

08-059920

IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS  
STATE OF GEORGIA

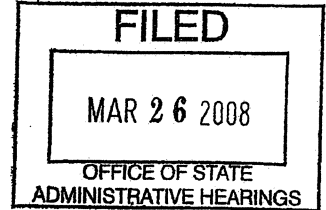
██████,

Plaintiff,

v.

WALTON COUNTY SCHOOL DISTRICT,  
Defendant.

Docket No.:  
OSAH-DOE-SE-0808233-147-Schroer



FINAL DECISION

**I. INTRODUCTION**

On September 28, 2007, Plaintiff ██████ filed a due process complaint pursuant to the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA"). The due process hearing was held in Monroe, Georgia, on January 16, 17, and 18, 2008, and continued in Atlanta, Georgia on February 5 and 13, 2008. Jonathan A. Zimring represented Plaintiff. Martha M. Pearson and Beth F. Morris represented Walton County School District. The record remained open until Thursday, February 28, 2008, in order for the parties to review the transcript and file post-hearing briefs. The deadline for the issuance of this decision was extended to March 26, 2008, pursuant to 34 C.F.R. § 300.515(c).

**II. FINDINGS OF FACT**

1.

██████ was born in ██████ and is ██████ years old. During the 2006-07 school year, she resided with her mother, step-father, and siblings in Monroe, Georgia and attended seventh grade at ██████ Middle School in Walton County.

2.

█████ has been eligible for special education services since she was in pre-school, although her identified disability has changed over the years, from attention deficit/hyperactivity disorder to emotional behavior disorder and finally, to autism. She received these services through the Walton County School District (“School District”) until this past school year, when her parents placed her at Cedars Academy, a private boarding school in Delaware for children with Asperger’s Syndrome, a form of autism.

A. **Educational Background**

Although the period relevant to the claims raised in the due process complaint is the 2006-07 school year, the Undersigned reviewed the child’s educational background to provide context for evaluating the services █████ received during the relevant period. See K.C. v. Fulton Co. Sch. Dist., 2006 U.S. Dist. LEXIS 46752, \*5 (N.D. Ga. 2006); Draper v. Atlanta Independent Sch. Sys., 480 F. Supp. 2d 1331 (N.D.Ga. 2007); *aff’d* 2008 U.S. App. LEXIS 4813 (Mar. 6, 2008).

1. **Elementary School**

3.

In 1998, █████ was evaluated for special education services at the age of █████ because of behavioral problems in pre-school. She was found to be eligible for services under the category of “Significant Development Delays” in the area of socialization. At that time, █████ had also been diagnosed with Attention Deficit/Hyperactivity Disorder (“ADHD”) and was taking medication.<sup>1</sup> (Exhibit D-3, at 1363)

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<sup>1</sup> According to a 2004 Pediatric Neurodevelopmental Evaluation, █████ took at least six different ADHD medications over the years. (Exhibit D-7, at 1373)

4.

The following year, while in ██████████, ██████. was reevaluated and found to be eligible for special education services under the category of "Other Health Impaired" as a result of "significant impairments related to ADHD." Her difficulties included "poor self-control, inattention, overactivity and lack of cooperation." At that time, her intelligence test results indicated "high average intelligence" and her achievement tests indicated average pre-reading skills and below average math skills. Id.

5.

In 2002, while in ██████████ grade, ██████. was reevaluated by the School District. She was found to be eligible for services under the category of "Emotional and Behavioral Disorders" or "EBD." At that time, ██████. exhibited "a pattern of overactivity, impulsivity, poor social boundaries, a low frustration tolerance, and problems with emotional control that interfere with interactions with others, classroom performance, behavior, and personal adjustment." Her academic achievement was described as "above average" in most areas; however, attempts to administer cognitive tests were hampered by her behavior. (Exhibit D-3, at 1364)

6.

In 2004, while in ██████████ grade, ██████. was referred for a psycho-educational evaluation to consider the "possible diagnosis of autism or autism spectrum disorder."<sup>2</sup> During her observation of ██████., the evaluator, Marcia Jones, noticed a difference

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<sup>2</sup> The Georgia Department of Education defines "autism spectrum disorder" as a "developmental disability generally evident before age three that adversely affects a child's educational performance and significantly affects developmental rates and sequences, verbal and non-verbal communication and social interaction and participation." Ga. DOE Rule 160-4-7-.05 (App. A).

between ██████'s behavior and academic performance depending on whether she was in a small-group "resource" class or a larger "regular education" class.<sup>3</sup>

During observation in the regular education setting, [██████] was easily distracted by other students and required several redirections to complete her work. When told she would have to wait, she began to cry and stomp her feet. Call outs for teacher assistance were frequent. In the small group setting, [██████] was able to complete her work in a timely fashion.

(Exhibit D-3, at 1363) These observations were consistent with the reports of ██████'s teachers. (Exhibit D-3, at 1367)

7.

With respect to the cognitive abilities testing, Ms. Jones determined that ██████'s overall general intellectual ability was in the "low average range." However, on the academic achievement tests, which measure learning in school subjects such as math and reading, ██████ scored much higher. Ms. Jones concluded that ██████'s academic skills were "above average," with the exception of math reasoning.

These scores meet or exceed current and past estimates of cognitive ability, chronological age, and current grade placement. Academic achievement does not appear to be impacted by behavioral and adjustment difficulties.

(Exhibit D-3, at 1364-1366)

8.

Ms. Jones also evaluated ██████'s social development and emotional functioning. She used a variety of sources, including teacher and parent rating scales, interviews, and

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<sup>3</sup> "Resource" classes are small classes taught by a special education teacher and contain only special education students. Regular education classes have more students who are mostly non-disabled students. When a regular education class contains disabled students and is co-taught by a special education teacher and a regular education teacher, the School District refers to it as an "inclusion" or "collaborative" class. (McGuffin Testimony, Tr. 753-754; Carter Testimony, Tr. 1036)

direct assessment of █████. She concluded that “█████’s social interaction appear to be significantly impaired by autistic-type behaviors.”<sup>4</sup> (Exhibit D-3, at 1366-71)

9.

In February 2004, an Individual Education Program (“IEP”) Team met to review the psycho-educational evaluation, as well as recent speech-language<sup>5</sup> and occupational therapy evaluations. The IEP Team determined that █████ met the autism eligibility criteria,<sup>6</sup> as well as speech and language impairment criteria, but decided to maintain her current placement in a special education resource room for Reading, Math, and Language Arts. █████ would also receive speech-language therapy and occupational therapy consultation services. (Exhibit D-6)

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<sup>4</sup> Her teachers reported that █████ sees and hears things that are not there, eat things that are not food, seems out of touch with reality, chews on clothing, repeats one thought over and over, and babbles, sings or hums to herself. █████’s mother reported that █████ has poor communication skills, limited peer interaction, and abnormal patterns of behavior. *Id.*

<sup>5</sup> The speech and language assessment found that █████ demonstrated “deficits in social language, problem solving skills and pragmatic skills in general. This is evidenced at home, at school, and in the community. She is eligible for language services in the speech-language impaired program.” (Exhibit D-5, at 1242)

<sup>6</sup> Shortly after the February 2004 IEP meeting, █████ was evaluated by the Marcus Institute at Emory University. Dr. Amy Pakula conducted a pediatric neurodevelopment evaluation and disagreed with the autism diagnosis. “I do not think she meets criteria for either Autism or Aspergers Disorder, though she does have some PDD [Pervasive Developmental Disorder] spectrum symptoms... She is odd socially, and I am concerned that she may have disordered thought. Her reasoning skills seem impaired. Her social understanding and interactions are quite significantly abnormal/impaired.” (Exhibit D-7, at 1375) Notwithstanding Dr. Pakula’s report, both Plaintiff and Defendant agree that D.W. was and remains eligible under the autism disability category as it is defined by IDEA regulations and the Georgia Department of Education (“Ga. DOE”). See 34 C.F.R. § 300.8(c)(1); Ga. DOE Rule 160-4-7-.05 (Appendix A)(the state definition of autism spectrum disorder includes PDD).

10.

The IEP Team developed ten goals and objectives for improving [REDACTED]'s behavior and social skills, including following all rules, walking from class to class unassisted, refraining from temper tantrums, and respecting the personal space of others. As described below, [REDACTED] failed to master many of these behavior objectives by the time her parents removed her from the School District three years later. (Exhibit D-6, at 1547-54)

11.

The Team met again in May 2004 to develop [REDACTED]'s IEP for the next school year. The IEP provided that [REDACTED] would be placed in a collaborative class in fifth grade for language arts and math and a resource class for social skills and writing. (Exhibit D-9, at 1223) The IEP Team Minutes noted that "[REDACTED] struggles some with Math" and [REDACTED]'s mother, [REDACTED], reported her concerns "about math and getting [REDACTED] to do better on tests."<sup>7</sup> (Exhibit D-9, at 1225, 1229)

12.

The May 2004 IEP Minutes also discuss [REDACTED]'s problems with her peers.

[REDACTED] struggles with peer interactions. She has difficulty reading social cues, maintaining personal space, and interacting with the students in her class... She likes to pretend to be a dog and will bark and crawl on the ground. [REDACTED] is not interested in most of the same activities that the other girls in the class are... [REDACTED] still loves to do the same things that she did in first and second grade... This usually makes [REDACTED] a target for ridicule by her peers. Some students have begun to get very frustrated with her outbursts and behavior. Other students in the class baby her and try to take care of her. They do not see her as an equal peer. Most of the girls feel that they need to take care of her.

(Exhibit D-9, at 1229)

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<sup>7</sup> At the end of fourth grade, [REDACTED] did not meet the Georgia Criterion-Referenced Competency Test ("CRCT") standards in reading, language arts or math, although she met the standards in science and social studies and received all "A"s on her report card. (Exhibit D-51, at 290; Exhibit D-52, at 1303)

13.

The May 2004 IEP contained a Behavioral Intervention Plan or "BIP," which identified [REDACTED]'s interfering behaviors as "off task, yelling out, getting out of seat, non-compliance, and invading personal space." The BIP also identified a number of strategies to deal with these behaviors, including daily behavior ratings, token reinforcement, social skills training, redirection, and others. (Exhibit D-9, at 1234)

14.

[REDACTED] began fifth grade in collaborative classes for language arts and math, which were taught by two teachers that had been with [REDACTED] for several years. [REDACTED] was removed from the general education setting for only 50 minutes per day for social skills and writing. (Exhibit D-10)

15.

Although [REDACTED]'s May 2004 IEP was drafted to carry her through the academic year, the Team met shortly after the start of [REDACTED] grade to discuss [REDACTED]'s disruptive behaviors at school, including poor impulse control, getting out of her seat, talking to herself, stomping her foot, pouting and crying. (Exhibit D-10) This behavior contributed to her continued problems with peer interactions.

[REDACTED] wants to belong to a group of friends but her lack of maintaining interpersonal relationships and reading social cues hinders her from doing this. Students have begun to shun her at lunch and recess and call her names... [REDACTED] has problems in the lunchroom. She has pushed some of her peers down to get in line to get her food... She will beg for food from her peers, [and] has snatched food off of other students [sic] plates... (Exhibit D-10, at 1212)

16.

At the September 2004 IEP meeting, [REDACTED] disclosed that she had taken [REDACTED] off Concerta (medication for ADHD) during the summer and found that [REDACTED]'s behavior at home was much more appropriate without it.<sup>8</sup> The Team noted that [REDACTED] had been on some type of ADHD medication since beginning school and that her increased lack of impulse control during the first five weeks of fifth grade was interfering with school and resulting in sporadic academic performance. (Exhibit D-10, at 1211)

17.

The IEP Team determined that [REDACTED] needed to spend a greater portion of the school day in the resource classroom and agreed that [REDACTED] would participate in the resource program for math and reading. (Exhibit D-10, at 1212)

18.

At the end of the fifth grade year, the Team met to review the current IEP and to develop a new IEP for [REDACTED]'s transition to middle school. With respect to her goals and objectives, the Team found that she had mastered only two of ten goals and her progress on the others were mixed. For example, [REDACTED] had mastered goals relating to staying on task for five minutes and refraining from stomping her feet. However, she had only attained 75% mastery of the goal of getting to class without wandering and without assistance. [REDACTED] also continued to have problems with personal space, peer interactions, yelling out, and whining. In addition, some behaviors appeared to have worsened.

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<sup>8</sup> This appears contrary to [REDACTED]'s report to Dr. Pakula in March 2004 that [REDACTED]'s behavior is "horrible" without Concerta: "She will constantly babble, she is extremely impulsive, and her ability to interact appropriately with other people and her social understanding diminishes when she is not on this medicine. However, parents wonder if some other medicine might be indicated." (Exhibit D-7, at 1373) Dr. Pakula concluded that a psychiatric consult should be obtained before making any medication changes.



"█████ talks aloud to herself and makes noises most of the day now. This behavior has increased over the year." In fact, both her teachers and her parents expressed concern with this behavior and █████ reported that schizophrenia is prevalent in █████'s father's family. (Exhibit D-12, at 1192, 1195)

19.

Academically, █████ continued to struggle with math and performed well in writing only when using a computer. (Exhibit D-11, at 1195) She finished fifth grade with a "B" grade average in all subjects. (Exhibit D-51, at 1302)

20.

In planning for the upcoming school year, the Team agreed that █████ needed a "structured setting" with "as much support as necessary to adjust to the middle school.... █████ will receive all instruction in a small group setting then participate in connections in the general ed setting with a supportive paraprofessional." The Team found that continued speech/language and OT services were not warranted.<sup>9</sup> (Exhibit D-11, at 1193)

21.

On the CRCT administered in 5th grade, █████ earned passing scores in all subjects except math.<sup>10</sup> However, after meeting in the summer, the School District determined that notwithstanding her math scores, █████ would be promoted to sixth grade. (Exhibit D-12; Carter Testimony, Tr. 132, 134)

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<sup>9</sup> █████ had met all goals and objectives for speech and language impairment, with one exception. Her articulation errors, while noticeable, did not appear to impact her in the classroom and the Team agreed that these areas would be addressed in the resource room. (Exhibit D-11, at 1726)

<sup>10</sup> █████'s scores were only slightly above the 300 "pass" mark in Reading (304), Language Arts (302), Science (313), and Social Studies (308). (Exhibit D-51, at 290) D.W. scored a 294 in math in the spring and a 284 in the summer. (*Id.*; Exhibit D-12, at 1181)

2. Middle School

22.

█████ began █████ grade at █████ Middle School (“YMS”) and was placed in a special education resource classroom taught by Stacy McGuffin. Ms. McGuffin has certification in the areas of special education for children with emotional behavior disorders, specific learning disabilities, and special education language arts, math, and science. In addition to her educational training, Ms. McGuffin has received specific training in the teaching of students with autism and Asperger’s Syndrome. Ms. McGuffin, who testified as a witness at the hearing, impressed the Tribunal as a caring, highly-competent educator who demonstrated extraordinary commitment to █████ and her educational progress at YMS. (McGuffin Testimony, Tr. 752-53, 755-56, 767)

23.

Ms. McGuffin’s resource classroom consisted of seven to eight disabled children, most with social or emotional disabilities. (McGuffin Testimony, Tr. 754-755) Ms. McGuffin described █████ as a “sweet girl” who enjoyed coming to school and was a hard worker. Although she did well in the resource classroom, the transition times were difficult for D.W., particularly lunch time. Ms. McGuffin worked with █████ on basic table manners and also with respecting other student’s personal space. (McGuffin Testimony, Tr. 757)

24.

In November 2005, the IEP Team met to discuss █████’s behavior problems while riding the school bus and to review the existing IEP. █████ had received three bus referrals for disruptive behavior, including pulling hair, taking things from others, kicking

the seat and temper tantrums. The Team agreed that ██████ would ride the special education bus through January 2006 and that bus behavior would be added to her daily behavior point sheets. In addition, the Team discussed ██████'s behavior during her regular education science class, which ██████ attended accompanied by a paraprofessional, as well as her continuing overall disruptive behaviors, including "crying, pouting, whining, and saying no during class time." (Exhibit D-14, at 1796-97; McGuffin Testimony, Tr. 758)

25.

██████ signed the modified BIP and later sent a letter to the assistant principal of YMS, thanking her for "a productive meeting on behalf of our daughter. Everyone was very supportive of ██████'s disability and eager to provide her with extra support in areas needed." ██████ was particularly pleased that ██████ was attending a regular education science class. She ended the letter stating that "[w]e really look forward to a successful three years at ██████ Middle School and we're sure ██████ will grow to be a strong self sufficient young lady ready for the transition to high school." (Exhibit D-14, at 1796; Exhibit D-15)

26.

In April 2006, ██████'s IEP Team met to review her progress during ██████ grade and plan for ██████ grade. The "present level of performances" section of the IEP described ██████ as "a very smart student," polite and generous, and a strong reader with excellent comprehension skills. She continued to have difficulties, however, with staying on task. She often talked out and made noises. When angered, she cried, pouted, whined, stomped her feet or growled. Nevertheless, the IEP Team determined that ██████

had made progress on achieving her goals during sixth grade. Specifically, ██████ had learned to use her lunch number, walked unassisted through the hallways, and asked for objects in an appropriate manner. She made improvement, short of mastery (scores of 4 out of 5), on her goals of eating slowly, accepting consequences for her behavior, sitting quietly, accepting “no” for an answer without whining and crying, and keeping up with books and assignments. (Exhibit D-11, at 1196-99; Exhibit D-18, at 1461; McGuffin Testimony, at 762-64)

27.

█████ wanted ██████ to be in more collaborative classes in seventh grade and the Team agreed based on ██████’s progress in the regular education science class and her improvements overall.<sup>11</sup> Specifically, the IEP Team decided to place ██████ in collaborative classes for English, science and social studies and maintain her placement in the resource room for math. (Exhibit D-18, at 1453; ██████ Testimony, Tr. 616-17)

28.

The IEP Team drafted new goals and objectives for ██████’s ██████ grade year, which included improving on-task behavior, social skills, and self-control. In addition, the Team created a new BIP, targeting three problem behaviors – (1) off task/playing with materials, (2) talking out/making noises, and (3) cries or whines when denied her way. The BIP identified a number of intervention strategies, including the continuation of daily behavior point sheets. (Exhibit D-18, at 1454, 1456-58)

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<sup>11</sup> Ms. Brooks reported that “█████ is functioning more and more appropriately in the science room. Ms. Brooks shared that ██████ has friends and eats lunch with them. Mom thinks ██████ needs to be in more co-teaching classes next school year. The Team agrees with this since ██████ has made lots of improvement.” (Exhibit D-18, at 1461)

29.

On ██████'s sixth grade report card, she earned final grades of "A's" and "B's" in her connections classes, an 85 in Social Studies, 79 in Language Arts, 83 in Science, and 77 in Math. (Exhibit D-52, at 1310)

30.

█████ also met the standards on the CRCT in sixth grade for reading, language arts, science and social studies. She did not meet the standards for math. (Carter Testimony, Tr. 132, 134; Exhibit D-51, at 1301-09)

31.

█████ asked to review the April 2006 IEP before signing it. She testified that her practice was to review these documents with her husband and make sure she was satisfied with them first. She would then write or tell the IEP Team if she had a question or concern about the IEP. There is no indication in the record that ██████ ever notified the IEP Team following the April 2006 IEP meeting that she had any questions, objections, or concerns to the IEP as it was written at that time. (Exhibit D-18, at 1461; ██████ Testimony, Tr. 616-17)

32.

In the "additional information" section of the April 2006 IEP, the Team mentioned that Ms. McGuffin was the sponsor of the school's cheerleading squad and ██████ had become its manager. This was a position specifically created for ██████ and was directly tied to Ms. McGuffin's involvement. Cheerleading was not identified in the section of the IEP that described recommended "special education, related services and supplemental services" and the Tribunal finds that there was not a determination by the

Team that cheerleading was to be a part of her IEP. Rather, as stated by Ms. McGuffin, ██████'s involvement with cheerleading was "not part of the IEP at all," but something Ms. McGuffin thought would be fun for ██████. (McGuffin Testimony, Tr. 766, 806-09; Exhibit 18, at 1451, 1461)

**B. Seventh Grade (2006-07 School Year)**

33.

██████ began seventh grade primarily in collaborative classes. These regular education classes were much larger than the resource classes that ██████ was used to in sixth grade, with a typical collaborative class having 28 students, 7 of whom were special education students. In addition, for the first time, ██████ was required to change classrooms and teachers for each class period and adjust to a class schedule that rotated every week. (McGuffin Testimony, Tr. 754, 789; Clayton Testimony, Tr. 289, 293)

34.

██████'s adjustment to this new, more "mainstreamed" placement did not go smoothly. Almost immediately, ██████'s problem behaviors escalated and new behavior problems emerged. During the first week of school, Sandra Dotson, ██████'s new case manager and the special education teacher that co-taught ██████'s collaborative classes, observed ██████ hitting other students, kicking them, taking their food, pushing them, spitting on them and taking their belongings. Ms. McGuffin also saw a change in ██████'s behavior from the previous year, observing that ██████'s existing behavior problems increased in intensity and frequency and new behavior problems appeared. (Exhibit D-21, D-25, at 1436; Dotson Testimony, Tr. 863-65; McGuffin Testimony, Tr. 770)

These behavior problems continued through August 2007 and included property destruction, physical aggression toward students (e.g., growling, kicking, hitting, pushing, spitting) and staff (pinching, slapping, twisting arm), and some self-injurious behavior. During this time, [REDACTED] was aware that [REDACTED]'s behavior was deteriorating because the school had been calling her frequently to report the problems. Specifically, [REDACTED] testified that the school called to report "negative" behaviors, such as spitting on a student, running out of the classroom, or attempting to bite another student. (Exhibit D-21; Dotson Testimony, Tr. 864-66; [REDACTED] Testimony, Tr. 590-91, 617-18)

The IEP Team scheduled a meeting on August 29<sup>th</sup>. Ms. Dotson, who had been keeping detailed behavior data called "ABC" data,<sup>12</sup> brought the data to the meeting and presented a summary of this information to the Team. She did not review every behavior listed in the ABC data, but the Tribunal finds that the Team fully informed [REDACTED] of the nature and severity of the behaviors that gave rise to the meeting.<sup>13</sup> (Exhibit D-22, at

<sup>12</sup> "ABC" stands for Antecedent, Behavior, and Consequence and the collection of this data is part of a functional behavioral assessment ("FBA") used to determine the "function" or purpose behind a person's behavior. Specifically, such data will identify an "antecedent" event that precedes a problem "behavior," as well as the "consequence" or reaction to the behavior. Applied behavior analysts, educators, and parents can use this data to determine what is likely to trigger problem behavior, and perhaps more importantly, what consequences reinforce this behavior. (Mueller Testimony, Tr. 413-14; Dotson Testimony, at 861; McGuffin Testimony, Tr. 769) See also *infra*, at ¶ 54.

<sup>13</sup> Plaintiff tendered a cumulative exhibit with statements from [REDACTED]'s regular education science teacher, Ann Clayton, as well as unauthenticated statements purportedly written by some of [REDACTED]'s classmates about [REDACTED]'s actions at school. (Exhibit P-4) Ms. Dotson testified that she and Ms. Clayton asked students to write down concerns they had about things [REDACTED] did in the classroom. The teachers commonly used this practice so that the students would feel validated, but that attention would not be called to the situation and the flow of the class could continue without undue disruption.

1141; Dotson Testimony, Tr. 867-69; ██████ Testimony, Tr. 617-19)

37.

At the meeting, the School District members of the Team expressed their concern that “maybe we had moved too fast” in moving ██████ out of the smaller resource setting of the previous year and into three regular education classes. Ms. Dotson expressed that “possibly that was too much. We wanted to take a step back.” The Team proposed moving ██████ into a resource room with Ms. McGuffin for social studies/social skills to help her get “readjusted.” (Dotson Testimony, Tr. 867; McGuffin Testimony, Tr. 771)

38.

█████ objected to placing ██████ back in Ms. McGuffin’s resource room.<sup>14</sup> (Dotson Testimony, Tr. 867; McGuffin Testimony, Tr. 771-72) ██████ did not approve of the other students who had been assigned to Ms. McGuffin’s resource room the previous year and said that ██████ was uncomfortable there. ██████ thought that the other children had been “ugly” to ██████ and mistreated her. In explaining why she objected to the disabled students in Ms. McGuffin’s class, but not the disabled children at Cedars, ██████ explained:

The kids that were in [Ms. McGuffin’s] class were a little different. They were boys, they wore all black clothing, chains – you would actually see them smoking cigarettes and things. They live in a subdivision over from where we live so you would see them with their skateboards and, you know, cigarettes and things in their hands. And so it’s not the same kind of student.

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(Dotson Testimony, Tr. 870-71; Clayton Testimony, Tr. 293-94) Although it is doubtful whether these unauthenticated hearsay statements have any probative value, the Tribunal finds, based on the preponderance of the evidence, that the behaviors described therein were adequately disclosed to C.S. See ██████ Testimony, Tr. 619.

<sup>14</sup> At the meeting, ██████ told the Team that it wasn’t Ms. McGuffin that she opposed because ██████ “loved” Ms. McGuffin and she had gone out of her way to show that she cared for ██████. (█████ Testimony, Tr. 622)



(C.S. Testimony, Tr. 623-24, 643-44; McGuffin Testimony, Tr. 772; Exhibit D-22, at 1141)

39.

In addition, [REDACTED] also stated that she would like to have [REDACTED]. “fully evaluated prior to making any decisions about her services.”<sup>15</sup> She asked whether the School District could retain either May South or Southern Behavioral Group for outside consultation on autism. The School District told [REDACTED] that it had a different outside expert under contract who could come and observe [REDACTED] at school. (Exhibit D-22, at 1141)

40.

At the conclusion of the August 29, 2006 IEP meeting, the Team recommended that [REDACTED] return to one resource class with Ms. McGuffin for social skills training, despite [REDACTED]’ reservations. The BIP was modified to identify aggressive behaviors such as slapping, pinching and kicking as “target behaviors,” but [REDACTED]’s goals and objectives were not changed. In addition, [REDACTED] was moved to a different Language Arts class because [REDACTED] was dissatisfied with her first teacher. This transfer meant that Ms. Dotson was no longer available as [REDACTED]’s language arts co-teacher and a para-professional was assigned to accompany [REDACTED] to her new class. (Exhibit D-22, at 1141, 1445; McGuffin Testimony, Tr. 771-72; Dotson Testimony, Tr. 868)

41.

One month later, the IEP Team met for a “redetermination meeting” to decide whether a complete reevaluation was necessary for [REDACTED] to remain eligible for special education services. (This process must occur every three years under IDEA regulations.

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<sup>15</sup> [REDACTED] was scheduled for a triennial reevaluation of her eligibility for special education services in the upcoming months. See *infra*, at ¶ 41.

See 34 C.F.R. § 303.303. The Team decided that a full reevaluation was not necessary, but recommended an occupational therapy (“OT”) evaluation.) In addition to discussing the reevaluation issues, the Team also discussed ██████’s current behavioral problems in the regular education setting. However, ██████ wanted to focus on the reevaluation testing information, as she was “tired” of hearing so much negative information about ██████’s behavior. (Exhibit D-25, at 1436; McGuffin Testimony, Tr. 774-75; ██████ Testimony, Tr. 629-30)

42.

As part of the redetermination meeting, the Team reviewed ██████’s past test results, as well as the results of recent testing. Generally, the testing fell into two categories. The first category of tests measured cognitive abilities or “intelligence” and the second measured academic achievement. Intelligence tests attempt to measure a student’s level of general cognitive ability and the scores “are usually similar over a child’s school years.” However, the scores also “may reflect the child’s motivation, energy level, and task preference on the day of the test.” To adjust for this, the intelligence scores are typically given as a range of scores that predict how a student might perform 95 times out of 100. (Exhibit D-3, at 1365; Carter Testimony, Tr. 1114-15)

43.

██████’s most recent intelligence test was in 2004, where she scored in the low average to average range on the Woodcock Johnson III Test of Cognitive Abilities. Her overall General Intellectual Ability (“GIA”) standard score was 89, with scores between 90 and 110 considered “average.” (Exhibit D-3, at 1365; Carter Testimony, at 1097-98)

44.

Achievement tests, on the other hand, are intended to “measure school learning in typical subject areas, such as reading, math, and writing.” Dr. Suzanne Carter, the Director of Exceptional Education for the School District, explained that there are two different kinds of achievement tests – “group” and “individual.” A group test, such as the Georgia CRCT, tests students to determine if they have learned a specific set of skills that the state has identified for their particular grade. The CRCT often changes from year to year as the state modifies its curriculum. Thus, it is difficult to make meaningful comparisons between an individual student’s CRCT test scores from year to year. (Exhibit D-25; Carter Testimony, Tr. 1094-97)

45.

An individual achievement test, sometimes called a “norm reference test,” reports standard scores and measures a student’s performance individually, based on how far they can accurately move through test questions in relation to their age and year in school. Thus, the results of an individual achievement test can be compared year-to-year to determine a student’s progress in a particular subject matter. Moreover, according to Dr. Carter, the School District anticipates that its students will receive standard scores on their individual achievement tests that are close to the standard score from their cognitive abilities test. In this regard, the School District considers individual achievement tests to be a more accurate, meaningful measure of a special education student’s academic achievement than the CRCT scores. (Exhibit D-25; Carter Testimony, Tr. 1094-97, 1100, 1116)

46.

█████. was given an individual achievement test called the Woodcock Johnson III Test of Achievement (“WJIII-ACH”) in August 2006. █████.’s standard achievement scores indicated that she was testing at or above her cognitive abilities score, with the exception of her score in “academic applications,” a subtest that required █████. to apply math skills to real world situations. (Dr. Carter testified that this subtest was often difficult for students with autism.) According to Dr. Carter, these scores show that █████. was achieving at or above her abilities in August 2006. Moreover, although some of D.W.’s standard achievement scores on the achievement tests had fallen since she was last tested in 2004, they were still within the same “band” of scores, were consistent with her cognitive ability, and indicated academic progress over time. (Exhibit D-51, at 1427, D-25, at 1133; Carter Testimony, Tr. 1100-04, 1156-57)

47.

At the conclusion of the September 26, 2006 meeting, █████. told the IEP Team that █████. had an appointment with a psychiatrist and the Team agreed to reconvene after that appointment and after the OT evaluation. █████. asked the Team for a second time whether an evaluation could be done by an independent behavioral analyst group called “May South.” (Exhibit D-25, at 1436)

48.

█████. did not sign the IEP documents from this meeting. On October 8, 2006, █████. wrote a letter to the School District reiterating her past requests for an outside evaluator to conduct a functional behavioral assessment of █████. and expressing her concern for █████.’s regression. (Exhibits D-26, D-25; Carter Testimony, Tr. at 1044-45)

49.

In response to ██████'s requests for an outside behavior evaluation, Dr. Carter began researching May South Home and School Based Behavioral Services ("May South") and another outside evaluator proposed by ██████. The School District chose May South and contracted with Sandra Rivers,<sup>16</sup> a Board-Certified Behavior Analyst ("BCBA") with a master's degree in behavior disorders and autism, to consult about ██████. Ms. Rivers is the Assistant Clinical Director of May South and has considerable experience as a teacher and clinician in the areas of behavior analysis and treatment of children with autism. Ms. Rivers conducted an informal assessment of ██████. on October 30, 2008. (Carter Testimony, at 1044-45; Rivers Testimony, at 931-35; Exhibit D-56)

50.

Shortly before Ms. River's assessment, ██████. exhibited particularly aggressive behaviors, including attempting to bite a teacher. After that incident, ██████. refused to return to her classroom and "was screaming and crying and hitting her head against the wall... She was biting herself . . . attempting to hit, or grab or . . . run away from the adults." When Ms. McGuffin arrived to help, ██████. resisted. ██████. scratched and bruised Ms. McGuffin's arm as she assisted in physically transporting ██████. out of hallway and into the closest classroom. (McGuffin Testimony, Tr. 776-78)

51.

YMS personnel contacted ██████'s parents to pick her up following this incident and scheduled a "manifestation determination meeting" for October 31, 2006. The purpose of the meeting was to determine if ██████.'s misconduct was a manifestation of her disability. The IEP Team determined that it was and that punishment in the form of

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<sup>16</sup> At the time of the evaluation, Ms. Rivers was known as Sandra Black.

suspension was not appropriate. (Exhibit P-41; Exhibit D-35)

52.

Immediately following the manifestation meeting, the IEP convened to review the results of Ms. River's informal assessment and the results of the OT evaluation. With respect to OT services, the Team determined that [REDACTED] experienced "several sensory issues" and that OT consultative services should be offered to [REDACTED], including training her teachers in OT strategies and using sensory tools such as a weighted vest, stress balls, and padded seats. (Exhibit D-36, at 1103, 1124-25)

53.

In addition, Ms. Rivers submitted a written report of her assessment of [REDACTED] and attended the October 31, 2006 IEP meeting. Prior to observing [REDACTED] in the classroom setting, Ms. Rivers reviewed [REDACTED]'s school records and interviewed her teachers. Based on these sources, Ms. Rivers concluded that [REDACTED]. "has shown difficulties this school year with the less restrictive environment as her disruptive behaviors have increased and appear to be effecting her skill acquisition and social interactions with staff and peers." (Rivers Testimony, Tr. 942, Exhibits D-33, D-36)

54.

During her approximately two-hour observation of [REDACTED] on October 30, 2006, Ms. Rivers took ABC data and formulated a number of hypotheses about the function of [REDACTED]'s problem behaviors. Under the theory of applied behavior analysis, there are four possible functions of these behaviors: escaping tasks, gaining attention, accessing tangible items, and sensory stimulation. A functional behavioral assessment attempts to identify the functions of the problem behaviors, which serve to reinforce the negative

behaviors. Once the reinforcers are identified, a behavior intervention plan (“BIP”) can be developed so that the reinforcers are provided in response to appropriate behaviors and withheld in response to problem behaviors. (Exhibit D-33; Rivers Testimony, Tr. 938, 942-45; Mueller Testimony, Tr. 414-15, 421)

55.

Ms. Rivers identified five disruptive behaviors – property destruction, aggression, elopement, self-injurious behavior, and non-compliance – and observed ██████ engage in one of these behaviors approximately every five minutes. Based on her informal assessment, Ms. Rivers hypothesized that ██████’s disruptive behaviors were being maintained by the attention given to the behaviors by staff, by access to breaks or escape from work, and possibly by access to tangible items such as the computer. (Exhibit D-33; Rivers Testimony, Tr. 944-45)

56.

Ms. Rivers considered this an informal assessment because generally she would do more observations of the child and also review feedback from the parents. Ms. Rivers gave a parent feedback form to ██████ to fill out after the October 31, 2006 meeting, but ██████ never returned it. Nevertheless, she had gathered enough information to make broad recommendations regarding a new BIP and to suggest specific interventions that might help reduce ██████’s disruptive behaviors. (Rivers Testimony, Tr. 943, 949-50; Exhibit D-33)

57.

One of the primary recommendations made by Ms. Rivers related to the importance of training the staff in how to implement the behavior plan:

The success of any behavioral recommendations will hinge on the consistency with which the service providers can implement the procedures. This will require specific training in all behavioral protocols developed through a functional behavioral assessment process. It is not uncommon for slight deviations in relatively simple procedures to cause increases in disruptive behavior once the behavior is under control. It should be recommended that any person working with [REDACTED]. be trained in ALL behavioral aspects of the treatment plan for consistency.

(Exhibit D-33, at 1383) Dr. Mueller, Plaintiff's expert behavioral analyst, echoed the importance of training and consistency, stating that when a student is given "intermittent" or inconsistent reinforcement, the behaviors are actually more difficult to change because the student is encouraged to persist in the behavior. (Mueller Testimony, Tr. 416, 485-87)

58.

Another important recommendation made by Ms. Rivers was for a slower transition to mainstream classes.

There may need to be a consideration for slowly increasing her time in a co-teaching environment from a resource environment, as she becomes more successful at self-managing her behaviors. [REDACTED]. is at a critical age for developing positive self-esteem, and this transition may be more effective in a slow transition from a more restrictive to less restrictive environment and that is a positive experience for developing friends and appropriate behaviors.

(Rivers Testimony, Tr. 943-46, 949; Exhibit D-33, at 1383)

59.

Ms. Rivers elaborated at the hearing, stating that if the parents were concerned that [REDACTED]. was being bullied or mistreated by her peers, it was even more important for her to work on social skills in a positive environment, such as the resource room. However, Ms. Rivers went on to state that she did not observe any bullying by [REDACTED]'s peers during her short observation; rather, she observed the other students being very



tolerant of her behaviors, an observation shared by ██████'s classroom teachers. (Rivers Testimony, Tr. 946-47; McGuffin Testimony, Tr. 798-99; Dotson Testimony, Tr. 871-72; Clayton Testimony, Tr. 296-97)

60.

██████'s parents opposed Ms. Rivers' recommendation to move ██████ out of the inclusion setting and back into the resource room. Instead, ██████, ██████'s step-father, proposed limiting some of the transitions built into the middle school's rotating class schedule. The Team agreed to study the feasibility of this option and reconvene the IEP meeting a few days later to discuss a draft BIP. (Rivers Testimony, Tr. 948; Exhibit D-36, at 1103-04; ██████ Testimony, Tr. 643)

61.

On November 2, 2006, the IEP meeting continued and included a special education advocate who represented ██████'s parents. The Team identified specific positive reinforcers to be used as part of a "token" economy suggested by Ms. Rivers. In addition, the Team discussed a fixed class schedule for ██████, which would allow her to go to the same class at the same time, week after week. In order to put this in place, however, ██████ would attend one class each day during a teacher's planning period and receive individual instruction from the teacher and the para-professional. The Team agreed to this fixed schedule. (Exhibit D-36, at 1104; Rivers Testimony, Tr. 950-51; McGuffin Testimony, Tr. 692-93, 788-90; ██████ Testimony, Tr. 643-46)

62.

The Team also reviewed the draft BIP, which was developed by Ms. McGuffin and was based on the May South report. ██████'s parents were pleased with the new BIP.

The Team agreed that the BIP would be implemented for two weeks, data collected on ██████'s behavior during that time, and the Team reconvened to review ██████'s progress. Ms. Rivers told ██████ that she could contact her after the meeting with any questions, but ██████ did not do so. ██████ testified that she did not contact Ms. Rivers because she believed that if she talked to Ms. Rivers for more than 15 minutes, she would have to pay for Ms. Rivers' time. (Rivers Testimony, Tr. 957; Exhibit D-36, at 1105; ██████ Testimony, Tr. 587-88)

63.

Beginning on November 6, 2006, YMS arranged for a substitute teacher for Ms. McGuffin for two weeks so that she and Kim Childs,<sup>17</sup> ██████'s para-professional (or "parapro") could collect data during the implementation of the BIP. During this time, Ms. McGuffin trained both Ms. Childs and ██████'s other teachers on how to implement the BIP strategies for applying appropriate "consequences" for the targeted behavior. In addition, she trained Ms. Childs on how to record the ABC data.<sup>18</sup> (Childs Testimony, Tr. 361, 378; McGuffin Testimony, Tr. 787-88; Clayton Testimony, Tr. 309-10)

64.

As emphasized by both Ms. Rivers and Dr. Mueller, this training process was critically important because of the negative effect of even small deviations from the plan.

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<sup>17</sup> Prior to working with ██████, Ms. Childs had no training or experience relating to autism or functional behavior management or assessment. Her background in the school setting was as a substitute teacher for three years.

<sup>18</sup> The ABC data consisted of frequent, detailed notations (sometimes every two or three minutes) of every target behavior, along with a code for the category of behavior (such as "AG" for aggression or "NC" for non-compliance), the time of day it occurred, the intensity level of the behavior (high, medium or low), the antecedent and the consequence. It was an intensive undertaking and one that the School District, inexplicably, continued past the two-week assessment period until May 2007. See Exhibit D-2.

For example, if ██████'s behaviors were being maintained by attention, the BIP strategy was for all staff members to ignore the problem behavior (i.e., withhold attention) and only give attention in response to appropriate behavior. However, if this strategy was not implemented consistently, the problem behavior would actually be more likely to persist. Similarly, if the strategy was not implemented properly, such as when attention is given in the form of "redirection" in response to a problem behavior, the behavior would also tend to persist. (Mueller Testimony, Tr. 415-17, 485-87; Exhibit D-33; Rivers Testimony, Tr. 1021-22)

65.

Based on the testimony of Ms. Childs, Ms. Clayton, and Ms. McGuffin, as well as the evidence relating to ██████'s behaviors during the intensive two-week implementation period, the Tribunal finds that the School District initially made reasonable efforts to train its staff to implement the BIP strategies. However, the level of consistency required for the BIP to be effective over time was difficult to maintain without extraordinary vigilance and ongoing training, particularly in the collaborative class setting. Moreover, despite the efforts of Ms. McGuffin and Ms. Childs, Ms. Childs did not always consistently implement the BIP strategies. For example, for some period of time, Ms. Childs would accede to ██████'s disruptive behaviors if they occurred in the middle of a test. In addition, Ms. Childs testified that she was instructed to intervene in ██████'s disruptive behaviors by "redirecting" her even when the disruptive behaviors were "attention-seeking." Although at times the redirection was followed by ignoring ██████'s behavior until she complied, this was often not the case. (Childs Testimony, Tr. 364-66, 396-98; Exhibit D-37; DDS 000011-12)

Similarly, both Ms. McGuffin and Ms. Childs were inexact in their data collection, despite a remarkable expenditure of time and effort in that endeavor. Dr. Mueller analyzed the data and found mistakes in coding from “day one.”

You know, it’s clear that whoever was coding the data wasn’t using the definitions that were provided in the behavior intervention plan and the IEP. There were so many instances of things being described different than that were coded as aggression, coded as non-compliance, coded as property destruction that didn’t relate at all to those definitions.

(Mueller Testimony, Tr. 485-87; *Attachments to Plaintiff’s Post-Trial Brief*) For example, Dr. Mueller found that only 2 of the first 48 instances coded as aggression actually met the definition in the BIP for aggression. (Mueller Testimony, Tr. 461) Ms. Rivers also found the data to be incomplete or incorrectly coded in some instances. (Rivers Testimony, Tr. 961)

Ms. Rivers’ report stated that further observation and assessment might need to be done by May South and she testified that she always recommends “following-up” on her FBA. (Rivers Testimony, Tr. 1023; Exhibit D-33) If the School District had retained Ms. Rivers or another BCBA to review the data from the two-week implementation period, many of these coding errors and inconsistencies would have been uncovered immediately. The School District, however, chose not to do so. Dr. Carter testified that she believed that the School District’s own staff was capable of implementing and evaluating the BIP without further assistance from an outside consultant. (Carter Testimony, Tr. 122-23) Thus, when the IEP Team met on November 29, 2007 to review the data from the first two weeks of the new BIP, Ms. McGuffin, not Ms. Rivers,

analyzed the findings and prepared a written report. (McGuffin Testimony, Tr. 797; Exhibit D-37) [REDACTED] was pleased with the reported results and signed a document indicating her agreement to the BIP. (Exhibit D-38)

68.

Ms. Rivers testified that it is not possible to verify that this reduction in target behaviors was attributable to the implementation of BIP strategies simply by reviewing ABC data. However, in a school setting it is reasonable to conclude that the reduction in behaviors likely correlates to the onset of treatment. (Rivers Testimony, Tr. 965) Of course, the implementation of [REDACTED]'s BIP coincided with the change to a fixed schedule, and also to a change in [REDACTED]'s medications that was completely unknown to the School District members of the Team at the time. ([REDACTED] Testimony, Tr. 649-50; McGuffin Testimony, Tr. 798)

69.

Specifically, at the hearing [REDACTED] admitted that she had just started [REDACTED] on a new medication called Abilify,<sup>19</sup> but failed to tell anyone on the IEP Team. [REDACTED] had told Ms. McGuffin about some "new medicine" she was taking, but when it was brought up at the November 29<sup>th</sup> IEP Meeting, [REDACTED] denied it, claiming that [REDACTED] was taking only vitamins. The minutes from that meeting state:

Mother shared that [REDACTED] is going to a doctor and will be going through therapy. Medications were discussed and they have opted not to start any medications at this time. However, she is taking a vitamin that seems to be helping.

In fact, [REDACTED] had started on this medication under the direction of a psychiatrist, and

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<sup>19</sup> Neither party presented evidence regarding the exact nature of the drug Abilify, although John Singleton, the Director of [REDACTED] Academy, testified vaguely that it was for "attention" issues. (Singleton Testimony, Tr. 249)

continues on this medication to date, a fact that was not disclosed to the School District until late in May 2007. [REDACTED] said she did not disclose this information because it was just a “trial.” (Exhibits D-38, D-41, at 1351; McGuffin Testimony, Tr. 798; [REDACTED] Testimony, Tr. 649-51; Carter Testimony, Tr. 1053-54)

70.

Dr. Carter testified that it is very important to both the IEP Team and the school to know about any medications, particularly new medications that affect behavior when behavior is a primary focus of an IEP. The Tribunal finds that the deliberate withholding of this significant information was unreasonable and hampered the IEP Team’s ability to develop a plan to address [REDACTED]’s individual needs. (Carter Testimony, Tr. 1054)

71.

Based on the available information, the Team decided to continue the BIP interventions and the fixed schedule for the remainder of the school year. There is no evidence in the record that [REDACTED]’s parents ever presented any information to the Team at that time, or any time through the school year, that [REDACTED] was experiencing similar behaviors in the home or that the family was in need of services or counseling outside of school. Although the parents testified at the hearing that [REDACTED] “cried everyday” about going to school, had trouble with hygiene, manners, and sibling rivalry in the home, there is no evidence that [REDACTED]’s parents disclosed this information to the School District. The Tribunal finds that without such information, the School District had no reason to discuss the need for home services. (Carter Testimony, Tr. 1052; [REDACTED] Testimony, Tr. 611-13, 644; McGuffin Testimony, Tr. 800; Dotson Testimony, Tr. 871)

72.

Nothing in the BIP or any of the IEP documents required the School District to continue the collection of ABC data after the two-week implementation period. In fact, Ms. Rivers, Dr. Mueller, and Dr. Carter all testified that the continuation of such extensive documentation of behaviors beyond the assessment period was unusual. (McGuffin Testimony, Tr. 795; Exhibits D-38; Carter Testimony, Tr. 1049; Rivers Testimony, Tr. 988; Mueller Testimony, Tr. 529-30) Nevertheless, Ms. Childs continued to take ABC data through most of the school year, until approximately the beginning of May 2007. (Exhibit D-2)

73.

Ms. Childs' data collection continued to contain inconsistencies as well as incorrect coding during this time period. Moreover, there is no evidence that Ms. McGuffin (who was on leave for over a month during this time) or any other special education teacher reviewed Ms. Childs' work or provided ongoing training. Based on Ms. Childs' testimony, including the Tribunal's observation of her demeanor, the Tribunal finds that Ms. Childs' was caring and well-meaning in the execution of her paraprofessional duties, but that her understanding of the practice and purpose of ABC data collection was cursory and insufficient to ensure that the data was reliable or consistent. Moreover, the data itself reveals that behaviors were not coded as called for in the BIP, nor were behaviors coded consistently from day to day.

74.

Despite its unreliability, both expert witnesses attempted to analyze the data to determine the frequency of the target behaviors and assess ██████'s progress. However,

each approached the errors in coding in a different way. Plaintiff's expert, Dr. Mueller,<sup>20</sup> took the raw data and entered it, unchanged, into a spreadsheet, notwithstanding that the coding was often incorrect or inconsistent. If the ABC data indicated a behavior, but failed to code the behavior, Dr. Mueller did not include it. Defendant's expert, Ms. Rivers, on the other hand, attempted to modify the codes based on the narrative description of the behavior prior to entering them into her spreadsheet. (Rivers Testimony, Tr. 959-63, 971-81, 986; Mueller Testimony, Tr. 431, 460-62, 474-80, 485-86, 511)

75.

The Tribunal finds both methods insufficient to cure the deficiencies in the data such that it is susceptible to reliable frequency analysis. Dr. Mueller testified that his analysis was premised on the unsupported presumption that although Ms. Childs incorrectly coded, she at least coded the same behavior the same way each time. However, as Plaintiff pointed out in her post-hearing brief attachments, the coding was rife with inconsistencies. For example, "growling" was supposed to be coded as non-compliance, but it was often coded as aggression. Similarly, "crying" or "whining" was not specifically defined as a target behavior, although it was most closely aligned with the definition for non-compliance. However, Ms. Childs coded "crying" as aggression almost as often as she did non-compliance. (Mueller Testimony, Tr. ; Exhibit D-2)

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<sup>20</sup> Dr. Mueller is the Director of Behavior Services for Southern Behavioral Group. He completed a Ph.D. dissertation on reducing classroom behavior problems and he has considerable experience and training in development treatment plans for students with autism in the public school setting. (Mueller Testimony, Tr. 408-11)



76.

Dr. Mueller admitted that if the data was collected in a random manner, an analysis based on the data would not be valid. In addition, Dr. Mueller testified that it was “probably common without ongoing training that people vary from the procedures that they’re supposed to follow.” Finally, Dr. Mueller acknowledged that he had not spoken to Ms. Childs, did not know “if she applied different rules inconsistently, if she started with one set of directions and ended up using something else that varied back and forth, if it was random, if she followed the directions. I just simply analyzed the data that were recorded on there.”<sup>21</sup> (Mueller Testimony, Tr. 475-76, 499-502)

77.

Even if the input data was considered reliable enough to be used in a frequency analysis, Dr. Mueller admitted that with respect to the target behavior of non-compliance, which was the most commonly-documented behavior, it was inappropriate to look at frequency as a measure of progress. As Dr. Mueller explained, “non-compliance is only important relative to the number of things that she was asked to do... So as a dimension of behavior, frequency is inappropriate to use and you have to take into account all of the things that she was asked to do and then only parcel out the non-compliance.” Notwithstanding this caveat, Dr. Mueller proceeded to analyze the frequency of the target

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<sup>21</sup> Dr. Mueller was discussing Ms. Childs’ recording of data on Daily Point Sheets that were given to ██████ as part of the token economy system; however, the Tribunal finds his comments relevant and applicable to Ms. Childs’ collection of the ABC data as well. Moreover, the Tribunal finds that the daily point sheets, where ██████ was awarded a 0, 1, or 2 for different behavior categories during each class period, were similarly incapable of meaningful numerical analysis because they were based on Ms. Childs’ or Ms. Dotson’s subjective impressions, were used to reward ██████ for improvements in her behavior, not to accurately document how frequently the target behaviors occurred, and were not a part of the BIP. (Rivers Testimony, Tr. 968; Dotson Testimony, Tr. 875-77; Childs Testimony, Tr. 370-75)

behaviors, including non-compliance, and made an overall conclusion that the frequency data did not show significant behavioral improvement. (Mueller Testimony, Tr. 458)

78.

Ms. Rivers agreed with Dr. Mueller that “non-compliance is the hardest probably to measure for the fact that so many demands are given in a day’s time.” This led Ms. Rivers to remove the non-compliance codes from her final analysis and look only at those behaviors coded as aggression, property destruction, self-injurious behavior, and elopement. Ms. Rivers found a reduction of these target behaviors, but concluded that D.W. “reached a point where the treatment plan needed to be relooked at because there was a reduction but there wasn’t a full zero reduction...” (Rivers Testimony, Tr. 987-88)

79.

Dr. Mueller agreed, opining that the data should have been reviewed on a much more frequent basis.

The reason you do it [collect daily behavior data] at that intensity level and that frequently is so that you can make almost immediate decisions about progress. So those things should probably have been reviewed probably weekly with the amount of energy put forth. And the reason that you do that is so you can analyze as quickly as possible whether or not the behavior intervention plan and other procedures are working. If they’re working, you continue, and if they’re not, then you tweak it until it becomes more effective.

(Mueller Testimony, Tr. 486-87) According to Dr. Mueller, the data collectors should have been retrained to code correctly and all the staff working with [REDACTED] should have been better trained on delivering appropriate interventions. With such strategies in place, Dr. Mueller opined that the School District could have expected almost immediate change and would have seen a significant decrease in target behaviors. (Mueller Testimony, Tr. 535, 539-40)

80.

In fact, as a general matter, Dr. Mueller was so confident that a properly implemented and monitored BIP could be successful in the public school setting that he has never recommended that a child be placed in a residential setting. Ms. Rivers echoed this sentiment, testifying that she saw no reason for ██████. to be placed in a residential setting to address her behavior issues and opining that in some cases, residential facilities make it more difficult for a child to transfer learned skills back to a natural, community setting. (Mueller Testimony, Tr. 527; Rivers Testimony, Tr. 989)

81.

Between the November 29<sup>th</sup> meeting and the May 1, 2007 IEP annual review meeting, ██████.'s parents expressed no concern about her behavior or academic progress to the School District. Yet, as early as January of 2007, ██████.'s parents began investigating private schools, both day and residential. They did not disclose their search to any staff member during the 2006-07 school year. (██████. Testimony, Tr. 652-53)

82.

In March 2007, ██████.'s parents made a request for all records relating in any way to ██████. The School District provided ██████.'s special education file, along with the daily ABC data sheets, class work, and anecdotal notes from teachers and students. (Exhibit D-39; ██████. Testimony, Tr. 633)

83.

After reviewing the records, ██████.'s parents were very disturbed that the teachers had recorded her behavior and that the students had written notes about ██████.'s behavior in the fall. They were upset that they had not previously been given these records,

although it is clear that they had been told of the nature of the recorded information at various IEP meetings and conversations with the school. (█████. Testimony, Tr. 613, 628, 655-56; J.S. Testimony, Tr. 699, 702)

84.

In late April 2007, Ms. McGuffin drafted a new IEP for ██████'s eighth grade year and provided a copy of the draft to ██████'s parents prior to the meeting. The draft IEP contained two general goals (reciprocating conversations and decreasing disruptive behaviors) with seven objectives; the criteria for measuring progress on each goal was based on progress made on the objectives. Ms. McGuffin also used the ABC data recorded by Ms. Childs to create a bar graph purporting to depict the frequency of ██████'s target behaviors from February through April. (Exhibit D-40; Carter Testimony, Tr. 84-85; 1059-60)

85.

The bar graph was flawed not only because of the unreliability of the data and the inappropriateness of graphing non-compliance in terms of frequency but also because Ms. McGuffin failed to take into account that March had fewer school days than February, and April had fewer days than March (because of spring break). Thus, just by virtue of fewer days in school, the bar graph depicted an artificial reduction in ██████'s target behaviors. According to Dr. Mueller, there was virtually no change in the frequency of the behaviors during this period when the graphs were adjusted for the number of days in school. Moreover, it is clear, despite the flaws in the analysis that ██████'s problem behaviors were still occurring; although the characterization of a decrease or leveling off in frequency may have been misleading. The draft IEP

acknowledged that “non-compliance and elopement continue to interfere with [REDACTED]’s skill acquisition and limit her opportunities for academic growth and social opportunities.” (Mueller Testimony, Tr. 479; Exhibit D-40, at 894)

86.

The subjective accounts by [REDACTED]’s teachers of her behavior described an improvement in her overall behavior since the tumultuous beginning of seventh grade. According to Ms. McGuffin, the intensity of her behaviors had diminished and necessitated fewer calls home. Also, [REDACTED]’s interactions with her peers had improved, as had her table manners, her respect of others, her ability to self-regulate and her demeanor. She appeared happier and less anxious. (McGuffin Testimony, Tr. 819-20; Dotson Testimony, Tr. 884-85) However, despite observing improvements in her behavior from the beginning of the year, Ms. Clayton, [REDACTED]’s regular education science teacher, as well as Ms. Fransioli, [REDACTED]’s regular education language arts teacher, found that [REDACTED]’s behaviors continued to interfere with her learning, as well as the learning of her classroom peers, and her behavior was unsatisfactory compared to her regular education peers. (Clayton Testimony, Tr. 287, 311; Exhibit D-73, at 308-09)

87.

Prior to the IEP meeting on May 1, 2007, Ms. Dotson administered two math subtests from the WJIII-ACH test to [REDACTED], as math has always been her weakest academic area. She received a higher standard score on the applied problems subtest than when she took the subtest in August 2006 and substantially the same standard score on the math calculation subtest. Moreover, both these math scores were commensurate with her cognitive abilities or intelligence test scores. (Carter Testimony, Tr. 1104-07; D-51,

at 1427)

88.

At the May 1, 2007 IEP Meeting, the Team reviewed [REDACTED]'s present level of performance and noted that she continued to have difficulties with non-compliance and elopement, as well as social skills and pragmatic language (the practical use of language in real life situations). [REDACTED] asked the Team to consider adding a goal for math, but School District believed that a math goal was unnecessary because [REDACTED]'s math weakness would be addressed through improving her behavior and attention, thus allowing her more exposure to the math curriculum. [REDACTED] also asked for a speech and language evaluation and the Team agreed to begin collecting data over the summer for a redetermination meeting. In the meantime, the Team agreed to a "tentative objective" for pragmatic language. (Carter Testimony, Tr. 1061-68)

89.

The IEP contemplated that [REDACTED] would remain in collaborative classes for eighth grade, except for math and social skills. She would also continue to receive OT on a consultative basis. The parents took the IEP with them to review, along with some of the recorded ABC data, and the Team agreed to meet again to discuss Extended School Year ("ESY") services. [REDACTED] testified that she agreed with the proposed IEP at the time because she felt that she had no other choice. There is no evidence in the record that [REDACTED]'s parents indicated at any time during this meeting that they were considering a private school placement. ([REDACTED] Testimony, Tr. 599, 658-59; Exhibit D-4-, at 1335; Carter Testimony, Tr. 1056-57, 1073)

90.

█████ took the CRCT for Georgia seventh graders prior to the May 1, 2007 meeting, although the results were not available in time for the meeting. Ms. Dotson administered the test and observed that █████ did not take a lot of time on the questions, putting her head down for most of the testing period. On the CRCT, the test administration is scripted and the teachers may not speak to the student during the examination. Ms. Dotson encouraged █████ prior to the start of the test, but was not permitted to prompt or encourage her during the test. (Dotson Testimony, Tr. 878-80, 891-92)

91.

█████'s lack of effort was reflected in lower scores on the CRCT than the previous year. She failed to meet the state standards in reading (794), language arts (797), math (760) or social studies (287); although, her scores were just below the passing scores of 800 for reading and language arts. Dr. Carter testified that considering the "confidence intervals" for these test scores, █████ would have met the standards in three of five areas and been close in social studies. She continued to struggle with math, despite her higher scores on the WJIII-ACH math subtests. (Exhibit P-68; Carter Testimony, Tr. 1094-97)

92.

█████ received the following final grades for the year: Language Arts 77; Social Studies 87; Math 81, and Life Science 87. She made an A and two Bs in her "connections" classes." Although there was some evidence in the record that certain of █████'s grades were changed during the course of the semester, particularly around the time when she moved from one teacher to another, the Tribunal finds no evidence of

improper modification or tampering with ██████'s grades. (Exhibit D-52, at 1313; Clayton Testimony, Tr. 278; Dotson Testimony, Tr. 904)

93.

On May 22, 2007, the Team met to discuss ESY services and agreed that ██████ would attend "intersession" or summer school. By this time, ██████'s CRCT scores were now available and included in the Addendum to the Annual Review. The intersession program was designed to enhance a student's performance on the CRCT, but was not generally offered for ██████'s grade level. The IEP Team decided to have ██████ participate in intersession in a collaborative setting for added academic instruction and to assist with social skills. In addition, ██████ was offered 12 hours of additional instruction devoted exclusively to social skills in a resource setting. The latter services were designed around the parents' vacation schedule. (Exhibit D-41, at 881; Carter Testimony, Tr. 1071-73)

94.

██████ testified at the hearing that she had asked for "one-on-one" instruction for ██████ for social skills, but that the School District denied this request at the May 22, 2007 meeting. She further testified that she did not agree with the ESY services that were offered by the School District and wanted information about other "programs." Finally, she testified that she requested that the School District identify ██████'s special education co-teacher for intersession. (██████ Testimony, Tr. 600-02)



The May 22, 2007 IEP meeting minutes and the testimony of the School District witnesses conflict with [REDACTED]' testimony. First, the ESY Goal Form indicates three behavior goals in the collaborative classroom. In addition, it clearly identifies 12 hours of services in the resource room, in addition to the 40 hours of collaborative instruction during intersession. Moreover, there is no documentation in the IEP record of [REDACTED]' objection or her request for additional information and the School District witnesses testified that [REDACTED] did not voice any objections or place any conditions on ESY services at the May 22, 2007 meeting. Finally, [REDACTED] filled out adaptive transportation forms for ESY services at the May 22, 2007 meeting and the Team concluded the meeting by agreeing to reconvene on August 17, 2007 to consider speech services. (D-41, at 880; [REDACTED] Testimony, Tr.662-63; Carter Testimony, Tr. 1071-73; Cooper Testimony, Tr. 333-37, 345-48)

[REDACTED] did not attend the first day of ESY services. Mary Cooper, special education coordinator at YMS, called [REDACTED] to determine whether [REDACTED] would attend and in a later return call, which [REDACTED] recorded without telling Ms. Cooper, [REDACTED] told Ms. Cooper that [REDACTED] would be attending a summer program at [REDACTED] Academy in Delaware. [REDACTED] told Ms. Cooper that while [REDACTED] "loved" her YMS teachers, her parents were looking for the best program for her. She also told Ms. Cooper that she was concerned that [REDACTED] had regressed and that [REDACTED] needed more social skills instruction than the School District was offering. [REDACTED] said that [REDACTED] would attend [REDACTED] through August 11<sup>th</sup> and she would keep the School District informed once they made the

decision regarding returning to YMS in the fall. (Cooper Testimony, Tr. 332, 7-38; ██████ Testimony, Tr. 664, 667; Exhibit D-42)

97.

On June 22, 2007, ██████ wrote a letter to Ms. Cooper, stating that she considered the offered ESY services to be insufficient and inappropriate. In addition, she disagreed with the School District that ██████ had made progress and wrote of her concerns about the adequacy of the IEP minutes. She also requested a number of documents, some of which she had previously been provided. The School District responded to ██████' letter on June 27, 2007, providing her copies of some of the requested documents and inviting her to submit additional information for inclusion in the IEP minutes. There is no evidence in the record that ██████ submitted any additional information. (Exhibits D-43, D-45; ██████ Testimony, Tr. 678-81)

98.

Also on June 22, 2007, ██████ sent a letter to the superintendent of the School District, confirming that he had refused her request to meet with him and reiterating her dissatisfaction with the services provided to ██████, including ESY services. The letter was intended to be "additional notice that we may seek private education and related services and public reimbursement for those services." According to ██████, she had not decided at that time whether ██████ would be back at YMS in the fall. (Exhibit P-83; ██████ Testimony, Tr. 666-68)

99.

The next contact ██████ made with the School District was a letter dated August 1, 2007 – the first day of the 2007-08 school year in Walton County – to inform the School

District that ██████. would not be returning “at the beginning of the school year” because ██████. considered the IEP and services to be improper and not designed to allow ██████. to progress. (Exhibit D-46)

100.

Dr. Carter responded to ██████.’ letter on August 16, 2007. She indicated that she was surprised because ██████ had not indicated that she disagreed with the proposed IEP or ESY services at the meetings in May and never gave an indication that she was rejecting the IEP or believed the ESY services to be inadequate. Dr. Carter invited ██████.’s parents to an IEP meeting to address their concerns. (Exhibit D-47)

101.

On August 22, 2007, ██████.’s parents responded to Dr. Carter’s letter, identifying a number of concerns and stating that Dr. Carter’s offer to meet and try to address them came too late. ██████.’s parents notified Dr. Carter that they had already signed a contract with a private school and that the IEP meeting would not be necessary. Although ██████.’s parents offered into evidence a copy of the summer school contract with ██████ dated July 6, 2007 for summer school services, they did not provide a copy of the contract for the 2007-08 school year. The record does contain evidence that the parents were asked to notify ██████ by July 27, 2007 whether ██████ would attend during the regular school year. However, ██████ testified that ██████ allowed them to make up their minds after the deadline because they wanted to get some feedback from ██████ after the summer session ended on August 11, 2007. (Exhibits D-48, D-57; Exhibit P-9; ██████. Testimony, Tr. 667-70)

C. Cedars Academy

102.

████████ Academy is a small, privately-operated boarding school owned by the Aspen Education Group, a for-profit entity. Until fairly recently, ██████s focused primarily on students with ADHD. Approximately eighteen months ago, when ██████s hired a new director, John Singleton, the mission of the school changed to focus primarily on students with Asperger's Syndrome and non-verbal learning disorders or "NLD." (Singleton Testimony, Tr. 144, 154, 208; Exhibit P-5)

103.

Mr. Singleton has been an educator and school administrator for many years and has a bachelor's and master's degree in education. However, he does not have any formal education or training in special education generally or autism in particular. He is not certified to teach special education in any state and has never directly taught students with Asperger's. His experience "in the field" with students with these types of disabilities was as an administrator in the public school setting in North Carolina and in two other private boarding schools, one for boys with ADHD and one for girls needing a "behavior modification program." He was employed by these two private schools for approximately one year each, before joining ██████s as its director. (Singleton Testimony, Tr. 144-47; 152)

104.

Under Mr. Singleton's direction, ██████s instituted a behavioral modification program called the "Peer Leadership Pyramid." This program has been developed by Mr. Singleton and a colleague and Mr. Singleton is in the process of researching and

collecting data on the program in connection with his Ph.D. dissertation. This research has not been completed or published and the "Peer Leadership Pyramid" program has not been peer-reviewed or otherwise demonstrated to be effective or appropriate.

Q. You have no way of knowing whether this program that is the centerpiece of your program works, do you?

A. That's exactly right.

Q. You use it for all students, don't you?

A. Yes, we do.

(Singleton Testimony, Tr. 169, 210, 370-72; Exhibit P-5A)

105.

Not surprisingly, Mr. Singleton's Peer Leadership Pyramid is not a method recognized by the educators and other experts who testified in this hearing and Mr. Singleton presented no corroborative evidence regarding the efficacy of this program. Dr. Mueller, who was qualified as an expert in applied behavior analysis and the assessment and treatment of behavior in school settings, did not recognize this method of treatment for children with autism. In fact, other than methods based on applied behavior analysis theories, the only other research-based option for treatment of severe behavior in children with autism, according to Dr. Mueller, "would be some medication changes."  
(Mueller Testimony, Tr. 550)

106.

Mr. Singleton testified that ██████s was "accredited" by CITA, the Commission on International and Transregional Accreditation, and was scheduled to receive accreditation from the Southern Association of Colleges and Schools ("SACS") sometime in February 2008. He also testified that ██████s was on the approved list for private school

placements for special education students from Connecticut and New Jersey. However, Plaintiff did not tender any corroborative documentary evidence of these accreditations or approvals. Moreover, given the recent changes in the program at ██████s and Mr. Singleton's own testimony regarding the lack of peer-reviewed data on the new program, the Tribunal finds that the evidence in the record is insufficient to prove that the current program at ██████ has been independently approved, accredited, peer-reviewed or accepted. (Singleton Testimony, Tr. 159-61)

107.

There are currently 37 students enrolled at ██████, ranging in age from 12 to 18 in middle and high school. All of the students have diagnoses of Asperger's or NLD. ██████ has approximately 41 staff members, eight of whom are teachers. Of the eight teachers, only two have special education certifications and two of the eight are both new to teaching and new to ██████s. None of the staff members have a Ph.D. and none of the staff are qualified to conduct a functional behavior assessment. Although Mr. Singleton testified that the school provides on-site training and copies of research journals relating to autism and Asperger's Syndrome, there is no evidence in the record that any of the educators at ██████ have formal training, education or experience in teaching students with Asperger's. (Singleton Testimony, Tr. 144, 168, 211-12, 244)

108.

The "Behavior Plan" prepared by ██████s adopts word-for-word the two goals and each of the objectives that are found in the IEP that was proposed by the School District in May 2007, which ██████'s parents ultimately rejected.<sup>22</sup> The Individualized Learning

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<sup>22</sup> Mr. Singleton initially hypothesized that ██████' verbatim adoption of the School District's behavior goals and objectives was the result of an IEP computer program that

Plan ("ILP") prepared by ██████, however, included a number of other goals for ██████ that the School District's IEP did not, including goals for mathematics, handwriting, organization and time management. ██████ ILP did not include a specific goal for pragmatic language or speech, nor is ██████ provided services from a speech-language pathologist. Mr. Singleton explained that it was mostly "a matter of dollars and cents for the parents," as speech services were an additional charge. The parents and ██████ had opted to focus on ██████'s hygiene issues through occupational therapy, as well as horse-back riding (both of which were add-on costs), prior to providing speech-language services. (Exhibit D-40, at 886-87; Exhibit P-10A; Singleton Testimony, Tr. 216, 264)

109.

A therapist at ██████ prepared a Progress Report in September 7, 2007, indicating that "residential placement would be the least restrictive environment for ██████ at this time due to her severe inability to function in her home and her community." (It did not mention an inability to function in school.) Mr. Singleton explained that this determination was made based on communications from ██████'s parents regarding ██████'s struggles with personal hygiene and sibling rivalry. In addition, Mr. Singleton testified:

Considering ██████'s severe disabilities in social skills, I think a residential program is, unfortunately, the only answer to be able to help this child. ██████ needs 24-hour, seven day a week monitoring to be able to build the skills necessary to be successful. In my opinion, without a residential setting for this young lady, she would be looking at not being able to attain the skills to live a normal life after high school.

(Exhibit P-8; Singleton Testimony, Tr. 247-48)

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generates "preselected" goals and objectives. He later retreated from this hypothesis, but admitted that he "didn't have a problem" with the School District's behavior goals as proposed in the May 2007 IEP. (Singleton Testimony, Tr. 243-47)

110.

This opinion directly contrasts with the opinions of both Dr. Mueller and Ms. Rivers regarding the need and the advisability of a residential program for ██████. In addition, Dr. Mueller testified that “behaviors are situational specific,” which is the reason you develop a behavior plan based on the setting where the behaviors occur. Thus, although a behavior plan may be implemented and lead to improvement in the school setting, it will not necessarily lead to improvement in behavior at home. The Tribunal found no evidence in the record to support the proposition that residential placement was necessary or reasonable to address ██████’s behavior in school. (Mueller Testimony, Tr. 522; Rivers Testimony, Tr. 989)

111.

Moreover, the evidence does not show that ██████ is progressing academically or behaviorally at ██████, notwithstanding ██████’ and Mr. Singleton’s testimony that ██████ is “happier.” There is no information from her therapists that ██████’s social skills are progressing. Similarly, Plaintiffs did not present any data or written documentation regarding her progress as to her ILP goals. The documentation that was provided, including progress reports and report cards, shows little to no academic progress, with grades in December awarded as follows: Science (68); Geography (95), Mathematics (62), Multicultural Studies (71), Study Skills (94), and English (71). Her behavior, as characterized by her teachers on the report card, were coded as poor in 12 categories, marginal in 10 categories, and good in only 2 in December 2007. (This was in contrast to her marks in September 2007, which consisted of 10 good marks, 14 marginal marks, and



0 poor.)<sup>23</sup> (Exhibit P-10B)

112.

The base tuition at ██████ Academy is \$5,250.00 per month, plus additional fees and expenses. At the date of the hearing in January 2008, the family had documented payments to ██████s of \$52,582.10 and projected additional tuition and expenses through April 2008 of \$17,250. This totals \$69,832.10, but does not appear to include additional fees for horse-back riding. (Singleton Testimony, Tr. 220-21; Exhibit P-124)

### III. CONCLUSIONS OF LAW

#### A. General Law

1.

The pertinent laws and regulations governing this matter include 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. (“Ga. DOE Rules”), Ch. 16-4-7.

2.

Claims brought under IDEA are subject to a two-year statute of limitations. See 34 C.F.R. § 300.507(a)(2). Plaintiff filed her due process hearing request on September 28, 2007. Accordingly, any claims relating to events prior to September 28, 2005, are barred. See generally *Draper v. Atlanta Indep. Sch. Sys.*, 480 F. Supp. 2d 1331 (N.D. Ga.

<sup>23</sup> Many of the ██████ teachers’ noted concerns similar to those noted by ██████’s teachers in seventh grade at YMS, when she was in a much less restrictive setting. For example, in science, “█████’s grade is low due to lack of participation and not turning in work... She has the potential to be an A-B student if she just stays focused.” Also, teachers noted that ██████ will refuse to do work and leave class at times. Other teachers noted varying degrees of improvement since arriving at ██████s, but those teachers still rated her behavior as marginal or poor. (Exhibit P-10B)

2007), aff'd, 2008 U.S. App. LEXIS 4813 (11<sup>th</sup> Cir. 2008).

3.

Plaintiff bears the burden of proof in this matter. Schaffer v. Weast, 546 U.S. 49 (2005); Ga. DOE Rule 160-4-7-.12(3)(1); 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 federal and state law, students with disabilities have the right to a free appropriate public education (“FAPE”). 20 U.S.C. § 1412(a)(1); 34 C.F.R. §§ 300.1, 300.100; 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 Sch. Bd., 483 F.3d 1151 (11<sup>th</sup> 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 Co. 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?” Bd. of Educ. of Hendrick

Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 (1982). “This standard, ... has become know as the *Rowley* ‘basic floor of opportunity’ standard.” C.P., 483 F.3d at 1152, citing JSK v. Sch. Bd., 941 F.2d 1563, 1572-73 (11<sup>th</sup> Cir. 1991). See also Draper, 2008 U.S. App. 4813, at \*4.

1. **Procedural Violations**

6.

As the Eleventh Circuit has found, “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). Under IDEA, in order to prove a denial of FAPE based on a procedural violation by the School District, Plaintiff must show that the procedural inadequacies “(i) impeded the child’s right to a FAPE; (ii) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or (iii) caused a deprivation of educational benefit.” 34 C.F.R. § 300.513(2); 20 U.S.C. § 1415(f)(3)(E). Under Weiss, the Court held that where a family has “full and effective participation in the IEP process . . . the purpose of the procedural requirements are not thwarted.” 141 F.3d at 996.

7.

As a general matter, the Tribunal concludes that Plaintiff’s mother, [REDACTED], was an active participant in the many meetings of [REDACTED]’s IEP Team during the 2006-07 school year and that the Team was, for the most part, responsive to most of her concerns and suggestions, including her insistence on collaborative classes, her request for a functional behavior assessment by an outside consultant, and her request for changes in [REDACTED]’s rotating schedule and teachers. Nevertheless, Plaintiff asserts a number of procedural

violations, including (a) the School District's failure to provide written notice when it "refused" to provide requested evaluations or services, (b) the School District's failure to include "measurable goals" in the proposed 2007-08 IEP and (c) the School District's failure to provide all relevant information and data in a timely manner. The Tribunal will address each of these alleged procedural violations in turn.

a) **Prior Written Notice**

8.

Plaintiff asserts that the School District failed to provide the written notice that is required under 34 C.F.R. § 300.503 before it "refuse[d] to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child." Specifically, Plaintiff asserts that the School District failed to provide notice when it "refused" to provide the services of an outside behavioral analyst when C.S. first requested them. In addition, Plaintiff asserts that the School District failed to provide notice concerning either its "refusal" to conduct a speech-language assessment or its "refusal" to include goals for mathematics or pragmatic language.

9.

Based on the findings of facts, the Tribunal concludes that the School District did not refuse to provide the outside consulting services requested by Plaintiff and that the notice provision of 34 C.F.R. § 300.503 was not triggered. Plaintiff first made an inquiry about such services at the end of August 2006 and Ms. Rivers was retained and completed her informal assessment by the end of October. The mere fact that the assessment did not take place immediately after it was first mentioned to the IEP Team in no way leads to the conclusion that the School District "refused" to provide the

evaluation. Similarly, the School District's decision to limit Ms. River's services to an informal assessment does not constitute a refusal to evaluate for which the School District was required to provide notice.

10.

Similarly, the Tribunal concludes that the School District did not refuse to conduct a speech-language evaluation, nor did it refuse to include a goal for pragmatic language in the proposed IEP. Rather, the IEP Team planned to begin collecting data over the summer as a precursor to a speech-language redetermination meeting and the Team agreed to a "tentative objective" for pragmatic language. IDEA requires that the Team review existing evaluation data, including current "classroom-based observations" before the Team "identifies what additional data, if any, are needed to determine" whether a child has a disability and what services are needed. 34 C.F.R. § 300.305. The Tribunal concludes that the School District's proposed timeline for assembling and reviewing this data was reasonable given the IEP Team's belief that [REDACTED] would be participating in ESY services through the summer. Further, the School District did not refuse to conduct an evaluation, write appropriate goals, or provide necessary services.<sup>24</sup>

11.

With respect to [REDACTED]'s request to include a specific goal for mathematics, it is clear that the School District refused to include such a goal in the IEP. However, refusal to include a specific goal in an IEP does not necessarily constitute the refusal to "initiate or change the identification, evaluation, or educational placement of the child or the

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<sup>24</sup> Even assuming that the School District's actions were considered to be a refusal and that they failed to provide written notice, Plaintiff did not meet her burden of proving that this procedural violation impeded her right to a FAPE or caused a deprivation of educational benefits.

provision of FAPE” for which notice is required under 34 C.F.R. § 300.503. Even assuming *arguendo* that notice was required, the IEP minutes from May 1<sup>st</sup> and 22<sup>nd</sup> clearly reflect the School Board’s position and an explanation for its position. See 71 Fed. Reg. 46691 (Aug. 14, 2006)(IEP and accompanying documents can serve as “prior written notice”). Finally, there is no evidence in the record that supports a finding that the alleged procedural inadequacy, that is, a lack of formal written notice, impeded ██████’s right to FAPE, significantly impeded her parents’ participation in the decision-making process, or deprived her of educational benefit.

12.

Accordingly, the Tribunal concludes that Plaintiff has failed to prove a procedural violation based on the lack of prior written notice under 34 C.F.R. § 300.503.

**b) Measurable Goals**

13.

IDEA requires that an IEP contain “a statement of measurable annual goals, including academic and functional goals.” 34 C.F.R. § 300.320(a)(2)(i). Plaintiff argues that the School District’s proposed IEP violates this requirement because its “goals” are not specifically measurable. However, Dr. Carter testified that the criteria for measuring progress on each goal was based on progress made on the objectives, all of which had measurable, quarterly criteria for mastery. Plaintiff’s argument elevates form over substance and the Tribunal concludes that the IEP adequately identified measurable annual goals in compliance with IDEA.

c) Full Disclosure

14.

The United State Supreme Court has recently considered the nature of the rights granted to parents under the IDEA. Winkelman v. Parma City Sch. Dist., 127 S.Ct. 1994 (2007). In Winkelman, the Supreme Court noted that parents play ““a significant role”” in the development of the IEPs for their disabled children, including serving as essential members of the IEP Team. Id., at 2000, quoting Schaffer, 546 U.S. at 53. “The statute also sets up general procedural safeguards that protect the informed involvement of parents in the development of an education for their child,” including mandating that States provide an opportunity for parents to examine all relevant records. Id., citing 20 U.S.C. 1415(b)(1) (emphasis added).

15.

The right of a parent to be “fully informed” is also recognized in the IDEA in the definition of “consent.” If a parent’s consent is sought for an activity, the parent must be “fully informed of all information relevant to the activity.” 34 C.F.R. § 300.9(a). IDEA requires the School District to obtain “informed consent from the parent of such child before providing special education and related services to the child.” 20 U.S.C. § 1414(a)(1)(D). The purpose behind IDEA’s extensive procedural framework is to provide parents the opportunity for “full and effective participation in the IEP process.” Weiss v. Sch. Bd. of Hillsborough County, 141 F.3d 990, 996 (1998), citing Doe v. Alabama State Dept. of Educ., 915 F.2d 651, 662 (11<sup>th</sup> Cir. 1990). Yet, as the Eleventh Circuit pointed out in Weiss, “although the IDEA envisions full parental participation in the development of the IEP, the Act does not mandate full parental participation in every

aspect of the education process.” Id. at 997.

16.

With respect to Plaintiff’s claim that the School District failed to provide her parents with copies of certain records (ABC data and student/teacher notes) until after her parents made a formal document request, the Tribunal finds that the School District did not deny the parents an opportunity to examine the records as required under 34 C.F.R. §§ 300.501 and 300.613. Moreover, as set forth in the findings of facts above, the School District adequately disclosed the substance of those records during the IEP meetings and other communications with the parents and provided the parents access to the records upon their request. The School District is not obligated, in the absence of a parental request, to affirmatively provide parents with a copy of every education record pertaining to their child. The Tribunal therefore concludes that the School District did not violate the procedural rights of Plaintiff and her parents relating to access to records.

17.

However, the School District’s use of the data from those records, in particular the use of the flawed ABC data to create bar graphs and written statements about the level and frequency of ■■■■■’s behaviors, is more troubling on both procedural and substantive grounds. See Draper, 480 F. Supp. 2d at 1345 (school district’s IEP was based on inaccurate and outdated information; school district was thus unaware of student’s unique needs and failed to provide an IEP that was specially designed to meet his individualized needs). The Tribunal has found that the School District’s creation and presentation of frequency data was unreliable and misleading due to the errors in both the data collection and the calculation. Although the School District was not obligated to



collect such data, when it undertook to do so and then proceeded to use it to inform the IEP Team, including ██████'s parents, about ██████'s progress, the School District assumed responsibility for its accuracy and reliability.

18.

The ABC data presented and interpreted by the School District at the May 1, 2007 IEP meeting was reviewed by ██████'s parents and the Team and relied upon by them to evaluate ██████'s placement and services for the upcoming year. The School District's failure to assure its validity and its misleading presentation of the information constituted a procedural violation of the School District's duty to fully inform ██████'s parents of relevant information before they consented to the proposed IEP. Moreover, the Tribunal concludes that this violation, although unintentional, significantly impeded ██████'s parents' opportunity to participate effectively in the IEP decision-making process.

2. **Educational Benefit**

19.

“In order to satisfy its duty to provide a free appropriate public education to a disabled child, the state must provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” WC v. Cobb County Sch. Dist., 407 F. Supp. 1351, 1359 (N.D. Ga. 2005)(citations omitted). However, IDEA does not require that a student's potential be maximized; “rather, it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit him to benefit from instruction.” Loren F. v. Atlanta Indep. Sch. Sys., 349 F.3d at 1312 n.1 (11<sup>th</sup> Cir. 2003)(citations omitted).

The IDEA also does not require a school district to “guarantee a particular outcome.” WC, 407 F. Supp. 2d. at 1359, citing Rowley, 458 U.S. at 192. In order for Plaintiff to show that the School District’s program was not reasonably calculated to allow ██████. to receive educational benefit, Plaintiff must show that ██████ made no “measurable and adequate gains in the classroom.” JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1573 (11<sup>th</sup> Cir. 1991). “In determining whether a student has received adequate education benefit, moreover, the Eleventh Circuit has noted that courts should pay ‘great deference’ to the educators who developed the IEP.” WC, 407 F. Supp. 2d at 1359, citing JSK, 941 F.2d at 1573.

a) 2006-07 IEP

█████’s IEP for seventh grade was drafted at the end of her sixth grade year. At the request of ██████’s parents and in keeping with IDEA’s “strong preference for ‘mainstreaming,’” the 2006-07 IEP proposed a change in ██████’s placement, away from the resource room and into larger collaborative classrooms. See WC, 407 F. Supp. 2d at 1362, citing 20 U.S.C. § 1412(a)(5); Rowley, 458 U.S. at 202-03. The IEP contained a BIP and provided paraprofessional support for her in the classroom. The Tribunal finds that the IEP as initially adopted was specifically designed to meet ██████’s unique needs and was supported by services to permit her to benefit from instruction. Loren F., 349 F.3d at 1312 n.1 (citations omitted)

22.

In addition, when ██████'s behavior deteriorated as soon as seventh grade began, the IEP Team responded by providing additional resource room time for social skills training, changing her schedule to reduce transitions, and amending her BIP to include the new aggressive behaviors. The School District also retained Ms. Rivers to do an informal behavioral assessment and resumed OT services on a consultative basis. The Tribunal concludes that the School District properly acted to review and revise ██████'s 2006-07 IEP to address "any lack of expected progress toward annual goals ... and in the general curriculum," as well as "the child's anticipated needs." See 34 C.F.R. § 324(b).

23.

The Tribunal concludes that the revisions to the BIP and the other adjustments to ██████'s IEP were reasonably calculated to allow ██████ to receive educational benefits. First, to the extent that academic progress is an important factor in determining educational benefit, the Tribunal concludes that although ██████ did not make as much academic progress as the previous year, she did make some academic progress notwithstanding the serious deterioration of her behavior that accompanied mainstreaming. WC, 407 F. Supp. 2d at 1360, citing CJN v. Minneapolis Public Schs., 323 F.3d 630, 638 (8<sup>th</sup> Cir. 2003), cert denied, 540 U.S. 984 (2003)(In the case of students with significant behavioral problems, academic progress may be "even more relevant to the educational benefit inquiry."). ██████ received passing grades of B's and C's in all her core courses. Her performance on the CRCT was not substantially different than in the past four years, during which her scores hovered slightly above or below the pass line. Finally, ██████ scored significantly higher when she was retested in math, her

weakest subject, at the end of the seventh grade year. The Tribunal concludes that the evidence does not support a finding that ██████ did not make any academic progress during seventh grade.

24.

Second, as ██████'s 2006-07 IEP goals centered on social skills and behavior issues the Tribunal must consider whether the IEP was reasonably calculated to allow D.W. to progress toward her non-academic goals. Clearly, ██████'s progress on these goals suffered a severe set-back when she transitioned into the mainstream environment at the beginning of the year. It is possible, even likely, that the negative impact of mainstreaming on her behavior resonated longer and was harder to ameliorate because ██████ was not placed back into a resource setting and allowed to transition to regular education classes more slowly, as Ms. Rivers' and ██████'s teachers suggested. However, as the parents objected to ██████ returning to the resource room, the IEP Team was forced to develop other interventions, namely the new BIP, to allow ██████ to make measurable and adequate gains in her behavior.

25.

Based on the evidence, the Tribunal concludes that the interventions identified in the new BIP were reasonably calculated to provide ██████ with educational benefit and did, in fact, result in some improvement in ██████'s most severe behaviors, such as the significant physical aggression toward students and staff members, as well as self-injurious behaviors. The evidence does not show that the frequency of other disruptive behaviors, such as non-compliance and elopement, substantially decreased over the course of the year. Nevertheless, ██████'s teachers concluded that she had made some

progress, short of mastery, on all of her behavior objectives in the IEP.

b) **Failure to Implement BIP**

26.

Plaintiff contends that even if the BIP and IEP were reasonably calculated to allow ██████. to receive educational benefit, the School District failed to implement the IEP and BIP properly. IDEA defines FAPE as special education and related services that are provided “in conformity with the IEP.” 20 U.S.C. § 1401(9)(D). Consistent with this definition, the three federal circuits courts that have explicitly addressed this issue have determined that in order to show a denial of FAPE as a result of IEP implementation failures, plaintiffs are required to show that the school failed to implement “substantial,” “material,” or “essential” IEP provisions. See Van Duyn v. Baker Sch. Dist., 502 F.3d 811, 822 (9<sup>th</sup> Cir. 2007); Houston Indep. Sch. Dist. V. Bobby R., 200 F.3d 341 (5<sup>th</sup> Cir. 2000); Neosho R-V Sch. Dist. V. Clark, 315 F.3d 1022 (8<sup>th</sup> Cir. 2003). In the most recent of these decisions, the Ninth Circuit held in Van Duyn that “a material failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child’s IEP.” Id. at 822.<sup>25</sup>

27.

Based on the evidence in this case, the Tribunal concludes that the School District failed to implement the BIP, which was clearly a material part of ██████.’s IEP.

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<sup>25</sup> The Fifth Circuit requires more than a showing of a *de minimis* failure to implement; plaintiffs must show that the school failed to implement a “substantial” or “significant” provision of the IEP. Bobby R., 200 F.3d at 349. The Eighth Circuit held in Clark that IDEA is violated if the school failed to implement an “essential” element of the IEP that was necessary for the child to receive an educational benefit. 315 F.3d at 1027 n.3.

Particularly, the School District failed to consistently deliver the interventions required by the BIP, including but not limited to continuously ignoring inappropriate behaviors. The BIP itself noted the necessity of consistent implementation of the interventions, as did Ms. Rivers' assessment, which stated that "the success of any behavioral recommendations will hinge on the consistency with which the service providers can implement the procedures." In fact, both Dr. Mueller and Ms. Rivers acknowledged that inconsistent implementation of these procedures will cause the behavior to be "intermittently reinforced," which would actually cause the target behaviors to persist.

28.

The fact that ██████ achieved minor improvements in her behavior over the course of the school year does not negate the conclusion that the failure to implement was a material one. As the Van Duyn Court noted, because parties may debate whether a child's skills and behavior improved or deteriorated, as was done in this case, "the materiality standard does not require that the child suffer demonstrable education harm in order to prevail." Id. Similarly, the fact that ██████ made some academic progress despite her disruptive behaviors does not mean that the failure to implement the BIP was not a material violation. "An educational benefit in one IEP area" can not "offset an implementation failure in another." Id. at 820 n.3.

29.

The Tribunal concludes that the School District's failure to implement the interventions consistently as required by the BIP was a material failure and denied ██████ FAPE.

c) **ESY Services**

30.

█████'s parents' only objection to the proposed ESY services were that the School District did not offer "enough" social skills or individualized instruction. The evidence in the record shows that the School District offered █████ one-on-one instruction in the resource room relating to social skills, as well as a special education co-teacher in the CRCT remediation class to work on social skills, as well as academic skills. The Tribunal concludes that Plaintiff failed to prove that the offered services were inappropriate or insufficient to provide █████ with FAPE.

d) **2007-08 IEP**

31.

In addition to the procedural violations asserted by Plaintiff and discussed previously, Plaintiff's primary objection to the proposed 2007-08 IEP appears to be the failure to provide various related services, including speech-language services, and failure to include a math goal. However, with respect to speech-language services, the School District did not refuse to provide those services, but correctly found that a review of █████'s prior assessment and other background documents should take place before the Team decided whether █████ needed a formal evaluation to determine eligibility. Moreover, Plaintiff has not presented any evidence that such services are needed or that the failure to include them constitutes a denial of FAPE. Rather, the evidence presented by Plaintiff is that her current private placement does not provide speech-language services because they have not been determined to be a priority.

32.

With respect to other “related services,” such as parent counseling and training, the evidence does not show that such services are necessary to enable ██████. to receive educational benefits at school. See Devine v. Indian River Co. Sch. Bd., 249 F.3d 1289 (11<sup>th</sup> Cir. 2001)(where respite care for parents of autistic child will no doubt benefit family, plaintiffs failed to show how respite care will benefit child’s education). While these services may be helpful to any family of a disabled family as a general matter, the Tribunal concludes that the School District was not obligated to exhaustively explore every possible “related service” listed in 34 C.F.R. § 300.34, particularly in the absence of any information from the family that would suggest a need for a particular service. Although the family produced evidence at the hearing that there were significant problems in the home during the 2006-07 school year involving sibling rivalry and basic hygiene, these concerns were not disclosed to the IEP Team at the time.

33.

Finally, although there is evidence that ██████. has struggled with math for several years, Dr. Carter testified that ██████.’s weakness in math is related to her disability. The School District prefers to write goals and objective to address the social skills and behavioral issues arising from her disability, which if accomplished will allow ██████. to perform better in all academic subjects, including math. Accordingly, the Tribunal concludes that a math goal was not a necessary part of the IEP and its absence does not render the IEP deficient. Although it is not clear that a separate goal in math would be inappropriate, rather than just unnecessary or duplicative, the Tribunal will defer to the expertise of the educators who developed the IEP. Devine, 249 F.3d at 1292.



C. REMEDY

1. Reimbursement for Private School

34.

If a parent enrolls a child with a disability in a private school without the consent or referral of the School District, this Tribunal may require the School District to reimburse the parents for the cost of that enrollment if the Tribunal finds that the School District did not make FAPE available to the child in a timely manner prior to enrollment and that the private placement is appropriate. Ga. DOE Rule 160-4-7-.13(2)(a)(2); 34 C.F.R. § 300.148; 20 U.S.C. § 1412(a)(10)(C). “A parental placement may be found to be appropriate by an ALJ or a court even if it does not meet the state standards that apply to education provided by the State. . . .” Id.

35.

The Tribunal may deny reimbursement if the parents failed to give timely notice to the School District or upon a finding of “unreasonableness with respect to actions taken by the parents.” Ga. DOE Rule 160-4-7-.13(2)(a)(3).

36.

The United States Supreme Court has found that a hearing officer is authorized to reimburse parents for private special education “if the hearing officer ultimately determines such placement, rather than a proposed IEP, is proper under the Act.” Sch. Comm. Of Burlington v. Dep’t of Educ., 471 U.S. 359 (1985). In addition, as the Eleventh Circuit recently held in Draper, “it is well settled that an award of reimbursement for the expenses of a private school is allowed under the Act when the private placement is appropriate for the student and an educational program at a public

school has been inadequate.” Draper, 2008 U.S. App. LEXIS 4813, at \* 19.

37.

The Tribunal concludes that Plaintiff failed to prove that ██████ Academy was an appropriate or proper placement for ██████. ██████ Academy’s education program has been in existence for little more than a year, has “no demonstrable history of success,” and its “education methods” are admittedly “untested and unvalidated.” See WC, 407 F. Supp. 2d at 1363. Moreover, the Tribunal was unimpressed with the evidence presented as to the background, education, and experience of ██████ Academy’s Director or any of its teaching staff as it relates to the education and treatment of children with Asperger’s Syndrome, particularly with respect to behavior management.

38.

The Tribunal further concludes that the record does not support that a residential placement is the proper setting to address ██████’s educational needs. In fact, the evidence in the record shows that ██████s accepted ██████ into its residential program as a result of severe problems in the home, not as a result of problems at school. Dr. Mueller and Ms. Rivers both opined that students such as ██████ do not need residential placement to address their behavior, and that interventions, when properly implemented by trained staff, can be successful in the public school setting. Ms. Rivers further opined that placement in an artificial residential setting may make it harder for ██████ to transfer her new skills to a natural environment.

39.

The Tribunal also considers it an important factor, although not determinative, that ██████ Academy is one of the most restrictive setting possible on the continuum of

alternative placements for children with disabilities. See 34 C.F.R. § 300.115. As such, it is contrary to the IDEA's strong preference for allowing disabled students to be educated with their non-disabled peers "to the maximum extent possible." 34 C.F.R. § 300.114. As the Court held in WC, "a more restrictive placement in a private school is not an absolute bar to reimbursement, but the plaintiff goes too far when he claims that the Supreme Court does not permit mainstreaming as a consideration. . . . The least restrictive requirement remains a consideration for the hearing officer in determining whether the parent chose an appropriate placement." 407 F. Supp. 2d at 1362-63.

40.

Taking into account the restrictive nature of the placement and the lack of evidence that it is necessary to address ██████'s educational needs, as well as the "lack of verifiable evidence demonstrating the success of this program or the qualification of its educators," the Tribunal concludes that the evidence is insufficient to demonstrate that ██████ Academy is the appropriate placement. Id. This conclusion is not changed by Petitioner's witnesses' testimony that ██████ has shown progress while at ██████. First, the evidence of ██████'s progress at ██████ is inconclusive at best, given the progress reports and reports cards, which do not show academic progress or significant behavioral improvements. Second, even if there was credible evidence of progress at ██████, such evidence is not enough to justify requiring the state to reimburse for tuition. Id. See also Draper, 480 F. Supp. 2d 1331.

41.

Finally, although the Tribunal concludes that ██████'s parents failed to provide timely notice of its intent to withdraw ██████ from the School District and enroll her at

██████ at public expense, the consequence for failing to provide such notice is left to the sound discretion of this Tribunal. Ga. DOE Rule 160-4-7-.13(2)(a)(3)(i) & (ii). See generally Loren, 349 F.3d at 1314. Similarly, when a parent has acted unreasonably in connection with the IEP process, such as when ██████'s parents misled the IEP Team regarding medications or when ██████'s parents failed to disclose severe conditions in the home that contributed, at least in part, to their seeking residential placement, the Tribunal has the discretion to deny reimbursement for public school expenses. Ga. DOE Rule 160-4-7-.13(2)(a)(3)(iv). The Tribunal, however, declines to deny reimbursement on these grounds. Although the Tribunal is particularly troubled by parent's affirmative, untruthful statements regarding medication, the Tribunal finds that such violations, under the specific facts of this case, were not severe enough to warrant denial of reimbursement.

2. **Prospective Relief**

42.

The Tribunal “may award educational services to be provided prospectively to compensate for a past deficient program.” Draper, 2008 U.S. App. LEXIS 4813, \* 4, citing G ex. Rel. RG v. Fort Bragg Dependent Sch., 343 F.3d 295, 308 (4<sup>th</sup> Cir. 2003). The Draper court found that “equitable considerations are relevant in fashioning relief” under IDEA and that courts enjoy “broad discretion” in doing so. Id., quoting Burlington, 471 U.S. at 374. IDEA requires that the relief granted be “appropriate.”

43.

The Tribunal finds that there is insufficient evidence in the record to support a finding that any residential setting, including ██████, is the appropriate placement for

█████. The evidence in the record is similarly insufficient to show the availability or appropriateness of private day schools surrounding Walton County to provide special education services to ██████. Rather, the evidence before this Tribunal shows that the School District, with ongoing proper training and oversight of its staff by outside professionals experienced and trained in functional behavioral analysis, is more than capable of providing ██████ with educational benefit. The Tribunal finds that the actions of the School District that led to the denial of FAPE were not intentional and did not stem from a lack of competence or ability on the part of the dedicated and caring personnel at YMS.

44.

Accordingly, the appropriate relief, based on the evidence in the record, requires the School District to “take reasonable steps to promptly obtain the child’s records, including the IEP and supporting documents and any other records relating to the provision of special education or related services to the child,” from ██████ Academy. See 20 U.S.C. § 1414(d)(2)(c)(ii). ██████’s parents must also provide the School District with a list of all medications and other relevant health and treatment information, to the extent that such information is not available through ██████’ records. The School District shall convene a meeting of the IEP Team within two weeks of the receipt of the above information from ██████ and ██████’s parents, in accordance with the procedures outline in IDEA, to determine what further evaluations are required, including whether a speech-language evaluation, OT evaluation, or further cognitive achievement or abilities testing are necessary.

45.

The IEP Team shall specifically consider the appropriateness of other related services, including adaptive transportation, parent counseling or training, psychological services for ██████, recreation, and any other related service identified by either ██████'s parents or the School District.

46.

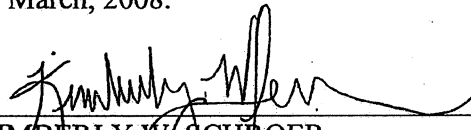
The School District shall immediately identify at least two outside BCBA's capable of providing consultative services to the IEP Team on an ongoing basis, including providing ongoing training and monitoring of school staff and reviewing and monitoring any data collection and analysis. At least one week prior to the first scheduled IEP Team meeting, the School District shall inform ██████'s parents of the identity and qualifications of the BCBA's and ██████'s parents shall have the opportunity to provide input into which BCBA is most appropriate. The School District shall promptly choose and retain, at its own expense, one of the identified BCBA's to work on an on-going basis with ██████, ██████'s parents and the IEP Team. The IEP Team shall determine the appropriate duration and extent of the services to be provided by the BCBA, but at a minimum, the BCBA shall be retained to (i) conduct a formal functional behavior analysis of ██████, (ii) provide written recommendations to the IEP Committee, including placement recommendations, (iii) assist in the development of a BIP and a training program for staff, and (iv) provide recommendations for ongoing monitoring, training and implementation of the BIP.

**IV. DECISION**

For the reasons stated above, the Tribunal finds that the Walton County School District did not provide [REDACTED] with a free and appropriate public education under IDEA. However, the Tribunal finds that Plaintiff failed to prove that [REDACTED] Academy was the appropriate placement for [REDACTED]. Accordingly, reimbursement for [REDACTED] Academy tuition and expenses is hereby **DENIED**.

Plaintiff is entitled to the prospective relief as set forth above.

**IT IS SO ORDERED**, this 26th day of March, 2008.

  
KIMBERLY W. SCHROER  
Administrative Law Judge