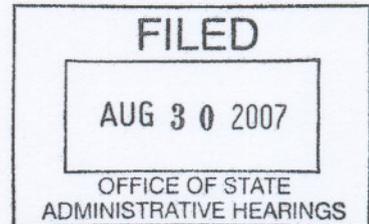


07-037523

IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

█, Petitioner,
v.
DOUGLAS COUNTY SCHOOL DISTRICT,
Respondent.

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: Docket No.:
: OSAH-DOE-SE-0722350-48-Schroer
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FINAL DECISION

I. INTRODUCTION

Petitioner █ filed a due process complaint pursuant to the Individuals with Disabilities Education Act ("IDEA") on March 7, 2007. The Complaint was amended on April 9, 2007, after being found insufficient pursuant to 34 C.F.R. § 300.508. The due process hearing was held in Douglasville, Georgia, on July 26 and 27, 2007, and continued on August 6 and 7, 2007. Laurene Cuvillier and Ralph Goldberg represented Petitioner █. and his mother █. Mary Anne Ackourey and Adrian Moore-Pleasant represented Respondent, Douglas County School District ("School District").

The record remained open until Tuesday, August 21, 2007, in order for the parties to review the transcript and file post-hearing briefs. The deadline for the issuance of this decision was extended until August 30, 2007, pursuant to 34 C.F.R. § 300.515(c).

II. FINDINGS OF FACT

1.

Petitioner █. was born on █, █ and is █ years old. During the 2006-07 school year, he resided with his mother █. in Lithia Springs, Georgia and attended fourth grade at █, █ Elementary School in Douglas County.

2.

█████ is a bright child. However, from a very early age, he has exhibited significant problems with behavior. In addition, in or around 2005, █████ was diagnosed with Attention Deficit Hyperactivity Disorder (“ADHD”) and has been prescribed medication. The interplay between █████’s ADHD symptoms and his severe behavioral problems and how it influences his appropriate educational placement and special education services is a central issue raised by Petitioner in this case.

A. Educational Background

Although the only period relevant to the claims raised in the due process complaint is the 2006-07 school year, the Court reviewed the child’s educational background to provide context for evaluating the services █████ received during the relevant period. See K.C. v. Fulton County School Dist., 2006 U.S. Dist. LEXIS 46752, *5 (N.D. Ga. 2006); Draper v. Atlanta Indep. Sch. Sys., 480 F.Supp.2d 1331 (N.D. Ga. 2007)(appeal pending).¹

Pre-Kindergarten, Kindergarten, First Grade

3.

During the 2001-02 school year, █████ attended pre-kindergarten (“Pre-K”) at ██████ Primary School in Carroll County, Georgia. Shortly after beginning pre-K, █████ was referred to the Student Support Team (“SST”) because of “hitting, tackling, choking other children, ... [he] has bitten & tackled teachers, tells teachers they are

¹ The Court admitted █████’s background educational records under Office of State Administrative Hearing (“OSAH”) Rule 18(1)(a). In addition, these records were reviewed and relied upon by the IEP Committee to make decisions that Petitioner has alleged were retaliatory, intentionally discriminatory, and not reasonably calculated to provide educational benefit. As such, these records are relevant and admissible. See generally, Dotson v. State, 276 Ga. App. 418 (2005)(witness statements to police officer admissible to prove conduct and motive of police officer during suppression hearing).

stupid & to shut up, says 'I don't have to listen to you,' says demons & the devil make him do these things." (Respondent's Ex. 3, pp. 399, 475) ■■■'s pre-K teachers implemented various interventions in the classroom, including "time out, positive reinforcements and concrete rewards, daily notes, shadowing, limiting and redirecting." (Respondent's Ex. 3, p. 475)

4.

In January 2002, the SST referred ■■■ for evaluation by an Individualized Education Program ("IEP")/Placement Committee. The IEP Committee concluded that ■■■ was a "youngster who may be experiencing significant emotional distress, including anxiety and insecurity. These may account for behavioral difficulties in the classroom." (Respondent's Ex. 3, pp. 476-77) On January 18, 2002, the IEP Committee determined that ■■■ was not eligible at that time for an emotional and behavioral disorder program because his behaviors had improved as a result of behavior management strategies. (Respondent's Ex. 3, p. 477)

5.

■■■ continued in Carroll County schools in kindergarten and part of first grade. In kindergarten, ■■■ again exhibited inappropriate behavior in the classroom and on the bus, however his behavior improved by the end of the school year. (Respondent's Ex. 3, pp. 347, 501-05) In first grade, the SST reconvened to address academic and behavior concerns regarding ■■■, including failing to complete assignments, physical and verbal aggression toward peers, hyperactivity, and defiance. (Respondent's Ex. 3, pp. 487-95) In December 2003, the Carroll County Schools referred ■■■ for a Functional Behavior Assessment and developed a behavior plan, which included daily communication with his

parent, reinforcement of appropriate behavior, and demonstration of positive alternative behaviors. (Respondent's Ex. 3, pp. 492-500)

First and Second Grade

6.

In February 2004, shortly after the Functional Behavior Assessment was presented to the SST, [REDACTED] was withdrawn from Villa Rica Primary. On February 3, 2004, he was enrolled in first grade at Mirror Lake Elementary in Douglas County. (Respondent's Ex. 13, p. 42; Respondent's Statement No. 6,² *Interrogatory Testimony of Cathy Swanger*, p. 2)

7.

There is little evidence in the record relating to [REDACTED]'s academic progress or behavior during the last few months of first grade at Mirror Lake. However, soon after the start of second grade, [REDACTED] began exhibiting significant behavioral problems, including physical aggression (hitting, tripping, pushing, punching, choking), verbal aggression (threatening students and teachers), defiance of authority, and disruptive and off-task behaviors in the classroom. (Swanger Statement, p. 2; Respondent's Ex. 3, pp. 309-12)

8.

[REDACTED]'s second grade teacher at Mirror Lake referred him to an SST in August 2004. Initially, [REDACTED]'s mother [REDACTED] refused to fill out an SST background information sheet on [REDACTED] that was to be used to "help us plan more effectively for your child."

² Pursuant to the *Amended Pre-Hearing Order* issued by the Court on May 21, 2007, the parties were required to submit all direct testimony in written form prior the hearing. The direct testimony of each witness was introduced into evidence at the hearing as "Petitioner's/Respondent's Statement No. ____."

(Respondent's Ex. 3, pp. 301, 304-06) Later, on or about November 14, 2004, S.C. did complete the SST Background Information form, checking off the following "significant problems" that [REDACTED]. had experienced: destructiveness, unusual or exaggerated fears, relating to others, attention span, and following directions. (Respondent's Ex. 3, pp. 302, 366)

9.

In November 2004, the SST met to review a Functional Behavior Assessment ("FBA") completed on October 27, 2004 and to discuss [REDACTED]'s behavioral issues. The SST, including [REDACTED]'s mother [REDACTED], recommended that [REDACTED] be referred to an IEP Committee, after determining that attempted behavior modification strategies, including reduced work, separate seating, and a reward chart, had been unsuccessful. (Respondent's Ex. 3, pp. 298-99; 313-17, 366) The IEP Committee convened a meeting on January 26, 2005 to consider, among other things, the psycho-educational evaluation conducted by Elizabeth S. Hendrix, a school psychologist. Ms. Hendrix administered a number of assessments of [REDACTED], including the Behavior Assessment System for Children ("BASC"). Based on the BASC teacher scales, certain areas were rated as "clinically significant" (suggesting a high level of maladjustment): aggression, conduct problems and externalizing problems. In addition, hyperactivity, school problems, and the behavioral symptoms index were in the "at risk" range. (Respondent's Ex. 3, 346-52, 355)

10.

The IEP Committee concluded that [REDACTED] met the eligibility criteria for the emotional behavior disorders ("EBD") program. The Committee concluded that [REDACTED] had exhibited daily, severe behavior problems since the beginning of his school career.

[REDACTED] has exhibited significant difficulty in his second grade classroom with aggressive behaviors, defiance of authority and following teacher directions, disrespect to teachers and other students and disruptive behavior which impedes his learning as well as the learning of his peers. [REDACTED] uses inappropriate language and gestures. [REDACTED] copes with his anger and feelings of inferiority by acting out verbally and physically. While [REDACTED] is able to perform on grade level at this point, he is missing classroom instruction due to numerous visits to O.R. which so far this year are at 36 visits.³ He was recently suspended from school for one week for hitting his teacher. [REDACTED]'s classroom teacher attempts to keep [REDACTED] in class and address behavior issues as they occur; however, [REDACTED]'s verbal behaviors, disruptive behavior and lack of following teacher directions often leads to his removal from the classroom so that instruction may continue for his peers.

(Respondent Ex. 3, p. 367)

11.

The IEP Committee considered a number of placement options. After rejecting the regular education classroom options, "the committee agreed that the least restrictive educational placement would be emotional behavior disorders resource and consultative services at this time."

[REDACTED] has emotional factors that manifest in inappropriate behavior and interpersonal difficulties. These behaviors impact [REDACTED]'s ability to complete work and follow directions in the class. In addition, these emotional problems also manifest in anger outbursts and inappropriate behaviors that have caused [REDACTED] to miss class due to time in the OR room. These behaviors are severe enough to warrant removal from the general curriculum for a portion of the day.

(Respondent's Ex. 3, p. 363)

³ "O.R." stands for "Opportunity Room," which is used for in-school suspensions due to student disciplinary infractions. (*Swanger Testimony*, T. at 709-10) Petitioner's counsel questioned Ms. Swanger regarding her notification of [REDACTED]'s mother of these and other disciplinary infractions while [REDACTED] was a student at Mirror Lake Elementary. (*Swanger Testimony*, T. at 701-06) See Ga. Comp. R. & Reg. R. 160-4-8-1-.15. However, given that the Amended Due Process Complaint, filed on April 11, 2007, did not assert any IDEA violations prior to the 2006-07 school year, the Court finds that this issue is not properly before the Administrative Court. See generally *M.T.V. v. Dekalb Co. School Dist.*, 446 F.3d 1153 (2006). Moreover, any violations arising before IDEA's two-year statute of limitations are barred. See *infra* at Conclusions of Law, ¶ 2.

12.

On January 26, 2005, S.C. stated in writing that she agreed with and consented to this placement. (Respondent Ex. 3, pp. 365, 368) With respect to the eligibility report as a whole, the minutes of the meeting indicate that "[REDACTED]" said that she agrees with some of what has been expressed on the eligibility report, but not all of it. [REDACTED] expressed concerns that she wants it documented that she is here and has attended all SST meetings that concern [REDACTED]. She agrees with everything that has taken place here." (Respondent's Ex. 3, p. 356) Finally, on the final signature page of the IEP, S.C. noted by her signature that she only "somewhat agree[d]." (Respondent's Ex. 3, pp. 365-67)

13.

Just two weeks later, the IEP committee reconvened to consider reports that [REDACTED]'s behavior had become increasingly volatile and aggressive, including hitting and kicking other students, being physically and verbally aggressive toward the teacher and a police officer, and using profanity. The Committee determined that [REDACTED] needed "a higher level of special education support to be successful in school" and decided that the [REDACTED] Academy program was the appropriate placement.⁴ [REDACTED] expressed concern that [REDACTED] not be a permanent placement and the school "assured her that [REDACTED] can work his way out of the program into the general curriculum." (Respondent's Ex. 3, pp. 376-77)

⁴ [REDACTED] Academy is a psycho-educational program, serving students with severe emotional behavior disorders ("SEVERE"). The [REDACTED] program for elementary-age students is in a self-contained classroom that is housed within [REDACTED] Elementary School in Douglas County. [REDACTED] students attend music, art and physical education with regular education students, accompanied by a para-professional. (Glidden Testimony, T. at 673; 676)

14.

█████. attended ██████ from February 15, 2005 through May 10, 2005, when ██████ withdrew him from the School District. (Respondent's Statement No. 5, *Interrogatory Testimony of Joy Glidden*, pp. 2, 5.) ██████ continued to exhibit severe behavioral problems while at ██████, although with the addition of a para-professional in his classroom, his behavior problems decreased. During the first month ██████ attended ██████, his teacher identified three concerning behaviors: (1) physical aggression, which included hitting, biting, spitting and kicking and occurred on a daily basis, (2) verbal aggression, which included cursing and threatening and occurred on a daily basis, and (3) not completing work. (Respondent's Ex. 3, pp. 379-82; 389-94)

Third Grade

15.

During third grade year, ██████ did not attend public school. Instead, in August 2005, ██████ enrolled ██████ in the ██████ Valley Baptist Academy in Villa Rica, Georgia, a small private school that offers no special education services ("██████ Valley"). (Respondent's Statement No. 12, *Deposition of Erick Dwane Knight*, pp. 6-7) In the application for enrollment at ██████ Valley, ██████ indicated that ██████ had been suspended from school for fighting in the past, but she answered "No" to this question: "Does the student have any mental, emotional, or physical, handicaps, which may affect his/her activities or progress, or that for some reason should be known to his/her teacher? (reply will be held confidential[])." (Respondent's Ex. 1, pp. 1-2)

16.

█████. attended ██████ from August 14, 2005 until September 29, 2005,

when he was expelled as a result of several disciplinary problems, including “disrespect, refusal to complete work, disrupting class, and inappropriate language.” (Knight Statement, p. 8; Respondent’s Ex. 1, p. 14) [REDACTED]’s teacher at [REDACTED], [REDACTED], described him as “an unruly and uncontrollable child who was a constant disruption in the classroom.” (Respondent’s Statement No. 1, *Interrogatory Testimony of Shirley Bolden*, p. 2) His teacher observed [REDACTED] physically fighting with other students, being defiant and disrespectful to school officials and his family members, and disrupting class.

[REDACTED] threw objects around the classroom, refused to stay in his chair, rolled around on the floor, talked to other students during class time, called other students inappropriate and offensive names, called out the answers in class, made “arm fart” noises. One day, for example, he disorganized the entire room by taking everyone’s belongings from their desk and moving them to someone else’s desk.... In addition, generally, he would tell other students that they were stupid, fat, or an idiot.

(Bolden Statement, p. 2)

17.

[REDACTED] was disciplined by the school administrator several times as a result of these behaviors, including receiving numerous demerits, in-school suspension, detention, and “corporal correction.” (Knight Statement, pp. 10-15; Respondent’s Ex. 1, pp. 6-13) On the day [REDACTED] was expelled from [REDACTED], [REDACTED], his grandmother came to pick him up from the school. [REDACTED] repeatedly punched, kicked and bit his grandmother and the school administrator called the Villa Rica police to intervene. (Knight Statement, pp. 15-16)

18.

Sometime later in the 2005-06 school year, [REDACTED] participated in an “alternative home school program” through the [REDACTED] Christian Academy (“[REDACTED]”). According to Ms. Ball, a volunteer teacher at [REDACTED], [REDACTED], “was supposed to do work at

home on Monday through Wednesday, and then submit his work and participate in testing on Thursday and Friday.” Although the alternative home school program required [REDACTED] to attend school once a week, Ms. Ball testified that “there were some weeks where we never heard from them.” (Respondent’s Statement No. 4, *Interrogatory Testimony of Donna Ball*, p. 2)

19.

In all, [REDACTED] only attended [REDACTED] [REDACTED] on three occasions, in the spring of 2006. When he did attend, he never completed any work and thus never received any grades. On all three occasions, [REDACTED] exhibited disruptive, inappropriate, and rude behavior. On his last visit, [REDACTED] told a teacher that “she was ugly and that her feet stink.” He also was disrespectful to Ms. Ball and spat on her face. He was expelled from the program. (Ball Statement, pp. 2-4; *Ball Testimony*, T. at p. 449)

20.

[REDACTED]’s mother [REDACTED] testified that she home-schooled [REDACTED] for his third grade year, with the exception of the six weeks he was enrolled at [REDACTED] [REDACTED]. Although [REDACTED] testified that her home-schooling of [REDACTED] was in conjunction with [REDACTED] [REDACTED] from October 2005 to approximately May 2006, the Court does not find this testimony credible in light of Ms. Ball’s testimony. ([REDACTED] *Testimony*, T. at p. 578) In addition, [REDACTED] invoked her privilege against self-incrimination in response to certain questions relating to her preparation of the home school records, whether any other schools (beside Mt. Zion) were involved in providing home school services to [REDACTED], and whether she had registered to home school [REDACTED] through Carroll County. ([REDACTED] *Testimony*, T. at p. 577-80, 583-85; Respondent’s Ex. 15) The Court infers from [REDACTED]’s invocation of this privilege that her

answers would have been unfavorable with respect to her provision of home-schooling services to [REDACTED] during the 2005-06 school year. See Simpson v. Simpson, 233 Ga. 17 (1974); Hathcock v. Hathcock, 249 Ga. 74 (1982).

21.

[REDACTED] testified that [REDACTED]'s behavior was good during their one-on-one home-schooling sessions. He was never disrespectful to her, never showed aggression toward her or the tutors she occasionally employed, and did not have any difficulties following her instructions. Although she had no record of his work or her teaching notes, [REDACTED] testified that she recalled that he achieved "pretty high grades" during home-schooling. [REDACTED] also testified that [REDACTED] began taking medication for ADHD during this time and that he was more focused when he took the medication. ([REDACTED] *Testimony*, T. at pp. 592-96, 602-03)

B. Education of D.C. at New Manchester Elementary

22.

Before [REDACTED] began fourth grade in August 2006, S.C. moved back to Douglas County, into the [REDACTED] Elementary School ("New Manchester") district. ([REDACTED] *Testimony*, T. at pp. 604-05)

23.

[REDACTED]'s behavioral issues began almost immediately. During the first six weeks at [REDACTED], while placed in a regular education classroom taught by Anna Clement, [REDACTED] did not get along well with the other children. He regularly taunted his peers, made fun of them, and exhibited aggressive behaviors towards them.⁵ His conduct was

⁵ Ms. Clements often observed him tell students that he would "beat their ass" and saw him engage in acts of physical aggression, including fighting and unprovoked

very disruptive to the classroom.”⁶ He also was defiant and disrespectful to his teachers.⁷
(Respondent’s Statement No. 13, *Interrogatory Testimony of Anna Clements*, p. 2)

24.

On August 17, 2006, [REDACTED] convened a Temporary IEP Committee meeting to consider special education eligibility, development of an IEP, reevaluation, placement, and a behavior plan. [REDACTED] attended the meeting, along with a representative from [REDACTED], his prior Douglas County placement, his regular education teacher, special education teachers, and others. (Respondent’s Ex. 3, p. 1; Respondent’s Statement No. 7, *Interrogatory Testimony of Amy Powell*, p. 2)

25.

[REDACTED] told the Committee that [REDACTED] had attended private school for third grade and that his behaviors had improved since being in [REDACTED] [REDACTED]. She reported that [REDACTED] was taking Concerta, a medication for ADHD and that he was less aggressive and more shoving, pushing and bumping. [REDACTED] also wrote a note to a student that he was going to “kick his ass” and “beat the fuck out of him.” (Clements Statement, p. 3-4)

⁶ [REDACTED] disrupted his class 3 to 4 times an hour every day. “[REDACTED]’s disruptions affected not only his own ability to learn, but also the educational progress of the other students. The other students were young and easily distracted by [REDACTED]’s inappropriate behavior. When [REDACTED] caused a disruption, I had to spend on average five to ten minutes redirecting the class to get their attention back on learning. As a result, the students never developed a proper foundation and their testing demonstrated objectively that their progress was not meeting expectations while [REDACTED] was in the classroom.” (Clements Statement, p. 5)

⁷ [REDACTED] frequently yelled at Ms. Clements, shouting, “Shut up, you’re stupid!” or “I’m not gonna do anything you ask ... [or] anything you tell me.” (Clements Statement, p. 5) Also during these early weeks of fourth grade, [REDACTED] told a teacher with cancer that she “needs to rob a wig store.” (Respondent’s Ex. 3, at p. 17) Ms. Clements also observed [REDACTED] being rude, disrespectful, and using inappropriate language toward Mr. Bentley, a para-professional that assisted [REDACTED] during transitions times, like going to the bus or the bathroom. (Clements Testimony, T. at 869). See also (Respondent’s Statement No. 18, *Deposition Testimony of Cate Flanagan*, pp. 63, 66-67)

compliant. She also stated that his interaction with peers was improved. [REDACTED]. did not disclose, however, that [REDACTED]. had been expelled from [REDACTED] Valley and [REDACTED] or that she had home-schooled him for much of the 2005-06 school year. She also refused to allow the private schools to release any of his disciplinary records. (Powell Statement, p. 4; *Powell Testimony*, T. at 731-33; Respondent's Ex. 3, pp. 3, 12; Respondent's Ex. 1, p. 15)

26.

At the hearing, [REDACTED]. acknowledged that the information regarding [REDACTED].'s expulsion from [REDACTED] Valley, as well as the fact that he was home-schooled for much of the year, was appropriate to share with the IEP Committee, but she testified that she did not do so because no one ever asked her about it. ([REDACTED]. *Testimony*, T. at 322) This explanation is not credible. The Court finds that [REDACTED].'s failure to disclose this material information and her refusal to permit the IEP Committee to review his complete record from the private schools was misleading and hampered the Committee's efforts to develop an appropriate IEP. See 20 U.S.C. § 1414(d)(2)(C)(ii); 34 C.F.R. § 300.323(g) (recognizing the materiality of such records by mandating that a new school promptly obtain a disabled child's records from the previous school).

27.

At the time of the Temporary IEP Committee meeting, [REDACTED]. was determined to be eligible for services under his prior EBD category, which was still current. (Respondent's Ex. 3, pp. 3-4) Based on [REDACTED].'s reports regarding [REDACTED].'s improved behavior, as well as her preference for [REDACTED]. to remain at New Manchester, the Committee agreed to place [REDACTED]. in a regular education classroom (with two hours per day in a special

education resource room) on a trial basis, as opposed to placing [REDACTED] at [REDACTED] or in a self-contained EBD classroom at another school. [REDACTED] consented to this placement. (Respondent's Ex. 3, pp. 1-5, 11)

28.

The Committee developed a list of goals and objectives relating to his behavior and his ability to stay on task and complete assignments. The Committee also identified appropriate accommodations for [REDACTED], including allowing him to stand to complete work, repeating instructions for assignments, and using an agenda to send home assignments and communicate with [REDACTED] (Respondent's Ex. 3, pp. 1-8) In addition, the Committee agreed upon a BIP, which identified target behaviors (non-compliance with teacher directives, verbal aggression toward peers, and off-task behaviors/failure to complete assignments) and proposed positive behavioral interventions and supports (a combination of positive reinforcements and consequences). (Respondent's Ex. 3, p. 8)

29.

[REDACTED] consented to have [REDACTED] evaluated and the Committee planned to meet to review the interim placement in three weeks. (Respondent's Ex. 3, pp. 5, 9) On September 5, 2006, the Committee met again and agreed, at [REDACTED]'s request, to reduce the number of hours that [REDACTED] spent in the special education resource room per week. [REDACTED]'s classroom teacher reported that he was doing grade level work, but needed redirection to stay on task and complete assignments. (Respondent's Ex. 3, p. 13-14)

30.

On September 25, 2006, [REDACTED] was moved to an Early Intervention Program ("EIP") classroom, which served fewer students within a remedial, general education

setting. [REDACTED] agreed to this move, which was intended to help [REDACTED] decrease his behavior problems in a smaller class size. (Respondent's Statement No. 14, *Interrogatory Testimony of Dr. Sandra Dyer*, p. 2) After a few weeks, it became clear that although his behavior improved with the smaller number of students, the EIP classroom was not academically advanced enough for [REDACTED]. Also, [REDACTED] made fun of lower functioning students and impeded the learning of those students. (Respondent's Ex. 3, pp. 17, 19; Dyer Statement, p. 2) [REDACTED] was reassigned to the regular education fourth grade classroom of Keesha Robinson. In January 2007, at the request of [REDACTED], [REDACTED] was moved to the regular education class of Cate Flanagan, the most experienced teacher in fourth grade. (Dyer Statement, p. 2)

31.

During this time, from approximately August 2006 to October 2006, [REDACTED] also exhibited behavioral problems on the regular education school bus. His bus driver, Guy Swanner, completed six disciplinary referrals for [REDACTED].⁸ [REDACTED] frequently cursed on the bus, calling female students "ho," "fat," and "ugly," as well as using other profanities. [REDACTED] also would not stay in his seat, taunted other children repeatedly, threw sunflower seeds at another child, and disobeyed the bus driver's directions. On at least two occasions, [REDACTED] got in physical fights on the bus and Mr. Swanner had to pull the bus over to the side of the road. On October 23, 2006, [REDACTED] threw paper out the bus window and then took a girl's shoe and threw it out of the window while the bus was driving on

⁸ Mr. Swanner expressed genuine affection for [REDACTED] and attempted to counsel [REDACTED] and model appropriate behavior. (*Swanner Testimony*, T. at 848) However, Mr. Swanner considered [REDACTED]'s behaviors on the bus serious and could not tolerate them on a school bus with student passengers. (Respondent's Statement No. 11, *Interrogatory Testimony of Guy Swanner*, p. 5)

Camp Creek Highway. [REDACTED] was expelled from the regular education bus after this incident. (Swanner Statement, pp. 2-5)

32.

On October 13, 2006, the IEP Committee met to discuss [REDACTED]'s behavior and to consider possible amendments to the temporary IEP. They reviewed the observations of his classroom teacher and the bus driver⁹ and considered his academic progress. The Committee also reviewed the accommodations and other interventions that were attempted by [REDACTED]'s teachers¹⁰ and discussed placement options, including changing [REDACTED]'s placement back to [REDACTED]. The school representatives on the Committee recommended this placement, but [REDACTED] rejected it.¹¹ (Respondent's Ex. 3, pp. 15-29)

33.

On December 7, 2006, the IEP Committee reconvened to discuss eligibility, review the temporary IEP, develop a permanent IEP, and consider new information and possible program changes. (Respondent's Ex. 3, pp. 39, 44) [REDACTED] and [REDACTED]'s

⁹ 20 U.S.C. § 1414(c)(1)(A) mandates that an IEP Team review various data, including "observations by teachers and related services providers."

¹⁰ Various interventions were used to address [REDACTED]'s behavioral issues, including daily contracts, sticker charts, telephone calls to [REDACTED], verbal warnings, class time out, OR, bus suspension, out of school suspensions, and "Excellent Eagle Tickets" for positive behavior. In addition, the special education resource teacher worked with [REDACTED] to identify alternative acceptable behaviors. (Respondent's Ex. 3, p. 18; Powell Statement, p. 9)

¹¹ The School District members of the Committee believed [REDACTED] to be the appropriate setting because it offered very small class sizes and student teacher ratios (approximately 7 children per class and adult support of 1 teacher and two para-professionals). [REDACTED] also had special support services that were not available at [REDACTED], including an intensive social skills program, counseling for parents and students, and a specialized behavior management system designed for students with behavioral difficulties. (Powell Statement, p. 9)

grandmother attended the meeting, accompanied by counsel, as well as [REDACTED]'s general education and special education teachers, Dr. Dyer, [REDACTED]'s principal, Christi Teal, the Special Education Director, Amy Powell, and other school personnel. (Respondent's Ex. 3, p. 56) Ms. Powell reviewed [REDACTED]'s present level of performance, including achievement and intelligence test results, classroom performance and grades, behaviors, and health factors. (Respondent's Ex. 3, pp. 46-47)

34.

The Committee discussed the need for a comprehensive re-evaluation to address eligibility, including [REDACTED]'s request that [REDACTED] be considered for eligibility under "Other Health Impaired" ("OHI") disability, which encompasses ADHD.¹² The Committee was already aware that [REDACTED] was diagnosed with ADHD and was taking Concerta. [REDACTED] was given a medical exam report to be completed by a physician regarding ADHD to be considered as part of the comprehensive reevaluation.¹³ The Committee concluded at that time that [REDACTED] remained eligible under an EBD category. (Respondent's Ex. 3, pp. 46-47, 57-58)

¹² Under IDEA regulations, as well as Georgia Department of Education regulations, "[o]ther health impairment means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the education environment" that is due to chronic problems such as ADHD and that "adversely affects a child's education performance." 34 C.F.R. § 300.8(c)(9); Ga. Comp. R. & Reg. R. 160-4-7-.05, Appendix (g).

¹³ [REDACTED] admitted that she forgot to bring the documentation of [REDACTED]'s medical diagnosis for ADHD to the March IEP meeting and did not give the documentation to the School District until June 2007. She also testified that she gave the IEP Committee a diagnosis of ADHD by Dr. Barbara Kay, a clinical psychologist, at the August 2006 meeting, but no one ever asked her for a copy. ([REDACTED] Testimony, T. at 3) However, there is no evidence in the record that Dr. Kay ever prepared a written assessment of [REDACTED] prior to submitting her interrogatory testimony for this hearing.

35.

The Committee identified the appropriate evaluations for [REDACTED], including cognitive testing, projective measures, self-concept measure, behavior checklists/data, and medical information/report. The minutes of the meeting also reflect that the Committee agreed to a Functional Behavior Assessment ("FBA"). The assessments were to be completed and the IEP Committee reconvened to review the results on or before February 28, 2007. [REDACTED] signed a Reevaluation Determination form containing this information, as well as a Consent for Evaluation, on December 7, 2006.¹⁴ (Respondent's Ex. 3, p. 48, 58, 87; Powell Statement, pp. 10-11)

36.

The Committee reached consensus on modifications to the temporary accommodations, goals and objectives, the BIP, and continued placement in the regular education setting, with five hours of EBD special education in a resource room, pending the results of the comprehensive reevaluation. (Respondent's Ex. 3, pp. 45-59)

Accommodations included the following:

Provide list of spelling words to parent/repeat instruction for assignments, and have student repeat instructions if not engaged/preferential seating near instruction/use of agenda to write assignments and communicate with home/copies of graded work to be sent home Monday/provide assignments to parent ahead of time as well as missing assignments/allow extra time (time and 1/2) to complete assignments if needed/allow missed assignments to be made up at home or resource room.

(Respondent's Ex. 3, p. 53)

¹⁴ The February 27, 2007 IEP Committee Meeting minutes state that "the student's attorney indicated that the parent requested the meeting three months prior..." (Respondent's Ex. 3, p. 67). However, the Court found no evidence in the record that [REDACTED] requested that the IEP reconvene earlier than the agreed-upon date in February 2007.

37.

The BIP was modified to include a single target behavior – “aggression toward peers.” It identified positive behavioral interventions, including a self-monitoring recording form, behavior chart, self-control strategies, and time-out from the regular education classroom in the special education resource room, as well as specific positive reinforcers or “rewards” for good behavior, including computer time, reading a book from home, phone call home to speak with mom about appropriate behavior, drawing time, and extra recess. (Respondent’s Ex. 3, p. 54)

38.

During January and February 2007, the School District administered numerous assessments and evaluations of ■■■. Ms. Powell, an educational evaluator, gathered information from a variety of sources, including ■■■’s discipline record, his grades, his IQ score, his self-concept test, the Burk’s behavior ratings test, the BES-2 ratings, and anecdotal information from his teachers. In addition, Kimberly A. Evans, a nationally-certified school psychologist from the School District, conducted a psycho-educational evaluation, and Dr. Ajamu Nkosi, a Senior Educational Consultant and Board Certified Behavior Analyst with the Southern Behavioral Group, completed a Functional Behavior Assessment. (Respondent’s Ex. 3, pp. 73-160; Powell Statement, p. 11; Respondent’s Statement No. 8, *Interrogatory Testimony of Kimberly Evans*, pp. 1-2)

39.

Ms. Evan’s conducted testing regarding ■■■’s cognitive performance, level of anxiety, and emotional and behavior disorders.¹⁵ She also observed ■■■. and reviewed

¹⁵ The cognitive tests included the Reynolds Intellectual Assessment Scales (“RIAS”) and the Baktenica Development Test of Visual-Motor Integration (BEERY).

background documents and prior testing.¹⁶ (Evans Statement, p. 2) She did not observe him in his regular education class, however, because [REDACTED] was very private, especially about being singled out for special education services in front of his regular education peers. (*Evans Testimony*, T. 786-87)

40.

Ms. Evan's asked [REDACTED] to complete a parent interview as part of her assessment, but she did not. (*Evans Testimony*, T. at 780-81)

41.

Ms. Evans' testing indicated that [REDACTED] functions in the average range of intellectual ability and did not show any evidence of anxiety. On the BASC-2, D.C. was rated by his teachers in the clinically significant range for hyperactivity, aggression and conduct problems, as well as for withdrawal symptoms, study skills, and social skills. (Evans Statement, p. 3)

42.

Based on all her assessments and reviews, Ms. Evans detected "emotional indicators consistent with an Emotional Behavior Disorder."

In my evaluation of him, he appeared to have a different set of rules that applied to him pertaining to what is right and wrong than those that applied to other students. I also found that [REDACTED] tends to reason away inappropriate behavior instead of taking responsibility for his behavioral problems at school and conflicts with other students. He feels that many

Other tests administered by Ms. Evans were the Revised Children's Manifest Anxiety Scale ("RCMAS") and the Behavioral Assessment System for Children-2.

¹⁶ Ms. Evans testified regarding the importance of having a thorough history of a child in completing this type of psycho-educational evaluation and looking at the "total child." (*Evans Testimony*, T. at 765, 777-78) The Court finds Ms. Evan's evaluation and her testimony at the hearing to be the product of a thorough, impartial, and complete analysis of all available evaluations, testing results, and background records and thus accords it significant weight.

of his behavioral problems are the result of other students trying to fight with him, which also may be an indicator of emotionality in his behaviors. [REDACTED] also demonstrated an inclination for rigid thinking with much potential for explosive behavior.

(Evans Statement, pp. 3-4)

43.

Ms. Evans also "noted some symptoms of ADHD through behavioral observations which is consistent with his previous diagnosis of ADHD." However, she also noted that the school version of the Hawthorne rating test for ADHD did not indicate concerns in the areas of inattentiveness or hyperactivity-impulsiveness. Finally, Ms. Evans observed indicators that [REDACTED] had auditory short-term memory problems and a significant weakness in the area of written expression. (Respondent's Ex. 3, pp. 158-59)

44.

Ms. Powell administered additional achievement testing and behavioral assessments. [REDACTED] scored in the average range in all academic areas, and appeared to perform commensurate with ability, except in the area of written expression. On the Burk's behavior rating scale, teachers indicated difficulty with poor impulse control, poor anger control, excessive aggression and resistance, and poor social conformity. Poor attention and poor impulse control was rated significant by some of the raters. On the BES behavior rating scale, the majority of the teachers rated significant difficulty in the areas of interpersonal skills, inappropriate behavior under normal conditions, and pervasive mood of unhappiness and depression. Finally, as indicated above, the Hawthorne ADHD scales did not indicate any areas of significant concern. (Respondent's Ex. 3, pp. 67, 85-149; Powell Statement, p. 12)

45.

According to Ms. Powell, other than the Hawthorne test, there are no other tests at the school level to detect ADHD. However, she stated that regardless of a student's specific eligibility category, the school would address and give accommodations for any difficulties – such as inattention or impulsivity – the student displayed. (Powell Statement, pp. 12-13)

46.

Dr. Nkosi performed a Functional Behavior Assessment or FBA to determine the “function” of [REDACTED]'s behaviors in school, including name calling, teasing, cursing, verbal threats and physical aggression to peers. Dr. Nkosi conducted the FBA from January 25, 2007 to February 23, 2007, which included the review of background records, teacher interviews, a motivation assessment scale, and direct behavior observations by Dr. Nkosi at school. Dr. Nkosi was aware of [REDACTED]'s diagnosis of ADHD, which he described as a “psychological disorder of childhood characterized by hyperactivity, inattention, and impulsivity.” (Respondent's Ex. 3, pp. 68, 73-81)

47.

Dr. Nkosi concluded that [REDACTED]'s most severe problem behaviors were being maintained by access to verbal attention from his teacher and peers, rather than an escape from task demands. Dr. Nkosi made a number of recommendations for behavior management based on his findings:

- 1) Conduct a preference assessment;
- 2) Differential Reinforcement of Other Behavior;¹⁷

¹⁷ For every 20 minutes of time he is behaving appropriately, [REDACTED] would earn 10 minutes of an activity or item of his choice. During this time, his teacher should comply with all his requests, within reason. The teacher should begin with five minutes of appropriate behavior as a goal, using a digital timer, and work up to 20 minutes.

- 3) Provide [REDACTED] with noncontingent access to attention on a fixed time schedule;
- 4) Provide a rich schedule of attention when [REDACTED] is not engaged in problem behavior;
 - a) [REDACTED] should be praised as much as possible;
 - b) [REDACTED] should be verbally engaged as much as possible;
- 5) Extinction;¹⁸
 - a) This is not an "over night process," but needs to be used consistently over time;
 - b) Be prepared for an increase in behavior;
 - c) Ignoring will not work in isolation of other recommendations;
- 6) Positive supports during tasks should be used;
 - a) Give him easier assignments first;
 - b) Present him work tasks in small units of time
 - c) Explain what he has to do prior to the beginning of an activity;
 - d) Allow access to highly preferred items contingent upon completion of work;
- 7) Use effective instruction delivery techniques;
- 8) Time Out should not be used at this time for problem behaviors;
- 9) Structured social skills curriculum;
- 10) Intense training for teachers in basic behavior management; and
- 11) D.C.'s teachers should be trained to collect data.

(Respondent's Ex. 3, pp. 68, 73-81)¹⁹

48.

On February 27, 2007, the IEP Committee reconvened to review the comprehensive reevaluation results and discuss eligibility. Inadvertently, [REDACTED]'s special education substitute, Ms. Clark, was left off the invitation list. When asked whether she would consent to Ms. Clark participating in the meeting, [REDACTED] refused, because "she was

¹⁸ Teacher and staff must ignore his problem behavior and must follow through on demands and not allow him to escape them. Although teachers must not ignore overt acts of physical aggression and should physically block him from inappropriate physical contact with other students, they must do so without bringing any additional and unnecessary attention to his problem behavior.

¹⁹ Dr. Nkosi's recommends a significant level of intervention in response to [REDACTED]'s severe behavioral issues. Some of these interventions would be nearly impossible to implement in a regular education setting. (Respondent's Statement No. 1, *Interrogatory Testimony of Christi Teal*, p.13)

just asked yesterday.”²⁰ (Respondent’s Ex. 3, p. 68)

49.

Ms. Flanagan, ■■■.’s regular education teacher, attended the IEP Committee meeting and reported on his behavior and academic performance in her class since mid-January 2007. Ms. Flanagan is a very experienced teacher and has had special education students as part of her regular education classroom every year for 23 years. (Flanagan Statement, p. 8-9)²¹ Ms. Flanagan reported that ■■■. has poor work habits and trouble completing work. She gave him extra time, but he still did not complete most assignments. Because of the absence of graded work, ■■■. was earning mostly “F” grades, except for a “C” in spelling. Ms. Flanagan also reported that ■■■.’s problem behaviors have escalated, including kicking, yelling out, name-calling, taunting, and disrespecting the teacher. (Respondent’s Ex. 3, pp. 68-69; Flanagan Statement, p. 22)²²

²⁰ Petitioner did not contend in the Amended Due Process Complaint that the absence of a special education teacher at the February 2007 IEP meeting was a procedural violation under 34 C.F.R. 300.304.321(a)(3)(requiring that the IEP Team include “not less than one special education teacher of the child, or where appropriate, not less than one special education provider of the child”). Even if this issue had been properly raised, the Court does not find that her absence substantively impacted the procedural rights of ■■■. or ■■■. given that Ms. ■■■. had provided substantial input to Dr. Nkosi, Ms. Powell and Ms. Evans during the comprehensive assessments. Further, both Amy Powell and Ellen Morrow were present and had provided special education services to ■■■. during the 2006-07 school year. (Respondent’s Statement No. 17, *Interrogatory Testimony of Ellen Morrow*, p. 3).

²¹ Ms. Flanagan’s testimony was taken by deposition in lieu of live testimony because she was undergoing medical treatment and her availability at the time of the hearing was uncertain. On June 8, 2007, the Court quashed a subpoena and issued a protective order prohibiting Petitioner from seeking documents or questioning the witness about her medical condition at the deposition. The findings and conclusions in the June 8, 2007 Order are incorporated herein by reference.

²² Ms. Flanagan described ■■■.’s daily disruptions during instructional time and aggressive and hostile behavior toward his classmates. “He called them names, he called their mamas names, he threatened to shoot them; he threatened to cut their throats; he

Ms. Flanagan stated that one-third of her day was spent on [REDACTED]. His disruptions in the classroom were moderate to severe on a daily basis and required considerable "redirection" to settle the students down after a disruption. According to Ms. Flanagan, as with Ms. Clement, [REDACTED]'s disruptions impacted not only his own education, but the education of the other students in the classroom as well. They were not able to "get directed teaching from me consistently."

...I am talking literally there were times when I could not get a sentence out of my mouth. I could not say, Who can tell what the largest continent is? I could get to continent and somebody would either scream out, [REDACTED.] stop that, or [REDACTED.], on many, many occasions, would yell out himself, Well, that's just stupid, or, Who cares, or pick up a rubber band and sling it at the map and, Ha, ha, ha, look at the map paper. It moved. It wiggled with the paper....

I was constantly reteaching ... I don't have a problem reteaching if a child doesn't know the material, but when you have entire classes not understanding, I didn't hear that, or Would you repeat that, or, I don't understand it, I'm not getting through lessons. My children ... were not able to reach the mastery level, just as in any person, any grownup who gets interrupted in their thoughts, and when it happens regularly, there isn't a continuity of thought or education going on....

(Flanagan Statement, pp. 36-37)

The School District members of the IEP Committee concluded that [REDACTED] continued to meet the eligibility criteria for EBD. S.C. disagreed. She preferred [REDACTED] be determined eligible under an "OHI" category as a result of his ADHD because the EBD classification was "stigmatizing." Ms. Teal, the School District's Special Education threatened to pee on them. He made many racial slurs: white stupid whore, white stupid bitch, "N" words. These were daily occurrences. These were not maybe once a week. These were daily occurrences. Therefore, in the classroom his peer relationships were not good." (Flanagan Statement, pp. 24, 297).

Director, advised █████ that the IEP Committee would consider OHI eligibility upon the receipt of medical documentation from █████.²³ It appears from the record that █████ consented to the amendments to the IEP that added services and specific goals and objectives relating to written expression. (Respondent's Ex. 3, pp. 65-72; Teal Statement, p. 11)

52.

Ms. Teal also broached the subject of changing █████'s school placement. Ms. Teal suggested that the current IEP could be implemented at a different school because "the school and parent relationship had so declined that it appears to be irreparable." In addition, Ms. Teal suggested a placement at █████ or a self-contained EBD classroom at another school. █████ and her counsel objected to a change in placement and the meeting adjourned without a decision on that issue. Ms. Teal asked █████ to visit the self-contained classroom at █████ Elementary and then the IEP Committee meeting would be continued at a later date. (Respondent's Ex. 3, pp. 71-72)

53.

Dr. Judy Scherer, the Deputy Superintendent for the School District attended the February IEP meeting at the request of █████. According to Dr. Scherer, █████ did not say much during the meeting, but "her demeanor was hostile and angry." Prior to the meeting, Dr. Scherer's interactions with █████ had been positive and she believed they had developed a productive rapport. (Respondent's Statement No. 15, *Interrogatory Testimony of Judy Scherer*, p. 2)

²³ The Court takes judicial notice of the Rules of the Georgia Department of Education ("Ga. DOE"). At the time of the February IEP meeting, Ga. DOE Rules provided that an OHI eligibility determination for ADHD could only be made based upon the medical evaluation from a licensed doctor of medicine. See former Ga. DOE Rule 160-4-7-.02; n. 27 *infra*.

54.

The day after this meeting, February 28, 2007, [REDACTED] had struggled all day in class and been suspended for attacking another student. After school that day, at approximately 5:30 p.m., Ms. Flanagan received a telephone call on her cell phone at home. The caller said, "I want to get you, you bald-headed bitch. I'm going to 'fuss'²⁴ all over you, you bald-headed bitch." Ms. Flanagan, who wears a turban as a result of medical treatment for a brain tumor, stated that the tone and the message were hostile and threatening and that she was scared and upset by the call. (Flanagan Statement, pp. 100-02, 342)

55.

Ms. Flanagan recognized [REDACTED]'s voice on the telephone call. Ms. Flanagan had given out her cell phone number to all the parents in her class. (Flanagan Statement, pp. 101-02, 126) Ms. Flanagan testified that she was later advised that the call was traced by investigators to Bell South, where [REDACTED] worked; however, at the time of the call, and "more importantly," she recognized [REDACTED]'s voice. (Flanagan Statement, pp. 102-04)

56.

Almost as soon as she received this call, Ms. Flanagan sent an email message to her principal and vice-principal at ~~New Manchester~~, as well as the other school members on the IEP Committee.

You are not going to believe this! I just got a call from [REDACTED] cussing me out!!! I picked up the phone from 404-521-2978 to be told "You bald-headed b_____, I'm gonna fuss all over you bald-headed b_____"
Then she hung up.

I'm assuming this is because [REDACTED] was suspended for tomorrow for

²⁴ The word "fuss" is the only word Ms. Flanagan was not positive she heard correctly. (Flanagan Statement, p. 101)

attacking another student in my room. It was caught on tape at 2:20 this afternoon. This is a first for me and I am shaking.

(Flanagan Statement, pp. 112-14, Petitioner's Deposition Ex. 1)

57.

On March 1, 2006, Dr. Dyer, [REDACTED]'s principal, discussed the telephone call with [REDACTED] [REDACTED] denied making the call. (Respondent's Statement No. 14, *Interrogatory Testimony of Sandra Dyer*, p. 5)

58.

Notwithstanding [REDACTED]'s denial, Dr. Scherer determined that protective action was necessary. Dr. Scherer asked the Douglas County School resource officer to issue a trespass warning against [REDACTED], prohibiting her from entering the premises at [REDACTED] [REDACTED]. The warning was served on [REDACTED] on or about March 2, 2007. (Scherer Statement, p. 3; Petitioner's Ex. 14a)

59.

Dr. Scherer, sometime after making the request for the trespass warning, received a police report regarding the incident that indicated that the caller's telephone number had been traced to Bell South, where [REDACTED] was employed. (Scherer Statement, p. 3; *Scherer Testimony*, T. at 890) However, at the hearing, Suzette Jackson, a compliance assistant for Bell South, produced records indicating that the call to Ms. Flanagan's cell phone, which lasted approximately 9 seconds, was not traced to a Bell South line. Rather, the call was placed from a pay phone outside of the Northside Grocery in Atlanta. Ms. Jackson explained that the reason that Bell South might have appeared on a reverse search of the phone number was because pay phone lines were owned and operated by Bell South up until a few years ago. (*Jackson Testimony*, T. at 910-17)

60.

Based on a preponderance of the admissible credible evidence, the Court finds that [REDACTED] placed the telephone call to Ms. Flanagan, that the call was threatening, and that the School District acted reasonably in taking protective action against [REDACTED]. Further, the Court finds no credible evidence that either Ms. Flanagan's report of the call or Dr. Scherer's actions in seeking the trespass warning were taken in retaliation for [REDACTED]'s actions relating to [REDACTED]'s IEP or her exercise of her legal rights under IDEA or other laws.

61.

Understandably, this incident created further tension in the relationship between [REDACTED] and [REDACTED]. For example, around this time, Ms. Flanagan was collecting permission slips for a field trip to the Aquarium. Prior to the February 28, 2007 telephone call, Ms. Flanagan had notified [REDACTED] that someone other than [REDACTED] must accompany [REDACTED] on the field trip, and this prerequisite remained in place following the February 28 telephone call. Ms. Flanagan did not want [REDACTED] to attend the field trip at all due to his behavior problems, however [REDACTED] was permitted to attend the field trip, accompanied by his grandfather. [REDACTED] testified that this had a negative impact on [REDACTED] because he wanted her to go on the field trip with him "really, really bad." (Flanagan Deposition Testimony, p. 164-66; *S.C. Testimony*, T. at 370)

62.

On March 23, 2007, the IEP Committee reconvened off school grounds. [REDACTED] attended, accompanied by counsel, along with Ms. Teal, Dr. Dyer, Ms. Flanagan, Ms. Powell, Ms. Evans, and Melissa Joe, the principal from [REDACTED] Elementary

("██████████"). (Respondent's Ex. 3, p. 162; S.C. Testimony, T. at 368)

63.

Ms. Joe discussed the EBD classroom at ██████████ and invited ██████████ to visit it any time, as soon as that day. ██████████ is a school with approximately 650 students. It has a full regular education program, as well as a self-contained EBD classroom that serves all of the County's EBD special needs students. The class typically has no more than ten students and this year is expected to have only five. There is one special education teacher, trained in behavior modification, and two paraprofessionals. The students receive almost one-on-one attention in all subjects in the EBD classroom, but interact with the general education students for P.E., art, music, lunch, and other school activities. Ms. Joe and Ms. Morrow also spends time in the class almost daily. (Respondent's Statement No. 16, *Interrogatory Testimony of Melissa Joe*, pp. 2-5)

64.

The school members of the IEP Committee proposed a placement at ██████████ in the self-contained classroom, but ██████████ rejected that placement. ██████████ believed that ██████████ had failed to implement the existing IEP, including failing to regularly communicate with ██████████ and failing to give ██████████ assignments in advance or extra time to complete work. She requested that the school incorporate the FBA recommendations and allow time to assess their effectiveness. (Respondent's Ex. 3, pp. 166-67)

65.

The Committee did agree to amend the BIP by adding the following target behaviors: following directions, completing work, and improving his behavior towards peers by saying and doing nice things. The positive interventions were also amended by

removing the self-monitoring record, which [REDACTED] tore up and would not use, and adding “positive peer praise.” (Teal Statement, p. 15; Flanagan Statement, pp. 247-48, 250-51; Respondent’s Ex. 2, p. 200)

66.

On March 27, 2007, after the IEP Meeting was adjourned, [REDACTED] visited [REDACTED] with Ms. Joe and Ms. Morrow. [REDACTED] spent an hour and half visiting the EBD classroom and learning about the program. Ms. Joe testified that she liked [REDACTED] and would be excited to have [REDACTED] at [REDACTED]. [REDACTED] told Ms. Joe and Ms. Morrow that she thought it would be a great program for [REDACTED] and stated that she wished it had been offered to her before. [REDACTED] also stated that she thought the behavior management program was what [REDACTED] needed and she liked that the classroom looked like a “regular” class. (Morrow Statement, p. 6; Joe Statement, p. 4)

67.

Although [REDACTED] told Ms. Joe and Ms. Morrow that she wanted to bring [REDACTED] to visit [REDACTED], she never did. After [REDACTED] rejected the proposed placement and invoked the IDEA’s “stay-put” provisions, [REDACTED] finished out his fourth grade year at [REDACTED] in Ms. Flanagan’s classroom, with time spent in the special education resource room of Shellie Grant, a new inter-related special education teacher. Ms. Grant taught [REDACTED] writing and math 1 hour per day and walked him to the bus. Ms. Grant tried to get [REDACTED] to use an assistive technology computer as an accommodation for his written expression deficits, but he refused to use it because it made him different from the other students. During this time, he made some educational progress in writing, but was not at grade level. According to Ms. Grant, even in the smaller setting, [REDACTED]’s behavior affected his

ability to make progress and he was disruptive and aggressive toward other students. (Respondent's Ex. 2, *Interrogatory Testimony of Shellie Lorraine Grant*, pp. 3-5, 7)

68.

Specifically, Ms. Grant observed [REDACTED] threaten other students by saying, "I'll bust you in your mouth" and similar comments, calling a girl in the class "ugly," and making comments about another student's mother when [REDACTED] knew that the student did not know where his mother was and believed her to be dead. She also observed acts of physical aggression, including hitting his fist in his hand and pulling a chair out from under a girl, causing her to fall. (Grant Statement, pp. 5-6)

69.

Even with a smaller class, [REDACTED]'s continuous, daily outburst "had a ripple effect on the entire class that disrupted not only [REDACTED]'s ability to focus but also distracted other students from their work. [REDACTED]'s outbursts caused everyone to get off task and it took a great deal of time for me to re-focus the children." Ms. Grant estimates that after each of [REDACTED]'s verbal outbursts, it would take her five minutes to settle the class down, during which time neither [REDACTED] nor any of the other children were making academic progress. (Grant Statement, pp. 7-8)

70.

Toward the end of the year, Ms. Grant detected some improvement in the level and frequency of [REDACTED]'s problem behaviors, as well as improvements in math and writing. She used positive encouragement and reward for [REDACTED] and modeled appropriate behavior. (Grant Statement, pp. 8-9; *Grant Testimony*, T. at 409) In addition, Ms. Grant saw some progress in his social interaction skills. Initially, he was clearly embarrassed

by receiving special education services. "He was afraid that his peers in regular education would see him and make fun of him," so he would hide under the table to avoid being seen from the door. (Grant Statement, p. 6)

71.

During this time, [REDACTED] remained in Ms. Flanagan's regular education class for most of the school day. Prior to the February 2007 telephone call, Ms. Flanagan used a combination of telephone calls home to [REDACTED], notes to [REDACTED] in [REDACTED]'s "agenda" or student planner, and electronic mail to communicate with [REDACTED] regarding [REDACTED]'s academic progress and behaviors. Following the February incident, it appears from the record that Ms. Flanagan restricted her contact with [REDACTED] to written notes by electronic mail or in the agenda. The communication to [REDACTED] from New Manchester, through one of these methods, appeared to be almost daily, if not strictly so. The Court finds that the school regularly and frequently communicated with [REDACTED] in substantial compliance with the IEP and BIP. (Flanagan Statement, pp. 92-93)

72.

During the second half of the school year, [REDACTED] also received social skills instruction weekly as part of a small group led by Terry Brown, a school social worker. In the group, the students worked on strategies for improving interactions with peers and appropriate responses to teasing. While in the group, Ms. Brown observed [REDACTED] being physically and verbally aggressive to other students. On May 7, 2007, Ms. Brown observed [REDACTED] bumping into other students in the hallway, saying he "wanted to fight them and kick their asses." Later that day, Ms. Brown observed [REDACTED] threatened another student, [REDACTED], stating that he and other boys were going to attack [REDACTED]. [REDACTED] continued to

“verbally rage about how he was going to go home, get his mother’s 32-caliber pistol and shoot [REDACTED].” He made these statements repeatedly, despite Ms. Brown’s intervention, ranting that he was going to harm [REDACTED] because he hated him. [REDACTED] was suspended pending a disciplinary tribunal for this threat. (Respondent’s Statement No. 9, *Interrogatory Testimony of Terry Brown*, pp. 1-4; Dyer Statement, p. 6).

73.

Due to the severity of [REDACTED]’s behavioral issues and the failure of the accommodations provided within the regular education setting to ameliorate or improve these behaviors, Ms. Teal opined that the [REDACTED] program was the optimal placement for D.C. [REDACTED], which is less than five miles from New Manchester, uses an intensive and specialized behavior management program that is based on social skills development through positive reinforcement in a small, adult-supported classroom. In addition, [REDACTED] has a full-time counselor and a full-time social worker who provide individual and group counseling for students focused on social skills, as well as training and counseling to parents. Finally, because [REDACTED] is a self-contained program, [REDACTED] can “focus on his social skills and class work and away from worrying about his status as a student who needs special education services.” Free from this anxiety, Ms. Teal believes that his behavior will improve at an accelerated rate. (Teal Statement, pp. 7-8; *Teal Testimony*, T. at 525).

74.

Ellen Morrow, the Special Education Coordinator of Behavioral Services, and Amy Powell, the educational evaluator, concur with this recommendation for placement.

Both agreed with Ms. Teal that the self-contained EBD classroom at ██████████ would be an appropriate, but not better alternative for ██████ (Morrow Statement, p. 5; Powell Statement, p. 13)

75.

Ms. Teal testified that she considered but rejected the use of a full-time para-professional as a supplementary aid to maintain ██████ in the general education setting. First, ██████ has demonstrated a deep concern about being singled out for special education services and “stigmatized” by the presence of other “itinerant instructors.” See 34 C.F.R. § 300.115. Also, ██████ responded negatively to a one-on-one para-professional assigned to him at ██████ ██████████ during “transition times.” Finally, Ms. Teal stated that research in this area indicates that an exclusive “para-pro” assignment minimizes a student’s interaction with his teacher and can have detrimental effects on peer interactions. (Teal Statement, pp. 15-16) Therefore, Ms. Teal concluded that the least restrictive alternative for ██████, due to the nature and severity of his behaviors, was the self-contained EBD classroom at ██████████.

C. NON-ACADEMIC SERVICES

76.

At times through the school year, ██████ was not permitted to participate in certain non-academic or extracurricular activities at ██████ ██████████. These activities, which included an after-school dance and class picture on February 23, 2007, an after-school running club called Road Runners, and two monthly school-wide “Celebrations” or parties, were all conditioned upon the good conduct of the student. (Scherer Statement, pp. 6-7; Dyer Statement, pp. 8-9; Flanagan Deposition Statement, pp. 98-100)

77.

For example, in the case of Celebrations, students had to earn a certain number of “Excellent Eagle” points to be permitted to attend. In order to accommodate [REDACTED]’s disability, [REDACTED] gave him greater opportunities to earn Excellent Eagle points and gave him many more points than other students as a reward for appropriate behavior. For all the students at [REDACTED], including [REDACTED], the Celebration parties served as positive reinforcements for good behavior. [REDACTED] did not always earn these positive rewards, even with the accommodations, and was therefore not permitted to attend every monthly event. (Flanagan Testimony, pp. 81-82, 315-16; *Dyer Testimony*, T. at 880-81)

78.

With respect to the school dance and class photograph on February 23, 2007, [REDACTED] engaged in numerous, extreme behaviors during the school day, including hitting a teacher with a rubber band and hitting a student. He was sent to OR and was prohibited from attending the school dance as a consequence for his behavior. When he arrived in OR, [REDACTED] told Ms. Washington, the vice principal, that he “couldn’t stand” her and “cannot wait until they sue” her. He also told Ms. Washington that she would be “very sorry when [her] lights are turned off.” (Washington Statement, p. 9)

79.

With respect to Road Runners, the Student Handbook provides that “Road Runners must maintain their daily classroom responsibilities as well as outstanding school behavior.” (Respondent’s Ex. 10, p. 5) D.C. was prohibited from going to Road Runners because of behaviors that occurred during the after-school activity. (*Dyer Testimony*, T. at 881-83)

D. PETITIONER'S EVALUATIONS

80.

█ had █ evaluated by two licensed clinical psychologists – Dr. Scott Greenaway and Dr. Robert Kleemeier – in May and June 2007. In addition, a licensed clinical psychologist, Dr. Barbara Kay, who evaluated █ in 2005, confirmed a medical diagnosis of ADHD from 2005. Finally, Patricia Swint, the Education Director at Kids Peace, a small charter school serving children with EBD, reviewed and opined on the BIPs developed for █.

81.

Respondent filed a Motion to Exclude the testimony of Dr. Kleemeier because Petitioner refused to allow Dr. Kleemeier (i) to testify regarding what █ told him during his interview or (ii) to produce any records of the interview notes, self-reporting scales or other documents from his file upon which he based his evaluation. Petitioner asserted a privilege against such disclosure based on an alleged psychologist-patient relationship.²⁵

²⁵ This argument is without merit. The mental health privilege does not attach to the communications between Dr. Kleemeier and █ because she was not a patient seeking treatment. Rather, she sought an evaluation of her son to be used for purposes of determining educational placement. See State v. Herendeen, 279 Ga. 323 (2005). Moreover, any privilege would have been waived by Petitioner offering Dr. Kleemeier as an expert in this hearing. See Fields v. State, 221 Ga. 307 (1965). After having reviewed Dr. Kleemeier's report and deposition transcript, the Court finds that Dr. Kleemeier relied upon the parent rating scales and other information given to him by █ in forming his diagnoses and opinions. Thus, Petitioner's refusal to allow Dr. Kleemeier to testify regarding the facts upon which he relied to form his opinion denied Respondent its right to fully cross-examine him. See Austin v. State, 275 Ga. 346, 348-49 (Ga. 2002). Finally, even if the Court were to allow Dr. Kleemeier's testimony, the Court would be unable to evaluate the efficacy of the expert's testimony because he failed to testify about the information he used in forming his opinion. Respondent's motion to exclude is therefore granted.

None of Petitioner's experts expressly disputed [REDACTED]'s EBD eligibility. Rather, they concentrated on [REDACTED]'s ADHD symptoms and opined that ADHD should be given equal or greater consideration than the emotional or behavioral issues. Specifically, Dr. Greenaway found that [REDACTED] demonstrated consistent signs and symptoms of both ADHD and Oppositional Defiant Disorder ("ODD"). ODD is a behavioral disorder. Dr. Greenaway testified that the presence of emotional problems was still unclear, but that [REDACTED]'s interactions and test results "indicate a high degree of mistrust for others, confrontational qualities, lack of inhibition, and substantial conduct problems." Dr. Greenaway testified that it would be important to address all of a student's disorders and "not overlook one to only focus on the other." (Petitioner's Statement No. 1, *Interrogatory Testimony of D. Scott Greenaway*, pp. 5, 14; *Greenaway Testimony*, T. at 99-100)

Dr. Kay saw [REDACTED] twice in 2005 to confirm a medical diagnosis of ADHD. She testified that there are no definitive tests for ADHD; rather, it is a "syndrome of behaviors" that is diagnosed from "an interview based on parent/teacher evaluation of children's behavior over a long period of time and your observations of having a child in your office." (*Kay Testimony*, T. at 135, 137) Dr. Kay expressly did not offer an opinion as to "whether he should or should not receive services for EBD. My contention is that his primary diagnosis is ADHD, and that needs to be addressed first." (*Kay Testimony*, T. at 143, 177-78) When asked whether her focus would change if the student were taking ADHD medications that successfully controlled his impulsivity, Dr. Kay testified:

I would address the behaviors. I don't know that I would get into whether EBD was more primary over ADHD. I don't know that I can do that. Again, in a young child, a lot of these behaviors are driven by the ADHD. It is very difficult to tease them out.

(*Kay Testimony*, T. at 153)

84.

Dr. Kay testified further that ADHD and EBD are so intertwined that the interventions used to address one will often accommodate the other. In general, Dr. Kay opined that if a child's ADHD behaviors are treated first, the other problem behaviors often will improve, allowing the school to "filter out" what behaviors remain and address them as a separate disorder. (*Kay Testimony*, T. at 177-78) Although she agreed that some of the accommodations offered at New Manchester were appropriate for ADHD, there were many others that they did not offer, such as using one-step commands, teacher-written instructions given in advance, greater parent involvement in transmitting assignments, special folders, and others. (*Kay Testimony*, T. at 170-71)

85.

Patricia Swint testified that she has worked as a special education teacher in both a psycho-educational program and in general education classrooms. She has worked with primarily EBD students, as well as ADHD students. The Court found her observations of the differences in the behaviors of children in these two categories to be helpful:

Although a child with ADD/HD has some of the same characteristics of a child identified as EBD (behavior problems and poor social skills and interactions), my experience working with a child with ADD/HD is they are usually easier to regain control and often times show remorse for their behavior. These children also want to do good and please others, and often times work hard on not getting in trouble in order that they can earn something. My experience with EBD children is they often do not care if they are rewarded and they often manipulate to get secondary gains/rewards.

(Petitioner's Statement No. 3, *Interrogatory Testimony of Patricia Swint*, p. 6.) The Court finds that [REDACTED] falls squarely within Ms. Swint's description of EBD children, and not that of children with a primary disability of ADHD.

86.

Ms. Swint, along with Dr. Greenaway, criticized the BIPs used at New Manchester as vague, lacking in details, and failing to include well-defined and measurable benchmarks. (Greenaway Statement, p. 10-11; Swint Statement, p. 8) Dr. Greenaway commented that the records he reviewed indicate "that teachers and staff at [REDACTED]'s school appear to have taken a great interest and devoted much time and effort to help him improve on his behaviors and that is to be commended....[H]owever, it remains that there are intervention strategies that have not been employed yet." (Greenaway Statement, p. 10) Dr. Greenaway gave concrete, cogent examples of specific and well-defined target behaviors, positive reinforcers, and behavioral interventions that would greatly improve the BIPs. (Greenaway Statement, pp. 11-14)

87.

In addition to changes to the BIP, Dr. Greenaway recommended counseling for both [REDACTED] (social skills and other issues) and [REDACTED] (behavior modification strategies and consistent discipline). (Greenaway Statement, p. 13) While [REDACTED] was in Dr. Greenaway's office, he observed [REDACTED]. "making unprovoked derogatory comments to his mother, and it would not be surprising if he tends to make similar comments to classmates in a way that get them to turn on him...." (Greenaway Statement, p. 7)

88.

Dr. Greenaway disagreed with the proposed placement in a full self-contained

EBD classroom based largely on a philosophical understanding of what that type of placement entails. (Greenaway Statement, p. 5; *Greenaway Testimony*, pp. 79-80) Dr. Greenaway acknowledged that “[i]t may be true that [REDACTED] is not well-suited to be in a traditional classroom, but this does not by default, imply that an EBD classroom is the next best thing.” (Greenaway Statement, p. 6) Dr. Greenaway suggests alternative placements, such as a para-professional in the regular classroom or a class with “a smaller student to teacher ratio, but one in which the student population are socially well-adjusted and of Average intellectual functioning.” (Greenaway Statement, pp. 10, 13)

III. CONCLUSIONS OF LAW

A. General Law

1.

The pertinent laws and regulations governing this matter include the Individuals with Disability Education Act (“IDEA”), 20 U.S.C. § 1400 *et seq.*; federal regulations promulgated pursuant to IDEA, 34 C.F.R. 300 *et seq.*; and Georgia Department of Education Rules, Ga. Comp. R. & Regs., Ch. 16-4-7 (“Ga. DOE Rules”). Other statutes and rules that may apply include the Americans with Disabilities Act, 42 U.S.C. § 12101 (“ADA”), *et seq.* and the Rehabilitation Act, 29 U.S.C. § 700 *et seq.* (“Rehab Act”).

2.

Claims brought under IDEA are subject to a two-year statute of limitations. See 34 C.F.R. § 300.507(a)(2). Petitioner filed the amended due process hearing request on April 11, 2007. Accordingly, any claims relating to events prior to April 11, 2005, are barred. See generally *Draper v. Atlanta Indep. Sch. Sys.*, 480 F.Supp.2d 1331 (N.D. Ga. 2007)(appeal pending).

3.

Petitioner bears the burden of proof in this matter. See Ga. DOE Rule 160-4-7-.12(3)(1); Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 537; OSAH Rule 616-1-2-.07. The standard of proof on all issues is a preponderance of the evidence. OSAH Rule 616-1-2-.21(4).

B. FAPE

4.

Under both the IDEA and Georgia law, students with disabilities have the right to a free appropriate public education (“FAPE”). See 20 U.S.C. § 1412(a)(1); 34 C.F.R. §§ 300.1, 300.101; Ga. DOE Rule 160-4-7-.01(1)(a). “The purpose of the IDEA generally is ‘to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living....’” C.P. v. Leon County School Bd., 483 F.3d 1151, 1152 (11th Cir. 2007), quoting 20 U.S.C. § 1400(d)(1)(A).

5.

In order to accomplish this purpose, local school districts must identify and evaluate children with disabilities and develop IEPs for the disabled child. W.C. v. Cobb County School Dist., 407 F. Supp. 2d 1351, 1358 (2005). The Supreme Court has developed a two-part inquiry to determine whether the school district has provided FAPE: “First, has the State complied with the procedures set forth in the Act? And second, is the individualized education program developed through the Act’s procedures

reasonably calculated to enable the child to receive educational benefits?" Board of Educ. v. Rowley, 458 U.S. 176, 206-07 (1982). "This standard, ... has become known as the *Rowley* 'basic floor of opportunity' standard." C.P. v. Leon County, 483 F.3d at 1153, citing JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1572-73 (11th Cir. 1991).

6.

In order to prove a denial of FAPE based on a procedural violation by the School District, Petitioner must show harm to [REDACTED] as a result of an alleged procedural violation. "Violation of any of the procedures of the IDEA is not a *per se* violation of the Act." Weiss v. Sch. Bd., 141 F.3d 990, 996 (1998). Rather, Petitioner must prove that a procedural violation restricted [REDACTED] from full participation in [REDACTED]'s education and "seriously infringed" upon her opportunity to participate in her son's IEP process. K.C. v. Fulton County Sch. Dist., 2006 US Dist LEXIS 46752 (N.D. Ga. 2006).

7.

Petitioner has failed to show by a preponderance of the evidence that the School District violated the procedural requirements of IDEA.²⁶ [REDACTED] convened an IEP meeting as soon as [REDACTED] reentered the School District. The IEP Committee met six times throughout the school year and [REDACTED] participated in each meeting. Moreover, there is no evidence in the record that [REDACTED] was hindered in attending or fully participating in the educational planning for [REDACTED], even after the criminal trespass warning necessitated that the sixth and final IEP meeting be held off school grounds. The record shows that [REDACTED] and her representatives were "active and vocal participants in every step of the IEP process." Gwinnett County Sch. Bd. v. J.B., 398 F.Supp. 2d 1245, 1268 (N.D. Ga. 2005).

²⁶ Petitioner did not raise the issue of "highly qualified teachers" in the complaint. See 20 U.S.C. § 1412(a)(14). Therefore, this matter is not properly before the Court.

8.

The IEP Committee determined that [REDACTED]'s educational and related services needs warranted a comprehensive reevaluation as provided in 34 C.F.R. § 303(a)(1). The School District provided [REDACTED] with notice of the evaluation procedures that it intended to use and she consented to those procedures. See 34 C.F.R. § 304. The School District used a "variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child" and assessed [REDACTED]. "in all areas related to the suspected disability." *Id.* With respect to assessing [REDACTED] specifically for ADHD or OHI eligibility, the School District administered the Hawthorne test for ADHD and reviewed the observations by teachers and related service providers on [REDACTED]'s impulsivity and inattention. In addition, the School District expressed a willingness to consider any "evaluations and information provided by the parents of the child," as required under 34 C.F.R. § 300.305(a)(1)(i), including the medical diagnosis of ADHD from [REDACTED]'s physician. [REDACTED] failed to provide such information.

9.

In the case of a reevaluation of a child, the IEP must determine whether the child continues to have a disability and what his educational needs are. 34 C.F.R. § 300.305. In order to make this determination, "a group of qualified professionals and the parent of the child" must "draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background and adaptive behavior." 34 C.F.R. § 300.306(a) & (c).

10.

In this case, there is no dispute that [REDACTED] is a child with a disability. The dispute pertains to the category of disability under which he will access special education services. IDEA regulations delineate specific categories of disability to determine special education eligibility. The relevant categories of disability for this case include “a serious emotional disturbance” or “other health impairment.” 34 C.F.R. § 300.8(a)(1).

11.

An “emotional disturbance means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child’s educational performance:”

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

(C) Inappropriate types of behavior or feelings under normal circumstances.

(D) A general pervasive mood of unhappiness or depression.

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

34 C.F.R. § 300.(c)(4)(i); Ga. DOE Rule 160-4-7-.05, Appendix (d).

12.

Under Ga. DOE Rules, this disability is termed “Emotional and Behavioral Disorder” or “EBD.” Ga. DOE Rule 160-4-7-.05(1)(d). Under the State rule,

A child with EBD is a child who exhibits one or more of the above emotionally based characteristics of sufficient duration, frequency and intensity that interferes significantly with educational performance to the degree that provision of special educational services is necessary. EBD is

an emotional disorder characterized by excesses, deficits or disturbances of behavior. The child's difficulty is emotionally based and cannot be adequately explained by intellectual, cultural, sensory general health factors, or other additional exclusionary factors.

Ga. DOE Rule 160-4-7-.05, Appendix (d).

13.

The Ga. DOE Rule specifically requires local school districts to review "reports of behavioral observations over a significant period of time," as well as documentation of the prior extensions of services, both in and outside of the school. *Id.* The IEP Committee at New Manchester considered both [REDACTED]'s past behaviors and the prior services offered to him, as well as the current comprehensive assessments and other data collected from the 2006-07 school year. The evidence in the record overwhelmingly supports the determination of the IEP Committee that [REDACTED] was eligible for services for an EBD disability.

14.

Petitioner's own expert witnesses do not dispute this determination. Nevertheless, Petitioner argues that he was denied FAPE by the failure of the IEP Committee to find him eligible for services under an OHI designation. This argument is without merit. Under the Ga. DOE Rule in effect during the 2006-07 school year, an evaluation for OHI must include "a medical evaluation from a licensed doctor of medicine." *See* former Ga. DOE Rule 160-4-7-.02(g)(Appendix G).²⁷ *See also* *Draper*, 480 F. Supp. 2d at 1345 ("In

²⁷ On July 1, 2007, Chapter 160-4-7 of the Ga. DOE Rules was amended. Although there were no significant changes to the Appendix on EBD disabilities, the new rules amended the Appendix on OHI to allow an evaluation by either a licensed doctor of medicine or a licensed clinical psychologist to determine OHI based on ADHD. *See* 160-4-7-.05(Appendix (g)). In addition, the Appendix was amended to provide that a child must not be determined to be a child with OHI if the determinant factor is "emotional disturbances." *Id.*

evaluating the appropriateness of an IEP, the Court must determine the measure and adequacy of an IEP at the time it was offered to the student...”). The IEP Committee asked S.C. to provide the medical diagnosis and was willing to consider it, but S.C. failed to provide it. Petitioner cannot assert a violation under IDEA when the parents frustrated the School District’s efforts to comply with the procedures. See Loren v. Atlanta Ind. Sch. System, 349 F.3d 1309, 1312-13 (2003).²⁸

15.

Based on the preponderance of the admissible evidence, giving due weight to the testimony of Petitioner’s experts, who have had selective access to Petitioner’s behavioral and educational history, as well as the observations and opinions of the School District’s teachers and experts, the Court agrees with the School District’s that [REDACTED]’s primary disability at this time is his severe emotional and behavior disorder. Devine v. Indian River Co. Sch. Bd., 249 F.3d 1289 (11th Cir. 2001)(11th Circuit recognizes that great deference must be paid to the educators who develop the IEP), citing JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1573 (11th Cir. 1991). D.C.’s aggressive and hostile behaviors cannot be explained solely or primarily by an OHI disability, particularly given that he was on medication for ADHD during the 2006-07 school year and accommodations for ADHD were unsuccessful in ameliorating his problem behaviors. Accordingly, Petitioner failed to prove by a preponderance of the evidence that the

²⁸ The Eleventh Circuit in Loren cited with approval MM v. Sch. Dist. Of Greenville Co., 303 F.3d 523, 533-35 (4th Cir. 2002)(school district not IDEA liable for its failure to timely complete IEP where parents ceased to cooperate in IEP’s completion); Doe v. Defendant I, 898 F.2d 1186, 1189 n.1 (6th Cir. 1990)(parent could not complain that school district failed to complete a timely IEP when IEP’s non-completion was attributable to parent’s request that school allow student to perform on his own for a while.).

School District denied FAPE by declining to find [REDACTED] eligible for services under OHI.

16.

Petitioner argues that the School District violated the procedures of IDEA by “predetermining” the appropriate placement, thus denying [REDACTED] her right to meaningfully participate in the development of the IEP. Greer v. Rome City Sch. Dist., 950 F.2d 688, 696 (1991)(subsequent history omitted). “It is not sufficient that school officials determine what they believe to be the appropriate placement for a handicapped child and then attempt to justify this placement only after the proposed IEP is challenged by the child’s parents.” Id.

17.

The evidence in the record does not support a finding that [REDACTED]’s placement was predetermined. In fact, the IEP history demonstrates the opposite. When [REDACTED] reentered the School District in fourth grade, his immediate past placement within the School District was at [REDACTED]. However, based on [REDACTED]’s opposition to [REDACTED] and her preference for a regular education classroom at [REDACTED], as well as her less-than-forthright accounting of [REDACTED]’s third grade experience, the IEP Committee agreed that the regular education classroom, with special education through the resource room and other accommodations, was the least restrictive, appropriate placement.

18.

In October the school members of the IEP Committee recommended placement in a self-contained EBD program, but [REDACTED] rejected it. Thereafter, in December 2006, despite the School District’s growing concern over [REDACTED]’s aggressive and disruptive behaviors, the IEP Committee agreed to continue placement in the regular education

setting, with supplementary aids and services, including special education in the resource room, special accommodations, and a modified BIP. It was not until after the comprehensive evaluations came back and the supplementary aids and accommodations had failed to improve [REDACTED]'s behaviors and performance in the regular education setting that the school members of the IEP Committee insisted on a placement in a self-contained setting.

19.

School District clearly considered a full range of supplemental aids and services to help maintain [REDACTED] in the regular education setting at [REDACTED]. In addition to the specific accommodations adopted in the IEP, the school tried placing [REDACTED] in a smaller IEP regular education classroom and providing a para-professional to assist his regular education teacher during portions of the school day. See 34 C.F.R. § 115(b)(2). These supplemental aids and services were not sufficient to allow [REDACTED] to obtain adequate educational benefit in the regular education setting. See 34 C.F.R. § 114(a)(2)(ii) (“Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature and severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”).

20.

Further, the Eleventh Circuit has held that it is permissible for a school district to take into account “what effect the presence of [REDACTED] in a regular classroom would have on the education of other children in that classroom.” See Greer, 950 F.2d at 697. Of course, in considering whether the proposed placement constitutes the “least restrictive

environment” for [REDACTED], the impact on the other children is in no way determinative. However, as illustrated in this case, when a child with a disability is so disruptive that the teacher repeatedly must interrupt instruction time not only to redirect the disabled child, but also regain control of the entire class, both the disabled child and his classmates are impacted. Neither [REDACTED] nor his classmates received adequate educational benefit as a result of the frequency, duration, and severity of [REDACTED]’s disruptive and aggressive behavior in the regular education classroom.

21.

The BIPs developed by the IEP Committee contained “positive behavioral interventions and supports, and other strategies, to address [REDACTED]’s behaviors.” 34 C.F.R. § 300.324(a)(2)(i). While the Court agrees that the BIPs could have been improved, “perfection is not required” in the development of an IEP or BIP. Loren, 349 F.3d at 1312, citing CJN v. Minneapolis Public Sch., 323 F.3d 630, 638-39 (8th Cir. 2003)(In CJN, the 8th Circuit held that “even assuming *arguendo* that more positive behavioral interventions could have been employed, that fact is largely irrelevant. The record reveals that the District made a ‘good faith effort’ to assist CJN in achieving his educational goals.”). The Court concludes that the BIPs adopted by the School District were reasonably calculated to enable D.C. to receive educational benefit.

22.

Based on the evidence, the Court concludes that the School District’s proposed placement in the self-contained EBD classroom at [REDACTED] constituted FAPE in the least restrictive environment for [REDACTED] under 34 C.F.R. § 300.114. The Court further concludes that the proposed placement at [REDACTED], which will allow [REDACTED] to be

“mainstreamed” for non-academic and extracurricular services and activities, such as meals, P.E., art and music, complied with the IDEA requirement that the School District ensure that a child with a disability “participates with nondisabled children in the extracurricular services and activities to the maximum extent appropriate to the needs of that child.” See 34 C.F.R. § 117.

C. Non-Academic Services

23.

The School District was required under IDEA to “take steps, including the provision of supplementary aids and services determined appropriate and necessary by the child’s IEP Team, to provide nonacademic and extracurricular services and activities in the manner necessary to afford children with disabilities an equal opportunity for participation in those services.” 34 C.F.R. § 300.107(a). The evidence in the record shows that, with respect to these services and activities, which were school-wide events conditioned upon exemplary behavior, [REDACTED] was given equal opportunity to earn the right to participate in these activities and that, in fact, the School District provided appropriate accommodations to do so.

D. Retaliation and Intentional Discrimination

24.

Under Eleventh Circuit law, both the ADA and the Rehab Act require proof of intentional discrimination or bad faith. See KC v. Fulton, 2006 U.S. Dist. LEXIS 47652 (N.D. Ga. 2006). Thus, “[t]o make a claim under section 504 [or the ADA] in the education context, something more than an IDEA violation for failure to provide a free appropriate public education in the least restrictive environment must be shown.” Id.

There is no evidence in the record of intentional discrimination against [REDACTED] because of his disabilities, or bad faith on the part of the School District. These claims are without merit.

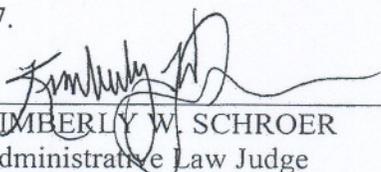
25.

Similarly, Petitioner has failed to show by a preponderance of the admissible evidence that any of the actions of the School District were taken in retaliation of Petitioner and his mother's exercise of their rights under IDEA or any other federal discrimination law.

IV. DECISION

For the reasons stated above, Petitioner's requested relief is denied.

SO ORDERED, this 30th day of August, 2007.



KIMBERLY W. SCHROER
Administrative Law Judge