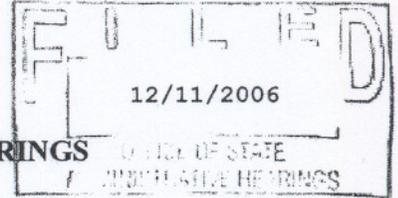


06-006505



IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS  
STATE OF GEORGIA

██████████, by and through her parents, )  
██████████, and ██████████, )  
Petitioners, )  
v. )  
COBB COUNTY SCHOOL DISTRICT, )  
Respondent. )

Administrative Action No:  
OSAH-DOE-SE-0617679-33-Gatto

FINAL ORDER

COUNSEL: Chris E. Vance, for Petitioner.

Neeru Gupta, for Respondent.

GATTO, Judge

I. INTRODUCTION

██████████ ("██████████") brought this action through her parents ██████████, and ██████████, against the Cobb County School District contending that it had failed to comply with the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§1400 *et seq.* (main ed. and Supp. 2005), and its implementing regulations, 34 C.F.R. Part 300.<sup>1</sup> ██████████ contends that the Individualized Education Program ("IEP") prepared by the School District for her failed to provide a free appropriate public education ("FAPE") to her in the in the least restrictive environment ("LRE") free from discrimination based upon disability. The issue before the Court therefore is whether the School District's proposed placement of ██████████, pursuant to the IEP, violated the requirement

<sup>1</sup> Citations to the federal regulations are to the 2006 federal regulations implementing IDEA, which became effective on October 13, 2006. All citations to evidence or testimony entered into the record are as follows: Respondent's trial exhibits are cited as "Respt.'s Ex." in accordance with their exhibit number. Petitioner's trial exhibits are cited as "Petr.'s Ex." in accordance with the Bates number on each page, as Petitioner's exhibits were not separately identified. The trial transcript is cited as "Tr."

of the IDEA that she be provided FAPE in the LRE that is, that she be educated to the maximum extent appropriate with children who are not handicapped. For the reasons stated below, this Court finds that [REDACTED] is entitled to the limited relief set forth herein.

## II. FINDINGS OF FACT

[REDACTED] is a [REDACTED] year-old child adopted from an orphanage in China at 20 months of age. (Tr. 45.) While in the orphanage, [REDACTED] experienced significant neglect and abuse. (Tr. 45, 52.) [REDACTED] attended the District's [REDACTED] Elementary School the 2003-2004 school year.<sup>2</sup> (Respt.'s Ex. 45; Respt.'s Ex. 46.) Kristin Sutherland taught [REDACTED] in her small group special education classroom and has been [REDACTED]'s primary teacher for three years. (Tr. 1583, Tr. 2098.)<sup>3</sup> [REDACTED]'s small group special education class consisted of between six and eight students. (Tr. 2100-2101.)

[REDACTED]'s overall academic performance was on grade level. (Tr. 1598.) Unfortunately, [REDACTED]'s behavior posed serious difficulties. For instance, [REDACTED] would punch and kick objects, yell profanity, "pretend" to stab other children with pencils, and climb on her desk. In addition, she engaged in self-injurious behaviors, such as making herself gag or scratching herself until her skin broke. These behaviors occurred as many as 30 times per day in every environment, usually after a demand had been placed on her. (Respt.'s Ex. 48, pp. 244-246.)

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<sup>2</sup> [REDACTED] was first referred to the District's special education preschool program in May 1999.<sup>2</sup> (Respt.'s Ex. 2.) At that time, the IEP team determined that [REDACTED] was eligible for special education services under the eligibility category of Significant Developmental Delay. (Respt.'s Ex. 8, pp. 58, 64.) Additionally, the IEP team determined that [REDACTED] qualified for speech language services due to a mild language and moderate articulation disorder. (Respt.'s Ex. 8, pp. 58, 65.) In December of 2002, the IEP committee reviewed available information and determined that [REDACTED] was eligible for special education services under the eligibility category of Emotional/Behavior Disorder (EBD). (Respt.'s Ex.40, pp. 208-212.)

<sup>3</sup> The Court recognized Ms. Sutherland as an expert in the areas of planning and provision of special education services to elementary school students with learning disabilities and emotional behavioral disorders. (Tr. 2088, 2097.) Ms. Sutherland has a degree in elementary education, with specific focus on special education and children with learning disabilities and emotional/behavior disabilities. She is currently enrolled in a master's degree program focusing on elementary curriculum and instruction. She is a certified teacher, certified by the State of Georgia to teach children of all ages with behavior disorders. (Tr. 2084-2086.) She has four years of teaching experience, all at the elementary level, all teaching students with behavioral disorders. (Tr. 2086-2088.)

Accordingly, the District began conducting a functional behavior assessment (FBA). (Respt.'s Ex. 48.) An FBA is conducted to help students who are having behavioral difficulties when a usual classroom behavior management plan is not successful. (Tr. 1599.) An FBA is designed to assess the student individually through observation to determine the purposes of behaviors, as well as interventions by taking data on behaviors that [REDACTED] exhibited in order to make any necessary changes to programming. (Tr. 1599, 2102-2103.) Ms. Sutherland also consulted with Stacey Chiak, a behavior specialist, in conducting this FBA. (Tr. 2104.) Carol Seay, a special education supervisor with the District, also became involved with [REDACTED] during her first grade year as her behaviors began to escalate and observed her in the classroom.<sup>4</sup> (Tr. 1581, 1598.) While [REDACTED] was an effective communicator, Ms. Seay noted concerns about her physical and verbal aggression in that setting. (Tr. 1598, 1604-1605.)

During the 2004-2005 and 2005-2006 school years, the District suspended [REDACTED] for her behavioral disabilities and although this did not help to decrease negative behavior, it did cause a significant amount of increased stress and anxiety for [REDACTED].<sup>5</sup> (Respt.'s Ex. 58, 72; Tr. 59-60, 2150, 2328.) Even though Ms. Sutherland admitted that suspensions were ineffective in decreasing or preventing [REDACTED]'s inappropriate behaviors and increased anxiety for [REDACTED], part of the behavior plan for [REDACTED] was to suspend her from school. (Tr. 2187-2189.) [REDACTED]'s mother had also reported to Ms. Sutherland that the suspensions were causing emotional harm to [REDACTED]. (Tr. 2191.) [REDACTED]'s psychiatrist, Dr. Sharon L. Curtis, explained that [REDACTED] was hospitalized after the suspensions in 2004 because [REDACTED]'s behavior did not seem to ease after

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<sup>4</sup> Ms. Seay was qualified as an expert in the areas of provision of educational services and educational programming for students with disabilities. (Tr. 1557, 1569-1570.) Ms. Seay has both undergraduate and advanced degrees in special education and educational leadership and is currently enrolled in a doctoral program in educational leadership, with her dissertation focusing on special education. She taught in special education classrooms for 14 years and became an assistant principal and later a special education supervisor, a position she has held for the last eight years. (Tr. 1549-1570.)

<sup>5</sup> When [REDACTED] was suspended, she did not receive any services. (Petr.'s Ex. 35.)

the suspension. (Tr. 135-137.) After the second round of suspensions, [REDACTED] had to be medically homebound. (Respt.'s Ex. 81.)

When [REDACTED]'s behaviors had not improved during the course of her first grade year, Ms. Sutherland referred her to the District's [REDACTED] program, a psychoeducational program, in April 2004. (Respt.'s Ex. 49.) [REDACTED]'s referral packet to the [REDACTED] program contained functional behavioral assessment information that documented inappropriate behaviors and antecedents to those behaviors, as well as specific strategies and interventions that had been attempted and utilized. (Tr. 1181-1182.)

The [REDACTED] program is designed for students who are having difficulty with their behavioral and/or emotional needs.<sup>6</sup> Typically, most of the students at [REDACTED] all have severe emotional behavioral disorders. (Tr. 1213.) It is founded on the principles of applied behavior analysis (ABA) and is designed to teach students how to control their behavior through techniques such as teaching self-control strategies to help them control and improve their behavior so the students can return to their home schools. (Tr. 1157.) Everyone within the HAVEN program, from teachers to lunchroom staff, is trained to effectively manage behavioral difficulties. (Tr. 1653-1654.)

When students are first enrolled in the [REDACTED] program at the elementary school level, they attend small group special education classes at the [REDACTED] School. (Tr. 1288.) As they show progress, students begin to attend a transition small group class at a regular education

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<sup>6</sup> The District presented Shannon Svetlay, the Administrator at [REDACTED] academy, during the bench trial to describe the [REDACTED] program. The Court recognized Ms. Svetlay as an expert in the education of children with disabilities such as autism. Further, this Court recognized Ms. Svetlay as an expert in the education of students with emotional behavior disorders. (Tr. 1144, 1151.) Ms. Svetlay has a degree in education, with a focus on working with children with emotional and behavioral disorders, as well as a master's degree in educational leadership. She has thirteen years' of special education teaching experience, including teaching students with emotional and behavioral disorders. As the Administrator with [REDACTED] Academy, she performs duties such as supervising special education teachers and helping develop IEPs. She is a certified teacher in interrelated (IRR) and emotional behavior disorders. Additionally, Ms. Svetlay has a great deal of experience in teaching children with autism. (Tr. 1142-1144.)

school, Belmont Hills Elementary School, taught by a HAVEN teacher. The students begin mainstreaming into regular education classes as appropriate. (Tr. 1166-1167, 1216.)

HAVEN used a "consequences" program for inappropriate behavior that Ms. Sutherland had found to be ineffective with [REDACTED] in the classroom. (Tr. 2259.) At HAVEN, students are rewarded for sustained good behavior by being permitted to attend a self-contained class at Belmont Hills, which is a transition or merit class. However, the students are punished by being returned to Belmont Hills when they have a meltdown or crisis or what Ms. Svetlay referred to as a "suspendable" offense. (Tr. 1218-1219.) Ms. Svetlay was aware that suspending [REDACTED] from school and putting her in a regular education classroom did not alter her behavior. (Tr. 1219.)

HAVEN teachers actively work with students to teach self-control strategies and to help students learn to monitor their behavior. (Tr. 1161-1162.) One strategy employed is the use of a point sheet, in which students earn points for appropriate behavior. As the students accumulate points, they redeem the points for both tangible and non-tangible rewards. (Tr. 1161.) Some students do not respond well to the use of point sheets. In these instances, these point sheets are modified to the extent necessary for the student. (Tr. 1161, 1406.) For instance, some students may not have any physical point sheet at all. (Tr. 1221-1222.) Ms. Svetlay admitted that children like [REDACTED] would have point sheets even though [REDACTED]'s teacher had stopped giving [REDACTED] consequences for poor behavior since she would get frustrated. (Tr. 1220, 2187-2188.)

In May 2004, the District convened an IEP meeting to review [REDACTED]'s progress and to determine her placement for the 2004-2005 school year. (Respt.'s Ex. 50, 52.) At this time, the IEP committee reviewed [REDACTED]'s eligibility for special education services. While she was already eligible under the category of EBD, the IEP committee revised [REDACTED]'s eligibility to SEBD, or "severely emotional/behavior disordered," given her "consistent and highly emotional

and physical behavior,” as well as the intensity, frequency, and duration of inappropriate behaviors. (Respt.’s Ex. 52, p. 264; Tr. 1607.) [REDACTED]’s mother agreed with this eligibility determination only after she was told in the meeting that if [REDACTED] were identified as “severely” emotionally behaviorally disabled instead of just emotionally behaviorally disabled, this change in eligibility “opens the door for more services for students.” (Respt.’s Ex. 52, p. 270; Tr. 1608.)

The IEP committee also reviewed [REDACTED]’s current functioning. As of December 2003, her “behavior [had] increased and her acceptance of consequences for poor choices and response to positive behavior interventions decreased.” (Respt.’s Ex. 52, p. 260.) Accordingly, the IEP committee developed goals and objectives that focused on assisting [REDACTED] with improving her behavior, such as recognizing how her behavior impacted others, implementing strategies to regain self-control, and refraining from physical and verbal aggression towards others. (Respt.’s Ex. 52, pp. 260-262.) According to Ms. Sutherland, [REDACTED] was behind the students of her own age in reading, writing, and mathematics. Also, behaviorally and emotionally [REDACTED] was exhibiting the same types of behaviors she had in the past. (Tr. 2111-2112.)

The IEP committee also discussed placement options including the possibility of a HAVEN placement. [REDACTED]’s mother visited HAVEN at the Wilmington School, accompanied by Dr. Curtis and Ms. Sutherland. (Tr. 187, 189, 2106, 2257.) Dr. Curtis observed classrooms with a lot of children in them, lots of noise, a boy trying to climb out of a window and teachers trying to grab and pull him back in, lots of screaming, total chaos. (Tr. 187-188.) After the observation, [REDACTED]’s mother, Dr. Curtis, and Ms. Sutherland stood outside and talked, and Ms. Sutherland had tears in her eyes and stated that the HAVEN placement would not be appropriate for [REDACTED]. (Tr. 188, 190.) Dr. Curtis testified that the Wilmington HAVEN program was the

worst possible placement for [REDACTED] because of [REDACTED]'s high anxiety and posttraumatic stress disorder, [REDACTED]'s trauma from the orphanage, the noise level, and the chaos. (Tr. 188, 190-193.)

The IEP committee reconvened on or about May 25, 2004. (Respt.'s Ex. 52, pp. 269-270.) The IEP committee again discussed [REDACTED]'s placement for the 2004-2005 school year. [REDACTED]'s mother expressed her disapproval of the JAVEN placement. Also, Dr. Curtis had provided a letter to the District the day before the meeting that recommended that [REDACTED] remain "in a special needs classroom with an assigned assistant." (Respt.'s Ex. 51.)

The IEP committee concluded that it could implement additional resources in an effort to maintain [REDACTED] in a less restrictive setting; therefore, the IEP committee opted not to place [REDACTED] in the JAVEN program at that time. (Tr. 1608.) Instead, the IEP included expanded supplementary services offered to [REDACTED] in her small group special education setting. Specifically, [REDACTED] would remain in a small group special education setting throughout the academic day and access general education for special, such as art, music, and physical education (P.E.). (Respt.'s Ex. 52, pp. 262-263.) Additionally, she would receive the services of a one-to-one paraprofessional and the assistance of a behavior specialist to work with her. (Respt.'s Ex. 52, pp. 264, 270; Tr. 1608-1609.) [REDACTED]'s mother signed this IEP, indicating her agreement with it. (Respt.'s Ex. 52, p. 269.)

At the beginning of her second grade year, the District developed a behavior intervention plan of de-escalation procedures in an effort to assist [REDACTED] improve her behaviors. (Respt.'s Ex. 55.) Ms. Sutherland met with [REDACTED]'s parents to develop this behavior intervention plan and incorporated their suggestions. (Tr. 2114-2115.) Also, Ms. Chiak, a behavior specialist, assisted with the development of the plan. (Tr. 1607-1609.) To inform her input, Ms. Chiak met with both [REDACTED]'s teacher and parent to get their input, observed [REDACTED] in the classroom, and worked

directly with [REDACTED] (Tr. 1609.) In addition, Ms. Chiak periodically visited [REDACTED]'s classroom throughout the school year to discuss additional strategies. (Tr. 2114.) This plan included several strategies to help [REDACTED]'s prevent inappropriate behavior. For instance, because [REDACTED] did not like to write, she would have her Daily Oral Language work typed for her on a worksheet, rather than having to rewrite sentences in full. She would also have the use of assistive technology, such as a slant board, as well as a token economy system. Additionally, the plan included several calming strategies, such as dimming lights to reduce stress, eating lunch in the classroom rather than the cafeteria, and keeping printouts of things she enjoyed on her desk. (Respt.'s Ex. 54, p. 278.)

In addition to preventive strategies, this plan focused on teaching appropriate replacement behaviors, such as teaching appropriate words to replace profanity and daily lessons in social and communication skills. [REDACTED] would also be taught stress management techniques such as deep breathing, counting, and calming techniques. Finally, this plan included responses to problematic behavior, such as providing a break time, verbal reminders, and/or redirection. (Respt.'s Ex. 54, p. 278.) In addition to the behavior intervention plan, Ms. Sutherland continued conducting an FBA for [REDACTED] (Respt.'s Ex. 55; Respt.'s Ex. 56; Respt.'s Ex. 57.)

Unfortunately, [REDACTED]'s behaviors were not improving, as recorded by her teacher and paraprofessional, and the beginning of the school year was marked by "intense, frequent out-of-control behaviors". (Respt.'s Ex. 59; Tr. 2116.) For instance, on one occasion, [REDACTED] was physically aggressive towards an adult and destroyed property. (Respt.'s Ex. 58, pp. 312-313.) On another occasion, she threw her desk onto her teacher's foot and again onto other students. She then threw a chair and kicked furniture, threw a pencil at her teacher, and kicked her teacher and paraprofessional. (Respt.'s Ex. 58, pp. 342-343.) On yet another occasion, she pinched her

paraprofessional, hit and scratched her teacher, and threatened to kill people with guns. (Respt.'s Ex. 58, p. 315-317.) These actions often warranted disciplinary referrals. (Respt.'s Ex. 58.) [REDACTED] also displayed self-injurious behaviors, such as scratching her arms until they bled, threatening to kill herself, and pulling her own hair out. (Tr. 2116, 2121.) In December 2004, [REDACTED] had to be hospitalized for three weeks at Ridgeview, a psychiatric hospital. (Tr. 1755.) Prior to the hospitalization, [REDACTED] had been suspended from school for 8 or 9 days, and the school administration had become "frustrated with this situation." (Respt.'s Ex. 71, p. 426.)

While at Ridgeview, [REDACTED]'s medication regime was adjusted. (Tr. 1612.) When she returned, her behavior had improved, and she often did not display the intensity of aggression that she had before. (Tr. 1612-1613, 2131.) Yet, [REDACTED] still struggled with her emotional and behavioral difficulties. (Respt.'s Ex. 59, pp. 332-339.) For instance, in February 2005, she disrupted her class by yelling out and pushing a desk onto another student. (Respt.'s Ex. 58, p. 318.) On another occasion, she yelled inappropriate phrases at others, pushed over a desk onto another child, scratched herself and her teacher, and ran after other students trying to punch them. (Respt.'s Ex. 48, p. 343.) Overall, [REDACTED] still displayed great difficulty with frustration tolerance and self-control and still warranted SEBD eligibility. (Respt.'s Ex. 59, pp. 332-339; Tr. 1612.)

In May 2005, the District convened an IEP meeting to review [REDACTED]'s IEP, as well as to discuss reevaluation. (Respt.'s Ex. 61.) At this IEP meeting, the IEP committee discussed [REDACTED]'s current functioning. [REDACTED] had improved her performance on the Georgia Criterion Referenced Competency Test (CRCT). Specifically, in Spring 2005, [REDACTED] met expectations in both Reading and English/Language sections, scoring 325 and 308, respectively. Also, she was only two points shy of meeting expectations on the Mathematics sections. (Respt.'s Ex. 1, p.

26.) The only accommodation [REDACTED] received on this CRCT pursuant to her IEP for the 2004-2005 school year was administration in a small group setting. (Respt.'s Ex. 52, p. 263.) On the Spring 2005 administration of the Iowa Test of Basic Skills (ITBS), she scored on the 49<sup>th</sup> percentile, or in the overall third-grade equivalent in both vocabulary and reading. Her overall composite score placed her in the 54<sup>th</sup> percentile. She was in the beginning of her third grade year at the time. (Tr. 572-573, 1104.)

While [REDACTED]'s writing skills were age appropriate, her frustration level during writing instruction was delayed. (Respt.'s Ex. 62, p. 354.) [REDACTED] also had difficulty expressing herself when she became angry or frustrated or during redirection. (Respt.'s Ex. 62, p. 354.) As before, [REDACTED] displayed poor frustration tolerance and behavioral difficulties. (Respt.'s Ex. 62, p. 354.) The IEP committee developed goals and objectives for [REDACTED] that focused on her social skills, following directions, behavior, and refraining from inappropriate verbal or physical aggression. In addition, the IEP committee developed a goal and short-term objectives focused on addressing [REDACTED]'s writing skills, given her difficulties in that area. (Respt.'s Ex. 62, pp. 357-358.)

Overall, Ms. Sutherland and the other IEP team members found that the small group special education placement had proven successful for ██████.<sup>7</sup> (Respt.'s Ex. 62, p. 363; Respt.'s Ex. 71, p. 426.) As ██████'s placement was proving successful, the IEP committee recommended that ██████ remain in that placement during the 2005-2006 school year, her third grade year. Specifically, ██████ would be placed in a small group special education classroom for all academic subjects. She would access the general education setting for specials such as art, music, and P.E. In addition, she would keep the services of a one-to-one paraprofessional. (Respt.'s Ex. 62, pp. 360-361.) Given her progress, the IEP committee determined that ██████ did not require ESY services. (Respt.'s Ex. 62, pp. 361-362.) The IEP committee also determined that ██████ would receive a psychoeducational evaluation at the beginning of the 2005-2006 school year. Further, ██████ was to receive a speech language evaluation for possible articulation difficulties. (Respt.'s Ex. 62, pp. 352, 363, 2305.)

In August 2005, pursuant to a recommendation made by the May 2005 IEP team, the District provided ██████ with the comprehensive psychoeducational evaluation. (Respt.'s Ex. 64-

<sup>7</sup> Comparing her levels of mastery from 2004 to 2005, ██████ appeared to be making some progress:

GOALS AND OBJECTIVES (Tr. 2234-2237)	MASTERY 5/25/04 (Respt.'s Ex. 52, pp. 261, 262)	MASTERY 5/16/05 (Respt.'s Ex. 62, p. 358)
██████ will verbally state how her behavior interfered with the classroom activities	75%	30%
██████ will verbally state how her behavior interfered with her peer relationships	20%	30%
██████ will verbally state how to regain control of her emotions with fading prompts	10%	15%
██████ will independently implement strategies to regain control	0%	5%
██████ will refrain from hitting others or kicking objects when angry	0%	50%
██████ will refrain from making injurious gestures towards others when angry	0%	50%
██████ will maintaining control toward herself (scratching, stabbing motions, etc) when angry	10%	50%
██████ will substitute appropriate words for inappropriate profanity when angry or frustrated	10%	50%

67.) The IEP team wanted further information regarding her visual and auditory processing skills and a comprehensive evaluation in general. (Tr. 1314.)

Dr. Marcia Page conducted a comprehensive psychoeducational evaluation of ██████ in August 2005.<sup>8</sup> (Respt.'s Ex. 67; p. 1313.) Dr. Page's evaluation of ██████ took place over five different testing sessions. This is atypical, as a full evaluation usually requires fewer sessions. (Tr. 1317.) ██████'s evaluation took longer to complete because she needed frequent breaks due to her frustration level, as well as behavior or emotional difficulties. (Tr. 1317-1318.) During the five testing sessions, Dr. Page assessed ██████ in a variety of areas, using a variety of tests. Dr. Page is trained to administer all the tests given during the evaluation. All tests were administered in English, ██████'s primary language. Further, Dr. Page administered and scored each test in accordance with test instructions.<sup>9</sup> (Tr. 1321-1324, 1329-1330, 1337-1338, 1341, 1357-1359, 1361-1362, 1364, 1366.) In Dr. Page's opinion, ██████'s intellectual functioning was probably a bit higher than the testing results indicated, as it is possible that ██████'s emotional and behavior difficulties interfered with her performance on these tests. In her professional

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<sup>8</sup> The Court recognized Dr. Page as an expert in the areas of school psychology and the evaluation of students for special education purposes. (Tr. 1311, 1313.) Marcia Page has a bachelor's degree in psychology earned from the University of Michigan, as well as a Ph.D. in school psychology from the University of Georgia. (Tr. 1306.) She is certified by the State of Georgia as a school psychologist and is a member of the National Association of School Psychologists, as well as the Georgia Association of School Psychologists. In addition to her academic training, Dr. Page has extensive professional experience working in school environments as a school psychologist, including duties such as evaluation of students with a variety of disabilities, consultation with educators, development of IEPs, and presentation and training for school staff. Since working with the District, Dr. Page has completed approximately 250 evaluations and attended approximately 200 IEP meetings. (Tr. 1306-1311.)

<sup>9</sup> Dr. Page assessed ██████'s intellectual functioning by administering the Reynolds Intellectual Assessment Scale (RIAS) and the Kaufman Brief Intelligence Test – Second Edition (K-BIT). (Respt.'s Ex. 67, pp. 377-378; Tr. 1320.) Dr. Page also attempted to administer the Differential Abilities Scale (DAS) to get another measure of ██████'s intellectual functioning. However, the test was too frustrating for ██████ to even complete. The DAS requires the administration of several sample test items and requires feedback when a student supplies an incorrect answer. This feedback and correction was too frustrating for ██████ to participate in the task. (Respt.'s Ex. 67, p. 378; Tr. 1324-1325.) ██████'s results on the RIAS showed her overall intellectual functioning to be slightly below average. Standard scores within a range of 85 to 115 are considered to be within the average range. ██████'s overall standard score was 84, slightly below this average range. (Respt.'s Ex. 67, p. 377; Tr. 1321-1322.) ██████'s standard score on the K-BIT was an 87, just within the average range. These scores are very consistent with each other. (Respt.'s Ex. 67, p. 378; Tr. 1323-1324.)

opinion, and based on her review of information and interaction with [REDACTED] Dr. Page believed [REDACTED]'s intellectual functioning likely fell within the average range. (Tr. 1325-1326.)

Dr. Page also assessed [REDACTED]'s adaptive behavior, or her overall functioning in society with tasks such as social responsibility and independence, social interaction, and so forth. (Respt.'s Ex. 67, pp. 378-379; Tr. 1326.) Dr. Page assessed [REDACTED]'s adaptive behavior by having [REDACTED]'s mother complete an Adaptive Behavior Assessment System Parent Form – Second Edition. This form contains a large number of questions regarding specific behaviors, and the parent indicates how frequently the student exhibits those behaviors. (Tr. 1327.) This form does not assess any area of school functioning; rather, this information assesses how the child functions within the home. (Tr. 1328-1329.)

[REDACTED]'s mother's answers on this form indicated that [REDACTED]'s adaptive behavior was well below average. (Respt.'s Ex. 67, p. 378; Tr. 1327.) However, her answers did indicate a wide range of scores. For instance, while she indicated that [REDACTED]'s self-care skills were well below average, other scores were within the average range. For example, [REDACTED]'s functional academic skills, or her skills in those academic areas essential for functioning in life, were within the average range. Similarly, [REDACTED]'s community use (or her ability to appropriately access community necessities such as hospitals or libraries) and her home living skills (such as her completion of household chores) were within the average range. (Respt.'s Ex. 67, p. 378; Tr. 1328.)

Dr. Page also assessed [REDACTED]'s academic achievement and educational performance in order to determine how [REDACTED] was currently performing academically in school by administering the Woodcock-Johnson Test of Achievement – Third Edition (WJ-III), the most recent version of

this test.<sup>10</sup> (Respt.'s Ex. 67, pp. 379-380; Tr. 1329.) [REDACTED] scored within the average range consistent with her intellectual functioning on each subtest except one. (Respt.'s Ex. 67, p. 379; Tr. 1330-1335.) On the Applied Problems subtest, [REDACTED] received a standard score of 84, just one point below the average range. (Respt.'s Ex. 67, p. 379; Tr. 1335.)

Dr. Page also assessed [REDACTED]'s psychological processes by assessing her visual processing skills, or how well she made sense of visual information presented to her, by administering the Test of Visual-Perceptual Skills-Revised (TVPS-R), the most recent version of this test.<sup>11</sup> (Respt.'s Ex. 67, pp. 380-382; Tr. 1337-1338.) Overall, [REDACTED] performed quite poorly on the TVPS-R, with some subtest scores in the first percentile. However, other subtests were higher, such as the Visual Discrimination subtest, on which she scored a standard score of 100, at the 50<sup>th</sup> percentile. (Respt.'s Ex. 67, p. 380; Tr. 1339.) This wide variety of scores could be explained either by varied visual processing skills, or the possibility that [REDACTED]'s scores were negatively impacted due to wavering attention or emotional and behavioral issues. (Tr. 1339.) Moreover, [REDACTED]'s impulsivity may have negatively impacted some of her scores, since all the

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<sup>10</sup> Dr. Page administered the following subtests on the WJ-III: Letter-Word Identification, which required [REDACTED] to successfully read a list words presented in isolation and without context, indicative of [REDACTED]'s reading skills within the classroom; Calculation, in which [REDACTED] was required to complete a series of math problems; Spelling, in which she orally dictated words which [REDACTED] was required to spell in response; Passage Comprehension, in which she read a brief paragraph with a word missing and was required to orally supply the correct missing word; Applied Problems, which measured her math reasoning skills through having [REDACTED] complete word problems and interpret graphs and charts; and Writing Samples, in which she was required to write a sentence in response to a verbal prompt given by Dr. Page. (Respt.'s Ex. 67, p. 379; Tr. 1330-1334.)

<sup>11</sup> Dr. Page administered the following subtests of the TVPS-R: Visual Discrimination, which requires a student to match an object with another object out of array; Visual Memory, which requires a student to briefly look at a picture of a shape and then look at another page with several shapes and recall the object previously shown; Visual Spatial Relationships, which requires a student to identify which of five forms contains a portion that is pointing in a direction different from the other forms; Visual Form-Consistency, which requires the student to perceive a geometric form and identify whether the form has been rotated, enlarged, shrunken, or hidden inside another form; Visual Sequential Memory, which requires a student to look at a sequence of shapes for a few seconds and correctly identify the sequence from a variety of sequences after it has been removed from sight; Visual Figure Ground, which requires the student to find a geometric design within larger figures; and Visual Closure, which requires the student to identify which of four incomplete forms, if completed, would like the same as the completed form. (Respt.'s Ex. 67, p. 380; Tr. 1338-1339.)

test items were multiple choice, and impulsive students like ██████ may not perform as well since they have the opportunity to make impulsive decisions. (Tr. 1340.)

Dr. Page also administered the Test of Auditory Perceptual Skills-Revised (TAPS-R), the most recent version of this test. This test measures ██████'s auditory processing skills.<sup>12</sup> (Respt.'s Ex. 67, pp. 380-381; Tr. 1340-1341.) Overall, ██████ performed poorly on the TAPS-R. (Tr. 1342.) These results could indicate either that she had auditory processing difficulties or that her attention deficit issues interfered with her performance on the test. (Tr. 1342.) Interestingly, ██████'s performance on these subtests was inconsistent within each subtest, indicating that she did not actually have true deficits in this area. For instance, she would miss some easier items on a subtest, but successfully completed more difficult items. Typically, students score better on easier items, and their performance worsens as items becomes more difficult. Given that ██████ showed the opposite pattern, it appears that ██████ may not actually have difficulties with auditory processing. (Tr. 1344-1345.)

██████'s performance on the TAPS-R was inconsistent across administrations. For instance, in November 2004, she completed the TAPS-R as part of a private evaluation, in which she scored in the low average and average range on some subtests, much better than she performed during Dr. Page's evaluation. (Petr.'s Ex. 20; Petr.'s Ex. 21.) Given that ██████

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<sup>12</sup> Dr. Page administered the following subtests of the TAPS-R: Auditory Number Memory Forward, which tests short-term memory by requiring the student to repeat a list of numbers read to her by the examiner; Auditory Number Memory Reverse, which tests working memory by requiring the student to repeat numbers in the opposite order in which they are read to her; Auditory Sentence Memory, which tests whole memory by requiring a student to repeat a sentence read to her; Auditory Word Memory, which tests short-term verbal memory by requiring the student to repeat a group of words read to her by the examiner; Auditory Interpretation of Directions, which requires the student to verbally indicate how she would follow directions read to her by the examiner; Auditory Word Discrimination, which requires the student to identify whether pairs of words are the same or different words; and Auditory Processing (Thinking and Reasoning), which is a measure of general knowledge and requires the student to respond verbally to questions read to her by the examiner. (Respt.'s Ex. 67, p. 381; Tr. 1341-1342.)

performed within the average range during the November 2004 evaluation, it is likely that [REDACTED] had average skills in this area. (Tr. 1343.)<sup>13</sup>

Dr. Page also assessed [REDACTED]'s social, emotional, and behavioral functioning. (Respt.'s Ex. 67, pp. 382-387.) Ms. Sutherland, Ms. Brandy Brown ([REDACTED]'s paraprofessional), and [REDACTED]'s mother, completed the Behavior Assessment System for Children (BASC) rating scale in order to provide their different perspectives on her functioning in a variety of areas, such as hyperactivity, aggression, conduct problems, learning problems, and anxiety. (Respt.'s Ex. 67, p. 383; Tr. 1345.) These rating scales divide scores into clinical and adaptive scales. Clinical scales look at clinical maladjustments such as aggression, while adaptive scales look at positive traits such as social skills and leadership. (Respt.'s Ex. 67, p. 383; Tr. 1346-1347.) Scores on the BASC are reported as T-scores. A T-score between 40 and 59 is considered to be within the average range.<sup>14</sup> All three rated [REDACTED] very similarly on all clinical scales. For instance, all raters described [REDACTED] as having clinically significant issues with hyperactivity, conduct problems (such as arguing with adults and refusing to follow school rules), depression, and atypicality (odd behaviors such as hearing or seeing things that are not there, or having unusual ideas). (Respt.'s Ex. 67, p. 383; Tr. 1347-1352.) Ms. Sutherland and Ms. Brown reported

<sup>13</sup> Like all standardized assessments, the TAPS-R has a test-retest interval that prohibits examiners from readministering a test within too short a timeframe, as students may experience practice effects that may invalidate scores. The test-retest interval for the TAPS-R indicates that it can be repeated within one semester to one year. Given that over one semester had elapsed between the November 2004 administration and Dr. Page's administration, Dr. Page complied with the TAPS-R test-retest interval. (Tr. 1342-1344.)

<sup>14</sup> Dr. Page noted that Ms. Sutherland's and Ms. Brown's scores were to be interpreted with caution, as the F index for their scales was elevated. The F index is a validity scale that indicates if a rater may have a tendency to rate a student in an overly negative manner. An elevated F index does not invalidate scores; rather, it indicates that the information should be compared with other information available. If the scores are consistent with other available information, the scores are considered valid. As Ms. Sutherland's and Ms. Brown's scores were consistent with other sources of information, their rating scales and information provided therein is valid, meaning that their rating scales accurately reflect reality. (Respt.'s Ex. 67, p. 383; Tr. 1354-1355.)

Similarly, the consistency index for Ms. Sutherland's and Ms. Brown's scores was elevated. The consistency index is a measure of reliability, or whether a measure is consistent across parts of a test or across times of administration. Again, because the information provided on Ms. Sutherland's and Ms. Brown's rating scales was consistent with other information available, their rating scales can be considered reliable and a valid reflection of [REDACTED]'s functioning within a classroom setting. (Respt.'s Ex. 67, p. 383; Tr. 1355-1356.)

slightly higher rates of aggression (such as hitting, bullying, or threatening others), although [REDACTED]'s mother agreed that [REDACTED] showed moderately high levels of aggression, as well. (Respt.'s Ex. 67, p. 383.) All three raters noted that [REDACTED] often/almost always "threatens to hurt others," "tries to hurt self," and "complains about being unable to block out unwanted thoughts." [REDACTED]'s mother also noted that [REDACTED] sometimes "says, I'm afraid I'll hurt someone." Further, both Ms. Sutherland and Ms. Brown noted that [REDACTED] often "says I want to die or I wish I were dead." (Respt.'s Ex. 67, p. 384.)<sup>15</sup>

Scores regarding [REDACTED]'s adaptive scales were also consistent across raters. All three noted that [REDACTED]'s adaptability, or ability to handle change, was of moderate concern, as were her leadership skills. (Respt.'s Ex. 67, p. 383; Tr. 1352-1355.) Ms. Sutherland and Ms. Brown further noted that [REDACTED]'s study skills were in the at-risk range. (Id.)<sup>16</sup> The overall results of the various BASC rating scales suggest that [REDACTED] had significant social, emotional, and behavior difficulties. (Respt.'s Ex. 67, pp. 383-384; Tr., p. 1356.) Dr. Page also had [REDACTED]'s mother complete the Gilliam Autism Rating Scale (GARS), another rating scale that looks at characteristics of autism and the frequency with which they occur.<sup>17</sup> According to [REDACTED]'s mother's responses, [REDACTED] scored as having an "average" probability of autism. (Respt.'s Ex. 67, p. 384; Tr. 1357-1358.)

Dr. Page had [REDACTED] complete the Kovacs Children's Depression Inventory (CDI), a self-report measure designed to measure characteristics associated with depression. (Respt.'s Ex. 67,

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<sup>15</sup> The only area of discrepancy regarding clinical scales was in the area of withdrawal, or the tendency to isolate oneself from one's peers, not to have friends, or to complain of not having friends. While Ms. Sutherland and Ms. Brown rated [REDACTED] as clinically significant in this area, Ms. B. rated [REDACTED] as average, indicating that there may be a difference in [REDACTED]'s performance in the school setting versus the home setting. (Respt.'s Ex. 67, p. 383; Tr. 1352.)

<sup>16</sup> The only area of discrepancy was in social skills. While Ms. Sutherland and Ms. Brown rated [REDACTED]'s skills in this area as average, Ms. B. rated them to be in the at-risk range, indicating a difference in [REDACTED]'s performance in the school setting versus the home setting. (Respt.'s Ex. 67, p. 383; Tr. 1353-1354.)

<sup>17</sup> Dr. Page did not have any of [REDACTED]'s teachers complete this scale, as it requires reports of developmental information that only her parents would have. (Tr. 1377.)

p. 385; Tr. 1358-1359.) According to [REDACTED]'s responses on the CDI, she was not experiencing an unusual or significant level of depression. (Respt.'s Ex. 67, p. 385; Tr. 1360-1361.) Dr. Page also asked [REDACTED] to complete the Revised Children's Manifest Anxiety Scale, another self-report measure designed to measure characteristics of anxiety. Although [REDACTED] scored herself within the average range for anxiety, her "lie scale" was elevated. The "lie scale" is a validity scale designed to determine if the student is answering questions in an overly favorable manner that may not be accurate, indicating that the student has more anxiety than is self-reported. Further, an elevated "lie scale" can indicate elevated anxiety. [REDACTED]'s elevated "lie scale" indicates that she likely has more anxiety than she reported on this measure. (Respt.'s Ex. 67, pp. 385-386; Tr. 1362-1363.)

Dr. Page also administered the Sentence Completion Test, a measure of social emotional functioning, to [REDACTED] (Respt.'s Ex. 67, p. 386; Tr. 1363-1364.) On this test, Dr. Page read part of a sentence and asked [REDACTED] to orally finish the sentence. (Tr. 1364.) The Sentence Completion Test is a qualitative measure that provides further insight into a child's social emotional functioning by allowing an examiner to look for any significant themes in the student's responses. (Tr. 1365.) Many of [REDACTED]'s answers focused on her behavior difficulties. For instance, when asked to complete "When I get mad," [REDACTED] responded, I "kick, punch holes in the wall, punch people." (Respt.'s Ex. 67, p. 386; Tr. 1365.) Moreover, some of [REDACTED]'s responses did not appear to match the test item. For instance, when asked to complete "When I break something," [REDACTED] responded, "I kill people." This is atypical, providing additional indications that [REDACTED] had difficulties with her social, emotional, and behavioral functioning. (Respt.'s Ex. 67, p. 386; Tr. 1365-1366.)

Dr. Page also administered the Guess Why? test, another measure of social emotional functioning. On this test, Dr. Page read a brief sentence about a fictional character and asked ██████ to answer a question about the character. (Respt.'s Ex. 67, pp. 386-387; Tr. 1366.) Behavior difficulties and death were prominent themes in ██████'s responses on this test. For instance, ██████ described several of the fictional characters as "out of control" or "wasn't behaving." When asked why a certain character liked to be by herself, ██████ answered, "Because her mom rose from the dead." When asked what this character would like to do, ██████ responded, "die." (Respt.'s Ex. 67, p. 386; Tr. 1366-1367.)

Overall, Dr. Page's evaluations indicated that ██████'s had average intellectual functioning, as well as average academic functioning, consistent with her intellectual functioning. ██████ displayed weaknesses with visual and auditory processing skills. However, her performance varied greatly across subtests, indicating that ██████'s difficulties with attention and focusing may have negatively impacted her scores, rather than the scores reflecting actual deficits in processing abilities. (Respt.'s Ex. 67, p. 387; Tr. 1368.) Clearly, however, ██████ did display significant difficulties with her social and emotional functioning that interfered with her academic progress. (Respt.'s Ex. 67, p. 388; Tr. 1368.)

Although children can certainly become as frustrated as ██████, her reactions to frustration are atypical in that they are extremely severe. (Tr. 1446.) In fact, while many children can have a variety of issues, such as processing deficits, or anxiety, or a desire to please others, it is ██████'s reactions to any level of frustration that appears to set her apart. Her emotionality and behavior are extremely severe to a level that is atypical of a student with processing deficits or any other difficulties. (Tr. 1444-1448, 1463, 1480-1481, 1507, 1515.)

During her third grade year, █████ continued to exhibit severe emotional and behavioral difficulties. In late September 2005, her teachers completed a skills inventory to assess her current functioning. (Respt.'s Ex. 68.) This inventory indicated that, overall, █████'s academic skills were age appropriate. (Respt.'s Ex. 68, pp. 393-394.) Moreover, her overall performance in her specials, such as art, music, and P.E., was good. (Respt.'s Ex. 69, pp. 397-399.) █████ also received specific social skills instruction in her classroom with nondisabled peers who were "reverse mainstreamed" into her class for social skills instruction. (Tr. 2298-2299.) Additionally, █████ had been taking advantage of assistive technology devices in the classroom. For instance, █████'s mother admitted that Ms. Sutherland had the Write Out Loud software on the computer in her classroom, which █████ had seen and worked with before. (Tr. 829.) Also, █████ had use of an Alphasmart, a portable word processor, a modification provided to her to assist her with her written production, as well as a slant board. (Tr. 2191-2193, 2352-2353.)

█████'s emotional and behavioral functioning, however, remained impaired. For instance, she had difficulty focusing her attention and staying on task. She did not adequately follow classroom rules or work cooperatively with others. (Respt.'s Ex. 68, p. 396.) She also continued to have difficulty controlling her emotions. (Respt.'s Ex. 69, p. 400.) Given these difficulties, Ms. Sutherland continued the FBA process for █████ (Respt.'s Ex. 70, pp. 401-406.) Despite this intervention, along with the continued services of a one-on-one paraprofessional and implementation of the behavior intervention plan (Respt.'s Ex. 54), █████'s behavior interfered greatly with her learning and that of others. She would frequently whine and call out in class. In addition, she frequently made verbal threats of killing or hurting others, in addition to using profanity. She would also often engage in physical aggression, such as kicking and throwing

desks, throwing objects at others, attempting to stab other students with pencils, trying to hit other students, and pulling her hair out. (Respt.'s Ex. 70, p. 408-422.)

██████████ continued to show great difficulty with her behaviors that warranted suspensions throughout the remainder of the 2005-2006 school year. Specifically, she repeatedly used profanity, threatened to kill her assistant principal, threatened to kill other students, kicked other students, and threw pencils and her slant board at others. (Respt.'s Ex. 72.) ██████████ was also physically destructive, beating on desks until the screws came loose, kicking walls, tearing posters off walls, destroying her glasses, coloring on her clothing, and breaking pencils, crayons, and markers. (Respt.'s Ex. 71, p. 425.) These destructive and aggressive behaviors occurred nearly everyday, sometimes two or three times per day. When they did occur, they would often continue for an hour or more. (Respt.'s Ex. 71, p. 425.) These behaviors continued to occur, despite implementation of the behavior intervention plan, receiving the services of a one-on-one paraprofessional and a behavior specialist, implementation of calming exercises and de-escalation strategies, use of positive behavioral incentives, preferential seating, and an ongoing FBA begun in 2003. (Respt.'s Ex. 71, pp. 425-426.) Indeed, ██████████'s behaviors were sometimes such that she was unable to attend her "specials," such as art, music, and P.E., despite having the assistance of a one-on-one paraprofessional at all times. (Tr. 2316.)

As ██████████ continued to display very concerning behaviors, Ms. Sutherland made a referral for service to the District's Technical Assistance for Severe Behaviors (TASB) program in October 2005. (Respt.'s Ex. 71.) At this point, the District believed that it had maximized the supports available to ██████████ within a small group special education setting through the additional supports of a one-on-one paraprofessional, support of a behavior specialist, and ongoing FBA. (Tr. 1619-1620.)

Dr. Ernest Whitmarsh, Jr., Director of the TASB program, conducted an observation of [REDACTED] on January 9, 2005 for a period of approximately 50 minutes.<sup>18</sup> During this time, he observed her doing her math work with one-on-one assistance from her teacher. Despite this constant attention, [REDACTED] would frequently whine and also displayed self-injurious behaviors, such as poking herself in the head with a pencil. (Respt.'s Ex. 71, p. 427.) The initial intent of the TASB referral was to provide additional support in the classroom. However, when Dr. Whitmarsh visited [REDACTED]'s classroom in response to this referral, he saw that Ms. Sutherland had already completed the activities that he could have completed within the confines of a classroom, such as conducting an FBA, and had a behavior plan in place. (Tr. 3115-3116.)

On February 13, 2006, the District convened an IEP meeting to review [REDACTED]'s IEP. Carol Sadler, [REDACTED]'s advocate, also attended. (Respt.'s Ex. 77; Respt.'s Ex. 78, p. 499.) [REDACTED]'s parents had also wanted a meeting to review [REDACTED]'s progress and placement, as they were concerned about her suspensions from school. (Tr. 1621-1622.) At the time of the IEP meeting, [REDACTED] had been suspended a total of ten days during the 2005-2006 school year. (Tr. 2300-2301.) However, prior to this IEP meeting, [REDACTED]'s medication regime had undergone important changes. For instance, the timing and dosages of [REDACTED]'s various medications changed repeatedly from October 2006 through January 2006. Further, [REDACTED]'s parents supplemented [REDACTED]'s medication regime with mood-altering over-the-counter supplements. (Respt.'s Ex. 76; Tr.1088-1091.)

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<sup>18</sup> The Court recognized Dr. Whitmarsh as an expert in the areas of school psychology, applied behavioral analysis, functional behavior assessment, and functional behavior analysis. (Tr. 2812, 2850.) Dr. Whitmarsh has an undergraduate degree in psychology, as well as a Ph.D. in school psychology. He has conducted extensive research in the areas of applied behavior analysis, functional behavior assessment, and functional behavior analysis, including actually conducting such assessments and analyses. He has worked extensively with school-age children who exhibit severe behaviors in an effort to help reduce or eliminate those behaviors. His professional experience includes an internship with the Marcus Institute's Behavior Center, an affiliate of Johns Hopkins University's Kennedy Krieger Institute, as well as several years of working in an educational setting through his employment with the District. (Tr. 2807-2850.)

Dr. Curtis submitted a letter to the District dated February 10, 2006, which recommended that ██████ stay in a "special needs classroom" and that her "educational needs will be better served if she is in a special needs classroom." (Petr.'s Ex. 37; Tr. 113.) Ms. Janice Turber, one of ██████'s private counselors, also submitted a letter to the District dated February 8, 2006 and advocated that ██████ remain in a special needs classroom with a paraprofessional. (Petr.'s Ex. 36.) Neither Dr. Curtis nor Ms. Turber actually attended the February 13, 2006, or any other, IEP meeting. (Respt.'s Ex. 79; Respt.'s Ex. 80.) Further, the District received no other recommendations from any other individual who had worked privately with ██████

At this meeting, the IEP committee reviewed the recent psychoeducational evaluation of ██████ and discussed her continuing eligibility for special education services. (Respt.'s Ex. 67.) The IEP committee, save for ██████'s mother and Ms. Sadler, agreed that autism was not an appropriate eligibility category for ██████ and that based on her functioning, that she continued to be eligible under the category of SEBD. (Respt.'s Ex. 78, p. 517; Respt.'s Ex. 79; Respt.'s Ex. 80, p. 529; Tr. 1622-1623.) In reaching this determination regarding eligibility, the IEP committee considered ██████'s current functioning, the recent psychoeducational evaluation, and information provided by ██████'s parents and teachers. (Tr. 1624.) The IEP team members who agreed with the SEBD eligibility believed that ██████'s difficulties were due primarily to her emotional and behavior disorder. (Respt.'s Ex. 78; Respt.'s Ex. 79; Tr. 1623-1624.)

By contrast, ██████'s parents believed that her difficulties with auditory and visual processing caused her behavioral difficulties. (See e.g. Respt.'s Ex. 78; Respt.'s Ex. 79; Tr. 1625.) However, Ms. Svetlay testified that it is extremely rare for these kinds of difficulties to cause the severe and aggressive behaviors displayed by ██████. Certainly, processing difficulties can certainly lead to frustration. Indeed, many students within the District have similar

processing difficulties and face frustration, but they do not engage in the kind of severe behavior that [REDACTED] displayed. (Tr. 1625-1626.) Rather, in the opinion of [REDACTED]'s educators, [REDACTED]'s behaviors resulted from her emotionally based disorders. (Tr. 1625-1626, 1752-1753.)

[REDACTED]'s mother and Ms. Sadler advocated that [REDACTED] be found eligible under the category of autism, given her diagnosis of autism. (Respt.'s Ex. 79; Respt.'s Ex. 80, p. 529.) However, as Ms. Sadler and Ms. Seay acknowledged, a medical diagnosis is distinct and separate from eligibility for special education services.<sup>19</sup> (Tr. 553, 1623.) Ms. Seay also stated that "our state regulations for autism, state that if there is an emotional disorder present, that precludes autism as a possibility..." (Tr. 1623.) Moreover, the Diagnostic and Statistic Manual – Fourth Edition, Text Revision (DSM-IV), which is the definitive guide to diagnosing psychological disorders, provides that a child cannot accurately or properly be diagnosed with both reactive attachment disorder and a pervasive development disorder such as autism. (Respt.'s Ex. 87; Tr. 1369-1374.) In fact, [REDACTED]'s mother herself had previously acknowledged to Ms. Sadler that the professionals treating [REDACTED] debated her diagnosis of autism because [REDACTED]'s behaviors did not necessarily match such a diagnosis. (Tr. 1108.) The IEP committee agreed that [REDACTED] continued to meet the eligibility criteria for SEBD eligibility, but agreed to conduct additional testing to investigate autism eligibility. (Respt.'s Ex. 79; Respt.'s Ex. 80, p. 529.)

The IEP committee also discussed [REDACTED]'s current functioning. (Respt.'s Ex. 79, 80, p. 529.) Standardized testing showed that she was working at grade level. As indicated *supra*, during the Spring 2005 administration of the CRCT and the ITBS, she met expectations in the area of reading on the CRCT and scored in the overall third-grade equivalent in both vocabulary and reading on the ITBS. (Tr. 571-573, 1104.)

<sup>19</sup> Additionally, a specific eligibility category does not determine placement; it makes a child eligible for special education services. Instead, the goals and objectives developed for a child, based on the child's functioning, drive a child's educational placement. (Tr. 1624-1625.)

However, [REDACTED] continued to display physically aggressive outbursts and an inability to regain self-control. (Respt.'s Ex. 79; Respt.'s Ex. 80, p. 520.) She had a low frustration tolerance, poor impulse control, and difficulty responding to correction. (Respt.'s Ex. 79; Respt.'s Ex. 80; p. 521.) [REDACTED]'s mother agreed that [REDACTED] responds to any level of frustration with "explosive" behavior. According to [REDACTED]'s mother, she has had "inappropriate explosions" that have been "consistent." (Tr. 614, 616.) [REDACTED]'s mother acknowledged that [REDACTED]'s behavior had gotten worse during the 2005-2006 school year. (Tr. 1048.)<sup>20</sup> The IEP committee developed goals and objectives for [REDACTED] that focused on improving her writing and social skills, and addressing her significant emotional and behavioral issues. (Respt.'s Ex. 79; Respt.'s Ex. 80, pp. 522-523.)

The IEP committee also discussed placement for [REDACTED]. Given her severe behavioral difficulties that could not be adequately addressed in her then-current placement, the IEP committee recommended that [REDACTED] enroll in the District's [REDACTED] program, the District's

<sup>20</sup> Indeed, [REDACTED] had goals to maintain appropriate behavior since kindergarten. While she had made some progress on these goals and objectives throughout her enrollment in the District, the standards for appropriate behavior increased as she grew older, and [REDACTED] was unable to improve her behavior commensurately. (Tr. 2331-2334.) [REDACTED] had done better on her other goals during the 2005-2006 school year, as follows, indicating her progress:

GOAL (Respt.'s Ex. 78, p. 512; Tr. 2335-2338)	MASTERY 10/17/05 (Tr. 2335-2338)	MASTERY 1/13/06 (Respt.'s Ex. 78, p. 512; Tr. 2338-2344)
[REDACTED] will write in a variety of genres to include correspondence (including writing letters and addressing envelopes)	0%	50%
[REDACTED] will be able to state aloud and correctly print address	0%	50%
[REDACTED] will respond to multi-step directions	25%	30%
[REDACTED] will follow teacher-given directions (up to three steps) with fading pictorial cues	25%	30%
[REDACTED] will demonstrate effective communication with peers	15%	25%
[REDACTED] will exhibit common communication skills needed in different social settings (e.g., recess, specials day to day classroom conversation/interaction with peers and classmates)	15%	25%

psychoeducational program, in order to take advantage of the therapeutic setting and interventions offered in the program. Specifically, [REDACTED]'s IEP would be implemented in the [REDACTED] program's [REDACTED] School, with opportunities to transition and mainstream to regular education schools as appropriate. (Respt.'s Ex. 79; Respt.'s Ex. 80, pp. 529-530.) Pursuant to State of Georgia regulations implementing IDEA, psychoeducational programs, such as HAVEN, are specifically intended for students with severe emotional/behavior disorders and/or autism. (Tr. 553, 1769.)

Also after the February 2006 IEP meeting, the District began the processing of providing several evaluations to [REDACTED]. At the February 2006 IEP meeting, [REDACTED]'s mother and Ms. Sadler had requested, and the District agreed, to provide additional testing regarding autism, to consist of an occupational therapy evaluation with an emphasis on sensory integration, an audiology evaluation, and a speech language evaluation.<sup>21</sup> (Respt.'s Ex. 85, p. 551.)

In addition, the IEP committee recommended that [REDACTED] receive the services of the TASB program for two to three hours per school day for a period of six to eight weeks, as well, in order to conduct a functional behavioral analysis to determine the exact causes of [REDACTED]'s behavior and develop the most effective treatment.<sup>22</sup> (Respt.'s Ex. 79; Respt.'s Ex. 80, pp. 529-520.) The TASB component would allow the District to isolate the causes of [REDACTED]'s behavior

<sup>21</sup> At the February 2006 IEP meeting, Ms. B. and Ms. Sadler also requested a vision therapy evaluation, alleging that [REDACTED] had difficulty tracking while reading. (Respt.'s Ex. 78; Respt.'s Ex. 79; Tr. 1694.) [REDACTED]'s reading teacher, however, noted that [REDACTED] did not have any observable difficulty in reading or tracking, and that [REDACTED] was on grade level in reading. (Tr. 1694-1695.) [REDACTED] could become easily distracted and so used a card to help maintain her place due to her distractibility. (Tr. 1822.) Given [REDACTED]'s good school performance and the fact that any purported vision issues did not have any impact on [REDACTED]'s access to education, the IEP committee determined that a vision therapy evaluation was not necessary. (Respt.'s Ex. 78; Respt.'s Ex. 79; pp. 1694-1695.) Indeed, Ms. Sutherland, [REDACTED]'s primary teacher for three years, saw no indication that [REDACTED] required a vision therapy evaluation in order to make educational progress. (Tr. 2353-2354.)

<sup>22</sup> Also at the February 2006 IEP meeting, the District also recommended that [REDACTED] receive extended school year (ESY) services for Summer 2006. (Respt.'s Ex. 79; Respt.'s Ex. 80, p. 526; Tr. 499, 554.)

difficulties in order to develop a plan to both prevent behavior and to teach appropriate replacement behaviors. (Tr. 1627-1628.)

The IEP team, through the TASB component overseen by Dr. Whitmarsh, wanted to conduct a functional analysis for [REDACTED] and expand on the FBA that was ongoing. (Respt.'s Ex. 78; Respt.'s Ex. 79; Tr. 2853-2854, 2860.) Up to that point, there were many hypotheses as to what caused [REDACTED]'s problematic behaviors of self-injury, disruption, and aggression. However, no one was confident about the actual factors that may have contributed to her behaviors. (Tr. 2853-2854.) District personnel knew that some factors, such as handwriting or being corrected, could sometimes escalate [REDACTED]'s behaviors. (Tr. 1674-1675.) Sometimes, when [REDACTED] was faced with a nonpreferred activity or a task she did not want to complete, her behaviors would escalate. (Tr. 2197.) However, [REDACTED] never showed a consistent pattern. (Tr. 1674-1675.) [REDACTED]'s performance on a given task generally depended on her mood and was anything but consistent. For instance, [REDACTED] had trouble speaking in sentences when angry, but no such difficulty when she was not angry. (Tr. 2286.) While [REDACTED] generally did not like to write, she did enjoy writing about science and did not display behavior difficulties when she did so. (Tr. 2268.) Sometimes noise bothered her, and sometimes it did not. (Tr. 2268.) Sometimes [REDACTED]'s language skills were impaired, and other times they were not. (Tr. 2285-2286.) In short, then, there were several hypotheses as to what caused [REDACTED]'s inappropriate behavior, but she never reacted consistently and there was no data to confirm these hypotheses.

A functional analysis, utilizing the principals of ABA, would allow the District to determine any environmental antecedents or environmental consequences that contributed to [REDACTED]'s problematic behavior. (Tr. 2854.) While Ms. Sutherland had conducted an ongoing FBA for [REDACTED], the more analytical functional analysis was required to systematically look at

environmental variables that might affect [REDACTED]'s behaviors by directly manipulating those variables. (Tr. 2854-2855.) Given the need to directly manipulate those variables in order to isolate and determine which factors influenced [REDACTED]'s behavior, and given that supports had already been maximally utilized in the classroom, Dr. Whitmarsh and the IEP team recommended that the functional analysis not take place in the regular classroom environment, as such an environment contained too many variables beyond control. (Tr. 2857-2858.) Accordingly, the IEP team recommended that the functional analysis take place in the TASB unit at the [REDACTED] School, where [REDACTED] would also attend class as part of the [REDACTED] program for the remainder of the day. (Tr. 2857-2858.)

To implement this portion of [REDACTED]'s IEP, Dr. Whitmarsh proposed to set up an "analog" classroom environment within the TASB unit so as to control as many environmental variables as possible and attempt to pinpoint the exact environmental causes of [REDACTED]'s problematic behaviors. (Tr. 2857-2858.) By its very nature, a functional analysis is individualized to each particular student, and would be so individualized for [REDACTED] (Tr. 2968-2970.)

Dr. Whitmarsh testified that in the TASB unit, he would create a classroom environment that would closely resemble [REDACTED]'s other classroom and would have academic materials relevant to her grade level. (Tr. 2862.) This classroom environment would have classroom-appropriate furniture such as desks and chairs, along with a computer. However, he admitted on cross-examination that he never told the parents this at the March IEP meeting; rather, the parents were told that it would be in a room with no furniture but said that they could put some furniture in there. (Tr. 2903-2904.)

Additionally, while in the TASB unit, [REDACTED] would receive services from a certified special education teacher. (Tr. 2873-2874.) While in the TASB unit, [REDACTED] would do her

schoolwork and work on her IEP goals. (Tr. 2866-2868.) Meanwhile, two individuals would take data on ██████'s behavior. (Tr. 2862, 2938-2939.) Two individuals independently take data to ensure consistency and accuracy. (Tr. 2939.) Children are never left unsupervised during a functional analysis. (Tr. 3127.) Essentially, then, ██████'s school day would be as follows. She would arrive at the Fitzhugh Lee School at 9:00 a.m., the regular starting time, and she would spend approximately 30 minutes with her class doing morning work. She would then spend approximately 90 minutes in the TASB unit for her functional analysis, where she would continue to work on academics and her IEP goals, while TASB personnel conducted the functional analysis. She would then go to lunch with her class, and then return to the TASB unit for another 90 minutes. She would spend the rest of the afternoon with her class. (Tr. 2875-2876.) During the February 2006 IEP meeting and a subsequent one in March 2006, Dr. Whitmarsh explained that he was going to conduct experiments on ██████ for 3 hours a day for up to 10 weeks. (Respt.'s Ex. 79, 85.) He admitted on cross examination that he told ██████'s parents that he planned on wearing protective gear to protect himself during the experiments. (Tr. 2900-2901.)

The variables that Dr. Whitmarsh would control and investigate were those that would be naturally occurring within a classroom environment, such as variables having to do with adult attention or delivery of instruction. While in the TASB unit, ██████ would not experience anything that would not occur in any regular classroom. (Tr. 2889-2890.) Dr. Whitmarsh could then "experiment" with variables that might affect ██████'s behavior, such as adult attention to misbehavior, in the same manner that a math teacher might "experiment" with different instructional methodologies, such as using visual cues, with her students to see what was effective. (Tr. 2890-2891.) The purpose of this functional analysis was to get reliable data on

what specifically contributed to [REDACTED]'s problematic behavior and then to develop treatment based on the data, while maintaining the integrity of the educational process and providing academic instruction. (Tr. 2878-2879, 2896-2898, 3011-3012)) Specifically, the functional analysis would allow the District to pinpoint the antecedents to [REDACTED]'s behaviors. (Tr. 2971-2973.) For instance, if the functional analysis showed that adult attention drove [REDACTED]'s inappropriate behavior, a treatment could be developed to take this into account. (Tr. 2878.)

Although a functional analysis looks at behavior and environmental causes of behavior, such an analysis, undertaken according to the principles of ABA is also useful for behaviors that have a neurological basis, such as those associated with Tourette's syndrome or autism. For instance, stressful or nonpreferred conditions can sometimes cause or exacerbate behaviors that are erroneously described as entirely "involuntary" or "tics." Using the information gleaned from a functional analysis, however, steps can be taken to reduce those environmental conditions that cause stress and lead to these behaviors. Additionally, children can be taught appropriate replacement behaviors or strategies to inhibit those behaviors. (Tr. 3120-3123.) At the time of the IEP meeting in question, there was no hard evidence as to what environmental factors influenced these "tic" behavior in [REDACTED], if they were even "tic" behaviors in the first instance, or even if they were specifically related to any of her diagnoses. (Tr. 3123-3125.)

Parents of children receiving a functional analysis are heavily involved throughout the process, and Dr. Whitmarsh's goal is to have as much parent involvement as possible. Parents are invited to observe sessions with their children, if they wish, and are invited to provide any input they desire. (Tr. 2884-2885, 2935.) At the end of the TASB proposal (of six to eight weeks), Dr. Whitmarsh would present the results of the functional analysis to [REDACTED]'s parents and the IEP team for consideration. (Tr. 2882.)

█'s parents were upset and worried about the placement and Dr. Whitmarsh's plan to conduct experiments on her because everyone realized that to de-escalate █ her tension needed to be reduced and that the experiments would increase her tension. (Tr. 2326.) According to █'s own teacher, a man wearing protective gear and provoking █'s behavior two to three hours a day for well over a month would cause █ stress. (Tr. 2271.) █'s parents had significant concerns about this procedure and expressed the harm it would cause to their child. (Tr. 2271.) █'s teacher also testified that she did not believe it was appropriate to elicit inappropriate actions from her since it would negatively affect her ability to learn. (Tr. 2271-2272, 2282.) █'s teacher testified that she did not believe it appropriate to cause █ stress and anxiety. (Tr. 2307.)

Dr. Curtis testified that a placement at █ was not appropriate for █ because █ needed the cause of her behavior addressed not the behavior itself and because █ was loud and disruptive and █ is easily over stimulated. (Tr. 65-66.) According to her, █ would deteriorate rapidly in a setting such as █ at █, and a placement there would be very devastating for her. (*Id.*) She explained that while full assessment of █'s underlying disabilities did in fact require assessment, everyone already had a strong idea of what they were, and those deficits needed to be addressed. (*Id.*) In her opinion, provoking █ to self-injurious behavior would be a real harm to her. (Tr. 67.) She also testified that the proposed placement in █ and █ "experimental" program would harm █'s chances of ever going back to a real school. (Tr. 67-68.) Placing █ in a room with Dr. Whitmarsh while he was wearing protective gear would produce a heightened amount of anxiety, especially given her prior institutionalization in an orphanage and her posttraumatic stress disorder. (Tr. 68-70.) She recommended, as she had for years to the District, that it address her underlying speech and language issues to see how that affected her behavior. (*Id.*)<sup>23</sup> Dr. Curtis found that the proposed February 2006 IEP placement would be very detrimental and devastating to █ and recommended, given the options the District made available, a home program with

<sup>23</sup> When the District provided █ speech and language services, her IEP's indicate she made progress and her behavior was better. (Respt.'s Ex. 10, 32, p. 165; Respt.'s Ex. 44.) It was not until after speech and language services were discontinued that █ began to regress resulting in the referral to █ (Respt.'s Ex. 10; Respt.'s Ex. 32, p. 165, 270; Respt.'s Ex. 44.)

teachers, speech language pathologist, assistive technology and training in assistive technology, other remediation, and interaction with neurotypical peers.<sup>24</sup> (Tr. 70-71, 74-77.)

█'s therapist, Janice Turner, a certified school psychologist and licensed counselor who is an expert in the area of professional counseling with over 20 years experience, testified that █ should not be placed at █, that it would be the worst placement for her, and that the proposed experiments by Dr. Whitmarsh would traumatize █. (Tr. 169, 174, 188, 193-195.) If █ were to be placed there, Ms. Turner indicated that she did not know if █ would ever recover from the proposed experiment. (*Id.*) Ms. Turner found the proposed experiments abuse. (Tr. 194.) Ms. Turner had observed at █, attended a meeting at school with █'s teacher, saw her periodically during 2004, and then saw her four times in January 2006. (Tr. 220-221.) Ms. Turner recommended █ be provided with assistive technology; a small, quiet learning environment; occupational therapy for her sensory integration issues; speech and language therapy; and counseling. (Tr. 218-219, 222.) Ms. Turner indicated that █'s placement prior to the February 2006 IEP was inappropriate because █ was being suspended repeatedly, her frustration levels were high, her IEP goals were not being met, and she was regressing. (Tr. 222-223.) She also recommended home placement. (Tr. 223.)

Given their disagreement, █'s parents expressed their intent to file a due process complaint and requested to invoke the protections of stay-put, in which █ could remain in her then-current placement, pending the outcome of a due process hearing. (Respt.'s Ex. 79; Respt.'s Ex. 80, p. 530; Tr. 916.) █'s mother was aware that the filing of the due process complaint invoked █'s stay-put placement. (Tr. 1096.) █ has not returned to school

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<sup>24</sup> Dr. Curtis also explained that it was not safe for █ to return to the proposed █ setting or the prior setting. Tr. 78. She stated that for medical reasons home was the best placement for █ until all appropriate assessments were completed, interventions put in place, and an appropriate setting was proposed. *Id.* 139.

since that time, as her parents have kept her out of school since February 14, 2006. (Tr. 554, 1629.)

On or about February 20, 2006, [REDACTED]'s parents filed the instant due process complaint. In the complaint, [REDACTED]'s parents requested the following of the District: (1) "a full school day of instruction in the home (32.5 hours a week or whatever a full week of instruction is in the school setting) with those trained to teach children with autism and [REDACTED]'s other disabilities;" (2) comprehensive evaluations in "all areas of suspected disability (ST including pragmatics, OT, SIT, CAPD, VT, AT, reading rate and fluency, and all other relevant areas);" (3) "all necessary related services, including but not limited to auditory processing intervention, speech and language therapy, ABA therapy, occupational and sensory integration therapy, vision therapy, assistive technology and training;" (4) "an ABA therapist/teacher working with her to reduce the need for assistance and attention and reduce unwanted behavior;" (5) "a strong behavioral modification program;" and (6) "compensatory education" of unspecified duration or amount. (*See generally*, Due Process Complaint [hereinafter, "Complaint"].)

This Complaint, made one week after the IEP meeting in question, was the first time any member of [REDACTED]'s IEP team, including her own parents, had ever suggested that [REDACTED] required educational services to be provided within the home. Indeed, neither [REDACTED]'s parents, or their advocate, ever raised any possibility that [REDACTED] should receive services in the home at the IEP meeting. (Respt.'s Ex. 78; Respt.'s Ex. 79; Tr. 1773.) Moreover, to the District's knowledge, [REDACTED]'s own private providers had never suggested that she needed educational services to be provided within the home. To the contrary, the sole information available to the IEP team from her private providers suggested that [REDACTED] required placement in a special needs classroom within a school environment. (Petr.'s Ex. 36; Petr.'s Ex. 37.) On or about March 15, 2006, long

after the IEP at issue in this hearing request, Dr. Curtis submitted another letter to the District recommending that ██████ required all educational services provided within the home. (Respt.'s Ex. 80, p. 546.) This request listed ██████'s diagnoses as autism spectrum disorder, ADHD, and OCD, but failed to list ██████'s several other diagnoses, including RAD, which Dr. Curtis herself believed to be "primary." (Respt.'s Ex. 80, p. 546; Tr. 46.) Nowhere in this request for hospital/homebound services, or in any other document provided to the District, did Dr. Curtis suggest that any part of the District's February 13, 2006 IEP would be harmful to ██████ (Tr. 3094.) During the trial, Dr. Curtis confirmed that ██████ continues to have reactive attachment disorder and anxiety. (Tr. 62.)

The request for hospital/homebound services provided to the District was not Dr. Curtis's first draft. Instead, she first drafted a request for hospital/homebound services on or about February 27, 2006, well after the February 2006 IEP meeting at issue, and after ██████'s parents had filed their Complaint. On this first draft, Dr. Curtis wrote that ██████ could return to school within one month. (Tr. 108.) The form Dr. Curtis actually submitted to the District, however, stated that it was unknown when ██████ could return to school. (Respt.'s Ex. 80, p. 546.) According to ██████'s mother, she and Dr. Curtis "had been in conversation" regarding hospital/homebound services for ██████ for "almost three weeks" before Dr. Curtis "officially" recommended those services on or about March 13, 2006. (Tr. 1086.) Accordingly, it appears that neither ██████'s parents nor Dr. Curtis had ever discussed the possibility of hospital/homebound services, much less determined that ██████ might require them, until well after the February 13, 2006 IEP meeting in question.

On March 16, 2006, the District convened an IEP meeting to discuss ██████'s parents request for hospital/homebound services. (Respt.'s Ex. 80; Respt.'s Ex. 84.) ██████'s parents

attended this meeting with their attorney. They did not invite any of [REDACTED]'s private providers to attend this meeting. (Respt.'s Ex. 80, p. 530; Respt.'s Ex. 84.) The District determined that it could provide appropriate services to [REDACTED] within the school setting. (Respt.'s Ex. 80; Respt.'s Ex. 84; Tr. 1630.) A homebound placement is the most restrictive setting possible for a child. (Tr. 1630-1631.) The IEP committee (save for [REDACTED]'s parents and their attorney) believed that such a placement was far too restrictive for [REDACTED], as she would not learn or interact with any other students. Further, [REDACTED] would not be able to learn how to function successfully in a classroom, as a child cannot learn to be in school without being in school. (Tr. 1630-1631.) The IEP committee continued to recommend placement in the ~~SAVEN~~ program, with additional assistance from TASB. Significantly, it was specifically discussed that the TASB component could be removed. (Respt.'s Ex. 80, p. 541; Respt.'s Ex. 84.)

### III. CONCLUSIONS OF LAW

The purpose of the IDEA generally is "to ensure that all children with disabilities have available to them [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. . . ." 20 U.S.C. § 1400(d)(1)(A). The IDEA also mandates that schools and parents together develop an IEP, a written statement for each disabled child that includes, *inter alia*, "a statement of the child's present levels of academic achievement and functional performance . . . ; a statement of measurable annual goals . . . ; [and] a statement of the special education and related services . . . to be provided to the child . . . ." § 1414(d)(1)(A)(i)-(iii). "The IEP is more than a mere exercise in public relations. It forms the basis for the [disabled] child's entitlement to an individualized and appropriate education." *Doe v. Ala. State Dep't of Educ.*, 915 F.2d 651, 654 (11th Cir. 1990).

If parents believe their child's proposed IEP is inappropriate, they may file a due process complaint. § 1415(f). However, as the party filing the complaint and seeking relief, [REDACTED] bears the burden of proof as to all issues for resolution. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 537 (2005); GDOE Rule 160-4-7-.18(1)(g)(8) (May 1, 2006). Accordingly, [REDACTED] bears the burden of proving that the IEP proposed by the District was inappropriate under IDEA. Furthermore, claims brought under IDEA are generally subject to a two-year statute of limitations. See § 1415(f)(3)(C). Thus, the cause of action accrues within 2 years of the date the parent knew or should have known about the alleged action that forms the basis of the complaint.

*Id.*

In determining the appropriateness of an IEP, the federal courts have maintained consistently that the analysis must be prospective rather than retrospective. *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1040 (3d Cir. 1993); see also *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999); *O'Toole v. Olathe Dist. Schools*, 144 F.3d 692, 701-02 (10th Cir. 1998). In *Fuhrmann*, the Court famously stated,

The measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date. Neither the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement.

*Id.* "An IEP is a snapshot, not a retrospective. In striving for 'appropriateness' an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, the time that the IEP was promulgated." *Mandy S. v. Fulton County Sch. Dist.*, 205 F. Supp. 2d 1358, 1367 (N.D. Ga. 2000) *aff'd*, 273 F.3d 1114 (11th Cir. 2001) (quoting *Frank S. v. School Comm. of the Dennis-Yarmouth Reg'l Sch. Dist.*, 26 F. Supp.2d 219, 226 n. 15 (quoting *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990))). Therefore, the appropriateness of an IEP is determined only based on the information available to the IEP team at the time it was

developed. Thus, the Court did not rely on any of the results of the evaluations conducted *after* the filing of [REDACTED]'s Complaint in determining whether or not the District violated IDEA.

Furthermore, "[t]o admit a narrative report of an event, or a conversation, or a diagnosis, as a substitute for oral testimony, is to give ... the right to use self-serving statements without the important test of cross-examination." *White v. Regions Bank*, 275 Ga. 38, 41 (2002) (citing *Martin v. Baldwin*, 215 Ga. 293, 299 (1959)) (hospital records which contain opinion evidence are not admissible under the business record exception to the hearsay rule). *See also Brown v. State*, 274 Ga. 31 (2001). Therefore, the Court did not rely on any reports admitted into the record unless they were supplemented by the oral testimony of the maker of the report. Although the Court recognizes that O.C.G.A. § 50-13-15(1) authorizes the use of evidence such as a report of medical, psychiatric, or psychological evaluations *when necessary*, the "proviso for the use of such evidence is that it is necessary to establish facts not reasonably susceptible of proof under the usual rules of evidence in civil non-jury cases." *Finch v. Caldwell*, 155 Ga. App. 813, 815-816 (1980). The "mere failure to call witnesses apparently readily available [does not render] their witness' testimony not reasonably susceptible of proof under the usual rules of evidence." *Id.* Furthermore, in Georgia even in the absence of objection, hearsay is without probative value to establish any fact. *Id.* at 815.<sup>25</sup>

The Supreme Court has held that in order to satisfy its duty to provide FAPE, the District must provide "personalized instruction with sufficient support services to permit [REDACTED] to

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<sup>25</sup> The following hearsay reports were admitted into the record without the support of the oral testimony of the maker: the Neuropsychological Evaluation completed on [REDACTED] by Dr. Johnson on May 18, 2006 (Petr.'s Ex. A), the Occupational Therapy Assessment completed on May 10, 2002 (Petr.'s Ex. 1-5), the Auditory Processing Evaluation completed on June 22, 2006 (Petr.'s Ex. C), the Neuropsychological Evaluation completed on November 2, 2004 (Petr.'s Ex. 13-33), the eye examination and visual perception evaluation completed on March 29, 2006 (Petr.'s Ex. 57-60), the attachment disorder assessment completed on April 6, 2000 (Respt.'s Ex. 13), the EEG test completed on March 11, 2002 (Respt.'s Ex. 23), the Autism Diagnosis from Cascade Center for Family Growth completed on December 10, 2001 (Respt.'s Ex. 28), the Psychoeducational Report completed on April 23, and 30, 2002 (Respt.'s Ex. 34), and the Occupational Therapy Assessment completed on May 10, 2002 (Respt.'s Ex. 36).

benefit educationally from that instruction." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 203, 102 S. Ct. 3034, 3049, 73 L. Ed. 2d 690 (1982). This standard, that the District must provide the child "some educational benefit," *Id.* at 198, has become known as the *Rowley* "basic floor of opportunity" standard. *J.S.K v. Hendry County Sch. Bd.*, 941 F.2d 1563, 1572-73 (11<sup>th</sup> Cir. 1991). In addressing the level of educational benefit required under IDEA, the Eleventh Circuit held in *J.S.K.*:

[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 F.2d 1576, 1580 (11<sup>th</sup> Cir. 1991). This opportunity provides significant value to the handicapped child who, before [IDEA] 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 F.2d at 665. If the educational benefits are adequate based on surrounding and supporting facts, [IDEA] requirements have been satisfied. While a trifle might not represent "adequate" benefits, *see, e.g., Doe. V. Alabama State Dep't of Educ.*, 915 F.2d 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 v. Indian River County Sch. Bd.*, 249 F.3d 1289 (11<sup>th</sup> Cir. 2001).

The Supreme Court has formulated a two-part test in analyzing whether a FAPE was provided in cases arising under the IDEA. This Court must determine: (1) whether the District has complied with the procedures set forth in the IDEA, and (2) whether the IEP developed pursuant to the IDEA is reasonably calculated to enable ████████ to receive educational benefit.

*Rowley* at 206-07. However, in matters alleging a procedural violation, this Court may find that

█ did not receive FAPE only if the procedural inadequacies—

- (I) impeded his right to FAPE;
- (II) significantly impeded his parents' opportunity to participate in the decision-making process regarding the provision of FAPE to █; or
- (III) caused a deprivation of educational benefits.

*See* § 1415 (f)(3)(E)(ii).

With regard to the first prong of the *Rowley* two-part test, the Court concludes that any procedural inadequacies that may have existed did not impede █'s right to FAPE, did not significantly impede her parents' opportunity to participate in the decision-making process regarding the provision of FAPE to █; and did not cause a deprivation of educational benefits. Therefore, █ has not met the burden of showing a procedural violation that prevented her from receiving FAPE. *See* § 1415 (f)(3)(E)(ii).

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 11<sup>th</sup> 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 F.3d 630 (8<sup>th</sup> Cir. 2003), *cert. denied*, 540 U.S. 984 (2003), 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 F.3d 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. The school district 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 the school district, 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."<sup>26</sup> *Id.* at 638. Like C.J.N., the Court concludes that [REDACTED]'s academic progress was

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<sup>26</sup> Indeed, courts in several 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 the school district has provided the student a FAPE in accordance with IDEA. *See, e.g., Adam J. v. Keller Independent Sch. Dist.*, 328 F.3d 804 (5<sup>th</sup> Cir. 2003) (academic progress of student with severe behavioral problems suggested that his IEPs were

even *more* relevant, given her behavior difficulties. The Court concludes therefore that [REDACTED]'s IEPs were reasonably calculated to provide educational benefit.

As to the placement issue, [REDACTED] bears the burden of proof that the District's proposed placement is inappropriate and that her proposed placement is appropriate. The Court concludes that [REDACTED] has set forth no persuasive evidence demonstrating that the District's proposed [REDACTED] placement is inappropriate or that her proposed placement is appropriate.

Given [REDACTED]'s emotional and behavioral functioning, the Court concludes that the District developed an appropriate IEP that took into account her needs known to the IEP team at the time. While [REDACTED] had always performed relatively well and made progress academically, her significant behavior difficulties were increasingly interfering with and jeopardizing her ability to continue such progress. It is clear that the District affirmatively considered the evidence provided by the parents and other team members, and it appropriately offered an educational placement at [REDACTED] that is far less restrictive, and undeniably more appropriately suited to [REDACTED]'s needs, than the one that her parents seek for her.

However, the Court agrees with [REDACTED] that the TASB component should be removed from her [REDACTED] placement since the proposed experiments by Dr. Whitmarsh would traumatize [REDACTED], especially while Dr. Whitmarsh is wearing protective gear, which would produce a heightened amount of anxiety, given her prior institutionalization in an orphanage and

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appropriate<sup>26</sup>); *Kings Local Sch. Dist. v. Zelazny*, 325 F.3d 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 F.3d 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); *W.C. v. Cobb County School District*, 407 F.Supp.2d 1351 (2005) (academic progress of a student with severe behavioral problems is an important factor in determining whether student receives FAPE); *Nygren v. Minneapolis Public Schools*, 2001 U.S. Dist. LEXIS 21980, \* 9 (D.C. Minn. 2001), *aff'd*, 323 F.3d 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 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).

her posttraumatic stress disorder. Also, since [REDACTED]'s teacher had discontinued the use of a "consequences" program for her inappropriate behavior after she found it to be ineffective with [REDACTED] in the classroom, the Court agrees with [REDACTED] that the use of a point sheet for her at [REDACTED] is not appropriate.

However, there is also no evidence in the record that supports [REDACTED]'s claim that a homebound instructional placement is appropriate. Homebound placements, like the one requested by [REDACTED], are considered to be the most restrictive type of placement. *See Dept. of Educ. v. Katherine D.*, 727 F.2d 809, 818 (9<sup>th</sup> Cir. 1983) ("Hospitalized and homebound care should be considered to be among the least advantageous educational arrangements [and are] to be utilized only when a more normalized process of education is unsuitable for a student who has severe health restrictions"). Given IDEA's very strong emphasis on educating disabled students in the least restrictive environment, requests for home instruction should be viewed even more skeptically.

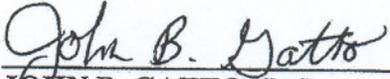
[REDACTED] must show that this setting is appropriate or that the District's IEP team failed to consider it as a viable placement option for her. She has done neither. She did not put forth evidence that would support a finding that the IEP team should have considered a more restrictive setting such as homebound instruction at the time of the February 13, 2006 IEP or that the more restrictive homebound was appropriate. Furthermore, Dr. Curtis submitted a letter to the District dated February 10, 2006, which recommended that [REDACTED] stay in a "special needs classroom" and that her "educational needs will be better served if she is in a special needs classroom." When Dr. Curtis completed the first draft of the request for hospital/homebound services, on or about February 27, 2006, she also wrote that [REDACTED] could return to school within one month. The final form Dr. Curtis actually submitted to the District, after consultation with

█'s mother, stated that it was unknown when █ could return to school. Moreover, █'s own private providers had never suggested that she needed educational services to be provided within the home. To the contrary, the sole information available to the IEP team from her private providers suggested that █ required placement in a special needs classroom within a school environment. Therefore, the Court concludes that a hospital/homebound placement would not be the LRE that █ could appropriately receive a FAPE. Accordingly,

#### IV. ORDER

**IT IS HEREBY ORDERED THAT** the relief requested by █ is **DENIED** except that the TASB component and the use of a point sheet shall be removed from her █ program. The Court also directs the District without undue delay to proceed with additional testing of █ to investigate autism eligibility. The Court further directs the District without undue delay to schedule an IEP meeting to review all relevant evaluations completed during the pendency of this proceeding, to the extent it has not already done so, and to take necessary steps to implement any changes the IEP team deems appropriate based upon those evaluations and the Court's directive to remove both the TASB component and the use of a point sheet from █'s █ program.

**SO ORDERED THIS** 11th day of December, 2006.

  
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JOHN B. GATTO, Judge