); Doe v. Alabama State Dept. of Education, 915 F2d 651 (11th Cir. 1990). In the present case, [REDACTED] did not lose any educational opportunity and his parents were not denied the opportunity to participate effectively in the IEP process. Therefore, FCSD has met the first prong of Rowley.

[REDACTED] argues that FAPE cannot be met if there has been any violation of the state regulations. The administrative court does not agree. The clause "meets all requirements of the IDEA and state law, including these regulations" in Georgia Board of Education Rule 160-4-7-.04 follows the term "IEP" and grammatically and logically refers to an IEP that meets all requirements of the laws regarding its contents. This wording in no way expands the definition of FAPE in IDEA or the federal regulation, especially as the state rule specifically refers to 34 C.F.R. 300.13 at the end of the paragraph in which FAPE is defined as authority for and interpretation of the Rule. Georgia Board of Education Rule 160-4-7-.01(3)(f)(2000) also defines FAPE with similar language as Rule 160-4-7-.04 (2000). It, too, cites 34 C.F.R. § 300.13 as authority for and interpretation of the Rule. Therefore, the Georgia Board of Education's definition of FAPE does not change the Eleventh Circuit's requirement that the procedural violation must have caused demonstrable harm.

IDEA grants parents of a disabled child the opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child and the provision of FAPE. 20 U.S.C. § 1415(b)(1). [REDACTED] alleges that his parents were not permitted full participation in his educational program because they did not receive sufficient home/school journals and therefore could not understand the day-to-day basis of the issues facing him. They

also allege that the strategies to move [REDACTED] toward independence developed by school staff and presented to [REDACTED] on October 30, 2003, violated their participation rights as they were created in a meeting without their presence.

However, the parent participation rights of IDEA do not include the right to have daily written communication between home and school. Even if there were such a legal requirements, the daily communication in this case was more than adequate for the family to be informed of [REDACTED]'s progress at school. The daily logs recorded [REDACTED]'s behaviors during each class period including detailed notes. The logs also contained responses to the daily notes from the family. [REDACTED]'s assistant recorded his homework assignments in his agenda so that the family was aware of his daily work. Over 900 E-mails were exchanged between the family and the school, and telephone calls from school staff regarding [REDACTED] were not infrequent. The allegation regarding lack of communication is therefore without merit.

Likewise, the allegation that FCSD denied the parents full participation at IEP meetings is without merit. If anything is clear in the massive record of this case, it is that Mr. and Dr. [REDACTED] were extensively involved in [REDACTED]'s education. One, and most of the time, both parents attended all the IEP meetings. They presented their ideas regarding [REDACTED]'s education program that were thoughtfully considered by FCSD members of the IEP committee. The IEP's developed over the years have been the result of collaboration between the family and FCSD. The three-day meeting to develop the IEP at issue here is a prime example of their full participation. They brought to the meeting their goals and objectives and accommodations that were discussed at length and many were incorporated in the final IEP. They insisted on a 1:1 aid for [REDACTED] that was

granted. At the December 14 IEP meeting and the January 5 telephone conference, they were represented by counsel and actively participated in the discussion.

§§'s allegation that the meeting at which strategies for §§ to become more independent were developed violated their participation rights as they were created in a meeting without their presence is also without merit. The discussion concerned development of instructional strategies to use with §§ in the classroom. No changes were made to the IEP or the services provided pursuant to the IEP. IDEA does not mandate parental participation in every aspect of the educational process. Weiss v. Sch. Bd. of Hillsborough County, 141 F3d 990, 997 (11th Cir. 1998). The choices regarding the implementation of an IEP, including the teaching methodology, are left to professional educators who are best equipped to make them. Hendrick Hudson Central School district v. Rowley, 458 U.S. 176, 208 (1982). Furthermore, even if the strategies were required to be developed in an IEP meeting, any resulting procedural violation did not cause demonstrable harm or deprive §§ of FAPE since FCSD did not implement the strategies after §§'s parents objected to them.

§§ also alleged that the family had not received the student's education records in adequate time in order to prepare for trial.<sup>3</sup> The administrative court finds no merit in this claim since discovery is not available in an administrative proceeding in Georgia. See ARP<sup>4</sup> Rule 38.

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<sup>3</sup> FCSD was served with a Request to Produce Documents on the first day of trial on May 18, 2004. FCSD failed to produce the requested documents. FCSD's counsel indicated that she was not aware of the Request to Produce but concluded after looking through her file that she had in fact received it. The case was continued until May 25, 2004 and FCSD was ordered to produce all documents by noon on Friday, May 21, 2004. FCSD produced some documents timely but did not produce other requested material until Monday, May 24, 2004.

<sup>4</sup> ARP means the Administrative Rules of Procedure adopted by the administrative court at Chapter 616-1-2 of the Official Compilation of Rules and Regulations of the State of Georgia (see <http://www.ganet.org/osah/rules>).



At trial, the parents were provided in response to a subpoena, six 4-inch-wide notebooks that contained not only IEP's and evaluations but all correspondence with FCSD.

①②③ also alleged that his parents were denied access to his education record. The Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, grants parents of public school students the right to inspect and review the student's education records. A school district must provide a parent access within a reasonable time but no more than 45 days. Copies must be given only if required to effectively provide for the parent's right to inspect and review the records. 20 U.S.C. § 1232g(a)(1) and (2). IDEA also grants parents the right to inspect and review educational records related to their child that are collected, maintained, or used by FCSD. 34 C.F.R. § 300.562. The definition of education records in IDEA is the same definition in FERPA. 34 C.F.R. § 300.560. FERPA defines an education record as any document that contains information directly related to a student and which a school district or a person acting on behalf of FCSD maintains. 20 U.S.C. § 1232g(a)(4)(A). It does not include records maintained in the sole possession of the maker of the record that are not accessible or revealed to any other person except a substitute. 20 U.S.C. § 1232g(a)(4)(B).

The United States Supreme Court has interpreted this definition of education records in Owasso Independent School district v. Falvo, 534 U.S. 426, 122 S. Ct. 934 (2002) where it found that education records as contemplated by Congress in FERPA are institutional records kept by a single custodian such as a registrar. In reaching this decision, the Court looked at the ordinary meaning of "maintain" which is to keep in existence, or to preserve, or to retain. The Court found that this definition supported its interpretation that FERPA records would be kept in a filing cabinet in a records room at the school or on a permanently secure database, perhaps even

after the student is no longer enrolled. Id. at 433. The Court also found that the FERPA requirement of a record of access and a parental right to a hearing to contest the accuracy of his or her child's education records supported its position that the education records in FERPA are institution records kept by a single custodian. The Court did not believe the Congress meant for every individual with a document relating to a child to maintain a record of access. The Court also found it doubtful that Congress would provide parents with the elaborate procedural machinery to challenge the grade on every document relating to the child in a school district. Id. at 434-435.

In the midst of the May/July 2003 IEP meetings, Mr. [REDACTED] emailed two school employees on July 2 a request for [REDACTED]'s education records. There was no evidence presented that either individual was the custodian of records for FCSD. In addition, neither employee was working during the summer break and, therefore, did not receive the request. Mr. [REDACTED] made another request in August to the director of the [REDACTED] Psychoeducational Program who provided him with the education records before the end of that month and clearly provided him access within the 45 days required by FERPA and IDEA. [REDACTED] also alleged that FCSD violated FERPA and IDEA by not providing emails relating to [REDACTED] as part of the education records. The United States Supreme Court in Falvo, supra, clearly held that not all documents related to a child in the possession of individuals in a school district comes within the definition of FERPA. Unless emails are removed and actually placed in the institutional record kept by a single central custodian, then they are not education records and the parent does not have a right to review and inspect them. There is no evidence that emails in FCSD are maintained in a central file.

Therefore, the administrative court concludes that emails are not education records under FERPA or IDEA.

§ 87(2)(b) contends that even if a requested document, such as an email, does not come within the definition of education record under FERPA, he still has a right to access the documents based on FCSD's parental rights brochure, stating that parents have the right to "examine all records" related to their children. The administrative court finds no merit in this argument since § 87(2)(b) is only entitled to education records authorized under FERPA or IDEA. FCSD's parental rights brochure does not provide additional due process rights under IDEA since it is not a regulation published by the state education agency and is therefore not a binding state law or regulation within the meaning of IDEA.

Furthermore, even if FCSD did not comply with the requirements of FERPA and IDEA regarding access of records, the administrative court cannot award compensatory services or reimbursement for private services for a violation of FERPA, as the enforcement procedures of FERPA are the only remedy for a violation. The remedy for a violation of FERPA is the filing of a complaint with the United States Department of Education Office of Family Compliance. To find a violation of IDEA, § 87(2)(b) must show that the failure to provide access to records under IDEA denied the student FAPE. The evidence at trial is clear that the parents received relevant documents from FCSD during § 87(2)(b)'s time in FCSD. Clearly, the family was not denied the opportunity to participate in the IEP process, and § 87(2)(b)'s outstanding academic performance is proof that he received educational benefit. Therefore, § 87(2)(b)'s IEP was developed in compliance with the procedural requirements of IDEA.



### §§'s Specific Needs

§§. claims that FCSD did not provide him FAPE because it did not evaluate him to determine if he had Asperger's syndrome. §§. further claims that FCSD should have completed a new eligibility based upon the diagnosis of Asperger's by Dr. ~~Platzman~~ and that his present eligibility is inappropriate. The requirements of IDEA and the facts of this case do not support these allegations.

The purpose of an evaluation pursuant to IDEA is to assist in the determination of two things: (1) whether the child is a child with an IDEA listed disability; and (2) the content of the child's IEP. 20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.532(b) (1999). The evaluation must be 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.* (Emphasis added) 34 C.F.R. § 300.532(h) (1999). FCSD has met these requirements with §§. There is no dispute that §§. is a child with a disability who by reason thereof needs special education and related services. 20 U.S.C. § 1401(3)(A); 34 C.F.R. § 300.7(a) (1999). A FCSD eligibility team, which included his parents, made this determination in 2000 and in the fall of 2003 reconfirmed that §§. was a child with an IDEA disability that affected his educational performance. The IDEA does not require that school districts create additional eligibilities for students once they are determined to be covered by the Act. In addition, the services and placement for the child provided by school districts must address all the student's identified special education and related services needs and must be based on the student's unique needs, not the student's category of disability. 34 C.F.R. § 300.300(a)(3) (1999); Georgia Board of Education Rule 160-4-7-.04(1)(b) (2000).

FCSD has identified all of [REDACTED]'s needs and has provided services and placements to address those needs. While Dr. [REDACTED] diagnosed [REDACTED] with Asperger's syndrome, the recommendations in her report for [REDACTED] were already a part of his IEP. She recommended speech language services, particularly in the area of pragmatic language, because children with Asperger's have difficulty interpreting social language. [REDACTED] was receiving two (2) hours of speech and language services per week with his goal and short-term objectives directed specifically to pragmatic language skills and understanding social situations. She also recommended transitioning [REDACTED] out of handwriting as much as possible. [REDACTED] was using a laptop provided by FCSD in all his classes. He received as part of his IEP, information regarding changes in school schedules or routines and praise for his ability to tolerate change with substitutes that were all recommendations of Dr. [REDACTED]. Dr. [REDACTED] also recommended a sensory diet for [REDACTED] that had been provided to him through occupational therapy in FCSD. Therefore, Dr. [REDACTED]'s diagnosis of Asperger's syndrome evaluation was not necessary to develop an appropriate program for [REDACTED] nor was an additional category of eligibility required for [REDACTED] to receive FAPE as the IEP in place already addressed the needs she identified.

[REDACTED] also claims that FCSD failed to consider Dr. [REDACTED]'s evaluation and therefore violated the IDEA. Mr. and Dr. [REDACTED] obtained the evaluation at their own expense as is their right under the IDEA. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(a)(1). The federal regulations implementing the IDEA require a school district to consider a parent-initiated evaluation in any decision made with respect to the provision of FAPE to the child if it meets school district criteria. 34 C.F.R. § 300.502(c)(1). FCSD received Dr. [REDACTED]'s report one school day prior to the December 15, 2003 IEP meeting. Copies were made at the IEP meeting for all his teachers to

review. On January 14, 2004, FCSD staff who provided services to [REDACTED] and who had been at the December meeting, including his teachers and therapists, met with Dr. [REDACTED] to review and discuss the report. Therefore, FCSD gave due consideration to the evaluation which contained recommendations already part of [REDACTED]'s IEP.

[REDACTED] further claims that he did not receive FAPE during the 2003-2004 school year because he did not have a complete IEP at the beginning of the school year because there was no behavior intervention plan (BIP) in place to address his behaviors on the first day of school. The IDEA, its implementing federal regulations, and Georgia Board of Education Rules, require a school district to have an IEP in effect for each child with a disability within its jurisdiction at the beginning of each school year. 20 U.S.C. § 1415(d)(2)(A); 34 C.F.R. § 300.342(a) (1999); Georgia Board of Education Rule 160-4-7-.09(3)(c). The IDEA and its implementing federal regulations set out mandatory elements of an IEP. See 20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.347 (1999). [REDACTED]'s IEP contained all these mandatory elements on the first day of the 2003-2004 school year. A behavior intervention plan (BIP) is **not** included as a mandatory requirement of an IEP. In addition, while the IDEA and its implementing federal regulations do require the IEP team to consider, if appropriate, as a special factor strategies, including positive behavioral interventions, strategies and supports to address behaviors of a child that impede his or her learning or that of others, 20 U.S.C. § 1414(d)(3)(B); 34 C.F.R. § 346(a)(2)(i) (1999), these provisions do not mandate a BIP. The only reference in the federal law to a mandatory development of a BIP is located in the 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). These provisions require a school district to conduct a functional behavioral assessment (FBA)



and it is the only place an FBA is required by the IDEA. Neither of these conditions existed in this case as [REDACTED] was not involved in any disciplinary actions contemplating a change in placement.

The IEP developed for [REDACTED] during May and July 2003 for the 2003-2004 school year contained the levels of his educational performance at that time; goals and objectives with the methodology of measurement identified; special education and related services (OT and speech); supplementary aids and services including a 1:1 assistant in all classes; modifications and accommodations; the amount of time [REDACTED] was in regular education; what modifications were required for his participation in state and FCSD-side assessments; how his parents would be informed of his progress on his goals; the frequency, location, and duration of his services and modifications; and the dates his IEP would begin. With these mandatory provisions in place, [REDACTED] started the school year with a complete IEP.

Even assuming, *arguendo*, that a BIP is a required element of an IEP, FCSD offered a BIP to Mr. and Dr. [REDACTED] on September 2, 2004, shortly after the opening of school. Mr. and Dr. [REDACTED] rejected the proposed BIP and notified FCSD on September 4 that they would prepare revisions to the BIP after obtaining private assistance and would forward their revisions to FCSD. FCSD never received the revised BIP. At the trial, the family claimed that the November 30, 2003 letter from [REDACTED] of [REDACTED] Consultants was their BIP. However, the letter is nothing more than four pages of general suggestions from a book she wrote and not specific to [REDACTED] whom she has never observed in the classroom. There is no evidence that FCSD was informed that these suggestions were the family's response to FCSD's proposed BIP.

The failure to complete the BIP is therefore attributable to the parents' request to delay the completion of the BIP until they provided their version. When parents seek reimbursement for private services, the administrative court can reduce or deny the reimbursement upon a finding of unreasonableness with respect to the action taken by the parents. See 20 U.S.C. § 1412(a)(10)(C)(iii)(III); 34 C.F.R. § 300.403(d)(3). Courts have denied reimbursement of a parent's own actions that frustrated the school efforts. Loren F v. Atlanta Independent Sch. Sys., 349 F3d 1309, 1312-13 (11th Cir. 2003), citing M.M. v. Sch. Dist. of Greenville County, 303 F3d 523 (4th Cir. 2002) (school district not IDEA liable for its failure to timely complete IEP where parents ceased to cooperate in IEP's completion, preferring to place child in private school); Doe v. Defendant I, 898 F2d 1186 (6th Cir. 1990) (parent could not complain that school district failed to complete a timely IEP when IEP's non-completion was attributable to parent's request that school allow student to perform on his own for a while). In this case, Mr. and Dr. [REDACTED]'s insistence that they provide the BIP significantly contributed to the lack of a BIP.

In addition, the lack of a BIP did not deny [REDACTED] FAPE. [REDACTED] received a substantial educational benefit from the IEP, and there was no demonstrable harm to him. Myles S. v. Montgomery Bd. of Ed., 823 F. Supp. 1549 (M.D. Ala. 1993). The 2003-2004 IEP provided a basic floor of educational opportunity for [REDACTED] and was reasonably calculated for [REDACTED] to receive educational benefit as required by Rowley, supra, and J.S.K., supra. Without a BIP, [REDACTED] was able to receive all his academic instruction in regular education classes pursuant to his IEP and earn superior grades.

Despite his superior grades, [REDACTED] alleges that FCSD denied him FAPE the second semester of the 2003-2004 school year because he required homebound instruction. The

evidence before the administrative court does not support this contention, and the IEP offered by FCSD (and pursuant to which [REDACTED] received educational instruction the first semester of the school year) afforded him FAPE. [REDACTED] did not require homebound instruction and even if he did, FCSD had no reliable information on which to allocate such instruction to him.

Georgia Board of Education Rules make clear that the provision of homebound services should be based on receipt by the local school district of a completed medical referral form signed by a physician, as defined in state law and licensed by the appropriate state agency or board, stating that it is anticipated the student who is able to participate in educational instruction will be absent a minimum of ten (10) consecutive school days or that the student has a chronic health condition causing him or her to be absent for intermittent periods of time, i.e., of greater than, equal to, or less than ten (10) days on each occasion during the school year. Georgia Board of Education Rule 160-4-2-.31(2)(a)(1). The homebound request form [REDACTED] presented to FCSD on January 7, 2004, two days after Mr. [REDACTED] had stated that [REDACTED] would not return to school until Ms. Novak was removed as his case manager, was incomplete as it was unsigned by the parent. FCSD requested the appropriate signature that was never provided.

In addition, [REDACTED] presented only one reason in support of his demand for homebound services, to wit, his Asperger's diagnosis. This reason was insufficient to justify the homebound request since FCSD routinely served Asperger's students throughout the system. FCSD requested clarification of the request and received no response until March 9, more than two months later, when Dr. [REDACTED] wrote a letter claiming [REDACTED] had PTSD and that he required homebound services until Ms. Novak and Ms. Bouldin were replaced. Interestingly, on March 19 FCSD received a signed homebound request form that requested services based on [REDACTED]'s



Asperger's, not his PTSD, and requested that [REDACTED] attend school for chorus and obtain help from his teachers as needed. No reason was given as to why [REDACTED] was able to come to school for some school subjects but not others.

The record therefore does not support [REDACTED]'s claim that he could not have returned to school in January. Dr. [REDACTED], [REDACTED]'s treating psychiatrist at the time of his suicide ideation, wrote on December 23 that [REDACTED] could return to school as long as he was supervised. Dr. [REDACTED]'s recommendation that he attend school for all but the last two periods of the day was based upon her disagreement with the use of two assistants with [REDACTED] and not upon a medical or psychological reason. On January 5, FCSD agreed to provide the supervision recommended by Dr. [REDACTED], to send the parents his class schedule, to implement a card system recommended by Dr. [REDACTED] for [REDACTED] to communicate his feelings and his need for assistance, and to provide only one assistant to work with him throughout the day. However, the parents did not agree with the individual FCSD selected and also demanded the removal of Ms. Novak as his case manager. When FCSD refused, only then did the family request homebound services. However, selection of a student's teacher or case manager is solely with the authority of FCSD. See, Letter to Fisher, 21 IDELR 992 (OSEP 1994). And the Georgia Board of Education Rule governing homebound services does not provide for services when the parents disagree with the selection of the individuals working with their child.

Additionally, there is no credible evidence in this case that either Ms. Novak or Ms. Bouldin presented a danger to [REDACTED] or that he was afraid of either of them. During the 2003-2004 school year, Ms. Novak saw [REDACTED] very little. When she did see him, it was when he was frustrated and needed a safe place to de-escalate. When [REDACTED] was having difficulties, his

assistant would ask him whether he wanted to go to the clinic, the media center, or Ms. Novak's office. Therefore, anytime he came to Ms. Novak's office it was of his own choice. She never met with [REDACTED] alone. Ms. Fantozzi who was present during several meetings with Ms. Novak stated that [REDACTED] was very comfortable and talked openly with Ms. Novak without apprehension. Ms. Fantozzi further stated that [REDACTED] had never had a negative reaction to Ms. Novak that she witnessed at [REDACTED] or at [REDACTED] Elementary School when she was involved with his program there. Dr. [REDACTED]'s testimony and letters recommending removal of both these individuals are based on the word of [REDACTED]'s parents and the statements of [REDACTED], whom his parents acknowledged would misstate circumstances and had a distorted way of thinking. It was possible that [REDACTED] even mimicked conversations he had overheard at home concerning his parents' unhappiness with Ms. Novak. Dr. [REDACTED] never consulted with any of [REDACTED]'s teachers or school staff or reviewed [REDACTED]'s complete educational record, even though he had parental consent to do so. He never observed [REDACTED] in his school setting; therefore, limited weight can be given to his assessment of [REDACTED]'s educational program and specifically, his need for homebound services. His view of the two individuals and specifically, Ms. Novak are in direct contradiction to the testimony of FCSD witnesses who have actually observed Ms. Novak and Ms Bouldin's work with [REDACTED].

Within weeks of the March request for homebound services, [REDACTED] began attending The [REDACTED] School part time. He attended part time, not because he was physically or emotionally unable to attend, but because the school did not have a full-time placement for him. Clearly, [REDACTED] was able to attend school. There has been no showing that any homebound services were required to provide FAPE to [REDACTED].

### Educational Benefit

In determining whether an IEP provides an opportunity for a student to receive educational benefit, the Supreme Court in Rowley specifically held that the Act does *not* require that the education services provided to the disabled student “be sufficient to maximize each child’s potential.” 458 U.S. at 198. Rather, IDEA requires a school district to provide a “basic floor of opportunity” for the disabled child. Id. at 201.

The Eleventh Circuit Court of Appeals in J.S.K. v. Hendry County Sch. Bd., 941 F2d 1563 (11<sup>th</sup> Cir. 1991), addressed the issue of the level of educational benefit required under EAHCA (now IDEA). Following Rowley, the Eleventh Circuit held:

[W]hen measuring whether a handicapped child has received educational benefits from an IEP and related instructions and services, courts must only determine whether the child has received the basic floor of opportunity. Todd D. v. Andrews, 933 F2d 1576, 1580 (11<sup>th</sup> Cir. 1991). This opportunity provides significant value to the handicapped child who, before EAHCA might otherwise have been excluded from *any* educational opportunity. The IEP and the IEP’s educational outcome need not maximize the child’s education. Id.; Doe v. Alabama State Dep’t of Educ., 915 F2d at 665. If the educational benefits are adequate based on surrounding and supporting facts, EAHCA requirements have been satisfied. While a trifle might not represent “adequate” benefits, *see, e.g., Doe. V. Alabama State Dep’t of Educ.*, 915 F2d at 655, *maximum improvement is never required*. Adequacy must be determined on a case-by-case basis in the light of the child’s individual needs.

Id. at 1572-73 (emphasis added). The Eleventh Circuit also noted that in determining whether an IEP provided adequate educational benefit, courts must pay great deference to the educators who develop the IEP. Id. at 1573. The J.S.K. decision continues to be the standard in the Eleventh Circuit for determining the educational benefit required under IDEA. *See, e.g., Devine*, 249 F2d 1289 (11<sup>th</sup> Cir. 2001).



When a handicapped child such as Q.P. is being educated in the regular classrooms of a public school system, "the achievement of passing marks and advancement from grade to grade will be one important factor in determining educational benefit." Rowley at n. 28. In determining whether a student has received adequate educational benefit, and therefore received a FAPE under the standard outlined by both the United States Supreme Court and the Eleventh Circuit, a student's academic progress and his ability to advance from grade to grade are important factors for consideration. See, e.g., Rowley, 458 U.S. at 203-204. For instance, in C.J.N. v. Minneapolis Public Schools, 323 F3d 630 (8<sup>th</sup> Cir. 2003), *cert. denied*, 2003 U.S. LEXIS 8045, the court considered the educational programming for a child with a long history of psychiatric illness and behavioral difficulties, but without any stated cognitive impairments. The school developed an IEP for the student that placed him in a special education classroom with a token economy system to reinforce positive behavior. C.J.N., 323 F3d at 635. The student continued to have frequent behavioral difficulties, however, that led to him being given "time-outs" and being physically restrained when he assaulted others and banged his head against the wall. On one occasion, the student had a behavioral outburst that led to police intervention and a period of hospitalization. FCSD then placed the student at another elementary school, with attendance in a day treatment program. The student remained in this placement for only seven days, as he had a behavioral outburst that required him to be taken to a local crisis center. At that point, the student's parent unilaterally withdrew the student and enrolled him in a private day school for disabled children. Id. Throughout his enrollment in the public school system, however, the student progressed at an average rate academically. Id. at 639.

The parent sued FCSD, alleging that the student had not received a FAPE. While the parent partially prevailed at the initial hearing, the school appealed the decision and prevailed at the second level of the state's two-level hearing system. The U.S. District Court likewise determined that the school had provided the student a FAPE. On appeal to the U.S. Circuit Court, the Eighth Circuit affirmed the findings of the district court and also determined that the school had provided the student a FAPE. In reaching its decision, the Eighth Circuit emphasized the academic progress the student had made while enrolled in the school. The parent contended that "because academic progress [had] not been identified as among C.J.N.'s educational needs, evidence of academic progress is particularly irrelevant." *Id.* at 638. The court specifically and explicitly rejected this argument. Instead, the court found the student's academic progress even *more* relevant, given the student's behavior difficulties. Such academic progress, the court held, "demonstrates that [the student's] IEPs were not only reasonably calculated to provide educational benefit, but, at least in part, did so as well." *Id.* at 638. Further, the court held that the student's academic progress demonstrated that his behavioral problems had effectively been addressed. *Id.* at 642.

Similarly, in *Adam J. v. Keller Independent Sch. Dist.*, 328 F3d 804 (5<sup>th</sup> Cir. 2003), the Court evaluated the educational services provided to a student with Asperger's Syndrome and ADHD. All parties agreed that the student, while bright, had serious behavioral problems. The student had an IEP that placed him in a highly structured classroom designed for behavior modification. After approximately three years of enrollment in the public schools, the parents filed a due process hearing request in May 2001 and demanded a publicly funded private placement for the student, citing the student's continued behavioral problems. FCSD prevailed

at both the administrative level and before the U.S. District Court. The Fifth Circuit affirmed the district court's decision and found that the school had provided the student a FAPE.

In support of their appeal, the student's parents cited his "severe behavioral problems" that continued through 2001 "as evidence that he actually regressed while enrolled in FCSD." Adam J., 328 F3d at 810. The Fifth Circuit rejected this argument and relied on the student's demonstrated academic progress to determine that the school had provided a FAPE: "Clearly, evidence of an academic benefit militates in favor of a finding that Adam's IEPs were appropriate."<sup>5</sup> Id.

Courts in several other jurisdictions have consistently held that academic progress, even when a student's IEP primarily addresses behavioral difficulties, is strong evidence that the IEP is appropriate and that FCSD has provided the student a FAPE in accordance with IDEA. See, e.g., Kings Local Sch. Dist. v. Zelazny, 325 F3d 724 (6<sup>th</sup> Cir. 2003) (child with Asperger's Syndrome, obsessive compulsive disorder, and Tourette's Syndrome received a FAPE, as he received good grades and advanced from grade to grade); Cypress-Fairbanks Independent Sch. Dist., 118 F3d 245 (5<sup>th</sup> Cir. 1997) (student with ADHD and Tourette's Syndrome received FAPE, as he earned passing grades and was making progress towards goals); Nygren v. Minneapolis Public Schools, 2001 U.S. Dist. LEXIS 21980, \* 9 (D.C. Minn. 2001), *aff'd*, 323 F3d 630, *cert. denied*, 2003 U.S. LEXIS 8045 (student with emotional and behavioral problems who was "learning with the average range in his academic subjects" had made "educational

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<sup>5</sup> The Fifth Circuit uses a four-factor test that considers individualization, manner of delivery of services, and benefit received by the student to determine whether a student has received a FAPE in accordance with IDEA. See, e.g., Cypress-Fairbanks Independent Sch. Dist., 118 F3d 245 (5<sup>th</sup> Cir. 1997). This test is "at least as stringent as any standard" articulated by the Eleventh Circuit. See Sch. Bd. of Collier County v. K.C., 285 F3d 977, 982 n.6 (11<sup>th</sup> Cir. 2002).



progress"); Hall v. Shawnee Mission Sch. Dist., 856 F Supp. 1521 (D.C. Kans. 1994) (academic progress made by student with behavior difficulties was evidence he had received a FAPE).

In the case *sub judice*, it is undisputed that [REDACTED] had made more than adequate academic progress throughout his enrollment in FCSD. [REDACTED] consistently earned superior grades and appropriately advanced from grade to grade. During the 2003-2004 school year, he earned his superior grades in the regular classroom, the least restrictive environment available. Further, independent sources, such as standardized testing and the Georgia CRCT, show that [REDACTED] is functioning on grade level and meeting academic expectations. In fact, [REDACTED] scored at the highest performance level in all content areas of the CRCT. Indeed, [REDACTED]'s due process hearing request raised no complaints about the academic instruction [REDACTED] received and the academic progress it enabled to him to achieve. In conclusion, FCSD has offered [REDACTED] FAPE and provided [REDACTED] with a program that was reasonably calculated to enable [REDACTED] to receive educational benefits.

Even if [REDACTED] had shown that FCSD had denied him FAPE, in order to obtain reimbursement for private services, at public expense, [REDACTED] bears the burden of proving that the private services he elected to obtain were appropriate. 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.403(c); School Committee of the Town of Burlington v. Dep't of Educ. of the Commonwealth of Mass., 471 U.S. 359, 105 S.Ct. 1996 (1985). [REDACTED] has failed to make such a showing for the private services [REDACTED] School provided or for the private placement there. The [REDACTED] School is a more restrictive environment than the placement FCSD had provided [REDACTED] It is undisputed that [REDACTED] has no nondisabled students and [REDACTED] has no opportunity for any interactions or learning experiences with nondisabled students. In FCSD, [REDACTED] was able to

successfully attend all classes in a regular education environment, thereby meeting the least restrictive environment requirement of IDEA.

IDEA expresses a strong preference for "mainstreaming" and requires that children be educated in the least restrictive environment with nondisabled peers to the maximum extent possible. 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.550(b). [REDACTED]'s placement at [REDACTED] is not the least restrictive environment for him as it allows him no education with nondisabled peers. Further, there is no evidence that placement at [REDACTED] would ever lead to a less restrictive placement for [REDACTED] as [REDACTED] has never attempted to transition any of its middle/high school students to a less restrictive environment.

Moreover, [REDACTED] has failed to show how [REDACTED] would meet his educational needs. None of the teachers at [REDACTED] hold any current teaching certificates in academic subjects. Next school year, the school will have one certified special education teacher. Mr. [REDACTED], who directs the middle school program at [REDACTED], has no known training regarding education or the education of disabled children. Further, the program has only been in existence for two school years, with no demonstrable history of success. The academic program offers no advanced programs such as algebra from which [REDACTED], an A student, could benefit and qualified for at FCSD.

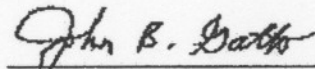
Finally, [REDACTED]'s educational methodology remains untested and unvalidated by any empirical research. W.C. v. Cobb County School district, 132 OSAH 133 (2004). The federal government has expressed a strong and specific preference for using research-validated methodologies when educating children. Elementary and Secondary Education Act, 20 U.S.C. § 601, *et seq.*

In conclusion FCSD provided [REDACTED] with a free and appropriate education pursuant to an IEP that had been developed in compliance with the procedural requirements of IDEA that was designed to meet his specific needs and was calculated to enable him to receive educational benefit. Accordingly,

**IV. DECISION**

**IT IS HEREBY ORDERED THAT** all requests for relief by [REDACTED] are hereby **DENIED**.

**SO ORDERED THIS 2<sup>nd</sup>** day of September, 2004.



**HON. JOHN B. GATTO, JUDGE**