



BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS  
STATE OF GEORGIA

FILED  
OSAH

DEC 7 2015

██████ by and through his parents, ██████ :  
and ██████ and ██████ :  
Petitioners, :  
v. :  
HOUSTON COUNTY SCHOOL :  
DISTRICT, :  
Respondent. :

Docket No.:  
OSAH-DOE-SE-██████-76-Miller  
15-312359

*Kevin Westray*  
Kevin Westray, Legal Assistant

ORDER GRANTING PETITIONERS' REQUEST FOR RELIEF  
UNDER THE INDIVIDUALS WITH DISABILITIES IN EDUCATION ACT<sup>1</sup>

For Petitioners:

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Chris E. Vance, P.C.

For Respondent:

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Daniel, Lawson, Tuggle & Jerles, LLP

I. SUMMARY OF PROCEEDINGS

On June 30, 2015, the Petitioners, ██████ and his parents, ██████ and ██████ filed a due process hearing request ("Complaint") against the Respondent, the Houston County School District ("District"), under the Individuals with Disabilities Education Improvement Act of 2004, as amended ("IDEA"). The Complaint presented, broadly, two issues: first, whether the District's evaluations of ██████ met the requirements of IDEA; and second, whether the District developed and implemented an Individualized Education Program ("IEP") for ██████ that provided him with a free appropriate public education ("FAPE").

<sup>1</sup> Because this Order provides for the reopening of the hearing record and the presentation of additional evidence as to compensatory education, it is not a Final Decision within the meaning of 34 C.F.R. § 300.515 and Ga. Comp. R. & Regs. 616-1-2-.27.

The evidentiary hearing took place over the course of six days in September and October 2015. The record closed on November 6, 2015, when the parties filed their proposed Findings of Fact and Conclusions of Law.

After consideration of the evidence and for the reasons explained herein, the Court finds that during the 2013-14 school year and continuing to the present date, the District has both failed to conduct evaluations in compliance with IDEA and failed to provide him with a FAPE. Accordingly, the Petitioners are entitled to relief as described more specifically below.

## II. FINDINGS OF FACT

### A. Background<sup>2</sup>

1.

██████ was born on ██████████ and is presently ██████ years old. He resides in Peach County, Georgia, with his father, ██████, and his mother, ██████. Because ██████. ██████ is a teacher in the Houston County School District, ██████ is able to attend school in the District as a tuition student. During the 2011-12 school year, when he was in kindergarten, he began attending ██████████ Elementary School, where Mrs. ██████ teaches ██████ grade.<sup>3</sup> (T. 245, 251-52, 364-65, 1022; Exs. J-1, J-9, J-32.)

2.

When ██████ started his kindergarten year, he was determined eligible for special education services under IDEA as a child with a significant developmental delay. Recently, in

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<sup>2</sup> Elements of ██████ educational history are described herein “as background material and to provide context for the claims, not to support a violation of the IDEA.” *Draper v. Atlanta Indep. Sch. Sys.*, 480 F. Supp. 2d 1331, 1341 (N.D. Ga. 2007), *aff’d* 518 F.3d 1275 (11<sup>th</sup> Cir. 2008).

<sup>3</sup> ██████ received services through the Babies Can’t Wait program beginning when he was between ██████ and ██████ months old, after his mother noticed that he was not meeting developmental milestones. Before he started school at ██████████ he attended a private daycare program that was owned and operated by a certified special education teacher and where he also received speech therapy. (T. 252-53.)

April 2015, his primary eligibility category was changed to autism, with a secondary exceptionality of speech-language impairment. (T. 513; Exs. J-9, J-32, J-287.)

3.

Autism is a neurological disorder characterized by social deficits, language and communication deficits, and, to a lesser degree, repetitive and stereotypic behaviors. ■■■ has been assessed at severity level three on the Gilliam Autism Rating Scale, which means that he requires substantial support to function in a home or school setting. Compounding ■■■'s autism is an intellectual disability, which causes global deficits in his cognitive and adaptive functioning. His test scores are in the moderate range of mental impairment.<sup>4</sup> He is nonverbal and has apraxia, a motor planning disorder that prevents him from producing speech sounds in the correct sequence.<sup>5</sup> He has also been diagnosed with attention-deficit hyperactivity disorder. Although his progress is expected to be "remarkably slow" due to his significant disabilities, ■■■ is capable of learning. (T. 172, 184, 327, 407-08, 660-61, 663-64, 676, 1022, 1072-74, 1105; Exs. J-503, J-534.)

4.

Intellectually disabled children with autism often have difficulty acquiring functional daily living skills and applying such skills across multiple settings. As a result, skills must be taught by different instructors, at different times, and in different settings, including both home and school. Lower-functioning students with autism are often pulled out of a classroom for

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<sup>4</sup> These scores must be interpreted with caution, however, due to the impact of his disabilities on his test performance. (T. 674-76; Ex. J-533.)

<sup>5</sup> ■■■ ■■■ ■■■'s speech therapist at ■■■ ■■■ testified that he does not have apraxia. However, her testimony was less credible than that of ■■■'s private speech therapist, ■■■ ■■■. Moreover, consistent with Ms. ■■■ testimony ■■■, ■■■'s school occupational therapist, testified that he at least has "characteristics of apraxia." (T. 184, 711-12, 751.)

instruction in a one-on-one setting. Access to peers and social interactions, however, are also important. (T. 1074-75, 1095-96, 1100-02.)

5.

Children with autism have difficulty connecting to their environment. ■■■ like other children with autism, is over-sensitive to certain stimuli in his classroom environment, such as technology, and is often unable to focus on relevant stimuli, such as instruction by his teacher. Teaching visual attendance to relevant stimuli is a crucial component of an educational program for children with autism, for three reasons: first, because visual attendance helps interpret the environment; second, because it signals engagement to the instructor; and third, because children with autism are usually visual learners. (T. 1092-94.)

6.

Communication skills are also critical for intellectually disabled children with autism. Every child needs a voice to express his or her needs and desires. When a child has no means to communicate, inappropriate behaviors are likely to materialize. (T. 62-65.)

7.

At school, ■■■ frequently exhibits disruptive behaviors that interfere with his learning. These behaviors, while not intentionally harmful, may include biting,<sup>6</sup> hitting, spitting, and scratching. At times, he is very active and overstimulated; at other times, he is unusually calm and lethargic. He has a tendency to get up from his seat during instructional time. He consistently seeks out food, and he may take food from others or eat what he finds on the floor or in a trash can. These behaviors have been present, with varying degrees of intensity, since ■■■

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<sup>6</sup> On several occasions, ■■■ has bitten staff members and broken the skin. (T. 541-43; Exs. J-34 to J-40.)

began attending [REDACTED]. (T. 88, 541-43, 832-34, 961-63; Exs. J-40, J-102, J-106, J-153, J-174, J-229, J-258, J-287 to 288.)

8.

When [REDACTED] entered kindergarten, in the fall of 2011, he was initially placed in a transitional kindergarten class. After a short time, because he struggled in that setting, he was moved to a self-contained small group classroom. [REDACTED]'s placement in a self-contained small group setting, with the related services of speech and occupational therapy, has continued to the present date. (T. 513; Exs. J-56, J-121, J-168, J-188, J-245, J-274, J-297.)

9.

In addition to the educational programming [REDACTED] has received in the school setting, his parents have hired professionals to provide supplemental speech and behavioral therapy outside of the school environment.<sup>7</sup> [REDACTED], a speech-language pathologist, has worked with [REDACTED] since January 2013. [REDACTED], a behavior management consultant,<sup>8</sup> has provided applied behavioral analysis therapy to [REDACTED] in his home since September 2012. (T. 175, 182-83, 394, 400; Exs. P-54 to 60, P-335 to 345.)

**B. 2013-14 School Year**

10.

During the 2013-14 school year, when [REDACTED] was in second grade, he was placed in a self-contained small group class for children with intellectual disabilities. His teacher was [REDACTED] [REDACTED] (T. 952; Exs. J-199 to 256.)

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<sup>7</sup> [REDACTED] also sees a physician who focuses her practice on children with autism. At her recommendation, he abides by a gluten- and casein-free diet. (T. 248, 288, 338-40; Ex. J-558.)

<sup>8</sup> Ms. [REDACTED] holds a master's degree in applied behavior analysis and special education, and she has eighteen years of experience in her field. (T. 377-99; Exs. P-54 to 58.)

█'s IEP team, which included his parents, convened on March 26, 2013, to develop the IEP that guided his instruction during his second grade year.<sup>9</sup> Prior to the meeting, at the request of Mr. and Mrs. █ █ █ observed █ in his first grade classroom.<sup>10</sup> She also attended the IEP meeting and shared the treatment plan that she had developed for him. Following her observation and at the IEP meeting, Ms. █ made a series of recommendations, including, among others:

- (1) that his IEP contain goals for starting a zipper, zipping his pants and jacket, and adaptive physical education ("PE");
- (2) that he utilize an individualized visual schedule;
- (3) that sign language, a picture exchange communication system, and vocal imitation be used to communicate with him;
- (4) that an assistive technology evaluation be performed;
- (5) that he receive attention, compliance, and functional communication training;<sup>11</sup>
- (6) that he receive instruction in a distraction-free teaching area;
- (7) that a behavior intervention plan ("BIP"), which would include operational definitions, baseline measurements, a data collection system, and interventions, be implemented;

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<sup>9</sup> Ms. █ although she did not write the March 2013 IEP, followed it when she began teaching █ in the fall of 2013. The March 2013 IEP was revised during a subsequent meeting on October 17, 2013, but the goals and objectives were not revisited. (T. 955; Ex. J-199 to 256.)

<sup>10</sup> Ms. █ has observed █ at school on eleven occasions between March 2013 and August 2015. (T.405-06.)

<sup>11</sup> Functional communication training is a method of using communication responses to replace the function of an inappropriate behavior. (T. 63.)

- (8) that preference assessments<sup>12</sup> be conducted; and
- (9) that a toileting schedule be implemented.

Ms. ■■■ repeated these recommendations during subsequent IEP meetings and interactions with District staff, and Mr. and Mrs. ■■■ asked the IEP team to follow her recommendations. However, most of her recommendations were neither incorporated into ■■■'s IEP nor implemented in the classroom. (T. 279-82, 416-24, 529-32; Exs. J-562 to 572, R-41 to 42.)

12.

For the 2013-14 school year, ■■■'s IEP team developed an IEP that contained the following twelve objectives:

- (1) making marks, coloring, and tracing on paper;
- (2) independently playing simple games with a ball;
- (3) imitating gross motor skills such as jumping, hopping, etc.;
- (4) imitating fine motor skills such as opening and closing a resealable bag, squeezing clothespins, etc.;
- (5) remaining in his designated area with an assigned adult;
- (6) communicating by selecting a picture from two or three choices and giving it to his communication partner with gestural prompts;
- (7) imitating consonant-vowel-consonant-vowel ("CVCV") sounds such as "ma-ma" and "da-da";
- (8) using sign language to request an item with a picture in view and with a model;
- (9) receptively identifying twenty new pictures or three-dimensional objects;
- (10) complying with one-step commands such as "quiet hands," "stop," etc.;

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<sup>12</sup> A preference assessment is a protocol for determining what items are most preferred by the child. Items that are most preferred are most likely to function as effective reinforcers. (T. 72-74.)

- (11) demonstrating proper self-care skills, such as washing his hands, brushing his teeth, and toileting, with fading prompts; and
- (12) sharing an item with a peer during turn-taking or simple games.

The IEP contained two adaptive PE goals but did not contain any specific goals for using a zipper, as recommended by Ms. [REDACTED] [REDACTED] received eighty minutes of speech therapy, sixty minutes of adaptive PE, and sixty minutes of occupational therapy per week. (Exs. J-231 to 242, R-41 to 42.)

13.

Two of [REDACTED]'s IEP goals, for playing ball games and imitative gross motor movements, related to adaptive PE. However, [REDACTED]'s adaptive PE class did not include facilitated games or skill-building interactions. Rather, [REDACTED] engaged in self-stimulatory behavior and moved about the gym freely. This did not help him progress toward his adaptive PE goals. (T. 427-28; Exs. J-232 to 233.)

14.

Ms. [REDACTED] classroom contained between five and seven intellectually disabled students, including [REDACTED] as well as three paraprofessionals. The classroom operated on a predictable routine, with an interactive visual schedule displayed on the active board. However, [REDACTED] did not have an individualized visual schedule, as recommended by Ms. [REDACTED]. An individualized visual schedule is important for a child with autism because it provides a predictable routine with tangible proof of completion. A common format is to select pictures representing each activity of the day, attach the pictures to the child's schedule, and allow the child to place each picture in an "all-done bucket" when the activity is completed. (T. 81-82, 836, 952-53, 963-64.)



15.

Each day began with breakfast, followed by a morning meeting. The morning meeting included activities on an interactive smart board, such as learning about the days of the week, colors, and numbers, as well as opportunities for social responding and interaction through music or other sensory activities. The instruction at the morning meeting was not appropriate for [REDACTED]. He did not have the prerequisite skills for attending and participating in the lessons, and he had a tendency to get “amped up” by the smart board. (T. 85-86, 832-35, 952-53, 963-64.)

16.

When the morning meeting was finished, the students were divided into groups depending on their needs. The four adults in the classroom worked with the students on their IEP goals, rotating every fifteen to twenty minutes to provide direct instruction to a new group. After this direct instruction, the class went outside for recess or attended a “special” class, such as art, music, or adaptive PE. Lunch was next, followed by a second recess and another rotation of direct instruction and/or a large group activity. (T. 835-36, 953-54.)

17.

Data was collected during direct instruction, but the collection was not always consistent and the raw data was not always preserved. Additionally, the amount of time devoted to instruction was minimal, with a limited number of trials during instruction. For the first semester of the 2013-14 school year, the District was able to produce data for only six [REDACTED]s twelve IEP objectives.<sup>13</sup> For the entire school year, the District produced data for just eight objectives. No data was produced for the remaining four objectives (complying with one-step demands,

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<sup>13</sup> Ms. [REDACTED] recorded data for three of these objectives. Ms. [REDACTED] recorded data for the remaining three objectives. (T. 997-99.)

remaining in his designated area, demonstrating self-care skills, and receptively identifying twenty new objects.) (T. 114-117, 993-1002; Exs. P-351 to 396.)

18.

Ms. [REDACTED] testified that [REDACTED] used sign language and picture exchanges<sup>14</sup> to communicate when he was a student in her class. However, his ability to communicate using sign language was extremely limited and required hand-over-hand assistance at that time.<sup>15</sup> Further, the record contains little evidence to support a conclusion that picture exchanges were used consistently and effectively as a method of functional communication. For instance, when [REDACTED] was taken to the bathroom, he was prompted to touch a picture of a “Big Mac” (a single-button communication device) with a toilet on it. This was not a picture exchange. Ms. [REDACTED] also testified that [REDACTED] was able to touch pictures to demonstrate receptive identification, and that “receptive identification is important, so that you can use those for picture exchanges later.” However, she offered no testimony about the use of picture exchanges in her classroom, other than to answer “yes” in response to a question as to whether a picture exchange program was part of the classroom environment. (T. 418-19, 733-34, 836-37, 977-79.)

19.

According to the March 2013 IEP, [REDACTED] was to be referred and considered for assistive technology (“AT”), as recommended by Ms. [REDACTED]. Notwithstanding this provision of his IEP, [REDACTED] did not receive an AT evaluation and did not use any AT devices during the 2013-14 school year. (T. 280, 418-19; Ex. J-229.)

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<sup>14</sup> A picture exchange is a simple method of communication wherein a student gives a card with a picture of a desired item to a teacher in exchange for the item. (T. 63-65).

<sup>15</sup> When [REDACTED] started kindergarten at [REDACTED], he was able to use several signs. This skill has regressed. [REDACTED] has also become prompt-dependent. (T. 423-24, 733-34.)

20.

█ customarily worked in a designated area away from other students. His work area incorporated visual barriers, as he was easily distracted by technology, other students, and food. Even with the visual barriers in place, he had difficulty attending to instruction. (T. 433, 832-33.)

21.

Regarding Ms. █ recommendation for compliance and attention training, Ms. █ testified that “everything we did was all about teaching attention and compliance,” and gave an example of teaching █ to maintain visual attention and follow directions by throwing and catching a ball with him. She also attempted to teach compliance and attention through the use of work boxes. █s work boxes consisted of simple fine motor tasks such as putting an eraser on a pencil or fitting the two pieces of a curler together. However, the work boxes represented skills that █ had already mastered, and they were not an effective means of teaching compliance and attention.<sup>16</sup> (T. 84-85, 706-07, 963-64.)

22.

Compliance and attention are critical for learning. Ms. █ teaches █ these skills by reinforcing attentive behavior and withholding desired reinforcers when interfering behaviors are present. As a result, when he works with her in his home environment, he is able to attend visually to instruction while sitting independently in a chair, facing forward, with quiet hands and his feet on the floor.<sup>17</sup> In Ms. █ class, in contrast, █ was usually seated in a Rifton compass chair during instructional time. This type of chair encourages good posture for learning

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<sup>16</sup> Moreover, █s work boxes have not changed in four years. (T. 483.)

<sup>17</sup> █ is also able to maintain compliance and attention with Ms. █ his private speech therapist. (T. 190-92.)

through its seating angle and armrests, and it is used primarily for support and positioning of children with physical disabilities. The compass chair also has a seat belt, which was used to keep █████ in his seat.<sup>18</sup> The compass chair did not teach attention and compliance, and █████ often completed instructional tasks only with hand-over-hand prompting. (T. 255-56, 582-83, 411-15, 419, 423-24, 437; Ex. R-25.)

23.

Although █████'s IEP for the 2013-14 school year did not include any behavior-related goals and objectives, it did include a behavior intervention plan ("BIP") that was intended to target "[a]cts of aggression towards others (to include biting, spitting, hitting), destructive behavior, [and] elopement."<sup>19</sup> The BIP provided that █████ would be removed to a calming area or taken for a short walk when he exhibited the listed behaviors.<sup>20</sup> Then, after he displayed appropriate behavior for five minutes, he would be given a reinforcer. He was also able to earn reinforcers by completing individual work activities or demonstrating appropriate behavior during group activities. Although the BIP stated that data should be taken to monitor █████'s behavior and the delivery of reinforcement, Ms. █████ did not take data on █████'s behavior or the

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<sup>18</sup> To the extent the District's witnesses testified that the purpose of the belt was for positioning or to prevent █████ from harming himself or others, this testimony was not credible. Rather, its purpose was simply to secure █████ in his seat as a convenience for his teachers. In fact, Ms. █████ presented █████'s mother with a form, which she signed on August 1, 2013, describing the compass chair and explaining that it "will be used only when necessary during instruction to help your child do his/her best." The form did not mention positioning or the prevention of injurious behavior. To the extent Ms. █████ recommended that █████ use a compass chair, she did not recommend that the seat belt be used. Despite its use as a restraint, however, █████ exhibited no visible distress at being belted in the chair. (T. 255-56, 668-69, 689, 696-701, 849, 883-84, 974-75, 1253-55; Ex. P-92.)

<sup>19</sup> █████ experienced significant difficulty with transitions to activities outside the classroom. He frequently attempted to break away from an adult who was accompanying him, which presented a safety concern. (T. 975.)

<sup>20</sup> These behaviors were not clearly defined. This was problematic because "biting," for example, can encompass a range of behaviors, from chewing on one's shirt, attempting to bite, or actually making contact with one's own skin or the skin of others. (T. 425; Exs. J-249 to 250.)

implementation of his BIP during the 2013-14 school year, and she did not implement the BIP as written. (T. 1002-04; Exs. J-249 to 250.)

24.

█ exhibited a number of interfering behaviors throughout the school year, including biting and spitting. Ms. █ addressed biting by attempting to meet █'s sensory needs and providing reinforcement when he performed tasks, as well as by training her paraprofessionals to avoid placing themselves in situations with the potential for a biting event. However, he continued to bite. As to spitting, Ms. █ required █ to wipe his mouth when he spat, based on a suggestion from Ms. █<sup>21</sup> She also provided reinforcement for task completion and provided opportunities for sensory activity. Ms. █ did not conduct formal preference assessments for █ but she tested possible reinforcers to determine what items he was willing to work for. (T. 266, 961-63, 969.)

25.

█ did not toilet independently, and he had periodic accidents in Ms. █ class. Ms. █ did not collect formal data on this subject, nor did she implement a toileting schedule as recommended by Ms. █ █'s IEP did not contain any goals related to toileting. (T. 417-18, 1033-34; Ex. J-229 to 256.)

26.

█ did not master any of his IEP objectives during the 2013-14 school year. (T. 1000.)

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<sup>21</sup> Ms. █ has successfully addressed █'s spitting behavior with an over-correction protocol, which requires him to clean the entire surrounding area in addition to the area where the spitting occurred. The over-correction protocol has almost eliminated the behavior during their sessions. According to Ms. █ █'s spitting behavior was extinguished within one or two months. However, her testimony was contradicted by that of █ █ who served as a paraprofessional in Ms. █ class during the 2013-14 school year. Ms. █ testified that she simply ignored █'s biting and spitting. (T. 415, 837-38, 963.)

### C. 2014-15 School Year

27.

█'s IEP team convened on March 17, 2014, to develop his IEP for the 2014-15 school year. Ms. █ attended the meeting and made the same recommendations she had made at the March 2013 IEP meeting, with the same results. Ms. █ testified that she drafted █'s IEP goals based on the Assessment of Basic Language and Learning Skills ("ABLLS"), a language-focused developmental skills inventory of 544 early learning skills across twenty-five domains. However, she did not assess █ using the ABLLS at that time.<sup>22</sup> Instead, she relied on Ms. █ ABLLS assessment, which had been done in early 2013. █'s 2014-15 IEP contained nine goals and objectives.<sup>23</sup> (T. 416-23, 957-58, 1043; Exs. J-156 to 165, J-176 to 185.)

28.

The 2014-15 IEP replaced the prior objective of imitating CVCV sounds with a lesser skill of imitating oral motor movements, dropped five other unmet objectives, and added two new objectives, for waiting without touching materials and giving attention within two seconds. The remaining six goals and objectives in █'s 2014-15 IEP (for identifying common objects from a field of three, tracing diagonal and circular lines, touching a picture to communicate using a communication book, imitating hand and arm movements, visually attending to a task until complete, and remaining in an assigned area with adult physical proximity and verbal prompts) were substantially similar or identical to the goals and objectives contained in his 2013-14 IEP.<sup>24</sup>

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<sup>22</sup> According to Ms. █ while an ABLLS-R may be conducted as part of an annual review, the District did not conduct an ABLLS-R for █ because his parents did not request it. (T. 1004-05.)

<sup>23</sup> Although the IEP listed ten goals and objectives, the first and fifth objectives were indistinguishable from each other. (Exs. J-156 to 165, J-176 to 185.)

<sup>24</sup> The team did not follow Ms. █ recommendation to include goals for using a zipper. (Exs. J-156 to 165, J-176 to 185.)

The IEP further provided that [REDACTED] would continue to receive eighty minutes per week of speech therapy, sixty minutes per week of adaptive PE, and sixty minutes per week of occupational therapy. (Exs. J-156 to 165, J-176 to 185.)

29.

[REDACTED] repeated second grade during the 2014-15 school year and was placed in a self-contained small group class for children with intellectual disabilities taught by [REDACTED] Ms. [REDACTED] was already acquainted with [REDACTED] as she had been a one-on-one paraprofessional for another student in his class during the 2013-14 school year, but this was her first year working as a classroom teacher. The class had five students and three paraprofessionals during the 2014-15 school year, including a one-on-one paraprofessional for [REDACTED] (T. 837-38.)

30.

Ms. [REDACTED] modeled her classroom after Ms. [REDACTED] classroom from the previous year, and she followed a virtually identical schedule. The morning meeting included similar activities, and she used a similar rotation of adult staff during instructional time. Like Ms. [REDACTED] Ms. [REDACTED] used an interactive visual schedule for the class, but she did not offer an individualized visual schedule for [REDACTED] The one material change she made to Ms. [REDACTED] schedule was to begin taking her students to the cafeteria for lunch, which they enjoyed. (T. 837-38.)

31.

Ms. [REDACTED] was on maternity leave from mid-December 2014 until February 3, 2015. During her absence, the District hired a substitute teacher to replace her. The three paraprofessionals also remained in the class, and the staff implemented the same program for [REDACTED] during Ms. [REDACTED] maternity leave. (T. 66, 857, 862-63.)

32.

█'s adaptive PE class was similar to that of the previous year, with no guided activities or instruction. The adaptive PE teacher did not record any data as to █'s IEP goals. Ms. █ attended the adaptive PE class at the beginning of the school year, but stopped in October 2014 when she was given planning time during that period. (T. 80, 913-14.)

33.

Ms. █ began collecting data after the first two weeks of the school year. However, because she was a new teacher, she was unfamiliar with the computer software that the District used to track IEP goals, and the first progress reports she prepared did not show that any data had been collected. She later corrected the entries, and she collected data for the remainder of the school year. Her data, like Ms. █ showed a limited number of trials and a low rate of instructional demands. (T. 79-80, 313-14, 859-62; Exs. J-508 to 509, P-105 to 119.)

34.

█ had no functional means of communicating during the 2014-15 school year, either through the use of an AT device, picture exchanges, or sign language. Although he had not been referred and considered for assistive technology as required by his 2013-14 IEP,<sup>25</sup> the 2014-15 IEP did not reference this failure. Instead, it stated that he did not need AT devices or services. Further, Ms. █ did not use picture exchanges. In fact, █'s IEP goal for communicating by giving a picture to his communication partner was eliminated in his 2014-15 IEP. Although he used a communication folder during speech therapy, it was not always used during the remainder of the school day; and, in any event, it contained only eight pictures. Finally, as

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<sup>25</sup> Minutes from a meeting that took place on April 30, 2013, indicate that "Ms. █ (presumably a teacher) attended "to review the options for an AT evaluation" and that "Ms. █ shared that they are working with Sensibilities (outside therapy) and they will work on getting a device and the school will adapt to what he uses." However, █'s parents were unable to pay for a device, and the District did not complete an AT evaluation. (T. 280; Ex. J-224.)



previously noted, his ability to use sign language was very limited. Consequently, [REDACTED] communicated primarily “by taking, using facial expressions (smiling, tensing forehead), moaning, laughing, squealing, jumping, pulling, and body movements,” as well as by displaying interfering behaviors. (T. 62, 83-84, 840-42, 912; Exs. J-106, J-175, J-229, J-505 to 508, J-517, J-665.)

35.

Ms. [REDACTED] did not do formal preference assessments, but she made an effort to determine [REDACTED]'s preferred items. During instructional time, she reinforced appropriate behavior by allowing him to select a preferred item, usually his iPad. (T. 840-43.)

36.

[REDACTED] continued to display significant interfering behaviors. Despite this, his 2014-15 IEP did not include a BIP or any goals and objectives that targeted his behaviors. In fact, the IEP indicated that [REDACTED] did not have “behavior which impedes his learning or the learning of others.” (T. 831, 834, 838-39; Exs. J-155, J-175, J-152 to 198.)

37.

According to Ms. [REDACTED] [REDACTED] had up to twenty toileting accidents per day. To address this, he was taken to the bathroom every half hour, and on some days, every fifteen to twenty minutes. She did not record any data regarding this issue, however, and his IEP did not contain any goals related to toileting. At home, [REDACTED] rarely had toileting accidents during waking hours. (T. 286, 836-37, 1270-72; Exs. J-156 to 165, J-176 to 185.)

During recess, █████ frequently placed rocks in his mouth and sometimes ingested them.<sup>26</sup> On one occasion when Ms. █████ was observing █████ during recess, she noticed that he went immediately to the swing set. After swinging for a short time, he got down, picked up some rocks, put them in his mouth, and started gagging. Ms. █████ was standing with a paraprofessional at the opposite end of the swing set and evidently did not notice this behavior. Ms. █████ who had been observing from a distance, walked over and told him to spit out the rocks, which he did. Ms. █████ then approached, indicated that she was aware of the behavior, and instructed Ms. █████ not to intervene. (T. 81, 310-11, 428-29, 708-09, 885.)

#### **D. GNETS Referral and FBA**

During the fall of 2014, District personnel reported to █████'s parents that he was exhibiting biting behavior in Ms. █████ class up to twenty times per day. At that point, for the first time, the District attempted to record data on █████'s interfering behaviors. On ten dates between September 11, 2014, and October 21, 2014, District personnel used a "Behavior Intervention Team ABC Data Form" to create a record of █████'s behaviors. However, the data collected, even if it is assumed to be accurate and reliable,<sup>27</sup> was not recorded in a way that provided any insight into █████'s behavior. During the same time frame, the District also held

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<sup>26</sup> In February 2015, █████ mother noticed rocks in the toilet after he had a bowel movement, and she asked Ms. █████ to be alert to his attempts to ingest rocks at school. Ms. █████ was often unavailable during recess because she used that time to pump breast milk. Therefore, she promised to write up a specific procedure for the paraprofessionals to follow, which would include interacting with █████ on the playground and giving him a chew toy to keep his mouth busy. Although she never created a written procedure, she did provide the paraprofessionals with verbal direction. (T. 81, 310-11, 428-29, 885; Exs. P-83, P-461.)

<sup>27</sup> The data is likely not accurate and reliable. Data was purportedly taken on September 14, 2014, which was a Sunday when school was not in session, and on October 1, 2014, from 11:00 a.m. to 2:00 p.m., after █████ had left for the day due to illness. (T. 299-301; Exs. P-244, P-248.)

several informal meetings with Mr. and Mrs. ■ and proposed transferring ■ to the Georgia Network for Educational and Therapeutic Supports (“GNETS”) program. (T. 40-48; Exs. J-150, P-243 to 255.)

40.

An ABC assessment collects data as to the antecedent, the behavior, and the consequence for each incidence of targeted behavior. The “A,” or antecedent, refers to what was happening immediately before the behavior was exhibited. The “B,” or behavior, is the targeted inappropriate behavior that occurred. The “C,” or consequence, is the impact that the behavior had on the environment. ABC data cannot conclusively determine the function of a particular behavior, but it can identify recurring patterns that suggest a reinforcer relationship between a particular behavior and its consequence. (T. 41-43.)

41.

The District committed two glaring errors in its collection of ABC data. First, it did not treat each incidence of behavior separately. Instead, all antecedents, behaviors, and consequences that occurred in a particular period of time were recorded as a group.<sup>28</sup> Second, the consequences recorded on the data sheets represented the staff’s reaction to ■’s behavior rather than the effect of his behavior on his environment. As a result, the District’s ABC data was essentially meaningless, as it could not be used to identify patterns that would suggest the function(s) ■’s behavior. (T. 41-46.)

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<sup>28</sup> For example, the ABC data sheet for September 11, 2014, shows that between 1:00 p.m. and 3:00 p.m., ■ exhibited the targeted behaviors of impulsive jumping and flailing, throwing objects, leaving his seat, getting off-task, and putting his mouth on someone without biting. The antecedents recorded were “teacher request to work,” “waiting,” “transition from preferred activity,” “unable to communicate needs,” and “over stimulated,” with no indication of which antecedent corresponded to which behavior. Similarly, the data sheet identified five consequences of ■’s behavior (calming-down chair, sensory break, hand-over-hand work, walk, and quiet hands), but it did not identify which consequence corresponded to which behavior. (T. 44-46; Ex. P-245.)

42.

Despite its obvious limitations, [REDACTED], an autism itinerant teacher for the District, relied upon the ABC data, along with a Functional Assessment Screening Tool (“FAST”), to form the basis of a Functional Behavior Assessment (“FBA”) that was completed on October 17, 2014. The FAST, like the District’s ABC data, should not have been used to draw conclusions about the functions of [REDACTED]’s behaviors.<sup>29</sup> Nonetheless, Ms. [REDACTED] FBA concluded that the function of [REDACTED]’s behaviors was to escape non-preferred tasks or an overstimulating environment. These conclusions were not reliable. (T. 55-57, 308; Exs. J-139 to 149.)

43.

Ms. [REDACTED] also prepared a BIP that was purportedly based on the results of the FBA. However, the October 2014 BIP was remarkably similar to the March 2013 BIP, which was completed without the benefit of an FBA. Moreover, if [REDACTED]’s behaviors were, in fact, maintained by escape from task demands or overstimulation, a teacher who followed the BIP’s directive to respond to inappropriate behavior by removing him to a calming area would actually be reinforcing the inappropriate behavior by providing an escape. (T. 47-49, Exs. J-129 to 130, J-249 to 250.)

44.

The District referred [REDACTED] to the GNETS program on October 21, 2014, due to its staff’s inability to manage his behavior. The referral packet included copies of his March 2014 IEP, the October 2014 FBA and BIP, and the District’s ABC data. (Exs. P-222 to 294.)

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<sup>29</sup> The FAST is an appropriate tool for identifying certain conditions that should be included or excluded in a functional analysis, but it is not a valid stand-alone method for determining what reinforces a behavior. (T. 55-56.)

45.

The IEP team met on November 12, 2014, to discuss amending [REDACTED]'s IEP. At that time, the team considered three placement options: the GNETS program, a half-day schedule, and homebound instruction. The team decided to place him on a half-day schedule pending the GNETS referral, which would give his parents time to visit the GNETS program. The team further determined that he would be placed on homebound instruction if his behavior did not improve. At the meeting, Mrs. [REDACTED] verbally requested an independent FBA, to be performed by Dr. [REDACTED] [REDACTED]<sup>30</sup> at the District's expense. (T. 304-06; Exs. J-96 to 97.)

46.

The following day, November 13, 2014, Mrs. [REDACTED] submitted a written request for Dr. [REDACTED] to complete an independent FBA. In response, the District's assistant superintendent for student services, [REDACTED], informed her that her request for an independent FBA could not be granted until the District had finalized its own report. According to the Prior Written Notice that Dr. [REDACTED] provided to Mrs. [REDACTED] on November 17, 2014, "The District is currently in the process of conducting a full comprehensive re-evaluation including an FBA, and must finalize and present the evaluation results prior to an [independent educational evaluation] being granted." Dr. [REDACTED] later revisited this decision and granted the request for an independent FBA. The District also proceeded to conduct its comprehensive re-evaluation, as well as a second FBA. (T. 306; Exs. J-1 to 9, P-71 to 74.)

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<sup>30</sup> Dr. [REDACTED] testified as an expert regarding, *inter alia*, educational and skill-acquisition programs for children with autism, applied behavior analysis, functional behavioral assessment, functional behavioral analysis, behavior modification, data collection, and teacher and parent training. Dr. [REDACTED] holds a doctorate degree in school psychology and is a board-certified behavior analyst at the doctorate level. He has published thirteen peer-reviewed articles and is the coauthor of the Assessment of Functional Living Skills, a curriculum guide and skills-tracking program. He has provided training and consultation on the education of children with autism to many Georgia school districts. Currently, he also develops, implements, and oversees educational programs for individual children with autism in two counties. His testimony at the hearing was credible and reliable. (T. 12-28; Exs. P-8 to 29.)

47.

The District's second FBA was prepared in December 2014 by Ms. [REDACTED] who had transferred into a position as a behavior specialist during the 2014-15 school year.<sup>31</sup> Ms. [REDACTED] collected frequency data on [REDACTED]'s behaviors,<sup>32</sup> reviewed the results of a motivation assessment scale, and observed him in the classroom. Neither the frequency data nor the motivation assessment scale was an appropriate means of determining the functions of [REDACTED]'s behaviors, and her classroom observations also yielded little information of value, as she did not record any valid ABC data. Despite this, Ms. [REDACTED] concluded that [REDACTED]'s behaviors served multiple functions, including access to tangibles, escape from tasks, and sensory issues.<sup>33</sup> These conclusions were not reliable. (T. 53-59, 946; Exs. J-76 to 90.)

48.

In December 2014, Dr. [REDACTED] began conducting an independent FBA. He observed [REDACTED] for a total of sixteen hours over the course of four days in the classroom. He did not observe [REDACTED] engage in any disruptive behavior beyond leaving his seat. Therefore, he proceeded to conduct a functional analysis, relying on the information provided by the District to form testable hypotheses as to the functions of [REDACTED]'s behaviors. (T. 55-57; Ex. J-509.)

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<sup>31</sup> Ms. [REDACTED] became a board-certified behavior analyst at the end of the 2014-15 school year, after completing online courses, completing a period of supervision, and sitting for the examination in May 2015. Her testimony was significantly less reliable than that of Dr. [REDACTED] who has many years of experience and whose credentials are far superior. (T. 12-28, 949-50; Exs. P-8 to 29.)

<sup>32</sup> Ms. [REDACTED] kept a frequency count of behaviors on the classroom whiteboard, and she took a picture of the whiteboard at the end of the day and sent it to Ms. [REDACTED] (T. 66-67.)

<sup>33</sup> The District proposed a meeting on January 6, 2015, to review the results of its second FBA. At Mrs. [REDACTED]'s request, this meeting was postponed until Dr. [REDACTED] had completed the independent FBA. Ultimately, both FBAs were reviewed at an IEP meeting that took place on April 7, 2015. (Exs. J-65 to 67, J-91, J-93, R-23.)

49.

Dr. [REDACTED] used three different test conditions to determine whether [REDACTED]'s behaviors were used to escape demands, access tangibles, or access attention. He also utilized a control condition, where no demands were placed on [REDACTED] and he had access to both preferred items and attention. [REDACTED] exhibited high levels of inappropriate behaviors (hitting, biting, slapping walls or windows, spitting at the therapist, throwing objects, or hitting himself) in both the attention condition and the tangibles condition. He exhibited no inappropriate behaviors in the control or escape conditions. Therefore, Dr. [REDACTED] concluded that [REDACTED]'s behaviors were reinforced by access to tangibles and attention. Dr. [REDACTED] conclusions were reliable and supported by the evidence. (T. 59; Ex. J-503-520.)

50.

Dr. [REDACTED] also noted in his report that [REDACTED]'s classroom did not use a number of academic and behavioral supports that are commonly used for children with autism. For example:

- (1) No communication system was in place;
- (2) No skills assessments (such as the ABLLS) had been used to select skills for [REDACTED]'s instruction;
- (3) Systematic preference assessments were not used to determine preferred items for use as reinforcers;
- (4) Reinforcers were not delivered following appropriate behavior;
- (5) Visual supports, such as an individualized schedule, visual timer, or token board, were not in place to support skill acquisition or behavior;
- (6) A systematic prompting sequence was not used; and
- (7) Instruction was presented primarily in small groups via the active board, rather than one-on-one.

The absence of these supports contributed to [REDACTED]'s interfering behaviors and prevented him from learning. Dr. [REDACTED] concluded that although [REDACTED]'s teachers were caring individuals, [REDACTED]'s educational program provided him with no educational benefit. He testified that [REDACTED]'s program was "literally the worst one I've ever seen."<sup>34</sup> (T. 69, 71, 75-76, 82-84; Exs. J-507 to 508, J-518.)

51.

On a typical day observed by Dr. [REDACTED] [REDACTED] attended to almost none of the attempts at instruction, and he required frequent physical guiding in response to instructional demands. For example, Dr. [REDACTED] report provides the following example of a typical instructional sequence, during which a paraprofessional encourages [REDACTED] to trace the letters of his first name and reinforces his inattentiveness to the task:<sup>35</sup>

The paraprofessional says, "Trace [REDACTED] trace [REDACTED] trace [REDACTED] and then physically guided [REDACTED]'s hand to trace the letter [REDACTED] while [REDACTED] was looking the other direction. "Trace [REDACTED] trace [REDACTED] trace [REDACTED] and then physically guided his hand while he was looking the other direction. "Trace [REDACTED] and then physically guided his hand while he was looking the other direction. The paraprofessional physically redirected his gaze to the task but after 1 second, he was looking the other way again. "Trace [REDACTED] and then physically guided his hand to trace as he looked in another direction. "Trace [REDACTED] and then physically guided his hand to trace as he looked in another direction. He was then given a small toy birthday cake for 1 minute. These letters and this same pattern was repeated a second time so that each letter was again presented.

Dr. [REDACTED] report includes other examples of similar attempts at instruction and reinforcement, with similar results.<sup>36</sup> During small-group instruction at the active board, [REDACTED] sat

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<sup>34</sup> Dr. [REDACTED] has observed "hundreds if not thousands of different classrooms" over the course of his career. (T. 68.)

<sup>35</sup> The letters that make up [REDACTED]'s name have been changed to avoid disclosing identifiable information.

<sup>36</sup> At other times, there were no attempts at instruction whatsoever. [REDACTED] a school psychologist for the District, conducted an observation of [REDACTED] prior to conducting psychological testing in conjunction with his November 2014 comprehensive re-evaluation. She reported that he spent the entire hour of her observation in the cool-down room with the light off and rap music playing. During this time, [REDACTED] was monitored by two



in a beanbag, covered with a weighted blanket and with a chew toy in his mouth. He did not attend to the other children, the visual instruction, or the music being played. (T. 69-71, 85-86, 156-57; Exs. J-505 to 508.)

52.

Due to his serious concerns about [REDACTED]'s educational program, Dr. [REDACTED] deviated from the classroom observation protocol he has abided by since 1997<sup>37</sup> and asked to meet with Dr. [REDACTED] Ms. [REDACTED] and [REDACTED], the District's program specialist. Although only Ms. [REDACTED] and an assistant principal met with him, Dr. [REDACTED] explained his concerns and presented recommendations similar to those he ultimately made in his report. His concerns and recommendations were not well-received,<sup>38</sup> and Ms. [REDACTED] expressed that the District did not need any help with its programming. (T. 90-92.)

53.

In his report, Dr. [REDACTED] recommended that [REDACTED]'s teachers and paraprofessionals receive additional training in the education of children with autism, and that [REDACTED]'s program be overseen by a board-certified behavior analyst to ensure appropriate ongoing support. In addition, he made the following specific recommendations for [REDACTED]'s educational program:

- (1) that a communication system should be put in place and used during the entire school day;

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paraprofessionals as he engaged in self-stimulating behavior, alternately sitting in a beanbag for three to five minutes, then knocking a telephone off the wall for a paraprofessional to pick up, grabbing at the paraprofessionals' phones, and flapping his arms while moving from one side of the room to the other. In her report, Ms. [REDACTED] suggested that [REDACTED] should be put on a "clear and explicit regimen" to help him understand boundaries and expectations, and that his one-on-one time in a separate room should be used as "learning moments." (T. 661-62, 680-81; Exs. J-533, J-536 to 537.)

<sup>37</sup> Dr. [REDACTED] has never previously attempted to make changes to the classroom environment before his observation was complete. (T. 90.)

<sup>38</sup> Although Dr. [REDACTED] had not been asked to evaluate [REDACTED]'s educational program, a program evaluation is within the scope of his expertise. Furthermore, and of critical importance, [REDACTED]'s behaviors cannot be addressed effectively without changes to his educational program and classroom environment. (T. 1108, 1124-25; Exs. J-517 to 518.)

- (2) that [REDACTED]'s IEP should include approximately forty objectives chosen based on the results of the ABLLS-R<sup>39</sup> and the Assessment of Functional Living Skills ("AFLS");
- (3) that the instructional methods used to teach [REDACTED] should be based on applied behavioral analysis, with data collected on each trial, reinforcement following correct responses, and at least four hours per day spent in intensive instruction;
- (4) that small-group instruction at the active board should be discontinued;
- (5) that preference assessments be conducted regularly, to determine which tangibles, foods, and activities might function as reinforcers;
- (6) that reinforcers should follow only correct academic, language, social, and adaptive behaviors;
- (7) that positive, praiseful or conversational attention should be provided as often as possible, and at least every two to three minutes; and
- (8) that a three-step prompting sequence (verbal, model/gestural, physical) be used for all task demands in all settings.

(T. 97; Exs. J-518 to 519.)

**E. 2015-16 IEP**

54.

Dr. [REDACTED] presented his report at an IEP meeting on April 7, 2015.<sup>40</sup> Ms. [REDACTED] also attended the meeting, along with [REDACTED]'s parents and appropriate District personnel. As to Dr. [REDACTED] first recommendation, for [REDACTED] to use a communication system as part of his educational program, the IEP team referred him for an AT evaluation. The team did not adopt any of Dr. [REDACTED] remaining recommendations. (T. 97-98; Exs. J-37 to J-71.)

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<sup>39</sup> The ABLLS-R is the revised version of the ABLLS. (T. 18.)

<sup>40</sup> During the meeting, the District withdrew its GNETS referral because [REDACTED]'s interfering behaviors had decreased since the referral was made. (Ex. J-67.)

The team rejected Dr. [REDACTED] recommendation for forty IEP objectives based on the results of the ABLLS-R and AFLS, and similarly rejected his recommendations for particular skills that he believed [REDACTED] should be taught.<sup>41</sup> At the meeting, Ms. [REDACTED] reported the results of an ABLLS-R that she had conducted in February 2015,<sup>42</sup> and she recommended twenty-three goals for [REDACTED]s IEP based on her assessment. The team did not follow her recommendations, either. Instead, the team adopted the twelve goals that had been proposed by Ms. [REDACTED] in the draft IEP, without modification. [REDACTED]s IEP for the 2015-16 school year therefore incorporates the following objectives:

- (1) visually scanning items in an array of five before responding to a teacher directive;
- (2) imitating five motor actions;
- (3) sitting independently in a chair without redirection for five minutes in a group setting;
- (4) matching four individual letters on a word card with gestural prompting;
- (5) completing a circuit of four activities (puzzle, fluent matching, non-identical matching, and block design) with gestural prompting before participating in free play;
- (6) following a four-step toileting schedule with verbal prompting;
- (7) on the playground, choosing between two leisure activities involving gross motor skills;
- (8) identifying common classroom objects by touching them upon request;
- (9) requesting to use the toilet by touching a picture of the toilet;

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<sup>41</sup> Ms. [REDACTED] concurred in Dr. [REDACTED] recommendations. (T. 447-48.)

<sup>42</sup> It is unclear from the record whether the results of the assessment were reliable. According to Dr. [REDACTED] Ms. [REDACTED] "descriptions on at least five or six of these skills don't represent the description of the criteria used in the scoring." (T. 93.)

- (10) demonstrating communicative functions with direct point prompts using pictures;
- (11) identifying pictures of common objects in the environment from a field of three; and
- (12) imitating oral-motor movements.

With the exception of the final objective, which is of limited utility for a child with apraxia,<sup>43</sup> ■■■■■s 2015-16 IEP contains objectives that are appropriate for him. However, the team's unwillingness to consider additional objectives, particularly when recommended by Dr. ■■■■■ Ms. ■■■■■ and even the District's own behavior specialist, Ms. ■■■■■ is baffling.<sup>44</sup> The team also decided that ■■■■■ would continue to receive eighty minutes per week of speech therapy and sixty minutes per week of occupational therapy. His adaptive PE time was increased from sixty to 100 minutes per week. (T. 97-98, 447-48; Exs. J-42 to 56, J-521 to 527.)

56.

The 2015-16 IEP continues to allow District staff to use a compass chair with a seat belt for ■■■■■ over the objections of Dr. ■■■■■ Ms. ■■■■■ and ■■■■■s parents. Under the heading "Supports for School Personnel," the IEP provides:

During the day we perform tasks that require a student to sit at a table and learn during instruction. To enable safety and maximum learning benefits, ■■■■■ needs to be seated at a chair with arms, a platform and a safety belt. This belt is only used during instructional moments and can be unbuckled during instructional times if he appears stressed at being seated. The chair is not to be used as a disciplinary tool . . . ■■■■■ will not be buckled in the chair for more than 10 minutes at a time . . . .

(Exs. J-54, J-56.)

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<sup>43</sup> This may be an appropriate objective for teaching compliance or addressing issues with swallowing, but it is unlikely to help ■■■■■ produce speech sounds. He has reached a point in his development where it is unlikely that he will be able to develop spoken language skills, and he made little or no progress toward this objective during the previous school year. (T. 112, 187-88, 758, 1077.)

<sup>44</sup> Objectives for simple fine motor skills like zipping and buttoning remain notably absent, even though ■■■■■ has not mastered these skills. (T. 281, 706-07.)

The IEP did not contain specific objectives related to ██████'s interfering behaviors. Instead, Ms. ██████ and Ms. ██████ wrote a new BIP, after the IEP meeting, that was purportedly based on Dr. ██████ report and the team's discussion. However, Dr. ██████ was not asked to give his input, and the BIP was not even discussed during the April 7 meeting.<sup>45</sup> Moreover, the new BIP, while improved, repeated some of the same errors contained in the District's prior BIPs. For example, the April 2015 BIP repeated the statement that one of the functions ██████'s behavior was a desire to "escape non-preferred activities," an assertion that had already been proven false by Dr. ██████ functional assessment.<sup>46</sup> The new BIP also lacked specificity, stating, for instance, that ██████ would engage in "functional communication activities" before receiving reinforcers,<sup>47</sup> without describing the specific action (pressing a button, touching a picture, exchanging a card, etc.) that he was expected to take. Finally, the BIP provided that "[d]ata collection will be reviewed weekly to maintain treatment integrity." Treatment integrity, however, cannot be maintained in this manner. Rather, to maintain treatment integrity and ensure implementation of a BIP with fidelity, an independent observer collects accurate data and determines whether the plan has been correctly and consistently followed. (T. 99-103, 965-68, 1007-09, 1142-43, 1267; Exs. J-60 to 61.)

Perhaps unsurprisingly, the new BIP has not improved ██████'s behavior. Frequency data collected during the first month of the 2015-16 school year indicate that ██████'s interfering

<sup>45</sup> The BIP may have been discussed at a follow-up meeting on April 16, 2015, which neither Dr. ██████ nor Ms. ██████ attended. Ms. ██████ did not provide the BIP to Dr. ██████ for review. (T. 1008-09.)

<sup>46</sup> Even at the hearing, the District continued to assert, without reliable evidence, that ██████ exhibited escape-maintained behaviors. (T. 1055.)

<sup>47</sup> Although the April 2015 BIP states that "[r]einforcer effectiveness and preference assessments should be conducted at least monthly to determine preference shifts," there is no evidence that this has been done. (Ex. J-60.)

behaviors have increased, rather than decreased, with the implementation of the new plan. However, no reliable data exists regarding whether the April 2015 BIP has been implemented with fidelity. Ms. [REDACTED] although she is currently supervising the BIP implementation, had difficulty explaining precisely how the plan was being implemented by the adults in the classroom or even which of [REDACTED]'s behaviors it was supposed to address. She also testified that the frequency data recorded by [REDACTED]'s classroom teacher and paraprofessionals were sufficient to show that his BIP has been implemented with fidelity, an assertion that is patently incorrect. (T. 101-03, 1045-50, 1142-43, 1072-74; Exs. P-134 to 140.)

59.

It is very likely that the District's implementation of the April 2015 BIP has continued to inadvertently reinforce [REDACTED]'s interfering behaviors, despite Ms. [REDACTED] assessment that District staff members "are doing an excellent job." According to Ms. [REDACTED] [REDACTED]'s classroom teacher acts as follows, in accordance with the BIP, when [REDACTED] exhibits interfering behaviors:

If that behavior starts occurring, the items that she perceives that he may be trying to get access to would be provided as a picture so that he could ask for it by getting the picture and giving it to – and it may require some prompting but those items would be given as a choice – photos of the items would be given as a choice. . . . It serves as a functionally equivalent replacement behavior.

The District's own expert, Dr. [REDACTED],<sup>48</sup> testified that this type of response could actually reinforce [REDACTED]'s interfering behaviors.<sup>49</sup> Although the District's BIP has added an

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<sup>48</sup> Dr. [REDACTED] testified as an expert regarding, *inter alia*, educational and skill-acquisition programs for children with autism, applied behavior analysis, functional behavioral assessment, functional behavioral analysis, behavior modification, data collection, and teacher and parent training. Dr. [REDACTED] holds a doctorate degree in clinical psychology and is a board-certified behavior analyst at the doctorate level. He has worked in the area of pediatric and developmental behavior analysis since 1985. He has extensive experience working with children with autism, and he provides direct services to both families and school districts. His testimony at the hearing was credible. However, his testimony was less reliable in some respects than that of Dr. [REDACTED] in large part because he has not evaluated [REDACTED] and spent only minimal time observing [REDACTED]'s classroom. (T. 1064-70; Exs. R-78 to 97.)

<sup>49</sup> To the extent Dr. [REDACTED] equivocated in his response to a hypothetical presented by the Petitioners' counsel, this was because he did not know whether [REDACTED]'s iPad was used as a reinforcer. (T. 1139-42.)

intervening communication step, it continues to allow [REDACTED] to access desired tangibles through biting, spitting, and engaging in other inappropriate behaviors. (T. 1014-15, 1054, 1057-58, 1072-74.)

60.

[REDACTED], a speech-language pathologist who serves on the District's AT team, conducted [REDACTED]'s AT evaluation on April 29, 2015. She characterized his communication needs as "complex" and recommended that he use an AT device consistently and across settings, including during transitions and at home. Although Ms. [REDACTED] noted that [REDACTED] showed an aptitude for an iPad or other dynamic display device with communication software,<sup>50</sup> she recommended that he use a mid-tech voice-output device containing sixteen to thirty-two buttons, with just eight buttons populated initially. The team agreed with Ms. [REDACTED] recommendation and chose a Tech Speak voice-output device with thirty-two buttons. Because it is a static device, [REDACTED]'s choices are limited to the pictures on the display. (T. 199-200, 281, 777, 780-81, 822; Exs. J-33, J-41, J-494 to 502, R-60.)

61.

An AT device with a dynamic display offers several advantages over a mid-tech device with a static display. First, it is customizable, with virtually unlimited possibilities for picture vocabulary as [REDACTED] expands his ability to communicate.<sup>51</sup> Second, because it is lightweight and easily transported from one place to another, [REDACTED] would have no difficulty keeping it with him

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<sup>50</sup> Ms. [REDACTED] presented [REDACTED] with an iPad containing a core vocabulary program during the evaluation. When she asked him to perform a Mr. Potato Head activity that he did not prefer, he touched "stop" independently three times, with no previous models. (T. 806-07; Ex. J-495.)

<sup>51</sup> A dynamic device would allow [REDACTED] to touch one picture to open a new screen of word choices. For instance, if he wanted something to eat, he would touch the picture for "eat" on the home screen, and a new, customizable screen containing pictures of different foods would pop up. The Tech Speak, in contrast, contains only an "eat" button, with no additional choices regarding the type of food. Thus, a dynamic device presents an opportunity for increased quantity and specificity of communication. (T. 199-202.)

at all times.<sup>52</sup> Third, ■■■ enjoys technology, by all accounts, and would potentially be more motivated to use a dynamic device. He is adept at navigating on his iPad, and he has also demonstrated his ability to use a dynamic device for communication purposes. (T. 201-02, 207-08, 245, 410.)

62.

According to the District, the team chose a mid-tech, static device rather than a dynamic device because Mrs. ■■■ stated that she did not want ■■■ to use an iPad for communication. However, it was clear to all involved that her only concern was that the iPad would be lost as a reinforcer if it were to be used as a communication tool.<sup>53</sup> No one explained to her that he could be provided with a different type of tablet or a second iPad (of a different color, so as to be easily differentiated from the iPad used for reinforcement) for use as an AT device. As a result, the Tech Speak was chosen. It has been used at school and at home since May 2015. (T. 281, 801-02, 1257-58.)

63.

■■■ has been placed in a new classroom with a different teacher for the 2015-16 school year. On August 19, 2015, Ms. ■■■ observed his classroom and noted that ■■■ continued to receive instruction in a small-group setting. His Tech Speak was used, but he did not have an individualized schedule, and he participated in the instruction only with hand-over-hand prompting.<sup>54</sup> (T. 450-55.)

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<sup>52</sup> To be effective, an AT device must be used across all settings. (T. 193-94.)

<sup>53</sup> An iPad used for communication would be configured to ensure that it was used only for communication. (T. 237.)

<sup>54</sup> Ms. ■■■ observed two lessons. During the first lesson, the teacher used the smart board to build a "mat man" out of shapes. She also built a corresponding tangible mat man out of shapes, which she placed on a kidney-shaped table where the other children in the class were seated. ■■■ was seated away from the group with his paraprofessional. While he occasionally looked at the smart board, a tangible mat man was not presented to him,



64.

Other than the marginal improvements noted by Ms. [REDACTED] there is no evidence that the District has made any other changes to [REDACTED]'s educational program. Although the District retained Dr. [REDACTED] to testify as an expert in this proceeding, his participation was confined to a records review and a short classroom observation<sup>55</sup> that took place after the hearing had already commenced.

65.

The Petitioners seek compensatory education for [REDACTED] specifically:

5 full years of a 40-hour a week direct educational program prepared, provided, revised as necessary, and overseen by Dr. [REDACTED] and Ms. [REDACTED] and their employees, or if one or both of them are not available or willing, some other individual or individuals with necessary expertise, at [REDACTED]'s parents['] selection with [the District] providing a distraction[-]free environment for that education and the related services of daily private [speech therapy] and [occupational therapy] with parent training and home programming and an iPad with an [alternative augmentative communication] program that [REDACTED] can use and is motivated to use. Necessary assessments and program development and oversight by the private providers is also appropriate and necessary during this time.

In addition, the Petitioners seek reimbursement totaling \$18,374.34, consisting of \$500.00 for their purchase of [REDACTED]'s iPad, \$11,914.75 for Ms. [REDACTED] services, \$4,368.66 for private speech therapy, and \$1,590.93 for transportation. Finally, the Petitioners propose that the District be enjoined from "ever again violating [Georgia Department of Education] policy . . . [through] use of mechanical restraint, use of physical restraint for non-compliance or getting out of his chair or making noise, failure to give written notice of each physical restraint, and failure to provide its restraint policies and procedures." The District, on the other hand, contends that the Petitioners

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and he did not otherwise attend to the instruction. During the next activity, [REDACTED] was asked to use a Bingo marker to place a dot on a letter "W" for "watermelon". Hand-over-hand prompting was used to initiate his response. (T. 450-55.)

<sup>55</sup> Dr. [REDACTED] spent less than one hour in [REDACTED]'s classroom. He also observed four other classrooms for students with intellectual disabilities and/or autism. (T. 1071-72.)

are entitled to no relief. (Petitioners' Findings of Fact and Conclusions of Law, filed Nov. 6, 2015, at 35; District's Proposed Findings of Fact and Conclusions of Law, filed Nov. 6, 2015, at 21.)

### III. CONCLUSIONS OF LAW

1.

The case at bar is governed by IDEA, 20 U.S.C. § 1400, et seq.; its implementing federal regulations, 34 C.F.R. § 300.01, et seq.; and the Rules of the Georgia Department of Education, Ga. Comp. R. & Regs. 160-4-7-.01, et seq.

2.

Claims brought under IDEA are subject to a two-year statute of limitations. 34 C.F.R. § 300.507(a)(2). Here, because the Petitioners' Complaint was filed on June 30, 2015, only events occurring after June 30, 2013, are at issue in this proceeding. Id.

3.

The Petitioners bear the burden of proof in this matter. Schaffer v. Weast, 546 U.S. 49, 51 (2005); Ga. Comp. R. & Regs. 160-4-7-.12(3)(n); 616-1-2-.07. The standard of proof is a preponderance of the evidence. Ga. Comp. R. & Regs. 616-1-2-.21(4).

4.

The overriding purpose of IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education ["FAPE"] that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(d)(1)(A). The statute offers the following definition of FAPE:

Free appropriate public education. The term "free appropriate public education" means special education and related services that—

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 614(d) [20 USCS § 1414(d)].

20 U.S.C. § 1401(9). Related services include “transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.” 20 U.S.C. § 1401(26).

5.

The United States Supreme Court has developed a two-part test for determining whether a FAPE has been provided. Board of Educ. v. Rowley, 458 U.S. 176, 206 (1982). The first inquiry is whether the school district complied with the procedures set forth in IDEA. Id. The second prong of the test is whether the IEP developed through these procedures is “reasonably calculated to enable the child to receive educational benefits.” Id.

6.

A procedural violation under the first prong of the Rowley test is not a *per se* denial of a FAPE. Weiss v. School Bd., 141 F.3d 990, 996 (11th Cir. 1998). Pursuant to 20 U.S.C. § 1415(f)(3)(E)(ii), this Court is authorized to find that [REDACTED] was deprived of a FAPE based on a procedural violation “only if the procedural inadequacies—

- (I) impeded the child's right to a free appropriate public education;
- (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or

(III) caused a deprivation of educational benefits.”

20 U.S.C. § 1415(f)(3)(E)(ii); see also 34 C.F.R. § 300.513(a)(2).

7.

Under the second prong of the Rowley test, known as the “basic floor of opportunity” standard, a school district is not required to provide an education that will “maximize” a disabled student’s potential. Instead, IDEA mandates only “an education that is specifically designed to meet the child’s unique needs, supported by services that will permit him to benefit from the instruction.” Loren F. v. Atlanta Indep. Sch. Sys., 349 F.3d 1309, 1312 n.1 (11th Cir. 2003) (internal citations omitted); see JSK v. Hendry Cnty. Sch. Bd., 941 F.2d 1563, 1573 (11th Cir. 1991).

**A. Evaluations**

8.

An “evaluation” under IDEA means “procedures . . . to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs.” 34 C.F.R. § 300.15. When conducting an evaluation, a school district must:

- (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 that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

34 C.F.R. § 300.304(b); see also 20 U.S.C. § 1414(b)(2).

9.

A school district further has the obligation to ensure that:

- (1) Assessments and other evaluation materials used to assess a child under this part—
  - (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 any instructions provided by the producer of the assessments.
- (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 (unless those skills are the factors that the test purports to measure).
- (4) The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities[.]
- (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) In evaluating each child with a disability under §§ 300.304 through 300.306, the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs . . . .
- (7) Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.

34 C.F.R. § 300.304(c); see also 20 U.S.C. § 1414(b)(3).

1. Functional Behavioral Assessment

10.

IDEA requires that if a child's behavior impedes his or her own learning or that of others, the IEP team must "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." 20 U.S.C. §§ 1414(d)(3)(B)(i). An FBA customarily precedes the development of a plan to address behavior. Ga. Comp. R. & Regs. 160-4-7-.21(20).

11.

Regulations promulgated by the Georgia Department of Education 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.

Ga. Comp. R. & Regs. 160-4-7-.21(20). An FBA, because it is intended to assess a child's needs for special education and related services, including behavioral interventions, is considered an evaluation under IDEA. Cobb Cnty. Sch. Dist. v. D.B., 2015 U.S. Dist. LEXIS 129855 (N.D. Ga. Sept. 28, 2015); Harris v. D.C., 561 F. Supp.2d 63, 67 (D.D.C. 2008).

12.

Here, the District's FBAs conducted by Ms. [REDACTED] in October 2014 and Ms. [REDACTED] in December 2014 were fatally flawed. As detailed in the Findings of Fact, above, because Ms. [REDACTED] and Ms. [REDACTED] did not collect accurate and reliable data and did not properly examine the contextual variables of [REDACTED]'s behavior, the FBAs they performed were not technically sound and produced invalid results. Therefore, the District's reliance on the FBAs conducted by Ms. [REDACTED] and Ms. [REDACTED] was improper. 34 C.F.R. § 300.304(b), (c); Ga. Comp. R. & Regs. 160-4-7-.21(20).

13.

As a consequence of the District's reliance on the invalid FBAs performed by Ms. [REDACTED] and Ms. [REDACTED] the District's BIPs did not provide effective strategies to address the functions of [REDACTED]'s interfering behaviors. Even more troubling, when Dr. [REDACTED] provided the District with the results of his FBA and functional analysis, which were technically sound and produced valid results, the District ignored his recommendations and implemented yet another ineffective BIP. Thus, [REDACTED]'s interfering behaviors have continued unabated to the present date.

14.

The District also failed to evaluate the functions of [REDACTED]'s interfering behaviors in a timely manner. Rather, during the 2013-14 school year, it implemented an inappropriate BIP which was not based on an FBA. Then, at the beginning of the 2014-15 school year, when the BIP was no longer in place, the District relied on the behavior management strategies of a first-year teacher. When the District finally attempted to address [REDACTED]'s behaviors by conducting FBAs in October 2014 and December 2014, it failed to ensure that its FBAs produced valid results.

15.

Accordingly, the Court finds that the District deprived █████ of a FAPE by: (1) improperly relying on the results of invalid FBAs conducted by Ms. █████ and Ms. █████ (2) failing to implement an appropriate BIP that meets his needs; and (3) failing to conduct a timely FBA. See Cobb Cnty. Sch. Dist. v. D.B., 2015 U.S. Dist. LEXIS 129855 at \*15-23 (affirming ALJ's determination that FBA based on unreliable ABC data was insufficient to evaluate child's educational needs).

2. Assistive Technology

16.

When an IEP is developed, IDEA requires the IEP team to consider, among other things, the child's communication needs and "whether the child needs assistive technology devices and services." 20 U.S.C. §§ 1414(d)(3)(B)(iv), (v). An AT device is "any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability." 20 U.S.C. § 1401(1)(A); 34 C.F.R. § 300.5. An AT service is "any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device." 20 U.S.C. § 1401(2); 34 C.F.R. § 300.6. AT services also include an evaluation of the child's AT needs, the purchase or acquisition of an AT device, and training of the child and the child's family, if appropriate. Id.

17.

In this case, the District failed to evaluate █████'s communicative status, and particularly his need for assistive technology to facilitate communication, in a timely manner. Although █████'s March 2013 IEP stated that he would be referred for an AT evaluation, the District did not



proceed to conduct the evaluation or provide him with an AT device until May 2015, more than two years later. In the interim, ■■■ was left without any means of functional communication. Later, when he finally received an AT device, the District chose a device with a static display that limits his communicative vocabulary. Accordingly, the Court finds that the District deprived ■■■ of a FAPE by: (1) failing to conduct a timely AT evaluation; (2) failing to timely acquire an AT device for his use; and (3) failing to provide him with a dynamic device that meets his AT needs. 34 C.F.R. §§ 300.304(b), (c).

### 3. Other Evaluations

18.

The Petitioners' Complaint asserts that the District also deprived ■■■ of a FAPE by failing to conduct a skills assessment, such as the ABLLS-R; failing to conduct a proper occupational therapy evaluation; failing to conduct a proper speech therapy evaluation; failing to perform re-evaluations on at least a yearly basis; and failing to perform preference and reinforcer assessments. However, the Petitioners did not meet their burden of proving these alleged violations by a preponderance of the evidence. Further, to the extent the Petitioners presented evidence on these issues, such evidence tended to suggest only a possible procedural violation that did not impede ■■■s right to a FAPE, impede his parents' opportunity to participate in the IEP process, or deprive him of an educational benefit. See 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2); K.A. v. Fulton Cnty. Sch. Dist., 741 F.3d 1195, 1203-05 (11th Cir. 2013).

**B. Educational Programming**

19.

IDEA does not require a school district to “guarantee a particular outcome.” W.C. v. Cobb Cnty. Sch. Dist., 407 F. Supp. 2d 1351, 1359 (N.D. Ga. 2005), citing Rowley, 458 U.S. at 192. Rather, the school district need only “provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” Id. at 1359 (citations omitted).

20.

For the Petitioners to establish that the District’s program was not reasonably calculated to allow ■■■ to receive an educational benefit, they must show that he made no “measurable and adequate gains in the classroom.” J.S.K., 941 F.2d at 1573. In determining whether a student has received an adequate educational benefit, “great deference must be paid to the educators who developed the IEP.” Id. “The educational benefit, however, cannot be a mere modicum or *de minimis*; rather, an IEP must be likely to produce progress, not regression or trivial educational advancement.” R.H. v. Plano Indep. Sch. Dist., 607 F.3d 1003, 1008 (5th Cir. 2010) (quotations and citation omitted).

21.

The Petitioners proved, by a preponderance of the evidence, that ■■■s IEPs from June 2013 to the present were not reasonably calculated to confer educational benefit. The District ensured that his IEPs included only a small number of objectives, which were chosen with little consideration of ■■■s functional needs. Similarly, his teachers collected inadequate data and provided limited instruction related to his IEP objectives, at least in part because they were overwhelmed by his interfering behaviors. Most importantly, however, the District ignored the

repeated recommendations of behavior experts and failed to offer [REDACTED] simple supports that are commonly found in the classrooms of students with autism. Because the District has failed to address [REDACTED]'s communicative<sup>56</sup> and behavioral needs appropriately, he has been unable to access the curriculum in a meaningful way, and he has not made measurable or adequate gains in the school setting. This is true even when viewed through the prism of [REDACTED]'s significant intellectual disability and severe autism. In fact, the evidence suggests that the District's program has, if anything, been counterproductive, as it has reinforced [REDACTED]'s interfering behaviors and caused him to become prompt-dependent. Thus, the District's program has provided him with no more than a *de minimis* educational benefit. See R.H., 607 F.3d at 1008; see also Chris D. v. Montgomery Cnty. Bd. of Educ., 753 F. Supp. 922, 932 (M.D. Ala. 1990) (noting that "an educational benefit is not conferred anytime a student is not left to vegetate").

### C. Restraint

22.

The Georgia Department of Education has promulgated rules prohibiting the use of mechanical restraint in the school setting. The term "mechanical restraint" is defined as:

the use of any device or material attached to or adjacent to a student's body that is intended to restrict the normal freedom of movement and which cannot be easily removed by the student. The term does not include an adaptive or protective device recommended by a physician or therapist when used as recommended by the physician or therapist to promote normative body positioning and physical functioning, and/or to prevent self injurious behavior. The term also does not include seatbelts and other safety equipment when used to secure students during transportation.

Ga. Comp. R. & Regs. 160-5-11-5-.35(1)(b). The District has violated this provision by using a belted compass chair to keep [REDACTED] in his seat for instruction. Furthermore, the District's

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<sup>56</sup> The speech therapy services provided by the District were minimally appropriate and provided him with some educational benefit. See Conclusions of Law, ¶ 26, *infra*. However, the education benefit they provided was insufficient to confer educational benefit to the program as a whole.

improper use of the seat belt for behavior management demonstrates that the District failed to appropriately address ██████'s behavioral issues, thereby depriving him of a FAPE.<sup>57</sup> See B.H. v. W. Clermont Bd. of Educ., 788 F. Supp. 2d 682, 698-99 (S.D. Ohio 2011) (rejecting reviewing officer's determination that the use of physical restraints must be shown to actually impact a student's educational opportunities in order to prove a FAPE violation, and instead concluding that "[t]he IDEA requires that the [school district] address the student's behavior if it impedes their learning or that of others").

#### **D. Remedy**

23.

Reimbursement is one remedy available to the Petitioners under IDEA. If a disabled child is enrolled in a private school or receives privately-provided services without the consent of the local school district, "a court or a hearing officer may require the [district] to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the [school district] had not made a FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate." 34 C.F.R. § 300.148(c); see also 20 U.S.C. § 1412(a)(10)(C)(ii); Ga. Comp. R. & Regs. 160-4-7-.13(2)(a)(2); Draper v. Atlanta Indep. Sch. Sys., 480 F. Supp. 2d 1331, 1352-53 (N.D. Ga. 2007). Further, "[a] parental placement may be found to be appropriate . . . even if it does not meet the state standards that apply to education provided by the State or [school district]." Ga. Comp. R. & Regs. 160-4-7-.13(2)(a)(2); see also 34 C.F.R. § 300.148(c).

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<sup>57</sup> It must be emphasized, however, that there is no evidence that ██████ has suffered any physical or emotional harm from being belted into the chair.

24.

To be considered appropriate, a private placement need only be “reasonably calculated to enable the child to receive educational benefits.” W.C., 407 F. Supp. 2d at 1362 (quotation and citations omitted). “The test for the parents’ private placement is that it is appropriate, and not that it is perfect.” Warren G. v. Cumberland Cnty. Sch. Dist., 190 F.3d 80, 84 (3d Cir. 1999).

25.

The Petitioners proved, by a preponderance of the evidence, that the District failed to provide ■■■ with behavior management services that offered more than a *de minimis* educational benefit, and that the Petitioners’ private provision of this related service was appropriate. Accordingly, ■■■’s parents are entitled to reimbursement of their costs for providing private behavior management services. Id.

26.

The Petitioners failed to prove, by a preponderance of the evidence, that the speech therapy services provided to ■■■ by the District conferred no more than a *de minimis* educational benefit. Although the speech therapy he received was not ideal, it was sufficient to provide him with an educational benefit. It was the District’s failure to integrate the communicative strategies ■■■ practiced in speech therapy, rather than the speech therapy itself, that was deficient. See Doe v. Board of Educ., 9 F.3d 455, 459 (6th Cir. 1993) (finding that a school district must only “provide the educational equivalent of a serviceable Chevrolet to every [disabled] student”). Therefore, ■■■s parents are not entitled to reimbursement of their speech therapy expenses.

27.

█'s parents are not entitled to reimbursement for their purchase of an iPad for him, as the evidence showed that the purchase was made for the primary purpose of entertainment and/or reinforcement in █'s home environment. They did not purchase the iPad as a communication tool.

28.

Compensatory education is another available remedy. “[O]nce a court holds that the public placement violated IDEA, it is authorized to ‘grant such relief as the court determines is appropriate.’” Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 15-16 (1993), *quoting* 20 U.S.C. § 1415(i)(2)(C)(iii) (formerly § 1415(e)(2)). The Eleventh Circuit has held that compensatory education is considered “‘appropriate relief where responsible authorities have failed to provide a handicapped student with an appropriate education as required by [the Act].’” Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1280 (11th Cir. 2008), *quoting* Todd D. ex rel. Robert D. v. Andrews, 933 F.2d 1576, 1584 (11th Cir. 1991). Although “ordinary [educational programs] need only provide ‘some benefit,’ compensatory awards must do more—they must *compensate*.” Reid v. Dist. of Columbia, 401 F.3d 516, 525 (D.C. Cir. 2005) (italics in original).

29.

After careful consideration of all the evidence in this case, including the opinions of the experts and the seriousness of the underlying violations, the Court concludes that █ is entitled to relief in the form of compensatory education. See Draper, 518 F.3d at 1280. First, because the Tech Speak device that █ currently uses is inadequate to compensate for the District’s failure to provide him with any means of communication prior to May 2015, the District shall

provide him with an AT communication device with a dynamic display. Second, the District shall cease its use of a seat belt to secure ██████ to his chair. Third, the District shall retain Dr. ██████ at its own expense,<sup>58</sup> to oversee ██████'s educational program at ██████ Elementary School. See P. v. Newington Bd. of Educ., 546 F.3d 111, 117, 121-23 (2d Cir. 2008) (affirming order for school board to retain an inclusion expert for a year as an appropriate compensatory-education remedy under the IDEA). The program overseen by Dr. ██████ may include the related services of behavioral management, speech therapy, occupational therapy, and parent training. However, because neither party presented evidence as to the appropriate parameters of Dr. ██████ oversight, the Court is presently unable to craft the terms of a compensatory education award that is sufficiently fact-specific and “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” Reid, 401 F.3d at 524. Accordingly, the hearing record will be reopened for the presentation of additional evidence and argument on this issue before a final compensatory education award is entered.

#### IV. ORDER

In accordance with the foregoing Findings of Fact and Conclusions of Law, the Petitioners' request for relief under IDEA is hereby **GRANTED**. ██████'s parents are entitled to reimbursement, in the amount of \$11,914.75, for their costs incurred in providing the related

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<sup>58</sup> Although requiring the District to hire a consultant selected by the Petitioners is an unusual remedy, it is warranted here, in light of the District's chronic refusal to consider the recommendations of experts and its inability to provide ██████ with needed services. Indeed, despite ample opportunity, the District did not retain its own consultant to observe ██████'s program until *after* the hearing in this case had begun. This suggests that the District was primarily interested in an after-the-fact justification of its actions, rather than a genuine assessment of the appropriateness of its program. See Weymouth Public Schools, 109 LRP 50941 (Mass. SEA 2009) (ordering parent's consultant to assist in tailoring student's educational program); Alba-Golden Indep. Sch. Dist., 45 IDELR ¶ 291 (Tex. SEA 2005) (ordering use of parents' private evaluator for formulating IEPs, along with training and coordination of BIP).

service of behavior management. Accordingly, the District is **ORDERED** to reimburse the Petitioners' expenditures for [REDACTED]'s education in the total amount of \$ [REDACTED].<sup>59</sup>

The District is **ORDERED** to cease its use of a compass chair with a seat belt for [REDACTED]. Use of the compass chair itself is not prohibited, provided that the seat belt has been removed.

The District is further **ORDERED** to provide [REDACTED] with an iPad or other device containing a dynamic display, after consultation with Dr. [REDACTED] and [REDACTED]'s IEP team, including his parents. Such device shall be used exclusively as a communication tool and shall be easily distinguished from the iPad used for reinforcement.

Finally, because the parameters of the Petitioners' proposal for Dr. [REDACTED] oversight of [REDACTED]'s educational program were not fully developed at the evidentiary hearing, the parties are **ORDERED** to present additional evidence and argument as to the following issues:

- (1) the proposed scope of Dr. [REDACTED] services, including the projected time frame and duration, as well as his proposed duties and responsibilities; and
- (2) Dr. [REDACTED] proposed rate of pay, including an estimate of the overall cost of his services.

The hearing record is therefore reopened for the limited purpose of the parties' presentation of additional evidence and argument as to these issues, which will take place as follows:

**DATE: DECEMBER 18, 2015**  
**TIME: 10:00 AM**  
**LOCATION: OFFICE OF STATE ADMINISTRATIVE HEARINGS**  
**225 PEACHTREE STREET, NE**  
**SUITE 400, SOUTH TOWER**  
**ATLANTA, GEORGIA 30303**


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<sup>59</sup> See Exhibits P-335 to 337. The Petitioners did not incur any transportation costs for Ms. [REDACTED] behavior management services.



The timelines for completing the hearing and issuing the Final Decision are extended, due to the complexity of the issues, until January 4, 2016, in accordance with 34 C.F.R. § 300.515 and Ga. Comp. R. & Regs. 616-1-2-.27.

SO ORDERED, this 7<sup>th</sup> day of December, 2015.

  
**KRISTIN L. MILLER**  
**Administrative Law Judge**