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JUN 3 2014

**IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS  
STATE OF GEORGIA**

*K. Westray*

Kevin Westray, Legal Assistant

COBB COUNTY SCHOOL DISTRICT, :

Plaintiff, :

v. :

█, a minor, by and through his parents, :  
█ and █ █ █ █ :

Defendants.

Docket No.:  
OSAH-DOE-IEE-█-33-Baxter  
14-291840

**FINAL DECISION**

This matter came before the Office of State Administrative Hearings for a hearing by Plaintiff Cobb County School District (“District”) under the Individuals with Disabilities Education Improvement Act of 2006 (IDEA), 20 U.S.C. §§ 1400 to 1482 and its implementing regulations.<sup>1</sup> The District filed for a hearing in response to Defendants’ (█ and his parents) request for an independent educational evaluation (“IEE”) at public expense, because of their disagreement with the District’s Functional Behavioral Assessment (“FBA”) completed by Board Certified Behavior Analyst Erica Cooper, on October 2, 2013, and revised on October 30, 2013. The District sought a determination that its FBA was appropriate and, therefore, that neither █ nor his parents, individually, have the right to an IEE at public expense.

Based on the evidence presented, the District’s FBA data lacked sufficient reliability and thus, is not appropriate. Accordingly, Defendants’ request for an IEE at public expense is **GRANTED**.

<sup>1</sup> On November 25, 2013, the District filed its Complaint. The hearing was held over seven days, starting January 15, 2014 and ending March 26, 2014. The record remained opened until April 24, 2014, for the parties to submit proposed orders.

## FINDINGS OF FACT

### A. Student ██████'s Educational Background

1.

█████ is a five-year-old kindergarten student at ██████ Elementary School in the District. He is eligible for special education services under the IDEA categories of autism and speech language impairment. (P-14.)

2.

█████ entered the District in the summer of 2013, and enrolled in Extended School Year ("ESY"). He previously attended pre-K at Atlanta Independent School District ("APS"), where he was found eligible for and received an Individualized Educational Program ("IEP"). ██████ began kindergarten at the District on August 7, 2013. (Transcript ("T-\_\_") at 529, 543.)

3.

The initial IEP Team meeting was held on August 6, 2013, the day before school started. For whatever reason, ██████'s ESY teachers were not invited to the meeting. Defendants provided the APS IEPs and an APS psychological evaluation which, along with the parent's statements, were the basis for the IEP. Because the parents declined to provide ██████'s medical records, the School District did not obtain them until the start of this hearing. Those records indicated that the parents were aware ██████'s problem behaviors and chose not to disclose that information to the District. (T. at 602, 604-5, 608; P-54, J-13.)

4.

During the initial IEP meeting, Defendants represented that the problem behaviors listed in the APS February 21, 2013 IEP, had been "extinguished in the fall of 2012." The team determined

that his “behavior does impede his/her learning” and could be supported through goals and objectives. Due to potential “transition issues,” the parents requested an FBA. (J-13.)

5.

At the start of the 2013 school year, ██████’s teachers presented demands similar to his neuro-typical peers, in reliance upon Defendants’ statements that ██████ performed at that level; that academic demands were preferred; and that problem behaviors had been extinguished. Following academic demands, ██████ exhibited “severe behavior outbursts,” including, “...head-banging attempts, self-injurious behaviors such as pulling his hair, biting, ...scratching, [and] pinching. This would also be directed at the adults trying to help him.” He also exhibited vocal and motor stereotypy across the day. (T. at 1257, 1273.)

6.

On August 26, 2013, Dr. Elizabeth Turnage<sup>2</sup> hired Integrated Behavioral Solutions (“IBS”) to conduct an FBA ██████ IBS assigned BCBA Erica Cooper to conduct the FBA. (T. at 539-40.)

7.

Cooper holds a Master’s in Psychology, with a focus on Applied Behavior Analysis (“ABA”), and is a licensed Board Certified Behavior Analyst (“BCBA”). She has performed over 100 FBAs since becoming a BCBA, and has conducted, designed, or been a part of hundreds of FBAs over her career. Of these FBAs, ninety percent were for students with autism, and

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<sup>2</sup> Dr. Turnage is Director of Legal and Policy Issues for the District’s Department of Special Student Services. She is an expert in the provision of special education services to students with disabilities and autism; identification of students eligible for services under the IDEA; development of IEPs and programming for students with disabilities and autism; identification of students with disabilities who require FBAs and BIPs, behavior intervention programming for students with disabilities within the school district; implementation of positive behavioral supports; and the conducting of FBAs. (T. at 509, 520.)

between one-fourth and one-third included a Functional Analysis. She has also created over 100 behavior intervention plans (“BIP”) over the course of her career.<sup>3</sup> (T. at 78-79; P-35.)

8.

On September 11, 2013, another IEP meeting was held to address ██████’s behavior problems. Having already started the FBA, Cooper attended and listened to both ██████’s teachers and his parents’ understanding of his behavior. His parents denied seeing the problem behaviors the District was observing within the home environment. (T. at 100, 542, 545-48.)

9.

While the testimony was laborious and conflicting as to what the parents knew about their son’s behavior, the evidence clearly indicates that they downplayed his behavior problems and did not disclose records that demonstrated behavior problems. Further, the evidence demonstrates that without this potentially helpful information, the District quickly and correctly identified the behaviors, recognized the seriousness of these behaviors, and took actions, including initiating an FBA, to address them. (T. at 287, 290, 671-72; P-54, P-55.)

## **B. Overview of Functional Behavioral Assessment**

10.

The purpose of a Functional Behavior Assessment is to identify the reasons for and the environmental variables related to problem behaviors based upon the underlying premise that all behaviors serve a purpose. This information enables evaluators to design a Behavior Intervention Plan that includes strategies for structuring the environment to reduce or eliminate

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<sup>3</sup> Cooper is an expert in ABA; FBA; functional analyses; BIPs; creation of BIPs; training of individuals regarding BIPs, ABA strategies, and FBAs; creation of BIPs for students with autism, provision of services to students with disabilities, and provision of services to students with extreme behaviors related to disabilities including autism. (T. at 83-84.)



conditions that maintain problem behaviors and create conditions that maintain positive behaviors. (T. at 75-6, 516, 942.)

11.

School-based FBAs may be conducted by educators, or if appropriate, certified behavior analysts. Unlike other evaluations, there is no mandatory structure for an FBA. Instead, industry standards provide a framework for what should occur in the evaluation and what should be included in the report. First, an FBA identifies the targeted behaviors. The evaluator will rely on teacher and parent interviews, medical and school records, and direct observation to help form a hypothesis concerning the purpose of the unacceptable behaviors in terms of how the behaviors are reinforcing to the child. Next, the evaluator will use data collection to reveal patterns in antecedents (circumstances or events that immediately preceded and presumably triggered the behaviors), behavior topographies (i.e., how the behavior looks, such as kicking or hitting), and consequences (the immediate aftermath of the behaviors), to create a hypothesis as to the function of the behaviors. (T. at 85-88, 390-91, 518, 943, 1189.)

12.

Experts agree that analysts have substantial discretion in designing the data collection that is tailored to the student. For example, it is acceptable for an evaluator to collect data on a response class, a group of topographically dissimilar behaviors (such as hitting or spitting) that serve the same purpose or are reinforced by the same thing. This strategy, however, is not very common and can more easily lead to incorrect assumptions regarding problem behavior. (T. at 950-51, 1013, 1091, 1472-3.)

13.

The evaluator must take some measures to ensure that data is accurate, possibly including explaining and demonstrating data collection, having data takers define variables to ensure everyone has the same understanding, watching data takers collect data, and providing feedback. (T. at 105, 1472-73, 1477.)

14.

The step beyond an FBA is a Functional Analysis (“FA”), which is “a procedure in which one manipulates environmental conditions repeatedly to see if they can replicate rates of behavior...to see under which conditions the behavior is going to be repeatedly exhibited.” An FA is the “only way to make definitive causal statements about the functions of the behavior.” While FAs are the most precise, a FA is not necessary if the evaluator has confidence that hypotheses reached from other tools are accurate. In fact, most FBAs conducted outside a clinical setting do not include FAs. (T. at 77, 382, 392, 925, 1100-02.)

### **C. Cooper’s FBA Process for Student [REDACTED]**

15.

Cooper began the FBA on September 4, 2013. She initially spent about four hours interviewing school staff regarding [REDACTED]’s behaviors and observing [REDACTED] in his school environment. She observed [REDACTED] cry; throw and swipe materials; elope from his chair; show aggression by kicking, hitting, and banging his head into adults; run into walls; and bang his head self-injurious. The behaviors occurred in “tantrum-like” episodes, with multiple behaviors in a span of less than twenty seconds. [REDACTED]’s teachers confirmed this was typical behavior. (T. at 95-97, 99; P-3.)

16.

Cooper visited the school on five dates during the FBA (September 4, 11, 16, 27, and October 1, 2013). On those dates, she either interviewed teachers about behaviors they observed, strategies they tried and ██████'s responses, conducted training on data collection or directly observed ██████. Cooper's direct observation totaled sixteen hours. Further, she presented him with "well over 100" academic demands during this time. (T. at 97, 109, 120, 1280; P-3.)

17.

Cooper administered the FBA in ██████'s native language of English. She administered the assessments without bias toward race or culture. (T. at 152, 194.)

18.

As part of her FBA, Cooper reviewed all records made available to her, which included the APS Psychological Evaluation and the Cobb County IEP. Cooper did not, however, review all possible records either because APS or the parents did not provide those records to the District. (T. at 101, 287.)

19.

In addition to the interviews and record reviews, Cooper collected data using an Antecedent-Behavior-Consequence, or "ABC" format, which is "customary" in ABA. ABC data can show patterns in events immediately preceding behaviors and responses in the environment immediately following behaviors, which suggest what conditions reinforce behaviors. (T. at 390-91, 953.)

20.

To collect data, Cooper relied on a form "Behavior Checklist." She customized the form to record behaviors as episodes, rather than individual topographies with separate antecedents and

consequences, based on her and [REDACTED]'s teacher's observations of the tantrum-like manner of [REDACTED]'s behaviors. In Cooper's professional opinion, one antecedent preceded all of the behaviors in the tantrum. (T. at 96, 258, 420, 1390.)

21.

Cooper's decision to collect episodic data was supported by the District's experts, but was severely criticized by Defendants' experts. While it might be scientifically acceptable to analyze tantrum-like episodes as one event, rather than separate topographies as distinct events within the tantrum, the practice is not common and it is a "very low likelihood" that all the behaviors [REDACTED] was exhibiting have the same antecedent and consequence. (T. at 404, 507-08, 1003.)

22.

Cooper tailored the realm of consequences on the data form to those she observed to be meaningful to [REDACTED] to the exclusion of other interactions in the room. The length of the episode was counted until it ceased for one minute. Based on her observations, Cooper hypothesized that individual topographies were not necessarily correlated with only one function, and behaviors (kicking, swiping, etc.) could change based on what was accessible to [REDACTED] at the time. (T. at 260, 1381-82, 1384.)

23.

Cooper trained [REDACTED]'s special education teacher, Melanie Kirby,<sup>4</sup> and his behavior support specialist, Nadine Friedly, in how to collect data prior to commencing data collection. Specifically, Cooper understood that both had experience collecting data, discussed the Behavior Checklist with them, and exchanged emails regarding questions. Some or all the training occurred during the data collection. Cooper observed the data collectors during the data

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<sup>4</sup> Kirby was qualified as an expert in: educational programming for students with disabilities, autism, and mild to severe behaviors; the role of FBAs in educational program development; and, data collection for FBAs. (T. at 1269-71).



collection period and determined that they were doing so accurately. (T. at 105-08, 270-72, 356, 1317, 1418.)

24.

The District collected data over a period of ten school days and documented ninety-eight problem behavior episodes over the ten-day period. (T. at 133; J-2.)

25.

Cooper's data collection focused on the antecedent and behavior data with much less reliable data on the consequences. She hypothesized that the function of all [REDACTED]'s problem behavior was either (1) escape/avoidance of aversive tasks or (2) a desire to access preferred items/activities, but neither of those consequences were ever marked on the Checklist. To explain, Cooper testified that she instructed staff not to remove tasks or deliver preferred items before following through with task demands. She opined that this immediate implementation of strategies to address severe behaviors created the void in data. Analysts, however, commonly have to employ strategies immediately due to severity of behaviors before collecting data. And all data, including the consequence, must support one's hypothesis in order for it to mean anything. (T. at 1297, 1383-85, 1421-22, 1510-11; J-2.)

26.

Further discrepancies existed with the data collection. For instance, [REDACTED] was initially scheduled to be in a general education class from 11:05-11:35 each day, but was frequently removed if his behavior was inappropriate. The Checklists do not list a single behavior in the general education setting even though there were days he was removed from the class for behavior. Also, Kirby did not witness recorded behaviors that she initialed as the data collector on at least two separate

occasions. Finally, a September 26, 2013 “episode” beginning at 9:54 lasting eight minutes is contradicted by an episode at 9:59 lasting one minute. (T. at 1223-24, 1326-28, 1330; J-2.)

27.

Cooper’s FBA did not include an FA because she believed it to be unnecessary and that it would be potentially harmful to elicit problem behaviors. Defense experts, however, opined that an FA is necessary when the student is engaging in serious self-injurious behavior. In fact, these experts testified that relying only on an FBA when a child has such severe behavior was inappropriate. As one expert stated regarding relying solely on an FBA hypothesis, “the stakes are too high to settle for guessing.” (T. at 157-58, 1111-12, 1196.)

**D. Cooper’s FBA Report for Student [REDACTED]**

28.

Cooper summarized her findings in a report dated October 2, 2013, which she revised to correct a typographical error on October 30, 2013. Cooper’s FBA contained all the necessary FBA components to conform to industry standards. (T. at 174, 400; J-1, J-3.)

29.

The FBA correctly identifies [REDACTED]’s problem behaviors and hypothesizes on when behaviors were most and least likely to occur. The Report concludes that [REDACTED]’s problem behaviors are related to three functions: (1) escape/avoidance, (2) access to preferred items/activities, and (3) automatic reinforcement. The FBA reports that [REDACTED] exhibits the same topographies for the first two functions (escape/avoidance and access to preferred activities). The third function (automatic reinforcement) relates solely to his stereotypy behavior. Cooper’s attribution of

█'s vocal and motor stereotypy to automatic reinforcement aligns with how those behaviors typically manifest in individuals with autism.<sup>5</sup> (T. at 121-25, 407; J-3.)

30.

Cooper reached her conclusions regarding the primary function of █'s behaviors, escape/avoidance, based significantly on her interviews and personal observations, even though she testified that the data also supported this conclusion. In fact, the ABC data neither supports nor refutes her hypothesis. Unfortunately, indirect sources and observations, as primarily relied upon here, are "commonly wrong" about what is reinforcing behavior. (T. at 136, 1098; J-3.)

31.

The data indicates that three consequences primarily occurred after █'s behavior: planned ignoring, verbal redirection, and physical redirection. A problem with this data was that in many incidents, the staff both withheld verbal attention as well as delivered verbal attention in the form of redirection. These consequences are incompatible and extrapolating a function from that data is likely unreliable. (T. at 1017, 1171, 1050, 1385; J-2, J-3.)

32.

Further, no data was actually taken regarding the consequences of escape/avoidance or seeking preferred items. Here, Cooper testified that the Report's "consequence" data was the staff's responses to █ as Cooper had directed the staff to respond █ in order to decrease the behaviors. The data collected was not actually █'s reinforcers. But staff instructions are not consequences for ABC data. (T. at 1030-32, 1127, 1510; J-2.)

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<sup>5</sup> Stereotypy was automatically reinforced, meaning the behaviors were not maintained by any environmental condition. Cooper observed stereotypy to occur across settings without observable antecedents or consequences. As such, data was not collected on stereotypy to determine function. (T. at 235-36, 1421; J-3.)

33.

Further, the FBA has two noticeable errors. First, one chart in the FBA contains incorrect numbers, providing antecedents for 88, not 98 episodes. Second, a paragraph in the Report makes little sense in relation to the rest of the Report and District testimony. Under the heading “Adult Attention” on page 11 of the Report, Cooper begins, “Descriptive data indicates that it’s unlikely that attention serves to reinforce [REDACTED]’s] behavior—even if that attention might seem ‘negative’ in response to inappropriate behavior.” This sentence is internally inconsistent and in the first version of the Report stated that attention “likely” reinforces behavior. The rest of the paragraph continues to address attention as a possible function when District witnesses, including Cooper, were adamant that attention was not a function. This paragraph appears to have been pre-written and not revised for [REDACTED] specifically. (T. at 1037-39; J-3.)

34.

Not surprisingly, the District’s expert witnesses, Dr. Lund<sup>6</sup> and Dr. Turnage, believed the FBA was appropriate and was thorough by professional standards. Dr. Lund, Cooper’s employer, has the necessary education and significant professional experience to lend his testimony weight, but it lacked detail regarding this specific case. (T. 408-09, 506, 576-77.)

35.

Further, not surprisingly, both Defense experts, Dr. Mueller<sup>7</sup> and Dr. Babcock,<sup>8</sup> found the FBA not appropriate. Here, however, Dr. Mueller did have personal experience with [REDACTED] having

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<sup>6</sup> Dr. Lund was qualified as an expert in ABA; FBAs; creation of FBAs; review of FBAs; review of BIPs; training of individuals regarding BIPs, FBA, and ABA strategies; functional behavioral analysis, performance of FAs; creation of BIPs for students with disabilities and students with autism; creation of FBAs for students with autism; and provision of services to students with autism and students with extreme behaviors related to disabilities including autism. (T. at 386-91.)

<sup>7</sup> Dr. Mueller was qualified as an expert in school psychology, school psychology and behavior analysis, assessment of students with developmental disabilities (including autism) and behavior analysis, constructing/implementing behavior evaluations, designing treatment/intervention programs for children

later conducted his own FBA and FA. Similar to Dr. Lund, Dr. Mueller evidenced a thorough knowledge of the field and had significant professional experience creating FBAs and FAs for students with problem behaviors similar to ■■■■■. Dr. Mueller credibly explained the flaws in Cooper's design of the data collection, testifying to the problems in the consequence data. He also explained that Cooper's approach to data collection did not allow for consideration of intervening reinforcers even over episodes lasting several minutes. (T. at 922-31, 939, 1002-03, 1006-07, 1014-17, 1160-61, 1170.)

#### **E. Defendants' Request for Independent FBA**

36.

On October 29, 2013, Cooper drafted a BIP implementing her conclusions from the FBA. (J-4.)

37.

On October 30, 2013, the parents concluded that the FBA was not appropriate, disagreed with it, and requested an independent FBA. (T. at 693.)

#### **F. Defendants' Independent Functional Behavioral Assessment & Functional Analysis**

38.

Prior to the hearing, Defendants hired Dr. Michael Mueller, BCBA-D, founder of Southern Behavioral Group ("SBG"), to conduct an independent FBA and FA. It is that assessment that Defendants want the District to pay for. At the time of the hearing, Dr. Mueller had not

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with developmental disabilities (including autism), conducting/assessing FBAs and FAs; and duties/responsibilities of behavior analysts who conduct FBAs. (T. at 937-38.)

<sup>8</sup> Dr. Babcock was qualified as an expert in the assessment of behavior in children; children with autism; behavior analysis; the application of the science of behavior analysis to assessment and FBA. (T. at 1148.)



completed his report, but provided charts summarizing his data. (T. at 939, 967; D-92, D-125A to I.)

39.

Dr. Mueller conducted functional assessments on ██████'s problem behavior and found that different behaviors were reinforced by different functions. Of relevance, Dr. Mueller's FA conclusions contradict, in part, Cooper's FBA, finding that the function of ██████ aggression was the seeking of a preferred item (e.g., milk or going for a walk) and not primarily avoidance of an academic demand. Dr. Mueller also found that some of ██████'s disruptive behavior was also reinforced by adult attention or escape/avoidance from task demands. (T. at 1000; D-92, D-125A to I.)

### CONCLUSIONS OF LAW

1.

The Individuals with Disabilities Education Act ("IDEA") grants the parents of a child with a disability the opportunity to obtain an IEE of the child. 20 U.S.C. § 1415(b)(1). Federal regulations permit parents to request an IEE at public expense if they disagree with an evaluation conducted by a school district. 34 C.F.R. § 300.502. A school district can elect to grant the IEE at public expense, but if it does not, the school district must request a due process hearing without unnecessary delay. 34 C.F.R. § 300.502(b)(2).

2.

When the school district requests a due process hearing, the burden of proof falls upon the school district. See Schaeffer v. Weast, 546 U.S. 49, 62 (2005). "The District must prove the adequacy of the assessment; the Parents do not bear a burden of proving the inadequacy of the

assessment.” Indep. Sch. Dist. No. 2310 v. Minnesota State Educ. Agency, 29 IDELR 330, 5 (SEA MN 1998).

3.

The relevant inquiry in an IEE hearing filed by a school district is the appropriateness of the district’s evaluation. See, e.g., Holmes v. Millcreek Twp. Sch. Dist., 205 F.3d 583 (3d Cir. 2000); Grapevine-Colleyville Indep. Sch. Dist. v. Danielle R., 31 IDELR 103 (N.D. Tex. 1999).

If the school district demonstrates that its evaluation was appropriate, the parent still has the right to an independent evaluation, but not at public expense. 34 C.F.R. § 300.502(b)(3).

4.

IDEA regulations require that a school district provide notice to the student’s parents regarding the proposed evaluation, and further, that evaluations meet the following standards:

- (1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining—
  - (i) Whether the child is a child with a disability under § 300.8; and
  - (ii) The content of the child's IEP . . .
- (2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and
- (3) Use technically sound instruments . . . .

Additionally, each public agency must ensure that—

- (1) Assessments and other evaluation materials . . .
  - (i) Are selected and administered so as not to be discriminatory on a racial or cultural basis;
  - (ii) Are provided and administered in the child's native language or other mode of communication and in the form most likely to yield accurate information . . . ;
  - (iii) Are used for the purposes for which the assessments or measures are valid and reliable;

- (iv) Are administered by trained and knowledgeable personnel; and
  - (v) Are administered in accordance with [the producer's] instructions . . . .
- (2) Assessments and other evaluation materials include those tailored to assess specific areas of educational need . . . .
  - (3) Assessments are selected and administered so as best to ensure that . . . the assessment results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills . . . .
  - (4) The child is assessed in all areas related to the suspected disability . . . ;
  - (5) Assessments of children with disabilities who transfer from one public agency to another public agency in the same school year are coordinated with those children's prior and subsequent schools . . . .
  - (6) [T]he evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs . . . .
  - (7) Assessment tools and strategies . . . that directly assist[] persons in determining the educational needs of the child are provided.

34 C.F.R. § 300.304.

5.

Other jurisdictions have recognized FBAs as "evaluations" under IDEA if conducted to assess the need for special education and related services. Harris v. D.C., 561 F. Supp. 2d 63, 67 (2008); Encinitas Union Sch. Dist., 112 LRP 54821, 23 (Cal. 2012). These courts found that FBAs should meet legal standards for evaluations. Id. State regulations define an FBA as:

A systematic process for defining a child's specific behavior and determining the reason why (function or purpose) the behavior is occurring. The FBA process includes examination of the contextual variables (antecedents and consequences) of the behavior, environmental components, and other information related to the behavior. The purpose of conducting an FBA is to determine whether a Behavioral Intervention Plan should be developed.

Ga. Comp. R. & Regs. 160-4-7-.21(20).

6.

There is an absence of mandatory standards in state or federal law that establish an appropriate FBA, except that FBAs should reasonably identify triggers to, and appropriate interventions for, problem behaviors. See           v. Houston Indep. Sch. Dist., 2007 WL 2947443, \*3 n.6 (S.D. Tex. 2007). Courts have recognized some minimum elements needed to make the FBA relevant to educational planning. H.D. ex rel. A.S. v. Central Bucks Sch. Dist., 902 F. Supp. 2d 614, 627 (E.D. Pa. 2012) (finding FBA was appropriate—even where recommendations were not all successful—when it “was conducted by a qualified BCBA, used various methods of collecting relevant data, identified the most significant behaviors of concern, identified the triggers and consequences of those behaviors, and provided instruction on how to create an educational program and behavior plan to address those behaviors”). Another court determined that an FBA “contained all the required elements” where the FBA set forth the reason for the referral and identified the problem behaviors and their triggers, concurrences, and consequences, and indicated what negative reinforcements caused the student to maintain the behaviors. W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149 (S.D.N.Y. 2006).

7.

FBAs have been deemed inappropriate where districts failed to reliably predict or prevent behaviors. Penn-Delco Sch. Dist., 113 LRP 25807, 12 (Pa. 2013). FBA evaluation data can be technically sound, and yield reliable results, even if there are “a few inconsistencies in how the [Antecedent-Behavior-Consequences] data is recorded by the various teachers.” Broward Cnty. Sch. Bd., 112 LRP 56747, 3 (Fla. 2012).

8.

Defendants attack this FBA for multiple failings, but the evidence demonstrates that all of these concerns were insignificant except one. Cooper reviewed and documented the information she received from the District, parents, and other sources thoroughly. The Report contained all the necessary sections by industry standards. The staff was adequately trained to collect the data. The data collection had flaws and the Report had errors, but those issues do not rise to a sufficient level to make the Report inappropriate. Instead and ultimately, Cooper's FBA is not appropriate because the data collection, as designed, was never going to provide a reliable enough conclusion as to the functions ██████'s serious and problematic behaviors.

9.

Specifically, data was not taken on the very responses to behavior that the FBA concludes were the functions of ██████'s behavior: escape/avoidance and access to preferred items. The structure of the Checklist and the exclusion of data on escape or access to items preclude a statistical and reliable assessment concluding these are the functions. Essentially, the FBA had no data to support the two primary conclusions it made as to functions of the target behaviors. Cooper, believing from her observations and teacher reports that ██████ was responding to teacher demands, cannot validly conclude that this meant that escape/avoidance was the cause or reinforcer for the problem behaviors. The antecedents *may* have been correctly identified, but the Report lacks reliability as to the consequences.

10.

While the Court appreciates the level of subjectivity that exists in an FBA, the ultimate goal that is required by law is to determine what the purposes of the behaviors are and how the District can implement positive behavior strategies to decrease the problem behaviors. This is critically



important in this case because this student was injuring himself and staff members. Without this reliable data, the Report cannot reliably predict when problem behaviors will occur or lead to effective strategies to eliminate the behavior. Here, the District has not proven that this FBA, as designed, adequately identified the functions of each of [REDACTED]'s problem behaviors. Accordingly, the Court concludes that the FBA is not appropriate.

11.

Finally, this Court finds that because [REDACTED]'s violent and aggressive behaviors to himself and others, a Functional Assessment was necessary to definitively identify the functions of these behaviors. Defendants' experts were persuasive and credible in opining that a student with severe behavior requires a more thorough assessment. As such, the Court concludes that the District has not proved the adequacy of the decision to exclude the FA.

### **DECISION**

For the foregoing reasons, the District has not satisfied its burden of proving that its FBA was appropriate under IDEA, state regulations, and industry standards. Further, the District did not meet its burden in showing it was appropriate not to conduct an FA. As such, Defendants are entitled to an IEE at public expense. Specifically, Defendants are entitled to reimbursement for the independent FBA and FA conducted by Dr. Mueller.

**SO ORDERED**, this 3rd day of June, 2014.



**AMANDA C. BAXTER**  
**Administrative Law Judge**