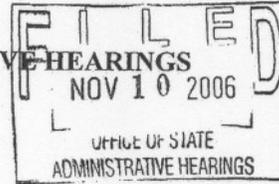


06-006630

IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA



[REDACTED], by and through his Parent, [REDACTED],
Petitioner,

v.

PAULDING COUNTY SCHOOL
DISTRICT,
Respondent.

Administrative Action No:
OSAH-DOE-SE-0627946-110-Gatto

FINAL ORDER

COUNSEL: Chris E. Vance, for Petitioner.

Neeru Gupta, for Respondent.

GATTO, Judge

I. INTRODUCTION

This action came before the Court pursuant to a complaint filed by Petitioner [REDACTED], by and through his mother, [REDACTED] ("Mrs. [REDACTED]"), against Respondent Paulding County School District alleging that the District failed to offer him a free appropriate public education ("FAPE") in violation of 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 300.² Specifically, [REDACTED] alleges that to receive FAPE, he requires both a residential placement, as well as a homebound placement. The District responds that it did offer [REDACTED] FAPE in the least restrictive environment ("LRE"), but that Mrs. S. refuses to allow him to attend school. For the reasons indicated below, the Court finds that the District offered FAPE to [REDACTED] in conformity with IDEA and therefore, [REDACTED]'s requested placements are **DENIED**.

¹ The action was originally styled erroneously without inclusion of [REDACTED]'s parent.

² Citations to the federal regulations are to the 2006 federal regulations implementing IDEA, which became effective on October 13, 2006.

II. FINDINGS OF FACT

██████████ is a thirteen-year-old disabled student residing within the District and is entitled to receive special education services pursuant to IDEA. (Respt.'s Ex. 109.)³ ██████████ entered the District in September 2001 in his third grade year when he was eight years old. At that time, he had already been diagnosed with attention deficit hyperactivity disorder ("ADHD") and oppositional defiant disorder ("ODD"). (Respt.'s Ex. 2, 6.) By January 2, 2006, ██████████'s only diagnoses referenced his complex partial seizure disorder and "behavior problems." (Petr.'s Ex. 726.) As of January 25, 2006, however, ██████████'s only diagnosis was "major depression." (Petr.'s Ex. 754.)

The District first evaluated ██████████ in September 2001. (Respt.'s Ex. 6.) At that time, ██████████ had been attending a private school paid for by Ms. ██████████ (Respt.'s Ex. 5, 6.) The District's evaluation showed that ██████████'s intellectual functioning to be in the overall average range, as was his academic achievement and visual-motor integration. However, ██████████ did display some distractibility and relatively slow processing speed, as well as relatively low achievement in the area of reading comprehension. (Respt.'s Ex. 6.)

A subsequent evaluation of ██████████, privately obtained by Ms. ██████████ while he was enrolled in a private school, showed similar results, although this evaluation also diagnosed ██████████ with "Written Expression Disorder." (Respt.'s Ex. 7.) In December 2001, the District held an IEP meeting to review the psychological information available about ██████████, as Ms. ██████████ had elected to enroll him at ██████████ Georgia Elementary School, a school within the District. The IEP committee determined that ██████████ was eligible to receive special education services under the eligibility

³ Respondent's exhibits are designated as "Respt.'s Ex. ", in accordance with their exhibit number. ██████████'s exhibits are designated as "Petr.'s Ex.", in accordance with the Bates number on each page, since ██████████'s exhibits were not separately identified. For instance, ██████████'s Bates stamped page 200 would be designated as "Petr.'s Ex. 200." Citations to the trial record are designated as "Tr." followed by the page number(s).

category of Other Health Impaired ("OHI"), given his diagnosis of ADHD and the impact of his ADHD on his educational performance. (Respt.'s Ex. 9-11.)

On January 8, 2002, the District convened another IEP meeting for [REDACTED]. This IEP placed [REDACTED] in a regular education third grade classroom for the majority of the day except for two segments per day (approximately 1-1/2 to two hours per day) in a small group resource classroom where he was to receive extra assistance for his reading comprehension and writing skills. The resource setting was a small group pullout model consisting of approximately six other students. (Tr. 597-599.) The IEP committee developed goals and objectives regarding [REDACTED]'s reading and writing skills, as well as goals to help him maintain on-task behavior. This IEP was to be in effect from January 9, 2002 to January 8, 2003. Accordingly, this IEP would span the latter half of [REDACTED]'s third grade year, and the first half of his fourth grade year. Ms. [REDACTED] signed this IEP, indicating her agreement with it. (Respt.'s Ex. 12.)

Joseph Wilson was [REDACTED]'s teacher for third, fourth, and fifth grade and taught reading and language arts in a small group resource classroom between 1-1/2 to 2 hours per day. (Tr. 599.)⁴ [REDACTED] did have some trouble in the third grade, especially with exhibiting tantrums when he did not get his way. He also had "some difficulties with motivation regarding his schoolwork." (Tr. 600.) Also in the third grade, [REDACTED] had a very difficult time making friends. (Tr. 600.) By the fifth grade, [REDACTED]'s peer relationships had improved, and Mr. Wilson saw [REDACTED] make some "really good friendships." (Tr. 600-601.)

Mr. Wilson did not require any specific behavior management plan for [REDACTED] as part of an IEP to manage his behavior. Rather, Mr. Wilson simply used his standard classroom management plan in which students earned privileges for good behavior, along with some

⁴ Mr. Wilson was qualified as an expert in the areas of planning of educational services to disabled students for special education purposes and provision of educational services to disabled students for special education purposes. (Tr. 596.)

consequences, such as time-out, for inappropriate behaviors like tantrums. (Tr. 600-601) By the fifth grade, [REDACTED]'s behavior had improved so much that he no longer required any behavioral goals in his IEP. (Respt.'s Ex. 14; Tr. 601.)

During his third and fourth grade years, [REDACTED] had IEP goals that focused on [REDACTED] paying attention in class, complying with directions, following school rules, and relating to peers in a positive manner. (Respt.'s Ex. 12, 13.) By his fifth grade year, however, [REDACTED]'s only nonacademic goal required that he turn his homework in on time. (Respt.'s Ex. 14.) By the fifth grade, [REDACTED]'s motivation to complete his academic work had also improved. [REDACTED] was certainly capable of the academic work and always "did well at anything he did attempt." (Tr. 601.) While he still had some difficulties, [REDACTED] "generally did all his work in class." (Tr. 601.) In order to address [REDACTED]'s motivation, Mr. Wilson would give [REDACTED] a choice of either completing his work or missing an enjoyable activity. This method would generally be successful. While [REDACTED]'s level of noncompliance with work completion was a significant issue when he was in the third grade, it was not significant by the fifth grade. (Tr. 601-602.)

During [REDACTED]'s enrollment at New Georgia Elementary School, he made steady and consistent progress. [REDACTED] met or partially met all of the goals and objectives on his IEPs, and he consistently received good grades on his report cards. (Respt.'s Ex. 12-14, 19, 20.) Additionally, [REDACTED]'s performance on testing measures showed his progress, as well. For instance, from January 8, 2003 to January 7, 2004, [REDACTED] improved his reading decoding abilities on the Kaufman Test of Educational Achievement from a 4.0 grade level to a 5.3 grade level. (Respt.'s Ex. 14.) He met expectations in all areas of the Georgia Criterion Referenced Competency Test ("CRCT"), with the exception of the Reading portion of the CRCT given during his fourth grade year. By his fifth grade year, however, [REDACTED] had improved his

performance and once again met expectations in this area as well. (Respt.'s Ex. 22, 25, 26.)

Similarly, ██████ progressed in his writing abilities, as shown by his performance on the Georgia Writing Assessment. From third grade to fifth grade, ██████ progressed from a Stage 3 "Focusing Writer" to a Stage 4 "Experimenting Writer." (Respt.'s Ex. 23, 27.)

For his sixth grade year in the 2004-2005, ██████ attended the District's ██████ Middle School. Upon entering sixth, ██████ had trouble with the transition from elementary school to middle school. This transition is one of the most difficult a child makes. (Tr. 73, 1319-1320.) However, ██████ was adjusting to middle school and making progress. (Tr. 1319-1320.) Pursuant to his IEP, ██████ attended co-taught classes for Math, Language Arts/Reading, Science, and Social Studies, where the classes contained a regular education teacher, as well as a special education teacher or a paraprofessional. ██████ attended homeroom, physical education, music, and all other elective classes in the general education environment. (Respt.'s Ex. 14.)⁵ ██████ was taught and was required to learn the same material as all other sixth grade students in his classes. (Tr. 728, 730-732, 1328.)

Mr. Bayne Smith was an inclusion special education teacher at ██████ Middle School and taught ██████ both language arts and social studies. In addition, Mr. Smith was ██████'s case manager. As his case manager, Mr. Smith was primarily responsible for tracking ██████'s academic, behavioral, and social progress. He was the point of contact for all of ██████'s teachers, should they have any concerns about him, and served as the liaison between his teachers and Ms. S. (Tr. 650.) Mr. Smith tracked ██████'s progress by the grades that he

⁵ Ms. S. alleges that the District was supposed to enroll Z.M.S. in a keyboarding class upon the start of his sixth grade year. Further, she alleges that she requested that Z.M.S. have an AlphaSmart, a portable word processing device. The relevant IEP, however, contains no such provisions. Ms. S. signed this IEP, indicating her agreement with it. (Respt.'s Ex. 14; Tr. 208, 672.) Nonetheless, the District later placed Z.M.S. in such a class. (Tr. 208.)

earned and by staying in contact with his other teachers. He communicated with these teachers regarding ██████'s progress at least once or twice per week, and sometimes daily. (Tr. 650-652.)

While in the sixth grade, ██████'s academics were, in general, a little above average for other special education students. He did have some socialization and organizational difficulties common for special education students. (Tr. 652.) ██████'s organizational difficulties were particularly common to students entering sixth grade, and organization is "one of the biggest challenges" that students face upon entering middle school. (Tr. 653.) Overall, ██████'s difficulties with organization were "typical of sixth graders." (Tr. 678.) ██████'s teachers did not note any difficulty with his ability to visually track or read. In fact, as a precursor to a child being admitted into the special education program, students must pass both a vision and hearing screening to that any vision and hearing issues are ruled out. (Tr. 732-733.) Z.M.S. has always passed his vision and hearing screenings. (Respt.'s Ex. 6, 94.)

██████ had writing difficulties, as reflected in his IEP. (Respt.'s Ex. 14; Tr. 652.) In particular, ██████ had difficulty producing written work that required original thinking, although he could articulate his thoughts. (Tr. 654.) ██████ received assistance in this area, particularly by receiving extra time to complete his assignments. (Tr. 654.) This strategy appeared to be successful, as ██████ was not missing any written assignments by the time Ms. █ withdrew him from the District on October 8, 2004. (Tr. 654-655.) At one point, ██████ was missing a bit of his work for science class. (Petr.'s Ex. 141.) Mr. Smith was aware of the situation, and ██████ was able to make up these missing assignments. (Tr. 702.) It is very typical for sixth grade students to miss assignments at any given time during a grading period. (Tr. 655, 1322-1327.) When ██████ displayed difficulty with work completion, his teachers would work with him and Ms. █ to assist ██████ in completing his work. For instance, Ms. █ and ██████'s teachers

communicated via email regarding [REDACTED] and issues that would periodically arise. (Petr.'s Ex. 122-159.) The concerns raised in these emails were usual for a special education child beginning sixth grade. (Tr. 736-737.) At times, he simply needed extra time or extra encouragement to complete assignments.

When [REDACTED] became frustrated, his outward signs of frustration did not include any aggression of any sort. Rather, they were limited to drawing deep breaths and exhaling them, and sometimes turning against the wall away from the teacher. (Tr. 680-681.) While in sixth grade, [REDACTED] had only one disciplinary infraction, "horseplay that turned into a scuffle." (Petr.'s Ex. 121.) This infraction resulted in a one-day out of school suspension. (Respt.'s Ex. 17.) In addition, while in the sixth grade, [REDACTED] was involved in another, minor, incident in the cafeteria. [REDACTED] had become upset because he was not able to sit by one of his friends during the lunch period. Mr. Smith removed [REDACTED] from the cafeteria and talked with him for a few minutes. This intervention was sufficient, and [REDACTED] was able to return to lunch and finish. (Tr. 662-664.) No disciplinary referral resulted from this incident, meaning that the incident was not of a serious nature and that [REDACTED] was able to modify his behavior appropriately such that a disciplinary referral was not warranted. (Tr. 734, 1525, 1555-1556.)

Overall, [REDACTED]'s behavior was not out of the ordinary. In fact, students with much more severe behavioral difficulties, including some of [REDACTED]'s own sixth grade classmates, were successfully managed within the school setting. (Tr. 666-667.) Mr. Smith never saw any behavior from [REDACTED] that could warrant involving the police or law enforcement. (Tr. 664.) Likewise, he never saw any behavior from [REDACTED] that he believed would warrant placing [REDACTED] in a residential institution. (Tr. 667.) Furthermore, in Mr. Smith's opinion, based on his own interactions with [REDACTED] as well as his review of his records, [REDACTED] was making adequate

progress academically, socially, and behaviorally at the time Ms. [REDACTED] unilaterally withdrew him from the District. (Tr. 664-666.)

On October 8, 2004, less than two months into his sixth grade year, Ms. [REDACTED] withdrew [REDACTED] from the District to place him in the Stone Mountain School (“SMS”), a residential facility in North Carolina. (Respt.’s Ex. 16.) The only notice she gave to the District was to send an email on October 7, 2004 to his teachers. (Petr.’s Ex. 157-159.) Although Ms. [REDACTED] had been “working on” transferring [REDACTED]. “for some time,” this October 7, 2004 email is the first and only notice she gave to the District.⁶ The email did not express any dissatisfaction with [REDACTED]’s IEP or his performance at South Building Middle School. (*Id.*) Furthermore, Ms. [REDACTED] characterized [REDACTED]’s behavior outside of the school environment, specifically his behavior at their religious congregation, as the “last straw” that motivated her decision to place [REDACTED] in a residential institution.⁷ (Petr.’s Ex. 437.) During his sixth grade year, Ms. [REDACTED] never notified the District that she believed [REDACTED]’s IEP to be inappropriate or inadequate. (Tr. 669-670.) In addition, Ms. [REDACTED] never requested any evaluation of [REDACTED] during this time or requested any particular related services, such as vision therapy or the services of a behavior specialist. (Tr. 733, 735.) Likewise, [REDACTED]’s teachers did not see a reason to call an IEP meeting or to provide other services, such as those of a behavioral specialist, as the issues [REDACTED] presented were being successfully addressed. (Tr. 684, 696, 707, 735, 1513-1514.)

At the time Ms. [REDACTED] withdrew [REDACTED] from South Building Middle School, he had completed all of his assignments in his math class and had earned a grade of 94. (Respt.’s Ex. 15; Tr. 1328-1329.) It would be impossible for [REDACTED] to have earned such a high grade unless

⁶ Ms. [REDACTED] alleges that she sent an email to all of [REDACTED]’s teachers “a week ahead of time” before making the decision to send [REDACTED] to Stone Mountain School. (Tr. 418.)

⁷ Ms. [REDACTED] alleges that only [REDACTED]’s keyboarding teacher, Ms. Kelly Wolfe, responded to her email. (Tr. 235, 418.) In reality, several teachers responded, as shown by [REDACTED]’s own documents in evidence. (Petr.’s Ex. 157-159.)

he had completed his schoolwork. (Tr. 1553-1554.) [REDACTED] had learned that he needed to do his work within the school setting and was successfully completing it, as reflected in his grades. (Respt.'s Ex. 15; Tr. 1374.) At the time of his withdrawal, [REDACTED] was performing well academically and was making progress. (Tr. 1330, 1533-1534; Respt.'s Ex. 15.)⁸

On October 11, 2004, just four calendar days after Ms. [REDACTED]'s email to the District, she enrolled [REDACTED] at SMS where he remained for a period of 10 months. (Tr. 500-502.) As part of its enrollment agreement, [REDACTED] specifically reserved the right to involve law enforcement regarding its students. (Respt.'s Ex. 29.) Upon arriving at SMS, [REDACTED] was described as a "sweet boy the majority of the time" by [REDACTED] staff. (Respt.'s Ex. 32.) After 10 months of enrollment at SMS, however, it became apparent that [REDACTED]'s behavior was deteriorating. Indeed, by April 2005, [REDACTED] staff reported that [REDACTED]'s level of respecting others, cooperating with others, following directions, and working on his personal goals had decreased from the time he had arrived. (Respt.'s Ex. 30.) For instance, in February 2005, [REDACTED] was forced to spend 24 hours in isolation for "hitting another boy in the back three times." (Petr.'s Ex. 185.) He also began "lashing out both physically and verbally" and destroying property. (Petr.'s Ex. 185, 187.) According to Ms. [REDACTED], [REDACTED] operates on a level system, with levels zero through five. At the end of ten months, Ms. [REDACTED] testified that [REDACTED] was still on level zero. (Tr. 237) Ms. [REDACTED] acknowledges that [REDACTED] was not successful at [REDACTED]. (Respt.'s Ex. 89.)

Additionally, [REDACTED] required two separate psychiatric hospitalizations at [REDACTED] Hospital in July 2005 during his enrollment at [REDACTED]. In early July 2005, during his enrollment at SMS, [REDACTED] attempted to commit suicide and was involuntarily committed in [REDACTED], a

⁸ Mr. Smith filled in [REDACTED]'s language arts grade himself. (Tr. 656.) Based on his duties as [REDACTED]'s case manager, Mr. Smith had no reason to doubt the accuracy of these grades. (Tr. 657.)

psychiatric hospital.⁹ (Petr.'s Ex. 229; Respt.'s Ex. 41-51.) ~~Capestone~~ noted that a psychosocial stressor/precipitant to ~~Z.M.S.~~'s admission to ~~Capestone~~ was his boarding school placement at SMS, a placement that ~~Z.M.S.~~ described as "the most disappointing thing" in his life. (Respt.'s Ex. 46, 48.) He was discharged on July 18, 2005, but was readmitted to ~~Capestone~~ on July 21, 2005 for "suicidal ideation, as well as [being] uncontrollably physically violent, as well as verbally violent."¹⁰ (Petr.'s Ex. 229; Respt.'s Ex. 51; Respt.'s Ex. 53.) Once again, it was noted that a psychosocial stressor/precipitant to ~~Z.M.S.~~'s admission to ~~Capestone~~ was his "prolonged" boarding school placement at SMS. (Respt.'s Ex. 54.)

In August 2005, Ms. ~~●~~ enrolled ~~Z.M.S.~~ at ~~Meridell~~ Achievement Center ("~~Meridell~~"), another residential institution in Texas, and the University Charter School ("UCS"), which provided educational services to ~~Z.M.S.~~ on ~~Meridell~~'s campus.¹¹ (Tr. 500-502.) ~~Meridell~~ developed an IEP and treatment plan for ~~Z.M.S.~~. When developing an IEP for ~~Z.M.S.~~ (developed on or about September 23, 2005), ~~Meridell~~ did not invite any personnel from ~~Stone Mountain~~ School to attend. (Respt.'s Ex. 58, 61; Tr. 502.) ~~Meridell~~ found that Z.M.S.'s only category of eligibility for special education services to be OHI. (Respt.'s Ex. 61.) There is no indication on this IEP that ~~Z.M.S.~~ ever received any related services, such as occupational therapy, speech language therapy, or assistive technology services. (Respt.'s Ex. 58, 61.) ~~Z.M.S.~~ made "very little progress" while at Meridell, as acknowledged by ~~Meridell~~ itself." (Petr.'s Ex. 355.) Ms. ~~●~~ likewise acknowledged that ~~Z.M.S.~~ had not been successful at ~~Meridell~~, did not make progress,

⁹ By the time of his July 2005 involuntary commitment into ~~Capestone~~, ~~Z.M.S.~~ gained an additional diagnosis of "Depressive Disorder – Not Otherwise Specified." (Respt.'s Ex. 51.)

¹⁰ During his second admission into ~~Capestone~~, he received yet another diagnosis of "Anxiety Disorder – Not Otherwise Specified." (Respt.'s Ex. 54.)

¹¹ By the time he arrived at ~~Meridell~~ Achievement Center in August 2005, ~~Meridell~~'s treatment plan referred to bipolar disorder, but eliminated the diagnoses of depressive disorder and anxiety disorder.¹¹ (Respt.'s Ex. 58.) However, there is no evaluation in evidence that actually diagnosed ~~Z.M.S.~~ with such a disorder. Rather, it appears for the first time on ~~Meridell~~'s treatment plan. (Respt.'s Ex. 58.) Further, those who have worked with ~~Z.M.S.~~, including Ms. ~~●~~ herself, acknowledge that his treating professionals are uncertain as to whether ~~Z.M.S.~~ actually has such a disorder. (Petr.'s Ex. 230; Respt.'s Ex. 149; Tr. 110-113.)

and was able to stay for only two months. (Respt.'s Ex. 89; Tr. 268-269.) Neither ██████ nor UCS provided any guarantee that law enforcement would not be summoned in response to a student's behavior or any other circumstance. In fact, as part of ██████'s and UCS's Facility Behavior Management Plan, "any rule violation constituting a violation of criminal law [was to be] referred to the executive director for consideration of prosecution." (Respt.'s Ex. 61.)

On October 3, 2005, Ms. █ enrolled ██████ at SUWS of the Carolinas, an outdoor wilderness program with no academic component. Like ██████ and ██████, SUWS did not provide any assurance that it will not involve law enforcement regarding a child. Rather, the SUWS enrollment agreement and application materials specifically reserved the right of SUWS to involve law enforcement. For instance, SUWS provided that law enforcement were "directed to detain and retain custody" of any child who ran away from the program. Likewise, SUWS retained the right to disclose otherwise private information regarding its students "to law enforcement officials...for law enforcement purposes. For example, disclosures were authorized to identify or locate a suspect, witness, or missing person; to report a crime; or to provide information concerning victims of crimes." (Respt.'s Ex. 65-66, 89; Tr. 270, 500-502.) On November 30, 2005, Z.M.S. was discharged from SUWS. It was noted on ██████'s Discharge Summary that he required a "positive peer environment." (Respt.'s Ex. 70.) By that time, Ms. █ had elected to enroll ██████ at ██████ School ("CCBS"), another residential facility. (Respt.'s Ex. 70.) CCBS was specifically recommended as appropriate for ██████ both by Ms. █'s private educational consultant, Tamara Ancona, and by a SUWS employee, Jesse Quam. (Respt.'s Ex. 73, 75.)

In early October 2005, Ms. [REDACTED] contacted Ms. LaVerne Suggs, then the District's Special Education Director spoke with her several times.¹² At no time during these telephone conversations did Ms. [REDACTED] disclose that she was a resident of the District. (Tr. 1435-1436.) Rather, Ms. [REDACTED] informed Ms. Suggs that she had a child in a residential facility in Texas whom she wanted to move closer to home and wanted to know whether the District offered assistance. (Tr. 1435.) Ms. Suggs did not realize that Ms. S. was a resident of the District, but gave her general information regarding residential schools in Georgia. (Tr. 1435-1436.) In late October 2005, Ms. [REDACTED] informed Ms. Suggs that [REDACTED] was in a residential wilderness camp and that she had already determined that he would attend [REDACTED] School ("CCBS"), a residential facility in South Carolina. (Tr. 1436.) At no time did Ms. Suggs ever inform Ms. [REDACTED] that the District would pay for a residential placement for [REDACTED] (Tr. 1572, 1575, 1607, 1610-1612.) Similarly, there is no evidence that Ms. Suggs or anyone else from the District contacted the Georgia Department of Education and represented that the District would place [REDACTED] in a residential setting. (Tr. 143-161.)

On November 21, 2005, Ms. Suggs learned that [REDACTED] was a resident of the District after someone in her office had located a previous District file for [REDACTED]. (Tr. 1437.) Immediately upon learning that he was a resident, the District began the process of convening an IEP meeting for [REDACTED], which was held on November 28, 2005. (Respt.'s Ex. 76; Tr. 1437-1438.)¹³ Ms. [REDACTED] and Ms. Kathy Whitmire, executive director of CCBS, attended this IEP meeting by phone, along with Jesse Quam, an employee of SUWS, the outdoor wilderness camp that [REDACTED] had

¹² Ms. Suggs was qualified as an expert in the areas of planning and provision of educational services to disabled students, as well as administrative and supervision of special education programs. (Tr. 1421, 1423.)

¹³ Since the time that Ms. [REDACTED] contacted Ms. Suggs in October 2005, the District had attempted to obtain releases from Ms. [REDACTED] in order to obtain full information from the various residential placements in which Ms. [REDACTED] had enrolled [REDACTED]. There is no such release in evidence. (Tr. 1591-1594.) Ms. S. provided what she purported to be a signed release to the District. (Petr.'s Ex. 816.) However, this release was insufficient, as it did not specify the institution, the person with the records, or the records sought. (Petr.'s Ex. 816; Respt.'s Ex. 93, 111; Tr. 1616.)

attended. Ms. [REDACTED] informed the IEP team that she had already determined that [REDACTED] would attend CCBS as of December 1, 2005. (Tr. 1437-1438.) Ms. [REDACTED], Ms. Whitmire, and Mr. Quam all advocated for placement at CCBS. (Respt.'s Ex. 76; Petr.'s Ex. C; Tr. 397; 1600.) Although the remaining members of the IEP committee did not believe that a residential placement was necessarily warranted for [REDACTED], they nevertheless agreed to visit CCBS. (Respt.'s Ex. 78; Petr.'s Ex. C; Tr. 1438.) Also at this meeting, the IEP team determined that all the academic goals drafted at UCS just two months earlier could be continued. (Respt.'s Ex. 58, 61, 78.)

[REDACTED] began attending CCBS on December 1, 2005. (Tr. 500-502.) During his enrollment at CCBS, [REDACTED] continued to display inappropriate behaviors, "was threatening to a couple of the boys [t]here [and] tried to kick the staff. He picked up a stool and [attempted] to throw it through the window, banging his head on the window." (Tr. 375.) Additionally, [REDACTED] "often would engage in power struggles." (Tr. 375.) Ms. Whitmire described [REDACTED] as "chronically violent."¹⁴ (Tr. 381.) [REDACTED] was enrolled at CCBS for a period of just 23 days. (Tr. 371.) CCBS made no promise to parents of its students that it would not involve law enforcement regarding their children. Ms. Whitmire acknowledged that nothing in CCBS's enrollment agreement would have prevented the parents of a child from pressing criminal charges against another child for events occurring at CCBS. (Tr. 398-400.) In fact, CCBS specifically also reserved the right to involve law enforcement and provided no assurance that law enforcement would not be involved in any given circumstance. (Tr. 1681-1682.)

¹⁴ [REDACTED] alleged both at trial as well as in his pleadings, that he had broken a lead pipe and physically threatened an adult with it while at CCBS. However, Ms. Whitmire had no personal knowledge of any such event. Furthermore, there is no documentation of any such event, and she testified that if such an event had happened, it would have been documented. (Tr. 400-401, 1675, 1681-1682.)

Ms. Suggs and Ms. Caryn Coleman¹⁵ visited CCBS on or about December 9, 2005, staying from approximately noon to four p.m. (Tr. 1437.) During their visit, Ms. Suggs and Ms. Coleman met with Ms. Whitmire, who explained the philosophy of CCBS. Ms. Suggs and Ms. Coleman also met ██████, who was "absolutely delightful" with a good sense of humor. (Tr. 1454-1456, 1627-1628.) At no time during their visit did ██████ display any physical or verbal aggression. (Tr. 1456, 1629.) After the visit, the District convened another IEP meeting on December 16, 2005. (Respt.'s Ex. 78.) Ms. ██████ attended this meeting in person, and Ms. Whitmire attended by phone. Ms. ██████ again requested that the District place ██████ at CCBS. She also stated that ██████'s various diagnoses were "not definite" and that "the people she was working with were thinking that maybe he might not be bipolar after all." (Tr. 1566-1567.) Ms. Whitmire again recommended that he be placed at CCBS.¹⁶ (Tr. 397-398.) However, both Ms. Coleman and Ms. Suggs, experts in the areas of planning and provision of educational services to special education students, opined that the December 2005 IEP was appropriate for ██████ (Tr. 1589, 1631.)

Also at the December 2005 IEP meeting, the District requested that Ms. ██████ provide her parental consent to conduct the following evaluations: psychoeducational, occupational therapy, assistive technology, and speech language. (Respt.'s Ex. 109; Petr.'s Ex. D; Tr. 1632.) Ms. ██████ did not return the signed parental consent for evaluation until January 19, 2006, over one month later. (Respt.'s Ex. 91.) At this IEP meeting, the IEP committee recognized that ██████

¹⁵ Ms. Coleman was qualified as an expert in the area of planning and provision of educational services to disabled students. (Tr. 1617-1628.)

¹⁶ Ms. Whitmire has had no contact with the District since December 2005, and Ms. ██████ has not invited her to attend any IEP meetings since that time. (Tr. 402.) Ms. Whitmire has not seen ██████ in any setting other than CCBS. (Tr. 401) Further, she has never seen any classroom or any other part of Paulding County District and has not been involved in public education in the State of Georgia for the last 30 years. (Tr. 400.)

continued to be eligible for special education services under the eligibility category of OHI.¹⁷ (Respt.'s Ex. 78.)

Disagreeing with the placement offered by the District, Ms. [REDACTED] filed a due process complaint on or about December 17, 2005 requesting placement at CCBS. (Respt.'s Ex. 81.) While that that action was pending, however, [REDACTED] was expelled from CCBS after being enrolled just 23 days. (Petr.'s Ex. 493; Tr. 400.) Specifically, CCBS informed Ms. [REDACTED] on December 22, 2005 that [REDACTED] was expelled and that she should retrieve him from CCBS, which Ms. [REDACTED] did on December 24, 2005. [REDACTED] was discharged from CCBS just eight days after Ms. Whitmire acknowledged specifically advocating for his continued placement at CCBS at the December 2005 IEP meeting.¹⁸ (Respt.'s Ex. 89.)

After [REDACTED] left Cherokee County Schools, Ms. [REDACTED] enrolled him at the [REDACTED] Hospital partial hospitalization program. Ms. [REDACTED] acknowledged that this program had no academic component and was simply a "holding" place. (Tr. 295) [REDACTED] has not been enrolled in any school since December 23, 2005. (Tr. 301) Since that time, other than the few days he spent in the [REDACTED] hospitalization program, [REDACTED] has spent his time at home "sleeping, reading, watching TV, playing with the computer, and occasionally visiting friends." (Tr. 298.) At the time of the trial, [REDACTED] was not attending any public or private school. Further, Ms. [REDACTED] had not submitted any intent to home school [REDACTED]. In fact, at the time of the trial, [REDACTED] had not been in any school program since at least December 24, 2005. (Tr. 508-509.)

On January 19, 2006, after receiving Ms. [REDACTED]'s consent to complete the requested evaluations, the District began conducting the psychoeducational, speech language, occupational

¹⁷ The IEP committee recommended placement in a small group OHI classroom, pending further evaluation results.

¹⁸ The Court granted the District's motion for summary judgment on the first complaint. Accordingly, there are no issues for resolution currently pending related to that complaint. See [REDACTED] v. Paulding County District, 293 Ga. OSAH 190 (May 30, 2006).

therapy, and assistive technology evaluations, as agreed upon at the December 2005 IEP meeting. All of these evaluations were completed within a two-week period. (Respt.'s Ex. 94-96, 98, 99.) Ms. [REDACTED] was not present for any of the District's evaluations of [REDACTED].¹⁹ (Tr. 519.)

Amanda Inman, an expert in assistive technology within a school setting, provided an assistive technology evaluation to [REDACTED]. (Respt.'s Ex. 99; Tr. 770). This evaluation was conducted on January 31, 2006 for a period of one hour and continued on February 2, 2006 for a period of two hours. (Tr. 770-772.) Prior to conducting the evaluation, Ms. Inman reviewed [REDACTED]'s records, including assessments he had received privately while he was withdrawn from the District. (Tr. 773-774.) Ms. Inman conducted the assistive technology evaluation in conjunction with [REDACTED]'s occupational therapy evaluation conducted by Linda Wagner, as [REDACTED]'s previous records indicated difficulty with writing, and the presence of such difficulties warrants a multidisciplinary team of both assistive technology and occupational therapy personnel. (Tr. 770, 774-775.)

On January 31, Ms. Inman observed a portion of [REDACTED]'s occupational therapy evaluation, specifically his ability to produce handwritten work. On the first day of the evaluation, January 31, 2006, [REDACTED] appeared tired, "whiny", and verbally expressed that he did not enjoy writing. It is usual for children to resist or refuse certain tasks, especially writing tasks. (Tr. 801, 849-850.) Ms. Inman and Ms. Wagner were able to persuade [REDACTED] to write by giving him different options for producing the work, such as using gray paper rather than white paper. (Tr. 779-783.) [REDACTED] successfully completed both dictation and copy tasks that required him to produce handwritten work. (Tr. 781-782.) Ms. Inman noted that [REDACTED] would become

¹⁹ While these evaluations were pending, Ms. [REDACTED] attempted to enroll [REDACTED] at [REDACTED] Middle School, another school within the District, on or about January 16, 2006, despite the fact that his IEP placed him at South Building Middle School. (Respt.'s Ex. 78; Tr. 508.) Ms. S. acknowledged that she stated to the school secretary she "needed to enroll him before going to court." (Tr. 508) [REDACTED] did not attend a single day at [REDACTED] Middle School. (Tr. 508.)

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frustrated with handwriting and had difficulty with spelling. (Tr. 771-772.) However, [REDACTED]'s handwriting was legible. (Tr. 787.)

On February 2, 2006, Ms. Inman began actively assessing [REDACTED]'s assistive technology needs. Because [REDACTED]'s records indicated a weakness in written expression and spelling, Ms. Inman focused on academic learning aids to assist him. (Tr. 775.) On the second day of the evaluation, [REDACTED], February 2, 2006, Z.M.S. appeared to be more "silly." (Tr. 783-784.) Given [REDACTED]'s dislike of writing, difficulty with spelling, and slow handwriting, Ms. Inman investigated the possibility of providing [REDACTED] with computer support supplemented with writing software that would provide both writing and spelling support. (Tr. 788-790.) Specifically, Ms. Inman assessed [REDACTED]'s use with the Co-Writer program. Co-Writer is a word prediction program that allows a student to begin typing and then provides a list of words that the program predicts based on what the student has typed. In addition, Co-Writer has auditory support such that the program will speak the word typed by the student. (Tr. 789-791.) [REDACTED] worked very well with the Co-Writer program. The program provided good assistance to [REDACTED] in the area of writing, editing, and spelling. (Tr. 791-792.)

Linda Wagner provided an occupational therapy evaluation to [REDACTED] over two days, January 31, 2006 and February 2, 2006. (Respt.'s Ex. 96; Tr. 770-772, 999, 1003.) The evaluation report generated by Ms. Wagner is an accurate account of her evaluation sessions with [REDACTED]. (Respt.'s Ex. 96; Tr. 1007.) Ms. Wagner conducted her evaluation with Ms. Inman, the assistive technology specialist, present. Ms. Wagner and Ms. Inman conducted their evaluations jointly because, when evaluating an older student with writing issues such as [REDACTED], and when assistive technology is to be a consideration, it is good practice for an occupational therapist and assistive technologist conduct their evaluations together. (Tr. 1000.)

Prior to conducting her evaluation, Ms. Wagner reviewed some of ██████'s records, as well as previous handwriting-samples in order to get background information and to select appropriate testing materials. (Tr. 1000.) In particular, Ms. Wagner reviewed a previous occupational therapy evaluation obtained by Ms. █ in late February 2005 and completed by Ms. █'s stepsister. (Respt.'s Ex. 33; Tr. 517, 1001.) Also prior to her evaluation, Ms. Wagner completed a checklist. (Respt.'s Ex. 97.) This checklist was used as a screening instrument and was completed based on observation of ██████ (Tr. 1004.) It was not a standardized instrument and served solely as a checklist for the occupational therapist to ensure that she looked at all areas. (Tr. 1004-1006.) During her observation of ██████, Ms. Wagner did not note anything unusual. (Tr. 1006.) Ms. Inman, who observed the entire occupational therapy evaluation, agreed that the occupational therapy checklist (Respt.'s Ex. 97) was an accurate description of ██████ during the evaluation sessions. (Tr. 780-781.)

As part of her evaluation, Ms. Wagner observed ██████'s writing, which she observed was "very legible," though it did contain some spelling and punctuation errors. To assess ██████'s writing, Ms. Wagner administered a standardized handwriting test by having ██████ copy from a far point source, such as a chalkboard, and a near point source, such as a book on his desk, as well as having him write sentences orally dictated to him. (Respt.'s Ex. 96.) ██████ had no difficulty in reading what he was asked to copy, both far point and near point. (Respt.'s Ex. 96; Tr. 1049-1050, 1053-1054.) In addition, Ms. Wagner assessed ██████'s motor skills by having him perform a variety of tasks that are good indicators of motor skills. ██████ performed well with these skills, indicating that he did not have any difficulty with his motor skills. (Respt.'s Ex. 96; Tr. 1009-1010, 1057, 1064.) Based on the results of this evaluation, Ms. Wagner concluded that ██████ had difficulty producing written work. However, ██████ had no

physical impediment that prevented him from producing handwritten work. Rather, ██████'s difficulties with writing appear to stem from his lack of motivation and apparent lack of practice in writing. (Tr. 1009-1011.)

Ms. Wagner also assessed ██████'s sensory integration, in large part relying on the previous evaluation obtained by Ms. ● in late February 2005.²⁰ Given that the previous evaluation was less than one year old and filled out by Ms. ●, it was appropriate for Ms. Wagner to rely on it. (Respt.'s Ex. 33; Respt.'s Ex. 96; Tr. 1011-1013.) ██████ did have some areas of sensory difference, or atypical response to sensory stimuli. However, he did not appear to have any difficulties in important areas such as auditory processing, visual processing, or touch processing. Overall, ██████'s sensory reactions were much more typical than not. (Respt.'s Ex. 33, 96; Tr. 1100-1102.) However, it was impossible to determine whether ██████'s sensory differences had any effect on his behavior since behavioral issues often appear to be sensory issues. (Tr. 1026.) Because sensory issues were a possibility, however, Ms. Wagner recommended that ██████ receive some occupational therapy to help him and his teachers maintain an appropriate arousal level. (Respt.'s Ex. 33, 96; Tr. 1013-1014.) Specifically, Ms. Wagner recommended that ██████ receive 30 minutes per month of consultative occupational therapy services, since these services would allow an occupational therapist to work with ██████'s classroom teachers to set up processes in the classroom to appropriately maintain his arousal level.²¹ (Respt.'s Ex. 96; Tr. 1030.) This consultative delivery model would not have required ██████ to be removed and isolated from his classroom in order to receive occupational

²⁰ Sensory integration is a process by which the brain and sensors in the body communicate. There is a debate within the occupational therapy community regarding sensory integration and how to treat sensory integration issues. (Tr. 1011.)

²¹ Importantly, a previous occupational therapy and assistive technology evaluation that Ms. ● had privately obtained in February 2005 did not recommend any occupational therapy or assistive technology services for ██████. That evaluation found that ██████'s "overall auditory processing and visual processing [were] in the Typical Performance range." (Respt.'s Ex. 33.)

therapy services. (Respt.'s Ex. 1032.) Instead, an occupational therapist would have consulted with ██████'s teachers for 30 minutes per month, and his teachers would have been trained to implement appropriate sensory strategies throughout the school day for ██████. (Tr. 1103.)

██████ received a speech language evaluation conducted by Tanya Akins.²² (Tr. 884.) Ms. Akins evaluated him on February 2, 2006 for a period of between two and two-and-one-half hours. This evaluation occurred immediately after the assistive technology evaluation. (Respt.'s Ex. 98; Tr. 884-886.) Prior to conducting this evaluation, Ms. Akins reviewed ██████'s education records, including a previous speech language evaluation ██████ had received.²³ Ms. Akins reviewed this background information to ensure that she did not improperly use assessment measures with ██████ that had recently been given. (Tr. 886-887.)

During the testing, ██████ was never physically or verbally aggressive and was never a danger to himself, others, or property, even though Ms. Akins was required, on occasion, to deny ██████'s requests. For instance, during a break in testing, ██████ wanted to walk outside, and Ms. Akins refused his request. ██████ reacted appropriately and continued with testing. Given the demands of the testing environment, and given that ██████ had been required to do non-preferred writing tasks as part of the assistive technology evaluation immediately prior to the speech language evaluation, if ██████ had any propensity to engage in explosive behavior, he likely would have done so with Ms. Akins.²⁴ Instead, ██████'s behavior remained appropriate throughout the evaluation. (Tr. 887-888, 905-906.)

²² Ms. Akins was qualified as an expert in the areas of speech language pathology, evaluation of students for speech language services, and planning and provision of speech language services. (Tr. 884.)

²³ Ms. Akins had previously known ██████ when he attended ██████ Elementary School in the District. (Tr. 886.)

²⁴ The testing environment is a demanding one, with all demands focused solely on ██████. (Tr. 905-906.) Further, ██████ was administered his speech language evaluation immediately after completing a two-hour assistive technology evaluation during which he was required to write, an activity that he strongly dislikes. (Tr. 905-906.)

Ms. Akins first assessed [REDACTED]'s articulation abilities by observing his speech. Observation is a primary method of assessing articulation. [REDACTED]'s articulation abilities were normal. (Respt.'s Ex. 98; Tr. 889-890.) Ms. Akins also gave [REDACTED] an oral screening to ensure that he had the necessarily ability to move his articulators to correctly product sounds. [REDACTED]'s abilities in this area were also normal. (Respt.'s Ex. 98; Tr. 890-891.) Ms. Akins also assessed [REDACTED]'s voice for hoarseness or a voice quality that is unusual for a child that age. [REDACTED]'s voice was appropriate for a child his age. (Respt.'s Ex. 98; Tr. 899-890.) [REDACTED]'s fluency was also assessed.²⁵ Ms. Akins observed that [REDACTED]'s fluency was "great," and that his speech was "very understandable." (Respt.'s Ex. 98; Tr. 899-900.)

Ms. Akins administered standardized language testing to [REDACTED], as the referral for the evaluation indicated possible concerns regarding his language abilities. (Respt.'s Ex. 98; Tr. 891.) Ms. Akins administered the Comprehensive Receptive and Expressive Vocabulary Test – Second Edition (CREVT-2). This test measured [REDACTED]'s receptive vocabulary skills by showing him an array of pictures and then asking him to match certain vocabulary words with the appropriate picture. This test further measured [REDACTED]'s expressive vocabulary skills by giving him a vocabulary item and requiring him to provide details about the item. (Respt.'s Ex. 98; Tr. 893-894.) [REDACTED] performed very well on both areas of the CREVT-2, with scores of 100, 103, and 102, respectively, in the middle of the average range.²⁶ (Respt.'s Ex. 98; p. 894.)

Ms. Akins also administered the Clinical Evaluation of Language Fundamentals – Fourth Edition, or CELF-4. (Respt.'s Ex. 98; Tr. 894-895.) Ms. Akins administered the core eight

²⁵ A fluency assessment tests the ability to speak without stuttering or stumbling over his words or speaking unusually slowly.

²⁶ A scaled score of 100 is an average score with an average range within 15 points of that within. Accordingly, any scores between 85 and 115 are within the average range. (Tr. 894.)

subtests on the CELF-4, necessary to obtain a good measure of [REDACTED]'s language capabilities.²⁷ (Respt.'s Ex. 98; Tr. 895-896.) [REDACTED] performed very well on the CELF-4, achieving scores within the average to high average range. (Respt.'s Ex. 98; Tr. 898-899.) Given these results, it appears that [REDACTED]'s speech and language skills are "either at or slightly above other children his age." (Respt.'s Ex. 98; Tr. 899-901.) Further, there was no indication that [REDACTED] had any unusual difficulties with pragmatic language, or his ability to manipulate social language. Ms. Akins also completed the pragmatics profile portion of the CELF-4 on which he scored very highly. (Tr. 914.)

Moreover, [REDACTED]'s previous language testing, obtained by Ms. [REDACTED] in February 2005, specifically assessed his pragmatic language and that he was within the average range and was a relative strength for him. (Respt.'s Ex. 34; Tr. 907-909, 974-976.) This previous evaluation also concluded that [REDACTED]'s speech and language skills were adequate for learning and that [REDACTED] did not require any services in this area. (Respt.'s Ex. 34.) Ms. Akins also rated [REDACTED]'s skills in interacting with peers, as well as his social maturity, to be within the average range. (Tr. 935-936.) Based on the results of her evaluation, based on what she knew of [REDACTED], and based on her expertise, Ms. Akins did not recommend speech and language services for [REDACTED] since there was no indication that he had any disorder in this area. (Respt.'s Ex. 98; Tr. 901-902.)

²⁷ The following subtests were given: Concepts and Following Directions; Recalling Sentences; Formulated Sentences; Word Classes Receptive; Word Classes Expressive; Word Definitions; Understanding Spoken Paragraphs; and Semantic Relationships. Total scores are calculated by combining various subtests. The scores on the Word Classes Receptive and Word Classes Expressive are combined to obtain the Word Classes Total score. The Receptive Language Score is comprised of the following subtests: Concepts and Following Directions and Word Classes Receptive. The Expressive Language Score is comprised of the following subtests: Recalling Sentences; Formulated Sentences; and Word Classes Total. The Language Content Total Score is comprised of the following subtests: Word Classes Total; Word Definitions; and Understanding Spoken Paragraphs. The Language Memory Score is comprised of the following subtests: Concepts and Following Directions; Recalling Sentences; and Formulated Sentences. The Core Language Score is comprised of the following subtests: Concepts and Following Directions; Recalling Sentences; Formulated Sentences; and Word Classes Total. Rather than reporting scores on each subtest, Ms. Akins reported the various total language scores. This is an accepting practice in scoring and reporting. (Respt.'s Ex. 98; Tr. 897-898.)]

Arlene Clark administered a psychoeducational evaluation to ██████ on January 31 and February 1, 2006 for four hours.²⁸ (Respt.'s Ex. 95; Tr. 1135-1138.) During the December 16, 2005 IEP meeting, Ms. Clark gave Ms. ██████ some rating scales to complete as part of the evaluation, as well as a parental consent form for Ms. ██████ to sign to give the District permission to evaluate ██████. Ms. ██████ returned these rating scales on or about January 19, 2006, when she gave the District permission to evaluate ██████ (Petr.'s Ex. 624-627, 630-632, 646-647.) Prior to conducting her evaluation, Ms. Clark reviewed ██████'s records in order to both get background information and to ensure that she addressed expressed concerns regarding ██████'s emotional and behavior issues, attention problems, and academics. (Tr. 1138-1141.) In addition, Ms. Clark had Ms. ██████ complete a parent questionnaire to get parental input. (Respt.'s Ex. 79; Tr. 1139.)

██████ appeared drowsy during the evaluation sessions, especially on the first day, and expressed difficulty focusing and concentrating. He also expressed resistance to academic tasks, especially writing tasks. Nevertheless, he completed virtually every task asked of him, was persistent in completing tasks, and was not distracted by extraneous noises or objects in the evaluation room. (Respt.'s Ex. 95, Tr. 1142.) Despite his resistance to completing certain tasks, ██████ was never verbally or physically aggressive, nor was he ever a danger to himself, others, or property. (Tr. 1142-1143.) Rather, his method of "resistance" to tasks consisted simply of putting his head down, whining, making groaning noises, and stating that he could not think. (Tr. 1143.)

Ms. Clark assessed ██████'s cognitive functioning using the Wechsler Intelligence Scale for Children – Fourth Edition and found his intelligence to be overall within the average range,

²⁸ Ms. Clark was qualified as an expert in the areas school psychology and evaluation of students within the school setting. (Tr. 1130-1135.)

with only a significant weakness in copying speed, indicating that efforts should be made to minimize copying requirements for him. (Respt.'s Ex. 95; Tr. 1144-1147.)

Ms. Clark also administered the Comprehensive Test of Phonological Processing to assess Z.M.S.'s phonological skills needed for acquisition of reading skills, as well as his reading fluency and rate. Again, Z.M.S. scored within the average range. (Respt.'s Ex. 95; Tr. 1147-1148.) Ms. Clark also assessed Z.M.S.'s visual motor integration skills-- his ability to combine what he sees with fine motor output-- by administering the Developmental Test of Visual Motor Integration. Again, Z.M.S. scored within the average range. (Respt.'s Ex. 95; Tr. 1148.)

However, Z.M.S. did display some difficulty with handwriting, indicating that Z.M.S. should have access to alternative methods of completing lengthy written assignments, such as access to word processing. (Respt.'s Ex. 95; Tr. 1148-1149.) Ms. Clark also assessed Z.M.S.'s academic functioning by administering the Woodcock Johnson - Third Edition (WJ-III), a battery of tests used to assess his academic functioning compared to peers of his age. (Respt.'s Ex. 95; Tr. 1148-1149.) Ms. Clark chose certain subtests on the WJ-III, based on the expressed referral concerns. The subtests that Ms. Clark chose provided sufficient information to assess Z.M.S.'s educational needs. (Tr. 1149-1150.) Overall, Z.M.S. performed within the average range, with the exception of the areas of spelling, writing samples, and writing fluency. Z.M.S.'s math calculation skills were relatively lower than his other scores, though still within the broad average range, even though he did not attempt certain problems that involved long division, mixed fractions, and negative numbers. (Respt.'s Ex. 95; Tr. 1150-1151.) Writing also appeared to be a difficulty for Z.M.S. He initially complained about completing the writing fluency subtest but did complete it. Z.M.S. also did not complete the Test of Written Language - Third Edition,

complaining that he could not focus or think of anything to write.²⁹ (Respt.'s Ex. 95; Tr. 1152-1153.) The results on the WJ-III indicated that writing was a definite area of difficulty for ██████. His primary difficulty appeared to be with the mechanics of writing, which may be due to lack of practice. (Tr. 1152.) Further, ██████ was clearly resistant to writing, as well. (Tr. 1153.) However, it is common for children to resist writing tasks. ██████'s difficulty with writing and his resistance to it suggested that he required accommodations for these difficulties within the educational setting. (Tr. 1153-1154.)

Finally, Ms. Clark assessed ██████'s social emotional functioning by using the rating scales completed by Ms. █, by having ██████ complete some self-reported rating scales, and by conducting an interview with ██████. (Respt.'s Ex. 96; Tr. 1155-1156.) Ms. █ placed ██████'s interests, involvement in activities, as well as his social competence within the normal range, even though he displayed some disruptive behaviors and marked hyperactivity and aggression. (Respt.'s Ex. 95.) ██████'s self-reports indicated moderately elevated symptoms of depression, and anger, with a mild risk for anxiety. (Respt.'s Ex. 95.) ██████ also stated that he was aware of his behavior, but that he very much resented the methods used at CCBS and resisted them. ██████ also expressed marked concern about not knowing what school he would attend in the future and that he wanted to return to South Paulding Middle School because he missed his friends there. (Respt.'s Ex. 95; Tr. 1156.)

The District convened an IEP meeting for ██████ on February 14, 2006 and reviewed the recent evaluations and determined ██████'s continuing eligibility for special education

²⁹ It is not unusual for a child to refuse to complete a specific test during an evaluation. However, such noncompliance does not suggest the need for residential placement. (Tr. 1154-1155.)

services.³⁰ At this IEP meeting, [REDACTED] was found to be eligible for special education services under the eligibility categories of OHI and Emotional/Behavior Disordered (EBD). In addition, he was found eligible for occupational therapy services. (Respt.'s Ex. 96, 106, 108.) However, given the results of the speech language evaluation, as well as his previous evaluations, the IEP committee determined that [REDACTED] was not eligible for speech language services. (Respt.'s Ex. 34, 98, 106.)

Ms. [REDACTED] requested that [REDACTED] receive an additional eligibility of Specific Learning Disability (SLD) in the area of written expression. (Respt.'s Ex. 109; Tr. 1159.) The rest of the IEP committee, however, did not believe that such an eligibility was appropriate. As an initial matter, the IEP committee believed, and supporting information from Ms. [REDACTED] indicated, that [REDACTED]'s primary areas of difficulties were his emotional and behavioral problems. Further, since [REDACTED] had not been in any classroom since at least December 24, 2005, the IEP committee concluded that it did not have sufficient information, such as current classroom work samples, to establish SLD eligibility. (Respt.'s Ex. 109; Tr. 1158-1159; 1335-1336.) While [REDACTED] had been diagnosed with a written expression disorder, a diagnosis by itself is not sufficient information to establish eligibility. (Tr. 1272.) The IEP committee did not rule out the possibility of SLD eligibility in the future, after Z.M.S. had an opportunity to complete some work within a classroom setting to determine such eligibility.³¹ (Respt.'s Ex. 109; Tr. 1247-1248.)

³⁰ Ms. [REDACTED] attended by telephone with her attorney. All of [REDACTED]'s evaluators, along with Ms. Suggs, Ms. Coleman, Ms. Sowell, and Mr. Wilson also attended on behalf of the District, along with the District's attorney. (Respt.'s Ex. 109, 149.)

³¹ The lack of SLD eligibility did not have any impact on [REDACTED]'s IEP, however, as a student's individual educational needs, rather than eligibility, drive the IEP. An IEP team can include whatever goals and objectives are appropriate for the child, regardless of eligibility. In fact, [REDACTED]'s IEP did include several academic goals and objectives in the areas of reading fluency, mathematics, and written expression, based on his areas of weaknesses and areas of individual need. (Respt.'s Ex. 109; Tr. 1159-1160.)

The IEP committee developed goals and objectives for ██████, which focused on his areas of weakness, such as written expression, mathematics, reading fluency, organizational skills, and behavior. (Respt.'s Ex. 109.) Ms. █'s comments and her input, along with the information provided from the various residential institutions at which ██████ had been placed, were considered. For instance, certain goals and objectives in the IEP were written specifically at Ms. █'s request, and some of the levels for mastery of other goals and objectives were changed at her request. (Respt.'s Ex. 109; Tr. 1158, 1220, 1337-1338.)

The IEP committee discussed placement for ██████ and recommended that ██████ be placed in a self-contained EBD classroom. Additionally, given the concerns noted in the occupational therapy evaluation, the IEP provided for 30 minutes per month of consultative occupational therapy services. Further, given the results of the assistive technology evaluation, the IEP committee recommended access to a computer as well as word-prediction software, such as Co-Writer, the software that ██████ had successfully used during the assistive technology evaluation. The IEP committee also recommended placement in a keyboarding class to help improve ██████'s ability to use a computer.³² Given the emotional and behavioral concerns expressed by Ms. █, the IEP committee also recommended 30 minutes per week of counseling services.³³

The IEP committee took information provided by Ms. █ into account when determining ██████'s placement. If the IEP committee had relied solely on the information from when

³² At this IEP meeting, Ms. █ specifically requested that ██████ be provided with voice dictation software called Dragon Dictation. (Respt.'s Ex. 149; Tr. 794.) Ms. Inman recommended against use of such a program because it is an overly restrictive option. (Tr. 819.) It must be used in a quiet environment and is therefore not suitable for a classroom setting. Rather, it would require ██████ to leave the classroom setting and be isolated in a quiet environment. Further, such a program does not provide the visual or auditory support or spelling assistance that word prediction programs offer. (Tr. 794-795.)

³³ The District also offered the services of a behavior intervention specialist, given Ms. █'s reports of ██████'s behavior. This behavior specialist would have worked with both the school and the parent and would have developed a functional behavioral assessment for ██████ (Respt.'s Ex. 109, 149; Tr. 1340.)

██████████ was in the District, it would have offered something less restrictive than the self-contained setting offered, based upon ██████████'s success in a less restrictive environment when previously enrolled in the District. However, given the reports from both Ms. ██████████ and the various residential institutions at which she had placed him, and given the goals and objectives developed for ██████████, the IEP committee determined that the self-contained setting was appropriate.³⁴ (Respt.'s Ex. 109; Tr. 1516.)

██████████ presented witnesses at trial that recommended a residential placement. However, these witnesses generally had little actual involvement with Z.M.S. or his education. For instance, Lyle Coalwell, a counselor at Sheltered Cove Counseling Center, had seen ██████████ only two times on June 30, 2006 and July 17, 2006, for a total of just two hours, for counseling sessions. (Tr. 64, 97-98, 100.) Mr. Coalwell did not communicate with any individuals outside of Sheltered Cove Counseling who had worked with ██████████ (Tr. 64.) Similarly, Mr. Coalwell had never had any communications with the District regarding ██████████, never observed ██████████ in any educational setting, is not an educator, and has no educational expertise. (Tr. 96-97.) He acknowledged that it is important to have full information when making recommendations for a child or when treating a child, yet he relied solely on information provided by Ms. ██████████ and by Jennifer Lassiter, another counselor seen by ██████████ at Sheltered Cove Counseling, rather than communicating with any professionals or educators who had worked with ██████████ (Tr. 97, 101)

Despite his lack of educational expertise, Mr. Coalwell described ██████████ at trial as "very, very far behind academically." (Tr. 70.) As shown by the District's evaluation, however,

³⁴ Indeed, ██████████'s proposed placement had changed from the December 2005 IEP based on the new information. In December 2005, the IEP committee recommended placement in a self-contained OHI classroom, based on the information available to it at the time. By February 2006, however, the IEP committee had obtained additional information, specifically current evaluative information and further parent information. Based on this new information, the IEP committee developed new goals and objectives and recommended that ██████████ be placed in a self-contained EBD classroom. (Respt.'s Ex. 78, 109; Tr. 1590-1591.) Additionally, the IEP committee added occupational therapy, assistive technology, counseling, and behavior specialist services, based on this new information. (Respt.'s Ex. 109; Tr. 1631-1632.)

██████'s academic achievement remains relatively strong. (Respt.'s Ex. 95.) Mr. Coalwell also described ██████'s friends as children younger than ██████ (Tr. 71.) However, according to the rating scales that Ms. ██████ completed as part of the District's psychoeducational evaluation, ██████ "never" avoided other adolescents, "never" had trouble making new friends, and "always" made new friends easily. (Petr.'s Ex. 631, Ex. 632.) Further, Ms. Lassiter herself described the ages of ██████'s friends as ranging "from ages seven or eight to maybe a year or two older than him." (Tr. 182.)

Like Mr. Coalwell, Ms. Lassiter is not an educator and had no educational expertise. (Tr. 184.) Also like Mr. Coalwell, she never communicated with the District and never made any recommendations to ██████'s IEP team. (Tr. 169, 184-185.) Ms. Lassiter first met ██████ on February 1, 2006. (Tr. 166.) She was not focused on ██████'s education or even his behavior in general; rather, she was "focusing on maintaining his behavior in the home." (Tr. 169.) In fact, when Ms. Lassiter began seeing ██████, she did not have any information from any other school he had attended.³⁵ (Tr. 186.) Instead, Ms. Lassiter relied heavily on information received from Ms. ██████ (Tr. 186.) At the time of the trial, Ms. Lassiter was not aware that the District had conducted evaluations of ██████ in January and February 2006. (Tr. 188.)

Ms. Lassiter's main diagnosis of ██████ was "attention deficit." (Tr. 167.) However, she never witnessed ██████ display any explosive behavior. (Tr. 168.) Instead, she noted that Ms. ██████ "rarely disciplined" in the home, and recommended a parenting curriculum to improve Ms. ██████'s parenting skills. (Tr. 186.) Ms. Whitmire, the only other witness who recommend residential placement, had no information regarding the District and had had no contact or involvement with ██████ since December 22, 2005, when he was expelled from CCBS, and had

³⁵ Ms. Lassiter did not contact any of the other schools until May 16, 2006, and even then did so not in relation to providing any services to Z.M.S, but only because she had been asked to testify in this trial. (Tr. 186-187)

not seen ██████ in any setting other than CCBS for the 23 days he was enrolled there. (Tr. 400-402.)

By contrast, all of the expert educators and educational professionals who attended the February 2006 IEP meeting and who have had access to additional and current information believe the February 2006 IEP to be appropriate for ██████ and believe that his educational needs can be met within the school setting provided by that IEP. (Respt.'s Ex. 109, 149; Tr. 794-796, 850-855, 904-905, 1015, 1160-1161, 1259, 1338, 1570-1571, 1589.) Similarly, those experts agreed that a residential placement would be unduly restrictive for ██████ since such a placement would remove ██████ from his school, his peers, his family, and his community. Further, a "more restrictive environment means less contact with the regular education population" and would deprive ██████ of appropriate role models, as "students will pick up the behaviors of the other children they're around." When a disabled student is provided more exposure to his nondisabled peers, that student "will function more appropriately from the example of those students." (Respt.'s Ex. 109, 149; Tr. 603-606; 621; 904-905, 1015, 1160-1161, 1249; 1344-1345; 1508.)

At the February 2006 IEP meeting, Ms. ██████ expressed extreme concern about the possibility of the District involving law enforcement regarding ██████ and asked that the District promise never to involve law enforcement regarding ██████ for any reason.³⁶ (Respt.'s Ex. 109, 149.) This concern does not appear to be well founded. For instance, in the many years that Ms. Sowell has worked in a public school setting, she has involved law enforcement only one time regarding a student, and only with the parent's permission. (Tr. 1349-1350.) Physically

³⁶ Importantly, while Ms. ██████ has repeatedly asked the District to guarantee it will never involve law enforcement regarding ██████ for any reason, she did not seek any similar guarantees from any of the residential institutions in which she placed ██████, all of which specifically reserved the right to involve law enforcement regarding their students.

aggressive behavior does not necessitate the involvement of law enforcement in a public school setting. Instead, teachers receive training regarding how to manage these situations within the school setting. (Tr. 1353-1354.) Furthermore, the District's teachers receive specific training in successfully addressing the behavior needs of students. Specifically, teachers learn how to both prevent students from displaying explosive behavior and how to address and maintain the safety of the student and others should a student display physically aggressive behavior. (Tr. 841-842, 1268, 1353-1354.) Accordingly, ██████ could be educated within a school setting without jeopardizing the safety of him or others. (Tr. 844-845.) Special education teachers in particular are trained to address the various populations of disabled students, including those with emotional and behavior disorders. (Tr. 906.)

Furthermore, the District had never involved law enforcement in any way regarding ██████ and specifically informed Ms. S. that it did "not currently foresee any need to involve law enforcement regarding [██████]" (Respt.'s Ex. 110; Tr. 602, 661, 664, 1689.) The District acknowledged that it could not offer any guarantees, especially regarding the "actions of parents of other students or of teachers, in their private capacity," but assured Ms. S. that, "should the District feel the need to involve law enforcement regarding [██████], it would immediately thereafter convene an IEP meeting to review his IEP." (Respt.'s Ex. 110.)

Furthermore, ██████ himself had expressed a desire to return to ██████ Middle School and had been resistant to his various residential placements. Given that ██████'s behavior in these various residential placements had been far worse than in the school setting, ██████'s resistance to residential placement may have motivated his worsening behavior in those placements. (Tr. 1176.) Also, the fact that ██████ displayed behaviors³⁷ in a residential setting

³⁷ ██████ displayed behaviors such as explosive behavior, banging his head, physically attacking adults, and kicking in a residential setting that he did not display in any the school. (Tr. 1551-1552.)

that he did not display in the school setting suggests that [REDACTED], in all likelihood, learned inappropriate behaviors in the residential settings and that the appropriate placement for [REDACTED] is a school setting, rather than a residential one. (Tr. 1551-1552.)

Ms. Sowell would have been [REDACTED]'s teacher in the self-contained classroom offered at the February 2006 IEP meeting. (Tr. 1346.) At that time, this classroom contained one student, one teacher, and one paraprofessional. If [REDACTED] had joined the class, the ratio of students to adults would have been one-to-one. (Tr. 1346-1347.) Behavior difficulties can be successfully managed in such a setting, and interventions are "absolutely individualized" to the student. Ms. Sowell in particular uses a rewards-based system in which she identified motivating rewards for each student and assisted students in achieving their goals in order to get these rewards. (Tr. 1347-1348.) Students are also successfully mainstreamed to less restrictive settings as they show progress. Teachers identify areas of success for students and then slowly reintroduce these students into less restrictive settings based on those areas of success. (Tr. 1348-1349.)

Subsequent to the February 2006 IEP meeting, Ms. [REDACTED] requested hospital/homebound services for [REDACTED]. These services are generally for students with medical conditions that prevent them from attending school. However, the sole reason listed for this request by [REDACTED]'s psychiatrist was his ADHD. The psychiatrist noted that there were no further limitations on [REDACTED] receiving home instruction. (Tr. 512-513, Respt.'s Ex. 128.) Upon receiving the hospital/homebound request, the District wrote to the psychiatrist who had completed the form and requested any information that would assist the IEP team. Even though Ms. [REDACTED] had signed the hospital/homebound form allowing release of necessary medical information to the District, when the District attempted to get this necessary medical information from the physician, [REDACTED]'s attorney objected and accused the District of attempting to obtain such information

“without consent.” (Respt.’s Ex. 128, 130; Tr. 514.) Nonetheless, neither Ms. ● nor ●’s psychiatrist provided any additional information to the District. (Respt.’s Ex. 122, 136; Tr. 1634.)

On or about May 15, 2006, the District convened an IEP meeting to consider Ms. ●’s request for hospital/homebound services, as well as possible extended school year (ESY) services for ●. Ms. ● and her attorney participated by telephone. (Respt.’s Ex. 126, 149; Tr. 1634-1635.) Unfortunately, the entire IEP committee had not assembled at the designated start time of the meeting. Ms. Coleman, who was present, gave Ms. ● the option of either receiving a written proposal, continuing with the meeting with the people present, waiting for additional team members to arrive, or rescheduling the meeting altogether. Ms. ● gave her consent to continue with the meeting. (Respt.’s Ex. 126, 149; Tr. 1635-1636; 1695.)³⁸

Many children with ADHD are routinely served within the school setting. Therefore, the IEP team appropriately determined that ● did not require hospital/homebound services. The IEP committee also discussed ESY services for ●. After reviewing all the information available, the IEP committee determined that Z.M.S. did not require ESY services. Ms. ● disagreed with both determinations. (Respt.’s Ex. 122, 149; Tr. 1635-1636.) Subsequent to this IEP meeting, Ms. ● filed the present action. (Respt.’s Ex. 133.) This complaint “covers all periods of time subsequent to the first [complaint],” or the period beginning approximately December 17, 2005. In the complaint, Ms. ● once again requested residential placement for ● and specifically requested placement at ● School. Ms. S. also requested hospital-homebound services. (Respt.’s Ex. 133.)

³⁸ After a short time, Ms. Sowell also entered the meeting and participated. (Respt.’s Ex. 126; Respt.’s Ex. 149; Tr. 1650.)

The District convened an early resolution session on or about May 31, 2006 in response to Ms. ●'s due process complaint. (Respt.'s Ex. 135, 140, 141.) Although the parties were not able to resolve the issues underlying Ms. ●'s complaint, the District offered to provide [REDACTED] with 35 hours of one-to-one services over the summer of 2006. Ms. ● was given the option to have the services provided in her home, at a local library, or at [REDACTED] Middle School. The District did not ask that Ms. ● waive any of her claims against the District; rather, the District was concerned that [REDACTED] had not been allowed to attend school or receive any educational services. (Respt.'s Ex. 141, 143, 149; Tr. 1636-1637.) Ms. Coleman and Ms. Sowell would have provided the services. (Respt.'s Ex. 143; Tr. 1637.) Ms. ● never accepted the offer of services. (Tr. 1636-1637.)

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 mandates that schools and parents together develop an individualized education program ("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). As the party filing the complaint and seeking relief, ██████ bears the burden of proof as to all issues for resolution. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 537 (2005). Accordingly, ██████ bears the burden of proving that the IEP proposed by the school district was inappropriate under IDEA. § 1412(a)(10)(C); *Sch. Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 370, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985).

Claims brought under IDEA are generally subject to a two-year statute of limitations. *See* § 1415(f)(3)(C). 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 this case, however, ██████ limited the relevant timeframe in his complaint from approximately December 17, 2005 onward. *See* § 1415(f)(3)(B) (party filing the complaint shall not be allowed to raise issues at the due process trial that were not raised in the complaint).

The Supreme Court has held that in order to satisfy its duty to provide FAPE, a state or local educational agency must provide "personalized instruction with sufficient support services to permit the child to 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 local school system must provide the child "some educational benefit," *Id.* at 198, has become known as the *Rowley* "basic floor of opportunity" standard. *JSK v. Sch. Bd.*, 941 F.2d 1563, 1572-73 (11th Cir. 1991) ("The . . . educational outcome need not maximize the child's education. If the educational benefits are adequate based on surrounding and supporting facts, [IDEA] requirements have been satisfied.") (internal citations omitted).³⁹ The Eleventh Circuit also noted

³⁹ The Supreme Court has developed a test for determining whether a school board has provided FAPE in cases arising under the IDEA: "(1) whether the state actor 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 the child to receive educational benefit." *Sch. Bd. v. K.C.*, 285 F.3d 977, 982 (2002) citing *Rowley*, 458 U.S. at 206-07, 102 S. Ct. at 3051.

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 (11th Cir. 2001). IDEA, as reauthorized in 2004, does not change this basic principle and instead leaves the choice of educational methodologies in the discretion of the educators who develop the IEP.

~~Z.M.S.~~ argued at trial that because his IEPs did not include a formal behavior intervention plan (“BIP”), his IEPs were therefore defective. However, the IDEA sets out the mandatory elements of an IEP and a BIP is **not** included as a mandatory requirement of an IEP. *See* § 1414(d)(1)(A)(i). Z.M.S.’s IEP contained all the mandatory elements. Furthermore, IDEA expressly provides that there is no requirement that any additional information has to be included in a child’s IEP beyond what is explicitly required in § 1414(d)(1)(A)(i). *See* § 1414(d)(1)(A)(ii). IDEA 2004’s implementing regulations and accompanying commentary likewise make clear that choices of methodology remain within the discretion of the educators who develop the IEP: “There is nothing in [IDEA 2004] that requires an IEP to include specific instructional methodologies.” 71 Fed. Reg. 46665 (August 14, 2006).

Thus, this Court has held that there is no requirement under IDEA for any IEP to include a BIP, even for a child that displays extreme behavioral difficulties. *See, e.g., B.F. v. Fulton County Sch. Dist.*, 181 OSAH 28, 64-65 (2004). Other courts have also consistently held that there is no requirement under IDEA for any IEP to include a BIP. *See, e.g., Sch. Bd. of Indep. Sch. Dist. No. 11 v. Renollett*, 440 F.3d 1007 (8th Cir. 2006) (IDEA does not require a written BIP to be part of any IEP); *CJN*, 323 F.3d at 639-640 (IEP was appropriate for child who displayed severe behavioral difficulties, such as kicking others, hitting staff with pencils, and

banging his head against a wall, even though IEP did not include a BIP); *J.K. v. Metropolitan Sch. Dist. Southwest Allen County*, 2005 U.S. Dist. LEXIS 42439 (N.D. Ind. 2005) (IDEA requires only that a District consider the use of positive behavioral strategies, as appropriate, but does not require that any such considerations be formalized in a BIP). The only reference in the federal law to a mandatory development of a BIP is located in the IDEA provisions dealing with disciplinary actions contemplating a change in placement. *See* § 1415(k)(1). These provisions require a school district to conduct a functional behavioral assessment (FBA) and it is the only place an FBA is required by the IDEA. In the present case, however, ██████ was not involved in any disciplinary actions contemplating a change in placement.

In addition to according great deference to the educators who develop a child's IEP, IDEA likewise expresses a very strong preference for mainstreaming and requires that children be educated in the least restrictive environment (LRE), with nondisabled peers to the maximum extent possible. § 1412(a)(5); 34 C.F.R. § 300.114(a); *see also, e.g., Rowley*, 458 U.S. at 194; *Greer v. Rome City Sch. Dist.*, 950 F.2d 688 (11th Cir. 1991). Indeed, extremely restrictive placements, such as residential or homebound placements, are generally disfavored and are to be used only as a last resort when other, less restrictive settings have failed. Indeed, courts in several jurisdictions have held that residential placement is to be rarely used, and then only as a last resort only when a District's IEP has been given an adequate opportunity to be implemented.

For instance, in *J.K. v. Fayette County Bd. of Educ.*, 2006 U.S. Dist. LEXIS 3538 (E.D. Ky. 2006), the child J.K. had been enrolled in the local public school. He had a difficult transition into middle school at the beginning of his sixth grade year, missed many classes, and wandered the halls and school grounds, eventually being arrested at school for biting and scratching a teacher. The District convened an IEP meeting and proposed a more restrictive

setting within the middle school, given his difficulties. The parent disagreed and placed J.K. in a wilderness camp for one week and filed a due process complaint challenging the District's placement and seeking reimbursement for the unilateral private placement. The district court found that the District's IEP offered the "basic floor of opportunity" required by IDEA:

The LEA was prepared to increase J.K.'s restriction, make physical modifications to his classroom to accommodate his sensory and anxiety problems, and provide additional assistance to him at all times. The LEA was never given an opportunity to implement these changes, and it cannot be faulted for not immediately imposing a full-time resource placement instead of trying to maximize J.K.'s time spend with non-disabled students.

Id. at 23.

Similarly, in *Evans v. District No. 17*, 841 F.2d 824 (8th Cir. 1988), a child with cerebral palsy, mental retardation, and severe behavioral impairment who displayed behaviors such as tantrums, screaming, and head banging, was placed in a local school. Unhappy with the placement, her parents unilaterally removed her, enrolled her in a residential placement, and later sought an order requiring the District to place her in this residential school. The court noted that the District was not allowed the opportunity to educate the child: "school officials were never given the opportunity to make (or refuse to make) changes because the parents unilaterally removed their child from the District." *Id.* at 831. The court determined that the child did not require such a restrictive placement, and that the District had complied with IDEA: "children who can be mainstreamed should be mainstreamed, if not for the entire day, then for part of the day; similarly children should be provided with an education close to their home, and residential placements should be resorted to only if these attempts fail or are plainly untenable." *Id.* at 832. *See also Doe v. Bd. of Educ. of Tullahoma City Sch.*, 9 F.3d 455 (6th Cir. 1993) (IEP must be given a chance to succeed), *cert. denied* 511 U.S. 1108 (1994); *Swift v. Rapides Parish Public Sch. Sys.*, 812 F.Supp 666 (W.D. La. 1993) (residential placement not required for child with

behavior/emotional disorder, as District's educators, who required deference from court, agreed that in-school placement afforded child educational progress).

While residential placements are undoubtedly extremely restrictive, homebound placements are considered even more restrictive:

Home instruction is, for school-aged children, the most restrictive type of placement because it does not permit education to take place with other children. For that reason, home instruction should be relied on as the means of providing FAPE to a school-aged child with a disability only in those limited circumstances when they cannot be educated with other children even with the use of appropriate related services and supplementary aids and services, such as when a child is recovering from surgery.

64 Fed. Reg. 12638 (March 12, 1999); *see also Dept. of Educ. v. Katherine D.*, 727 F.2d 809, 818 (9th 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.

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 11th 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 (8th 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, which 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 District then placed the student at another elementary school, with attendance in a day treatment program. The student remained in this placement for seven days until 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 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 determined that the school had provided the student a FAPE. In reaching its decision, the Eighth Circuit emphasized the academic progress the student had made while enrolled in the school. The parent contended that "because academic progress [had] not been identified as among C.J.N.'s educational needs, evidence of academic progress is particularly irrelevant." *Id.* at 638. The court specifically and explicitly rejected this argument. Instead, the court found the student's academic progress even *more* relevant, given the student's behavior difficulties. Such academic progress, the court held, "demonstrates that [the student's] IEPs were not only reasonably calculated to provide educational benefit, but, at least in part, did so as well." *Id.* at 638. Further, the court held that

the student's academic progress demonstrated that his behavioral problems had effectively been addressed. *Id.* at 642.

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 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 (5th Cir. 2003) (academic progress of student with severe behavioral problems suggested that his IEPs were appropriate⁴⁰); *Kings Local Sch. Dist. v. Zelazny*, 325 F.3d 724 (6th 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 (5th 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 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). In fact, at least one court has held that a child with a behavior disorder whose academic performance was

⁴⁰ The Fifth Circuit uses a four-factor test that considers individualization, manner of delivery of services, and benefit received by the student to determine whether a student has received a FAPE in accordance with IDEA. *See, e.g., Cypress-Fairbanks Independent Sch. Dist.*, 118 F.3d 245 (5th Cir. 1997). This test is "at least as stringent as any standard" articulated by the Eleventh Circuit. *See Sch. Bd. of Collier County v. K.C.*, 285 F.3d 977, 982 n.6 (11th Cir. 2002).

satisfactory or better was not a disabled child entitled to services under IDEA. *See Doe v. Bd. of Ed. of the State of Connecticut*, 753 F. Supp. 65 (D.C. Conn. 1990).

In the instant case, [REDACTED] bears the burden of showing that the District's proposed placement is inappropriate. [REDACTED] has failed to meet this burden. In November and December 2005, the District convened an IEP meeting and considered the information provided by the various residential institutions in which [REDACTED] had been unilaterally enrolled, as well as information regarding [REDACTED]'s functioning within the District and information provided by the parent. Indeed, it is clear that the District affirmatively considered the evidence provided by the parent and other private institutions, as it offered a setting more restrictive than the one [REDACTED] had previously attended while enrolled in [REDACTED] Middle School. The District also moved promptly to gain current evaluative information regarding [REDACTED] and requested his parent's consent to evaluate him on December 16, 2005. Ms. S. delayed this process by failing to provide her consent for over one month, until January 19, 2006. When the District finally obtained Ms. [REDACTED]'s consent, it completed these evaluations.

On February 14, 2006, the District held an IEP meeting and reviewed these evaluations. The IEP team then considered [REDACTED]'s goals and objectives, some of which were added and/or revised specifically at the request of Ms. [REDACTED], and then determined an appropriate placement for him based upon the information available to the IEP team. The IEP added both occupational therapy and counseling services, based upon the results of the evaluations and information provided by the parent. The IEP also provided for the services of a behavioral consultant who would work with both the school and the parent to provide appropriate support to [REDACTED]. The IEP also provided for [REDACTED]'s placement in a self-contained classroom for children with emotional and behavioral disorders, to address [REDACTED]'s needs. In addition, the IEP allowed

██████ to practice appropriate mainstreaming opportunities in his keyboarding class.

Additionally, ██████ would readily increase those mainstreaming opportunities, as he would attend a local school, rather than being removed from his peers, community, and family

Furthermore, the Court concludes that the District has complied with the procedures set forth in IDEA. Upon learning that ██████ was a resident, the District immediately convened an IEP meeting and ensured the presence of required IEP team members.⁴¹ In all instances, Ms. ● participated and contributed to the IEP process, resulting in the IEP being changed in several instances specifically at her request. Accordingly, the District has complied with IDEA's procedures. Moreover, any possible procedural violation, in order to be actionable, must have impeded the child's right to FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE to the parents' child, or caused a deprivation of educational benefits. § 1415(f)(3)(E)(ii). The Court concludes that ██████'s right to FAPE was not impeded, his mother's opportunity to participate in the decision-making process regarding the provision of FAPE to ██████ was not significantly impeded, and there was no deprivation of educational benefit. Therefore, the evidence does not support an actionable procedural violation.

It is clear in the instant matter that the District considered all appropriate information and planned for ██████'s individual needs, including his behavioral difficulties. It recommended placement in a self-contained classroom for students with emotional and behavioral disorders, with the structure that such a setting would provide. It also provided for weekly counseling services, as well as the services of a behavioral specialist who would work with both the school

⁴¹ In only one instance, the District did not have appropriate IEP team members in place. Faced with this situation, the District appropriately gave Ms. ● several options: she could continue with the IEP meeting with those individuals who were present; she could wait for additional team members to arrive; she could elect to receive a written proposal; or she could elect to reschedule the meeting. The choice was entirely hers, and she gave her express permission to continue the IEP meeting with the individuals present. The District complied with her choice.

and the parent. Accordingly, the District completed all necessary steps in planning for ██████'s education and behavioral concerns. Furthermore, it is not the District's legal responsibility to change ██████'s behavior in the school setting. So long as he is able to make adequate educational progress *in the classroom*, the requirements of IDEA have been fulfilled.

Nevertheless, the District offered services that could have assisted Ms. ● in addressing ██████'s behavior in the home, specifically the services of a behavior specialist. In doing so, the District exceeded the requirements of IDEA.

Ms. ● also raised the issue of the potential involvement of law enforcement regarding ██████ and demanded that the District agree never to involve law enforcement regarding ██████. Interestingly, Ms. ● neither sought nor received any such agreement from any of the residential institutions in which she unilaterally enrolled him, many of which explicitly reserved the right to involve police regarding their students. In any event, the District was under no obligation to make any such agreement. In fact, IDEA specifically provides that: "nothing in [IDEA] prohibits an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State law enforcement or judicial authorities from exercising their responsibilities with regard to the application of Federal or State law to crimes committed by a child with a disability." 2§ 1415(k)(6)(A); 34 C.F.R. 535(a). Nevertheless, the District attempted to work cooperatively with Ms. ● in this regard, assuring her that, based on the information it had, it did not foresee any need to involve law enforcement regarding ██████, but agreed to convene an IEP meeting should such an event occur. Again, the District complied with its obligations under IDEA.

In conclusion, all the educators who attended the IEP meetings, who had the most recent involvement with ██████ through their evaluations and the IEP process, and who would actually

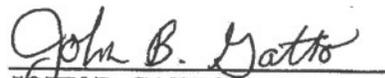
implement the IEP, agreed that the IEPs offered to ██████ were appropriate. As already noted above, these educators are entitled to great deference, and their opinions are persuasive. The Court therefore concludes that the IEPs proposed by the District offered ██████ FAPE in the least restrictive environment. The IEP team took into consideration all available information, including information provided by the parent, and developed an educational program (with significant input from ██████'s parent) that would provide the basic floor of opportunity required by IDEA. The Court therefore concludes that ██████ has not proven that the IEPs developed by the District were inappropriate.

██████ contends that the District's proposed placement would fail ██████. However, the available evidence suggests that the District's placement would be successful, especially since the last educational placement in which ██████ experienced any success was in the District. At the time of his withdrawal from ██████ Middle School, ██████ was beginning to make the difficult transition from elementary school to middle school, was improving in his work completion, and was making overall progress, as demonstrated by his good grades at the time of his withdrawal. By contrast, and by Ms. ██████'s own admission, ██████ has not been successful at any of the educational residential placements at which she has unilaterally enrolled him. The Court concludes that the District proposed an appropriate placement that provided maximum exposure and interaction with nondisabled students. Accordingly,

IV. DECISION

IT IS HEREBY ORDERED THAT the District offered FAPE to ██████ in conformity with IDEA and therefore, ██████'s requested placements are **DENIED**.

SO ORDERED THIS 16th day of November, 2006.



JOHN B. GATTO, Judge