

IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA



FILED
OSAH

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BUTTS COUNTY SCHOOL DISTRICT, :

Petitioner, :

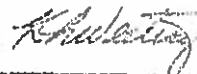
v. :

██████████ BY AND THROUGH ██████████ AND :

██████████ :

Respondents. :

Docket No.: 1837308
1837308-OSAH-DOE-SED-18-Walker


Kevin Westray, Legal Assistant

FINAL DECISION

I. INTRODUCTION

On April 13, 2018, the Petitioner, Butts County School District (“BCSS”), filed a Due Process Hearing Request (“Complaint”), seeking a finding that BCSS has developed an Individualized Education Plan (“IEP”) that educates the Respondent, ██████████ in the least restrictive environment (“LRE”). On April 24, 2018, the Respondents, ██████████ and ██████████ filed a pleading styled Answer, Defenses, and Counterpetition for Due Process Hearing (“Counter-Complaint”) alleging that BCSS had failed to provide ██████████ with a Free Appropriate Public Education (“FAPE”).¹ A due process hearing was held before the Office of State Administrative Hearings on July 16, 2018 and August 10, 2018.² Megan Pearson, Esq. represented the Petitioner. The

¹ Upon filing the Counter-Complaint was assigned docket number 1829276-OSAH-DOE-SE-18-Walker. On July 17, 2018, the two cases were consolidated under docket number 1837308-OSAH-DOE-SED-18-Walker. The Counter-Complaint states that ██████████ does not waive his rights to other non-IDEA claims for further relief after exhaustion of his administrative remedies, and asks for attorneys’ fees. Respondent’s Answer, Defenses, and Counterpetition for Due Process Hearing ¶¶ 90, 91.

² A hearing in this matter was originally scheduled for May 22, 2018. The Notice of Hearing was accompanied by a Notice of Filing and Order stating that the hearing would be set for one day only, unless the parties requested additional hearing dates. Prior to the May 22, 2018 hearing date, the Respondents suffered a tragic loss, and requested that the hearing be rescheduled. The hearing was rescheduled to July 16, 2018. Neither party notified the undersigned that it required additional time to present its case. On the July 16, 2018 hearing date, the parties stated

Respondents were represented by Claire Sherburne, Esq. and Michael J. Tafelski, Esq.³

II. FINDINGS OF FACT

Background

1.

██████ is a child with a disability as defined by 20 U.S.C. § 1401(3) and 34 C.F.R. § 300.8. He is eligible for and receives special education services pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq. (“IDEA”) under the categories of emotional/behavioral disorder (“EBD”)⁵ and specific learning disability (“SLD”).⁶ (T-39-40;

that they would be unable to present their claims in one day, and requested that a second hearing date be scheduled for August 10, 2018. For the aforementioned reasons, the deadline for the issuance of this decision has been extended pursuant to 34 C.F.R. § 300.515(c).

³ On October 1, 2018, Mr. Tafelski filed a Notice of Withdrawal of Counsel, due to his acceptance of out-of-state employment.

⁴ To protect their privacy, the Petitioners are referred to herein only by their initials.

⁵ An emotional and behavioral disorder is an emotional disability characterized by the following:

(i) An inability to build or maintain satisfactory interpersonal relationships with peers and/or teachers. For preschool-age children, this would include other care providers.

(ii) An inability to learn which cannot be adequately explained by intellectual, sensory or health factors.

(iii) A consistent or chronic inappropriate type of behavior or feelings under normal conditions.

(iv) A displayed pervasive mood of unhappiness or depression.

(v) A displayed tendency to develop physical symptoms, pains or unreasonable fears associated with personal or school problems. Ga. Comp. R. & Regs. 160-4-7-.05(Appendix d) citing 34 C.F.R. § 300.8(c)(4)(i) (A - E).

⁶ A specific learning disability is defined as:

a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell or do mathematical calculations. The term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia and developmental aphasia. The term does not apply to children who have learning problems that are primarily the

Exhibit P-2 at 19). He also has been diagnosed with Attention Deficit Hyperactivity Disorder. (T-113).

2.

In August 2017, ██████ enrolled as an ██████ grade student in the Butts County School System. (T-29). Prior to enrolling in BCSS, ██████ had been a student in the Griffin-Spalding County School System. (T-29, 33). In May 2013, the Griffin-Spalding County School System found ██████ eligible for IDEA services under the categories of EBD, SLD and speech/language impairment. (Exhibit P-5 at 2).

3.

On October 30, 2014, Griffin-Spalding County School System referred ██████ from his general education setting to ██████ Academy. (T-33, 112). ██████ is a part of the Georgia Network for Therapeutic Educational Supports (“GNETS”). (T-33). The school serves students from Spalding, Lamar, Upson, Fayette and Butts counties who are unable to function in general education settings because of their emotional and behavioral issues. (T-11, 31, 76). ██████’s objective is to return a student to the general education setting by using positive behavior intervention strategies to provide a therapeutic educational environment. (T-77-78, 81).

4.

A typical classroom at ██████ has five to six students, a teacher and a paraprofessional. (T-75-76). In addition to academic classes, the school also provides its students with social skills education. (T-77). Teachers receive special training in positive reinforcement, crisis intervention and crisis communication. (T-79-80, 82, 106-107).

result of visual, hearing or motor disabilities, intellectual disabilities, emotional or behavioral disorders, environmental, cultural or economic disadvantage. Ga. Comp. R. & Regs. 160-4-7-.05(Appendix i) citing 34 C.F.R. § 300.8(c)(10).

5.

██████████ C██████████ is ██████████'s elementary and middle school coordinator. (T-104). Prior to becoming the school coordinator, she was a ██████████ teacher. (T-104). According to Ms. C██████████ ██████████ will "accept a lot of behaviors" that would not be tolerated in a traditional school setting. (T-116, 233). For example, instead of being sent to an administrator's office for misbehaving, a student at ██████████ would first "talk about [the conduct]" with ██████████ staff to help the student regain behavioral control. (T-116). There are social workers available and students have the opportunity for one-on-one counseling. (T-80). Should disciplinary action be required, punishments at ██████████ might include silent lunch, in school suspension, or physical restraints when a student is a threat to themselves or others. (T-135, 272).

6.

██████████ had hoped that ██████████ would provide ██████████ with comprehensive, therapeutic supports from a specially trained staff. (T-422). However, ██████████'s conduct failed to improve and he continued to engage in confrontational and disturbing behavior. (T-88, 423).⁷ ██████████ also maintains that ██████████ has not made any academic progress. (T-423).

7.

Although ██████████ is not meant to be a long-term placement, ██████████ has been there for four years. (T-89). He is unhappy at ██████████ (T-450).

8.

██████████'s home school is ██████████ Middle School ("██████████") in Butts County. ██████████ provides a continuum of educational services for students with disabilities. A resource class assigns one teacher to eight students. (T-46). A co-teach class includes a special

⁷ ██████████ believes that personnel at ██████████ have physically abused ██████████ and inappropriately used restraints to discipline him. (T-426-427).

education teacher and a regular education teacher, and serves 25-28 students. (T-47). [REDACTED] also offers classes led by a regular education teacher, while providing a paraprofessional to support the students that need assistance. (T-47). It currently does not offer a self-contained classroom. (T-46-47, 470). In a self-contained classroom students do not change classes; instead, they remain with the same teacher for every subject. (T-105). Either a resource or self-contained classroom would constitute a less restrictive placement than [REDACTED]. (T-470).

Confidential Psychological Evaluation

9.

In February 2017, [REDACTED]'s school psychologist, [REDACTED] Cr [REDACTED] administered educational and psychological testing to [REDACTED] and prepared a Confidential Psychological Evaluation (also "the evaluation"). (Exhibit P-5). The evaluation reflected that [REDACTED] had severe academic and behavioral deficits, and made multiple recommendations for interventions and instructional accommodations. (T-191; Exhibit P-5).

10.

According to the evaluation, [REDACTED] is a child with a profound language-based learning disability. (T-191; Exhibit P-5 at 19). He displayed severely impaired comprehension; "it's almost like someone is speaking to him in a foreign language." (T-192, 202). Although [REDACTED] was in [REDACTED] grade when the evaluation took place, his vocabulary skills were on a first grade level. (T-176). He scored below 99% of his peers regarding receptive language skills. (Exhibit P-5 at 18).

11.

Ms. Cr [REDACTED] determined that [REDACTED] inability to express himself and understand others were the primary impediments to his academic progress. (T-191). Because his communication deficits were so severe, Ms. Cr [REDACTED] evaluation listed multiple recommendations to the IEP team for evaluations, interventions and instructional accommodations. (T-191, 202).

12.

Ms. Cr [REDACTED] recommended consultation with a speech/language therapist. (T-193; Exhibit P-5 at 19). A speech/language therapist could teach [REDACTED] how to organize his thoughts so that he would be able to communicate with others, and could provide teachers assistance with instructional planning and teaching strategies. (T-193-194; Exhibit P-5 at 19).

13.

The evaluation also recommended an assistive technology evaluation to “identify accommodations, modifications and/or strategies to assist [REDACTED] in making academic gains despite significant verbal processing, visual-spatial, and visual-motor integration delays.” (Exhibit P-5 at 19).

14.

Included in the evaluation was Ms. Cr [REDACTED] recommendation that [REDACTED] implement a number of individualized instructional supports and accommodations as follows:

Instructional Supports

- Individualized specialized instruction
- Pre-teaching and re-teaching lessons
- Presenting new content in multiple modalities (visual, auditory, verbal and kinesthetic)
- Encouraging hobbies and extracurricular activities to build competency in a variety of areas
- Using strength model that remediates weaknesses through strategies and methods utilizing cognitive processing strengths

- Encouraging activities that strengthen fluid reasoning skills
- Translating visual information into words
- Modifying grade materials
- Using visual images to introduce and reinforce new vocabulary
- Pre-teaching and previewing vocabulary
- Using semantic maps, word walls, word webs and visual organizers
- Teaching the use of reference tools
- Supplementing instruction with audio books, DVDs, TV programs and computer-based instruction
- Using educational videos and films to provide information that cannot be obtained from text on his reading level
- Providing explicit instruction in reading comprehension using think-aloud strategies
- Grading on content rather than grammar

Testing Accommodations

- Providing alternate test formats
- Allowing [REDACTED] to dictate responses to test questions
- Not penalizing spelling, grammar or punctuation errors
- Presenting testing instructions orally or through visual channels
- Reducing number of items per page or line
- Providing access to a designated reader
- Allowing for verbal responses
- Allowing the use of a voice recorder to capture responses
- Permitting computer assisted responses
- Permitting answers to be recorded directly into test booklets
- Allowing frequent breaks
- Extending allotted time for tests
- Providing a space with minimal distractions
- Administering tests in one-on-one setting
- Administering a test in several sessions or over several days
- Allowing tests to be taken in preferred order

(Exhibit P-5 at 19-21).

15.

Regarding Social/Emotional/Behavioral goals, Ms. Cr [REDACTED] recommended that teachers provide [REDACTED] with opportunities for responsibility and leadership, reduce competition, teach goal-setting and problem-solving skills, provide positive attention, frequently check on his

progress, encourage his interests and participation in school and community-based sports, and address bullying issues. (Exhibit P-5 at 22-23).

16.

In addition to his language-based learning disability, █████ performed significantly below grade level in all subject areas. (Exhibit P-5). His overall math achievement was at the first grade level, and he displayed difficulty with basic math, such as counting by twos and estimating and conceptualizing the passage of time. (Exhibit P-5).

17.

In spite of his learning challenges, Ms. Cr █████ testified that █████ “wants to do well, he wants to know the work.” (T-190). She believes █████’s academic and language deficits likely play a role in his behavioral outbursts. (T-190).

18.

█████’s confrontational behaviors are also consistent with a mood disorder, and Ms. Cr █████ urged that █████ be evaluated by a mental health professional. (T-184; Exhibit P-5 at 19). She also recommended individual, rather than group counseling, noting that █████’s poor self-image would prevent him from discussing his problems freely in front of a group. (Exhibit P-5 at 21). Despite █████’s history of disciplinary incidents, the evaluation did not include a Functional Behavioral Assessment conducted by a Board Certified Behavior Analyst. (Exhibit P-5).

19.

Griffin-Spalding School System last held an IEP meeting for █████ on January 25, 2017. (Exhibit R-1). █████’s IEP contained a total of eleven instructional supports and testing accommodations, including a few Ms. Cr █████ later recommended in the evaluation. The

Griffin-Spalding County School System did not hold an IEP meeting subsequent to Ms. Cr [REDACTED] evaluation, and had not incorporated any of the new recommended interventions and accommodations into [REDACTED]'s IEP. The Griffin-Spalding County School System did not perform either of the recommended evaluations. (T-34, 392; Exhibit P-1).

August 2017 IEP Meeting

20.

[REDACTED] transferred to BCSS in August 2017. If an incoming student has had an IEP in another school system ("prior IEP"), BCSS will schedule a meeting to review the prior IEP within thirty days of a new student's enrollment. At the meeting BCSS will determine whether to adopt the prior IEP, or make necessary changes. (T-30).

21.

BCSS scheduled an eligibility and IEP meeting regarding [REDACTED] for August 17, 2017. (T-34; Exhibit P-1). The stated purpose of the meeting was to "review the recent psychological evaluation and to re-determine eligibility." (Exhibit P-1 at 1). Ms. Cr [REDACTED], [REDACTED]'s psychologist who had performed [REDACTED]'s evaluation, attended the meeting. (T-35; Exhibit P-1 at 1). [REDACTED] and [REDACTED] D [REDACTED] [REDACTED]'s advocate, were also present. (T-35, 91; Exhibit P-1 at 1).

22.

During the IEP meeting, the team discussed returning [REDACTED] to a less restrictive environment, but determined that [REDACTED] was the appropriate placement. (T-244-246). When [REDACTED] learned that the IEP team opposed changing [REDACTED]'s placement, she indicated that she was considering revoking her consent that [REDACTED] receive special education services. (T-35-36, 52).

Ms. D [REDACTED] asked to “table the meeting” because she wanted to discuss the ramifications of revoking [REDACTED]’s special education services with [REDACTED] (T-36, 392). According to the IEP minutes, the meeting concluded but would “be rescheduled as soon as possible.” (P-1 at 1).

23.

[REDACTED] remained a [REDACTED] student for the months of August, September, and October 2017. (T-53). At the beginning of the school year, when [REDACTED] believed that he might be moving from [REDACTED] to [REDACTED], his teachers noted improvements in his behavior and academic performance. (T-161, 233). Had [REDACTED] continued to exhibit good behavior, his teachers would have been in favor of a transition back to general education setting for at least part of the day. (T-234).

24.

However, when [REDACTED] learned that [REDACTED] would not be attending [REDACTED] he “shut down.” (T-232). Teachers observed [REDACTED] intimidating peers and staff, arguing, using profanity, refusing to follow directions, and picking on other children. (T-230-231). He would disrupt class by continually singing at full volume. (T-124). As a result of this behavior, [REDACTED] underwent numerous crisis interventions in September and October 2017. (T-232; Exhibit P-15).

25.

[REDACTED] has a school resource officer (“SRO”). (T-100). On October 31, 2017, [REDACTED]’s SRO informed [REDACTED] that [REDACTED] had threatened one of his teachers, and that he was considering taking [REDACTED] to a Regional Youth Detention Center. (T-425-426). [REDACTED] stopped sending [REDACTED] to school. (T-73, 427). [REDACTED] last attended [REDACTED] on October 31, 2017. (T-41).

November 2017-December 2017

26.

█████ S█████ is a social worker for the BCSS. (T-294). She learned that █████ had not been attending school. (T-299-300). On November 8, 2017, Ms. S█████ attempted to call █████ to discuss █████'s absences, but the phone had been disconnected. (T-300). She went to █████'s home and left her card, asking █████ to contact her, but did not receive a response. (T-300). On November 14, 2018, Ms. S█████ returned to █████'s home to deliver a letter regarding █████'s absences. (T-300; Exhibit P-7). Again, she received no response. (T-300).

27.

BCSS did not schedule an IEP meeting to discuss █████'s absences, but referred his case to juvenile court. (T-72, 304). █████ has been to juvenile court, and has been told that she might face criminal consequences if she fails to enroll █████ in school. (T-429). Nonetheless, as of the date of the hearing, █████ had not returned to █████ nor had he enrolled in another academic institution. (T-437).

28.

Even before October 31, 2017, █████ displayed a pattern of "severe" absenteeism. (T-102). For example, he missed thirty days of school between August 2016 and January 2017, and often arrived late to school. (Exhibit P-5 at 3). Given his academic deficits, it is absolutely essential that █████ attend school every day. (T-207).

29.

Prior to his enrollment at █████, █████ won perfect attendance awards for the 2008-2009, 2009-2010, 2010-2011, and 2011-2012 school years. (T-450-451).

30.

At some point after the August 17, 2017 IEP meeting, [REDACTED] informed BCSS that she did not intend to revoke her consent that BCSS provide special education services to [REDACTED] (T-37). After two attempts to reschedule [REDACTED]'s IEP eligibility meeting, a meeting was scheduled for November 14, 2017. (T-37-38; Exhibit P-2).⁸ [REDACTED] and her advocate, Dr. [REDACTED] T [REDACTED] appeared via telephone. (T-40).

31.

At an eligibility meeting, BCSS determines whether it needs additional information before re-determining eligibility for students receiving special education services. (T-38). The IEP team reviewed Ms. Cr [REDACTED]'s March 2017 evaluation and also considered the information it had received regarding [REDACTED]'s first few months as a student in the BCSS. (T-39). It determined that [REDACTED] remained eligible for services under the IDEA under the categories of EBD and SLD. (T-39-40; Exhibit P-2).

32.

The eligibility report specifically found that [REDACTED]'s academic achievement remained substantially delayed, noting that he had difficulty understanding instructions or directions, confused similar looking letters and numbers, and had difficulty reading. (Exhibit P-2 at 10). It also reflected that he would benefit from multisensory learning and an evaluation by an assistive technology specialist. (Exhibit P-2 at 10). Notwithstanding Ms. Cr [REDACTED]'s explicit recommendations regarding accommodations and evaluations, BCSS did not modify the IEP and failed to obtain a speech/language or assistive technology evaluations for [REDACTED] (T-54-55).

⁸ It is unclear when [REDACTED] informed BCSS she did not intend to revoke her consent for special education services, or why there were multiple attempts to reschedule the meeting.

January 2018 IEP Meeting

33.

On January 23, 2018, the IEP team convened for an annual review of [REDACTED]'s IEP. (T-42; Exhibit P-3 at 1). [REDACTED] appeared via telephone. (T-43).

34.

The IEP team made the following determinations:

- In the category of cognitive achievement, [REDACTED]'s language skills were very weak, among his lowest area of functioning, and the team found that this deficit impacts his academic achievement and/or functional performance. (Exhibit P-3 at 2).
- In the category of math achievement, [REDACTED] has a history of learning problems in math, such as difficulty learning and memorizing basic addition and subtraction facts, counting principals, and estimating multiplication tables, and the team found that these deficits impact his academic achievement and/or functional performance. The IEP specifically noted that “[REDACTED] has not been able to practice the concepts that he has worked on this year” because of “excessive absences.” (Exhibit P-3 at 2-3).
- In the category of reading, [REDACTED] is significantly behind his peers. He reads at a third grade reading level. The IEP team found that this deficit impacts his academic achievement and/or functional performance. (Exhibit P-3 at 3).
- In the category of Social/Emotional/Behavioral, “[d]ata collection from [REDACTED]'s teachers from September 15 – October 31st indicated that in the area of ‘Getting

teachers['] attention appropriately' [] completed this at 0%. Teachers note that [] called out loudly without raising his hand." The IEP team found that this deficit impacts his academic achievement and/or functional performance. (Exhibit P-3 at 3).

- In the category of Social/Emotional/Behavioral, [] often makes inappropriate comments and only engages in appropriate conversation 16% of the time. The IEP team found that this deficit impacts his academic achievement and/or functional performance. (Exhibit P-3 at 4).
- In the category of Social/Emotional/Behavioral, the IEP established that [] struggles to develop appropriate interpersonal relationships. He has had "periods of success and improvement . . . and periods of time when his behavior has regressed and hindered his success." He "has expressed his displeasure at his continued placement at [] by demonstrating aggressive, defiant behaviors to peers and teachers." The IEP team found that this deficit impacts his academic achievement and/or functional performance. (Exhibit P-3 at 4).
- In the category of Social/Emotional/Behavioral self-management, the IEP found that [] accepted teacher feedback at a rate of 27%, and that this deficit impacts his academic achievement and/or functional performance. (Exhibit P-3 at 4-5).

35.

The January 2018 IEP reflected the following goals:

- Cognitive – [REDACTED] would complete daily assignments designed to improve verbal language vocabulary with at least 70 percent accuracy on four out of five school days. (Exhibit P-3 at 10).
- Math – [REDACTED] will use a calculator to solve basic mathematical calculation equations, with 50 percent accuracy. (Exhibit P-3 at 10).
- Reading - [REDACTED] will participate in timed reading activities with no more than three errors in his one minute timed reading segment on 5 out of 10 school days. (Exhibit P-3 at 10).
- Reading - [REDACTED] will correctly answer comprehension questions from his SRA reading questions with 80 percent accuracy. (T-123; Exhibit P-3 at 10).
- Social/Emotional/Behavioral - [REDACTED] will raise his hand and wait on teacher to call on him during 5 out of 10 academic classes. (Exhibit P-3 at 10).
- Social/Emotional/Behavioral - [REDACTED] will use language, comments, body language and engage in conversations that are appropriate for school. (Exhibit P-3 at 10).
- Social/Emotional/Behavioral - [REDACTED] will follow his teacher's directions during 5 out of 10 class periods with a maximum of 2 teacher prompts per period as reflected in teacher data collection. (Exhibit P-3 at 10).

- Social/Emotional/Behavioral - [REDACTED] will participate in 7 out of 10 academic periods using language and gestures that do not include threats of physical violence or intimidation to staff members and peers. (Exhibit P-3 at 10).
- Social/Emotional/Behavioral - [REDACTED] will accept feedback from his teachers without argument and disruption in 5 out of 10 academic periods. (Exhibit P-3 at 10).

36.

Ms. C [REDACTED]'s middle school coordinator, found these goals to be appropriately ambitious and measurable. (T-124 -127).

37.

The November 2017 eligibility report had found that [REDACTED]'s delayed language skills "appear to underlie [REDACTED]'s academic struggles and low achievement motivation, because weak language skills impede comprehension and communication, the basis of much school activity." (P-2 at 11). However, the January 2018 IEP did not incorporate Ms. Cr [REDACTED]'s new recommendations for interventions or accommodations, and, despite [REDACTED]'s severe language deficits, did not include a speech/language evaluation or speech therapy. (T-57; P-3).

38.

While [REDACTED]'s January 2017 IEP adopted by BCSS in August 2017 had detailed eleven instructional accommodations, the January 2018 IEP eliminated six of these accommodations including: breaking work up into manageable chunks, repeating directions, reading the text of school work aloud, teaching to [REDACTED]'s learning style, providing one-on-one instruction when

appropriate, and presenting lesson plans in multiple modalities. (Exhibit R-1). The IEP team left only five instructional accommodations intact: oral reading of test questions, frequent monitored breaks, small group instruction, a special education classroom and the provision of closed notes and materials. (P-3 at 14).⁹

39.

According to Ms. Cl [REDACTED], because [REDACTED] was no longer attending school, the IEP team did not have enough information to determine whether the accommodations included in the January 2017 IEP were still appropriate. (T-61).

40.

Notwithstanding the evaluation's strongly-worded recommendations regarding a speech/language consultation and an assistive technology evaluation, the January 2018 IEP explicitly found that [REDACTED] did not have special communication needs, did not need assistive technology devices or services, and did not require alternative formats for instructional materials. (Exhibit P-3 at 6).

41.

The January 2018 IEP contained the results of the Georgia Milestones Assessment. In 2016 [REDACTED] obtained a score of 329 in English/Language Arts (ELA), 442 in Math, 397 in Science and 443 in Social Studies. In 2017 [REDACTED] obtained a score of 406 in ELA and 431 in Math. (Exhibit P-3 at 2).

⁹ When reviewing the accommodations in the January 2018 IEP, Ms. Cr [REDACTED] testified that "it sounds like [REDACTED] could use more"; however, when considered with the accommodations and services at [REDACTED] she believed that the accommodations could be appropriate. (T-205, 207).

Dr. R [REDACTED]'s Review and Assessment

42.

Dr. [REDACTED] R [REDACTED] is a licensed psychologist. (T-334-335). She specializes in psychoeducational evaluation and learning disability assessments. (T-335). Dr. R [REDACTED] has conducted hundreds of psycho-educational evaluations, including for the specific purpose of assessing eligibility for special education services. (T-336-337). She has extensive experience regarding educational planning for special education students. (T-337).

43.

Dr. R [REDACTED] reviewed the evaluation conducted by Ms. Cr [REDACTED] and the IEPs developed by BCSS. (T-342, 338). At the outset, Dr. R [REDACTED] found that Ms. Cr [REDACTED] had employed appropriate assessment techniques. (T-342). Thus, it was possible for Dr. R [REDACTED] to analyze and interpret [REDACTED]'s score profile, even without personally performing the assessment. (T-339). She did not meet with [REDACTED] or his teachers, nor did she examine his school records. (T-382). According to Dr. R [REDACTED] it is an accepted practice for psychologists to consider only the data from evaluations to determine appropriate accommodations and interventions. (T-385-386).

44.

Dr. R [REDACTED] concurred with the IEP team's decision that [REDACTED] was eligible for IDEA services under the categories of EBD and SLD. (T-121, 344, 362). She also agreed with the IEP team that psychological testing demonstrated that he had a profound language-based learning disability. (T-121, 344, 362). Given the aforementioned determinations, Dr. R [REDACTED] concluded that the January 2018 IEP's cognitive and behavioral goals failed to address his [REDACTED]'s educational needs.

45.

The January 2018 IEP's cognitive goal stated that [REDACTED] would complete daily assignments designed to improve verbal language vocabulary with at least 70 percent accuracy on four out of five school days. Although Dr. R [REDACTED] agreed that [REDACTED] needs to improve his vocabulary, she testified that the goal was inadequate because it would not address his difficulty staying on topic, trouble naming people or objects, and difficulty understanding instructions. (T-137-138). Further, children who have a language-based learning disability will not necessarily understand a concept the first time, but will need clarification, repetition, rephrasing, and one-on-one assistance. (T-362). None of these accommodations were included in [REDACTED]'s January 2018 IEP. In fact, the IEP specifically found that [REDACTED] did not require an alternative format for instructional materials. (Exhibit P-3 at 6).

46.

Even in non-language based subjects like math, [REDACTED] would need language skills to understand and interpret information accurately. (T-343). The January 2018 IEP's math goal provided that [REDACTED] will use a calculator to solve basic mathematical calculation equations, with fifty percent accuracy. In light of [REDACTED]'s academic deficits, Dr. R [REDACTED] also found this goal deficient. He has difficulty estimating, difficulty with comparisons, trouble conceptualizing the passage of time, and difficulty counting rapidly. (T-142). The IEP goal addresses accuracy; however, it would not be effective regarding [REDACTED]'s failure to understand fundamental underlying math concepts. (T-345-346).

47.

Additionally, Dr. R [REDACTED] found the IEP's reading goals to be inadequate. [REDACTED] has weaknesses in basic letter-word recognition, confuses similar letters and numbers, has problems

associating letters and sounds, difficulty understanding the difference between sounds and blending sounds into words. (T-347). He also has difficulty understanding written texts. (T-344). He would need to strengthen these fundamental deficits before he could read fluently, or comprehend what he was reading. (T-346-347).

48.

Based on her review of [REDACTED]'s evaluations, Dr. R [REDACTED] concluded that he had made little to no academic progress at [REDACTED]. (T-364).¹⁰

49.

Dr. R [REDACTED] determined that the IEP's social and behavioral goals not only were ill-suited to his needs, they were most likely unachievable. [REDACTED]'s social and behavioral goals were critical to his academic success because "the frequency, duration and severity of [REDACTED]'s aggressive behaviors continue to hinder his progress in his current educational setting." (Exhibit P-3 at 5).

50.

For example, one of the IEP's behavioral goals stated that [REDACTED] should engage in conversations that are appropriate for school. Given that his comprehension scores were at a pre-kindergarten level, [REDACTED] likely does not have the necessary language to express himself and be understood by others. (T-361). As such, the goals of the IEP ask [REDACTED] "to achieve something that may or may not be attainable for him." (T-356-357).

51.

Another of the IEP's behavioral goal directed that [REDACTED] will raise his hand and wait for his teacher to call on him during 5 out of 10 academic classes. According to Dr. R [REDACTED] [REDACTED]'s

¹⁰ The January 2018 IEP stated that testing completed on 9/14/17 indicated [REDACTED] had improved his overall scores in math and reading, but there was negligible evidence regarding this testing, and its reliability was not established at the hearing. (Exhibit P-3 at 5).

communication deficits would make it difficult for [REDACTED] to raise his hand and answer questions; “he’s not engaged at all and so that he’s not--likely not going to raise his hand.” (T-357, 362). A better goal would include behavior that increased [REDACTED]’s engagement.

52.

The evaluation also detailed [REDACTED]’s difficulty with behavioral self-control, such as aggressive and disruptive behavior. (T-348). A child may act out aggressively because he doesn’t necessarily have the words or emotional language to communicate frustration and a lack of understanding. (T-362-363). Like Ms. Cr [REDACTED]; Dr. R [REDACTED] suggested that [REDACTED]’s lack of academic success could be generating this behavior; accordingly, appropriate IEP goals should emphasize mastering basic skills so that he could succeed academically. (T-350).

53.

Despite his “severe deficits,” BCCS failed to provide [REDACTED] with any uniquely tailored behavioral accommodations, instead relying on the generic program offered at [REDACTED]. (T-383). For example, the evaluation found that [REDACTED] is distrustful of authority and sensitive in groups, and cautioned that he would not be successful in group social skills training. (T-198, 378). However, the January 2018 IEP provides that [REDACTED] should engage in group social skills training. (Exhibit P-3 at 7).

54.

Given its failure to address [REDACTED]’s individualized academic or behavioral needs, Dr. R [REDACTED] concluded that the January 2018 IEP did not even provide a de minimis educational benefit; it “was not at all useful.” (T-383).¹¹

¹¹ The IEP’s listing of Supplemental Aids and Services were not specific to [REDACTED] but included a general description of [REDACTED]’s services regarding behavior modification systems and interventions used to de-escalate aggressive behaviors.

55.

The purpose of a Behavioral Intervention Plan ("BIP") is to assist a school in implementing positive behavior interventions, supports, and other strategies to address a child's challenging behaviors, and enable the child to learn socially appropriate and responsible behavior in school and or other educational settings. See Ga. Comp. R. & Regs. 160-4-7-.10, -.15. An effective BIP identifies specific target behaviors and should provide the teachers and the student tools, such as replacement behaviors, to mitigate these target behaviors. (T-143-144). Additionally, a BIP may reward a desirable behavior to increase the likelihood that it will continue to occur. (T-350). There was a BIP in place prior to [REDACTED]'s enrollment in BCSS, known as the Plan, and one created after his enrollment. (T-153-154).

56.

In order to draft a BIP, an IEP team may rely on a Functional Behavioral Assessment ("FBA"). An FBA uses systematic data collection as a tool for evaluating the behavioral function, or underlying reason for, a problematic behavior. It 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). The FBA's data collection allows for the creation of a functionally related replacement behavior. (T-144-145, 351). It is important to correctly identify the function of the target behavior in order to teach a child replacement skills for the target behavior. (T-351-352).

57.

[REDACTED] teachers use a software program called LiveSchool to track students' behavior throughout the day. (T-223; Exhibit P-15). Entries are dated and timed and include a brief description of a behavioral incident; for example, on August 19 at 9:15 a.m. [REDACTED] [had an]

“[i]nappropriate conversation with another student.” Unlike an FBA, LiveSchool does not systematically collect antecedent behavior, or identify the function of the behavior. (T-146).

58.

In formulating the BIP for ██████'s January 2018 IEP, ██████ did not employ a professional behaviorist to collect and assess behavioral data. (T-145). Instead, ██████ staff evaluated the behavioral function of ██████'s problematic behavior by discussing data they had collected, including data from LiveSchool. (T-145, 149-150).

59.

The January 2018 IEP's BIP identified two target behaviors interfering with ██████'s academic progress. (Exhibit P-3 at 6). The first target behavior detailed ██████'s failure to follow teacher directions throughout the school day. (Exhibit P-3 at 6). According to the BIP, this behavior tended to occur when ██████ did not “feel confident in his ability in the subject,” and was trying to avoid participation in an undesirable activity. (Exhibit P-3 at 6). The IEP team documented positive interventions as giving ██████ the opportunity to earn tangible reinforcers, discussing the behavior privately with ██████ and providing him opportunities for academic success. The BIP's replacement behaviors listed “including [██████] in the classroom instruction, and allowing [him] positions of leadership during the lesson and during the school day” (Exhibit P-3 at 7).

60.

The second target behavior was ██████'s threatening and aggressive behavior, typically occurring when he was denied something that he desired, usually a tangible item. (Exhibit P-3 at 7). The IEP team described the function of this target behavior as “attempting to gain an item from this behavior and as a by-product of this behavior gains his peer's attention and avoids

unwanted academic activity.” The BIP identified the following replacement behaviors: “Teacher will allow [REDACTED] to earn tangible reinforcers when they see him do positive things throughout the school day. Teacher will choose items that [REDACTED] enjoys and will reinforce positive behavior as they see pro social non aggressive behavior from [REDACTED].” (P-3 at 7-8).

61.

According to Dr. R [REDACTED] the BIP did a good job defining the target behaviors. (T-356). However, the interventions/replacement skills identified to address the target behavior were not functionally linked to the behavior; further, they were likely unattainable given his language and communication deficits. (T-353-354, 356-357). Rather than diminishing the likelihood that [REDACTED] would engage in the target behavior, the replacement skills increased the chances that the behavior would occur. (T-354).

62.

Dr. R [REDACTED] also evaluated the Positive Behavior Support/Intervention Plan (“Plan”) prepared by the Griffin-Spalding County School System in January 2017, and implemented by BCSS until the formulation of the BIP. (Exhibit P-4). The Plan identified one target behavior; “[w]hen given feedback concerning his behavior or when told ‘no’ regarding a request, or when he’s irritated by a peer or adult, [REDACTED] argues, screams, threatens to hurt others, will become physically aggressive and disrupts the classroom with a duration and severity that can escalate to the point of administrator intervention and parent phone calls. This behavior occurs [in] all of his academic classes on a daily basis.” (Exhibit P-4 at 1; T-156-157). The team hypothesized that the two functions of the Target Behavior were avoidance of academic work, and the attention of [REDACTED]’s peers and teachers. (Exhibit P-4 at 1; T-157-158).

63.

The Plan identified one planned intervention/positive behavioral change strategy, to allow [REDACTED] a five-minute walk with his teacher if he participated in a class without arguing, screaming or aggression. (T-158). Potential consequences for [REDACTED]'s behavior might include conferencing with a behavior interventionist, and possible involvement with the SRO. (Exhibit P-4 at 3).¹² The Plan noted that "it is hopeful that as [REDACTED]'s academic skills improve and his confidence increases, he won't feel the need to disrupt his classes during lessons to avoid work and gain attention." (Exhibit P-4 at 2).

64.

Dr. R [REDACTED] maintained that this BIP also was problematic. Although the BIP indicated that as his self-confidence and academic skills improved [REDACTED] would be less disruptive, it does not detail specific means to improve [REDACTED]'s self-confidence. (T-358-359). Dr. R [REDACTED] also determined that the reward of a five-minute walk with a teacher was unlikely to be effective because there was no evidence to suggest that a walk would be rewarding or reinforcing. (T-359). As noted in the evaluation, [REDACTED] struggles to feel as though he can trust or depend on authority figures such as teachers. (T-187).

March and May 2018 IEP Meetings

65.

The IEP team held two additional meetings in March 2018 and May 2018. (T-43). The March 2018 meeting addressed [REDACTED]'s failure to attend school. Believing that he would not have behavioral issues if he left [REDACTED], [REDACTED] again requested that [REDACTED] transfer from

¹² [REDACTED] testified that Dr. [REDACTED] T [REDACTED] has been educating [REDACTED] on a daily basis. (T-437).

██████ to ██████ Middle School. (T-44). She also requested that BCSS perform an FBA without ██████ returning to ██████ by using the data it previously had collected. (T-44-45).

66.

BCSS contacted several professionals to see if they would be able to perform an FBA without collecting their own data. Two of the practitioners contacted maintained that conducting an FBA without personally observing the behavior would be unethical, and another was reluctant to perform the FBA. (T-45, 457-458). The IEP team determined that if ██████ wanted an FBA, he would have to return to ██████. (T-44-46).

67.

BCSS also told ██████ that it was willing to obtain speech and assistive technology evaluations, but that it would not perform these evaluations unless ██████ returned to school. (T-46, 458). ██████ refused to send ██████ to school for these evaluations.

68.

At the May 2018 IEP meeting, BCSS proposed that ██████ be transported to ██████ during summer vacation so that he could receive extended school year services. ██████ refused these services because they would take place at ██████. (T-47).

69.

At the May 2018 IEP meeting the team determined that it would provide i-ready, as well as a laptop, to ██████. The computer-based i-ready program has been purchased by the state for GNETS schools. (T-110). The program is individualized for each student. (T-111). A ██████ teacher, Mr. A ██████, would be available for consultation either by phone or onsite at ██████. (T-131-132).

70.

BCSS provided [REDACTED] with a computer, and access to virtual learning. (T-47-48). [REDACTED] determined that over the summer [REDACTED] spent a total of 27 minutes working on the computer. (T-48).

71.

BCSS also offered [REDACTED] the opportunity to take the Georgia Milestones Assessment outside the regular testing window, which had taken place during the spring. (T-49). In 2018 [REDACTED] obtained a score of 384 in ELA and 442 in Math.

[REDACTED] Teacher Observations

72.

The [REDACTED] teachers that testified during the hearing struck the undersigned as dedicated educators who were sincerely concerned about [REDACTED] Ms. C [REDACTED] [REDACTED]'s middle school coordinator, was present at the August 2017, November 2017, March 2018 and May 2018 IEP meetings, as well as the January 2018 IEP Annual Review. (T-114). Although [REDACTED] has serious emotional and behavioral problems, Ms. C [REDACTED] believes that [REDACTED] can address his needs, and that the January 2018 IEP is appropriate. (T-132). The IEP team did not just consider the evaluation, it also assessed input from teachers who were familiar with [REDACTED] (T-460).

73.

[REDACTED] teachers have specialized training in crisis intervention, including Mindset, Prevention and Management of Aggressive Behaviors, and Life Space Crisis Intervention. (T-212, 250). If a [REDACTED] student is having behavioral issues, either a paraprofessional or teacher

can work with the student to deescalate the situation. Unlike a regular education placement, [REDACTED] provides social workers for group interactions, and teaches social skills. (T-260). In contrast, teachers at [REDACTED] would not be trained to address [REDACTED]'s particular needs. (T-132).

74.

[REDACTED] A [REDACTED] is a teacher at [REDACTED]. (T-75). He has been [REDACTED]'s math teacher. (T-88). When [REDACTED] was "willing to do the work he was very engaged and would do the work." (T-88). At other times he would "shut down," and become confrontational and disruptive. [REDACTED] might threaten another student with physical harm, use foul language or start singing incessantly. (T-88). After four years at [REDACTED], Mr. A [REDACTED] believes that [REDACTED] has not made significant academic progress because he will "leave the classroom or shut down and refuse to do the work." (T-97).

75.

Mr. A [REDACTED] believes that [REDACTED]'s academic deficits are "very possibly" related to his defiant behavior. (T-95-96). Mr. A [REDACTED] agreed that interventions need to be tailored to the individual student, and positive reinforcements have not consistently worked for [REDACTED] (T-91-93). He acknowledged that [REDACTED] is "probably struggling with [REDACTED]." (T-97).

76.

[REDACTED] O [REDACTED] is a special education teacher at [REDACTED] Academy. (T-211). He has been [REDACTED]'s teacher and is on his IEP team. (T-213). Although Mr. O [REDACTED] tries to talk to [REDACTED] when he misbehaves, [REDACTED] does not generally respond well. (T-241). Mr. O [REDACTED] believes that, if [REDACTED] participated in the behavioral program at [REDACTED], he could succeed. (T-235).

77.

█████ N█████ has been a ██████ special education teacher for 27 years. (T-249). She has known ██████ for three years and likes him “a whole lot.” (T-251).

78.

Ms. N█████ taught ██████ reading and science. (T-251). When ██████ first came to ██████ he was “virtually a non-reader.” (T-253). Ms. N█████ believes that ██████ did make progress in reading and science; however, his progress was inconsistent due to his frequent absences and his misbehavior in class. (T-254).

79.

Ms. N█████ acknowledged that ██████ has exhibited disruptive and defiant behavior. When ██████ was upset, he cursed at her, ground her foot into the carpet and called her names. (T-255). If ██████ didn't like what the class was doing, he would sing at the top of his lungs. (T-254). At times a teacher would have to remove him from the classroom. (T-254-255). Nonetheless, as a member of ██████'s IEP team, Ms. N█████ believes that ██████ is the appropriate placement for him. (T-251, 256).

80.

█████ G█████ is a behavior interventionist and works at ██████ (T-264). He has extensive training in crisis intervention, including Mindset training. (T-264-265). Behavior interventionists are called to the classroom when a student is in crisis, and their goal is to de-escalate the situation. (T-265). ██████'s staff prepares crisis intervention documentation when other interventions have not been effective, and the behavior warrants an office referral. (T-219; Exhibit P-14).

81.

█'s crisis intervention documentation includes information about the crisis situation, and the de-escalation techniques used before intensive intervention. (T-267). █ has had multiple crisis interventions, but the number of referrals is not atypical for █ students. (T-222).

82.

Mr. G █ worked with █ at the beginning of the 2017-2018 school year. (T-266; Exhibit P-14). He prepared crisis intervention documentation reflecting several incidents involving █ including leaving campus, rolling a tire at a teacher, and misbehaving on the school bus. (T-272-276).

83.

One of the █'s Behavior Crisis Interventions is to "process," or discuss, the incident with the student, with the goal of helping the student understand why their behavior was inappropriate. (T-268-269, 282). According to Mr. G █, █ refused to process on most, if not all, occasions. (T-271-273, 282). █'s refusal to process did not prompt █ staff to change the intervention. (T-284).

84.

█ M █ is a teacher at █ Middle School. (T-312). She has been teaching at █ Middle School for three years. (T-312). At █ she is a co-teacher for English Language Arts and supports all students. She is also a resource teacher with a small group of special education students. (T-315). The students come for one period a day. (T-318).

85.

Prior to teaching at ██████████ Middle School, Ms. M█████ was ██████'s teacher at ██████████. (T-315). ██████ had difficulty with self-control, would leave the classroom, and required a lot of one-on-one intervention. (T-315-316). In Ms. M█████'s experience, ██████████ is a better placement for ██████ ██████████ provides services not available at ██████████ including social skills instruction, active learning instruction, coping strategies, and self-control strategies. (T-319-20).

86.

█████████'s behaviors – such as singing in class – would be very disruptive in a general education setting. (T-320, 326-327). Ms. M█████ also does not believe he could function in a resource classroom, nor does she think a self-contained classroom would be appropriate. (T-317-318). At ██████████ there are no students who learn in self-contained classrooms. Although he might be able to eat lunch or participate in “specials” with other students, ██████████ would be the only one in his class. (T-318-19). Because ██████████ is already self-conscious about appearing different, which may fuel his inappropriate behaviors, placement in a self-sustained classroom may exacerbate his already-existing problems. (T-330.)

87.

Despite ██████████ and ██████████'s assertions that ██████████ could function at ██████████, Ms. C█████ is dubious. ██████████ has attended a number of schools, but according to Ms. C█████ “he’s never liked [any] school, he’s never wanted to be at school.” (T-162-163).

88.

Ms. Cr█████ testified that if ██████████ returns to a general education setting, even with co-teaching, a resource room or other accommodations, she does not believe he could succeed. It is

likely he would be expelled. (T-208). Dr. R [REDACTED] also acknowledged that it would be difficult for [REDACTED] to be in a larger group setting with general education students, if the setting does not account for his academic weaknesses. (T-380-381). While she does not believe [REDACTED] appropriate, Ms. Cr [REDACTED] also has doubts about whether [REDACTED] is a suitable placement because [REDACTED] is "done with [REDACTED]." (T-208).

III. CONCLUSIONS OF LAW

1.

The pertinent laws and regulations governing this matter include IDEA, 20 U.S.C. § 1400 et seq.; federal regulations promulgated pursuant to IDEA, 34 C.F.R. § 300 et seq.; and Georgia Department of Education Rules, Ga. Comp. R. & Regs. 160-4-7-.01 to -.21.

2.

The party seeking relief under IDEA bears the burden of proof. Schaffer v. Weast, 546 U.S. 49, 62 (2005); Ga. Comp. R. & Regs. 160-4-7-.12(3)(1); Ga. Comp. R. & Regs. 616-1-2-.07. Each party bears the burden of proof as to their respective claims. Cobb Ctv. Sch. Dist. v. D.B., Civil Action No. 1:14-CV-02794-RWS, 2015 U.S. Dist. LEXIS 129855, at *16 (N.D. Ga. Sep. 28, 2015), S.F. v. McKinney Indep. Sch. Dist., Civil Action No. 4:10-CV-323-RAS-DDB, 2012 U.S. Dist. LEXIS 29584, at *7 (E.D. Tex. Mar. 6, 2012). The standard of proof is a preponderance of the evidence. Ga. Comp. R. & Regs. 616-1-2-.21(4).

3.

Under IDEA, students with disabilities have the right to a free appropriate public education ("FAPE"). 20 U.S.C. § 1412(a)(1); 34 C.F.R. §§ 300.1, 300.100; Ga. Comp. R. & Regs. 160-4-7-.02(1)(a). "The purpose of the IDEA generally is 'to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special

education and related services designed to meet their unique needs and prepare them for further education, employment and independent living” C.P. v. Leon County Sch. Bd., 483 F.3d 1151, 1152 (11th Cir. 2007) (quoting 20 U.S.C. § 1400(d)(1)(A)).

4.

The United States Supreme Court has developed a two-part inquiry to determine whether a school district has provided FAPE: “(1) whether the school district complied with the procedures set forth in the act [IDEA]; and (2) whether the IEP was reasonably calculated to enable the child to receive educational benefit in the least restrictive environment (LRE).” A.K. v. Gwinnett County Sch. Dist., 556 F. App’x 790, 792 (11th Cir. 2014) (citing Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 (1982)).

5.

The IEP provides an assessment of a child's academic achievement and functional performance, delineates the child's academic and behavioral goals, and identifies the services that a school district will provide. 20 U.S.C. § 1414(d)(1)(A)(i)(I)-(IV), (d)(3)(B). The IEP also specifies the means by which the IEP Team will evaluate the child's progress. 20 U.S.C. § 1414(d)(1)(A)(i)(III)-(IV).

6.

In Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988 (2017), the Court affirmed its previous ruling that a student's IEP must be “reasonably calculated” to enable the child to receive educational benefits. See Bd. of Educ. v. Rowley, 458 U.S. 176, 207 (1982). A student's progress “must be appropriate in light of the child's circumstances,” and the “instruction offered must be ‘specially designed’ to meet a child's ‘unique needs[.]’” Andrew F., 137 S. Ct. at 999.

7.

To the maximum extent appropriate, a local educational agency (LEA), such as BCSS, is tasked with educating the child in the “[l]east restrictive environment,” or, in other words, “with children who are not disabled.” 20 U.S.C. § 1412(a)(5)(A); Ga. Comp. R. & Regs. 160-4-7-.07(1). IDEA clearly “favors reintegrating children into the school setting, where they can socially interact with other children.” A.K., 2014 U.S. App. LEXIS 2774, at *5-6; see also Greer v. Rome City Sch. Dist., 950 F.2d 688, 695 (11th Cir. 1991) (in order to meet the LRE requirement, a disabled student must be mainstreamed to the maximum extent appropriate) (citing Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1045 (5th Cir. 1989)).

8.

BCSS filed a due process hearing request, asking that the undersigned find that it has developed an IEP that is appropriate for ██████ in light of his circumstances, and educates ██████ in the LRE. It maintains that any deprivation of FAPE has been due to ██████'s actions in failing to bring ██████ to school.¹³ Given ██████'s serious behavioral issues, BCSS argues that ██████'s small classes, therapeutic services and highly-trained staff qualify it as the LRE.

9.

In turn, ██████'s and ██████'s Counter-Complaint asserts that BCSS has not developed an appropriate IEP for ██████, or placed him in the LRE. They request BCSS be ordered to employ a licensed psychologist to conduct an Independent Education Evaluation (IEE), including a speech-language evaluation of ██████ and an FBA by a board certified behavior analyst at BCSS's expense. The Respondents ask that BCSS be ordered to place ██████ in a self-contained special education classroom at ██████ Middle School with sufficient supplemental supports

¹³ BCSS also asks that the undersigned direct ██████ to bring ██████ to school and asks for attorney's fees.

and aids to allow him the opportunity to function in an integrated setting. In the alternative, they seek payment for private educational services. Finally, the Respondents request compensatory educational services.

The Failure to Provide Assessments Violated IDEA

A. Speech/Language and Assistive Technology

10.

The IDEA imposes on an LEA an obligation to identify, locate and evaluate all children with disabilities. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a)(i); Ga. Comp. R. & Regs. 160-4-7-.03(1)(a). An “evaluation” constitutes a procedure “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. Special education consists of “specially designed instruction . . . to meet the unique needs of a child with a disability,” 20 U.S.C. § 1401(29), while related services are those support services that are “required to assist [the] child . . . to benefit from” that instruction. 20 U.S.C. § 1401(26)(A). The LEA must employ 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); 20 U.S.C. § 1414(b)(2).

11.

An LEA violates the IDEA’s child-find provisions if it has “overlooked clear signs of disability and [was] negligent in failing to order testing, or [if] there was no rational justification for not deciding to evaluate.” Clay T. v. Walton County Sch. Dist., 952 F. Supp. 817, 823 (M.D. Ga. 1997); see Bd. of Educ. v. L.M., 478 F.3d 307, 313 (6th Cir.

2007) (adopting Clay T. standard). Consistent with this duty, the Eleventh Circuit has held that an LEA must evaluate a student for all suspected disabilities if it has information that gives the school notice of an underlying disability. See Phyllene W. v. Huntsville City Bd. of Educ., 630 F. App'x 917, 924-25 (11th Cir. 2015).

12.

BCSS had ample reason to know that a speech/language evaluation was essential for [REDACTED] Ms. Cr [REDACTED] [REDACTED]'s evaluator, pinpointed [REDACTED]'s communication deficits as the primary impediment to his academic progress. She found that [REDACTED]'s receptive vocabulary skills fell below 99% of his peers, concluding that it was as if someone were speaking to him in a foreign language. Her evaluation explicitly recommended a consultation with a speech/language therapist.

13.

Ms. Cr [REDACTED]'s evaluation also documented [REDACTED]'s "verbal processing, visual-spatial, and visual-motor integration delays," and advised that the school district conduct an assistive technology evaluation. See 34 C.F.R. 300.105(a) (school districts must "ensure that assistive technology devices or assistive technology services, or both . . . are made available to a child with a disability if required" as part of the child's special education-related services, or a part of the child's supplementary aids and services); 34 C.F.R. § 300.6(a) (assistive technology services include an "evaluation of the needs of a child with a disability, including a functional evaluation of the child in the child's customary environment").

14.

From March 2017 through August 2017, Griffin-Spalding School System was well aware of Ms. Cr [REDACTED]'s recommendations but, inexplicably, did not schedule either a speech/language

or assistive technology evaluation for [REDACTED]. In August 2017 BCSS received a copy of Ms. Cr [REDACTED]'s psychoeducational evaluation, and was put on notice that both a speech/language and an assistive technology evaluation were warranted. See Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1281, 1288 (11th Cir. 2008) (student who wrote letters and numbers backwards put school on notice that an evaluation for dyslexia should have been performed); N.B. v. Hellgate Elem. Sch. Dist., 541 F.3d 1202, 1205, 1209 (9th Cir. 2008) (once becoming aware of doctor's suspected diagnosis of autism, school was on notice that student likely suffered from a form of autism and an evaluation was required). Additionally, [REDACTED]'s teachers were well aware of [REDACTED]'s communication deficits. Indeed, given the severity of his speech/language disability, and Ms. Cr [REDACTED]'s conclusion that it was the primary impediment to [REDACTED]'s academic success, there was no rational reason for BCSS to fail to administer the evaluations. Clay T., 952 F. Supp. at 823.

15.

BCSS suggests that it was relieved from its obligation to schedule either of the recommended evaluations because [REDACTED] had indicated at the August 2017 IEP meeting that she was considering withdrawing her consent for [REDACTED] to receive special education services. It is undisputed that [REDACTED] never withdrew her consent for special education services. [REDACTED] remained a child receiving IDEA services, and he was entitled to the evaluations mandated by the IDEA – evaluations that, in any event, should have been conducted months before his enrollment in BCSS. See 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a)(i); Ga. Comp. R. & Regs. 160-4-7-.03(1)(a).

16.

Even if the undersigned agreed with BCSS that its failure to obtain the evaluations following the August 2017 IEP meeting was justifiable, BCSS *still* took no action to arrange evaluations after [REDACTED] indicated she would not revoke her consent and the November 2017 IEP re-eligibility meeting had been held.¹⁴ BCSS again took no action after the January 2018 IEP meeting. It was only at the March 2018 IEP meeting, one year after Ms. Ct [REDACTED]'s recommendations had been disseminated, that BCSS offered to conduct any type of evaluation. Despite BCSS's educational expertise, it has failed to offer a "cogent and responsive explanation" that would entitle it to deference in this matter. Andrew F., 137 S. Ct. at 1001-02; cf. 34 C.F.R. § 300.304(5) (assessments of children transferring in the same school year should be coordinated to ensure prompt completion of full evaluations).

B. Functional Behavioral Assessment

17.

The IEP team concluded that [REDACTED]'s social and behavioral deficits impeded his academic achievement and/or functional performance. When a student consistently demonstrates behavioral issues in his classroom environment, the student's 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).

18.

Regulations promulgated by the Georgia Department of Education define an FBA as:

¹⁴ BCSS did not establish when [REDACTED] notified BCSS that she was no longer considering revoking the services, nor why the IEP eligibility meeting held in November 2017 had to be rescheduled.

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). If an IEP adequately identifies behavioral impediments and strategies to address the behavior, IDEA does not obligate an LEA to conduct an FBA. M.W. v. New York City Dept. of Educ., 725 F.3d 131, 140 (2nd Cir. 2013) (when LEA does not administer an FBA, court must “take particular care to ensure that the IEP adequately addresses the child’s problem behaviors”) (quotation omitted); Rosaria M. v. Madison City Bd. of Educ., 325 F.R.D. 429, 439 (N.D. Ala. 2018) (FBA is not mandatory if the IEP team is able to craft an effective BIP). ██████ argues, and the undersigned concurs, that ██████’s BIP was neither appropriate nor effective, and BCSS’s failure to conduct an FBA denied him FAPE.

19.

Like a speech/language or assistive technology evaluation, an FBA is an “educational evaluation” under IDEA. See Harris v. D.C., 561 F. Supp. 2d 63, 67 (D.D.C. 2008); Cobb Cty. Sch. Dist. v. D.B., No. 1:14-CV-02794-RWS, 2015 U.S. Dist. LEXIS 129855, at *18 (N.D. Ga. Sep. 28, 2015). There are no explicit requirements regarding an FBA; however, an FBA must use systematic data collection as a tool for evaluating the behavioral function, or underlying reason for, a problematic behavior. D.B., 2015 U.S. Dist. LEXIS 129855 at *3-4. The data must be accurate and the standards governing its collection consistent: “[A]nalysts must ensure the accuracy of the data by, e.g., including explanations and demonstrations of data collection, asking data takers to define variables to ensure understanding across all data takers, observing data collection, or providing feedback during the collection.” Id.

20.

██████'s staff used LiveSchool, a computer program, to document ██████'s behavior. LiveSchool does not systematically collect antecedent behavior, nor does it identify the function of the target behavior. Additionally, there was no evidence presented that BCSS had trained ██████ staff to ensure that the data input into LiveSchool was accurate or its collection consistent. See D.B., 2015 U.S. Dist. LEXIS 129855, at *3-4 (to complete FBA, staff must be adequately trained to collect data); 34 C.F.R. § 300.304(c)(1)(iii) (school district must ensure assessments or measures are valid and reliable); see also Ga. Comp. R. & Regs. 160-4-7-.21(20).

21.

In formulating ██████'s BIP, the IEP team relied on the LiveSchool data, as well as staff discussions about the data. Because the LiveSchool data could not be used to identify patterns that would suggest the function of ██████'s behavior, Dr. R█████—a licensed psychologist—determined that the BIP's interventions/replacement skills were ineffective. The replacement skills were not functionally linked to the target behavior; moreover, due to ██████'s language deficits, the skills identified were likely unattainable. Rather than diminishing the likelihood that ██████ would engage in the target behavior, the replacement skills increased the chances that the behavior would occur.

22.

██████'s teachers confirmed Dr. R█████'s assessment. Mr. A█████ ██████'s math teacher, agreed that positive reinforcements had not consistently worked for ██████ and acknowledged that ██████ is "probably struggling with ██████." ██████ staff also testified that talking to ██████ has proven to be ineffective. According to teachers Mr. O█████ and Mr. G█████ when they attempted to talk to ██████ about a behavioral incident, he generally did not respond. Even

after [REDACTED] staff documented that [REDACTED] had undergone seventeen crisis interventions between August 2017 and November 2017, BCSS failed to initiate an FBA or review, modify or evaluate the behavioral components of [REDACTED]'s IEP. BCSS had no rational reason for its failure to conduct a comprehensive evaluation to identify [REDACTED]'s "special education and related service needs." 34 C.F.R. § 300.304(c)(6).

23.

The failure to properly evaluate [REDACTED] constitutes a procedural violation of the IDEA. See N.B., 541 F.3d at 1208. A procedurally defective IEP violates the IDEA if it impedes the child's right a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the child's FAPE, or causes a deprivation of educational benefits. T.P. ex rel T.P. v. Bryan Cty. Sch. Dist., 792 F.3d 1284, 1293 (11th Cir. 2015) (citing 20 U.S.C. § 1415(f)(3)(E)(ii)).¹⁵

24.

Without a speech/language or assistive technology evaluation, BCSS did not have the information necessary to formulate appropriate IEP goals for [REDACTED] 20 U.S.C. §§ 1401(14), 1414(d)(1)(A)(i)(II). The failure to formulate an effective BIP also impeded the team's ability to craft an IEP reasonably calculated to enable [REDACTED] to receive educational benefits. See K.I. v. Montgomery Pub. Sch., 805 F. Supp. 2d 1283, 1294 (M.D. Ala. 2011) (school district's failure to perform cognitive evaluation or assistive technology evaluation constituted procedural violations of IDEA, because both were "necessary for the development of appropriate educational goals"); see also Andrew F., 137 S.Ct. at 999 (IEP must be designed to enable student "to make progress appropriate in light of [the student's] circumstances.")

¹⁵ Although Respondents complain that BCSS impeded her ability to participate in the decision-making process, the undersigned finds no evidence to support this claim.

█'s Failure to Make Academic Progress Violated IDEA

25.

IDEA “establishe[s] procedures to guarantee disabled students access and opportunity, not substantive outcomes.” Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1151 (10th Cir. 2008). Thus, a student’s failure to make academic progress does not determine whether an LEA has provided FAPE. Rosaria M., 325 F.R.D. at 446-47; see Bd. of Educ. v. Michael M., 95 F. Supp. 2d 600 (W.D. Va. 2006) (“If the child did not make substantial progress, or even if the child regressed during the school year, the school district still meets its statutory mandate so long as the school district can prove that the IEP, when it was created, was reasonably calculated to provide some educational benefit.”).

26.

Ms. Cr█'s March 2017 evaluation recommended that █ be provided with a number of specific supports and accommodations. Not only did BCSS fail to add any of Ms. Cr█'s recommendations to █'s IEP, but the January 2018 IEP eliminated more than half of the accommodations that had been included in his prior IEP. BCSS's explanation that it eliminated instructional supports because, given █'s prolonged absence, it did not know if they remained necessary is illogical. The undersigned is mindful that courts should not substitute their own “notions of sound educational policy for those of the school authorities” Rowley, 458 U.S. at 206 ; Pottsgrove Sch. Dist. v. D.H., No. 17-2658, 2018 U.S. Dist. LEXIS 154991, at *22 (E.D. Pa. Sep. 10, 2018). However, the rationale that █, a student who had been struggling academically, would need less – rather than more – academic support after missing over two months of school is implausible. Further, BCSS's claim that many of the

recommended instructional supports were offered as part of ██████'s core curriculum also is unpersuasive. A.K. v. Alexandria City Sch. Bd., 484 F.3d 672, 682 (4th Cir. 2007) ("In evaluating whether a school district offered a FAPE, a court generally must limit its consideration to the terms of the IEP itself.") (citations omitted).

27.

Even when viewed through the prism of ██████'s extreme absenteeism, ██████'s IEPs from August 2017 to the present were not reasonably calculated to confer educational benefit. The IEPs included only a small number of objectives, which were chosen with little consideration of ██████'s functional needs. Most importantly, however, BCSS disregarded the recommendations of its own evaluator and failed to add the additional supports suggested in the evaluation. Because BCSS has failed to address ██████'s speech/language 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.

28.

BCSS argues that ██████'s excessive absenteeism is responsible for his failure to make academic progress. Although ██████'s absenteeism undoubtedly had a significant detrimental impact on his educational performance, and should be considered in any award of compensatory education, BCSS's failure to conduct needed evaluations and provide appropriate services and supports ensured that he would make minimal academic progress and denied ██████ FAPE.

██████████ Provides LRE Placement to ██████████

29.

Both federal and state regulations mandate that separate schooling “occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 34 C.F.R. § 300.114(a)(2)(ii); Ga. Comp. R. & Regs. 160-4-7-.07(2)(d). See Greer, 950 F.2d at 696 (“our analysis is an individualized, fact-specific inquiry that requires us to examine carefully the nature and severity of the child’s handicapping condition, his needs and abilities, and the schools’ response to the child’s needs.”) (quoting Daniel R.R., 874 F.2d at 1045). This balancing of considerations – potential harm versus quality of necessary services – in order to determine the LRE is a task delegated to the IEP team under IDEA. R.L. v. Miami-Dade County Sch. Bd., 757 F.3d 1173 (11thth Cir. 2014) (“Among the decisions that must be made by the IEP team is the educational placement – that is, the setting where the student will be educated – which must be ‘based on the child’s IEP’”) (citing 34 C.F.R. § 300.116(a)-(b)). In order to satisfy this mandate, BCSS “must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.” 34 C.F.R. § 300.115(a).

30.

Along the continuum of alternative placements, from least restrictive to most restrictive, a separate school, like ██████████ is one of the more restrictive placements. 34 C.F.R. 300.115.¹⁶ The Respondents argue that ██████████ is not the LRE, and ask that BCSS be ordered to place

¹⁶ The continuum of alternative placements under IDEA regulations is “instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions.” 34 C.F.R. 300.115(b)(1).

█████ in a self-contained special education classroom at ██████ Middle School with sufficient supplemental supports and aids to allow him the opportunity to function in an integrated setting.

31.

Although the Respondents propose that ██████ can function at ██████ with adequate interventions and accommodations, they offer scant evidence to support this claim. ██████ is disruptive and defiant on a daily basis, often necessitating that ██████ staff remove him from the classroom. He has been physically aggressive towards his teachers and his peers. All of ██████'s teachers testified that even with substantial support he would not be able to function in a general educational setting; they urged that he remain at ██████. If anything, the evidence suggests a more restrictive placement might be appropriate. Given the testimony at the hearing, ██████ does appear, at least for the time being, to be the LRE.

32.

Under 34 C.F.R. § 300.117, BCSS must afford ██████ the ability to participate in extracurricular services and activities with nondisabled children to the maximum extent appropriate.¹⁷ Extracurricular services may include athletics. 34 C.F.R. § 300.107. Ms. Cr█████'s evaluation recommended that ██████ be allowed to participate in a school sport's program. Several witnesses testified that ██████ wants to play sports, but that ██████ does not offer a sports program. BCSS should ensure that, to the extent the IEP team deems it appropriate, ██████ has the supplementary aids and services necessary to participate in extracurricular services and activities. 34 C.F.R. § 300.117.

¹⁷ Pursuant to 34 C.F.R. § 300.320(a)(4)(ii), an IEP also includes information concerning participation in nonacademic activities.

██████████ is Not Entitled to Independent Educational Evaluations

33.

Under IDEA, if the parent of a child with a disability disagrees with an evaluation obtained by the school district, she has the right to obtain an independent educational evaluation (“IEE”) of her child at public expense. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502. If the school district does not agree to the additional IEE, it may file a due process complaint to request a hearing to show that the district’s evaluation is appropriate. 34 C.F.R. § 300.502(b)(2)(i). At such a due process hearing, the school district has the burden of proof to show that its assessment is adequate. See Schaffer, 546 U.S. at 62.

34.

The Respondents assert that they are entitled to several IEEs, including a speech/language evaluation of ██████████ and an FBA by a board certified behavior analyst at BCSS’s expense. The Respondents’ claims are **DENIED**. Regarding the speech/language evaluation, the Respondents seek an IEE for an evaluation not yet performed by BCSS. They are not entitled to an IEE, because the right to a publicly-funded independent educational evaluation does not arise until there is an evaluation with which the parents disagree. G.J. v. Muscogee Cty. Sch. Dist., 668 F.3d 1258, 1263-64 (11th Cir. 2012).

35.

The Respondents also claim that they are entitled to an FBA performed by a board certified behavior analyst. It is unclear whether the Respondents argue that BCSS has yet to perform an FBA, or whether they are disputing an evaluation that already has been completed. In either instance, their claim must fail. Under G.J., the Respondents are not entitled to an IEE until BCSS performs the FBA. G.J., 668 F.3d at 1263-64. Even if the Respondents can identify

an evaluation performed by BCSS, there is inconclusive evidence that prior to filing the counterclaim they had officially sought an IEE from BCSS.¹⁸ Thus, although further evaluations appear necessary to ensure FAPE is met for [REDACTED] as discussed *infra*, this Court cannot conclude that FAPE was denied by the refusal to allow IEEs.

Equitable Relief

36.

BCSS has committed procedural violations that are serious enough in nature to give rise to a claim for relief under IDEA. 34 C.F.R. § 300.513(a)(2)(i) & (ii). A court has “broad discretion” to “fashion discretionary equitable relief.” Florence Cnty Sch. Dist. Four v. Carter ex rel. Carter, 510 U.S. 7, 15-16 (1993) (quotations and citation omitted); Draper, 518 F.3d at 1285 (“equitable considerations are relevant in fashioning relief” under the IDEA) (quoting Sch. Comm. of the Town of Burlington, Mass. v. Dep’t of Educ. of Mass., 471 U.S. 359, 374 (1985)). See also Draper, 480 F. Supp.2d 1331, 1352-1353 (“Appropriate relief is designed to ensure that the student is appropriately educated within the meaning of the IDEA and to provide the educational benefits the school district should have supplied in the first place”), aff’d, Draper, 518 F.3d 1275.

37.

Having considered the evidence in this case, the Court concludes that BCSS should pay for the three assessments that they failed to provide. See Aguirre v. L.A. Unified Sch. Dist., 461 F.3d 1114, 1116 (9th Cir. 2006) (addressing appeal of attorneys’ fees in case where school

¹⁸ Although it is unclear whether the Respondents seek an independent psychoeducational evaluation, there was no indication that the parties disagreed with the conclusions reached in Ms. Cr [REDACTED]’s March 2017 evaluation, and thus an IEE would be unwarranted. R. L. v. Plainville Bd. of Educ., 363 F. Supp. 2d 222, 235 (D. Conn. 2005).

district was found to have denied FAPE “when it failed to conduct the assistive technology assessment”). Specifically, as a remedy for failing to provide the speech/language and assistive technology assessments, the Court **ORDERS** BCSS to pay for a private, qualified evaluator to conduct each of these evaluations and prepare a written assessment. With respect to the independent FBA, the Court hereby **ORDERS** the School District to pay for a full functional behavior analysis by a qualified evaluator, including any necessary document review, interviews, observations and related testing. Within one week of the completion of the evaluations and preparation of a written assessment, BCSS shall provide a copy of the report to the Respondents and [REDACTED]’s IEP team. The IEP team shall meet and consider the report, including how to coordinate any recommended therapies, supports and devices with the other appropriate interventions or services.

38.

The undersigned notes that BCSS offered to provide these evaluations to [REDACTED] in March of 2018, but [REDACTED] refused to allow [REDACTED] to undergo the evaluations if they took place at [REDACTED]. [REDACTED]’s “all-or-nothing” tactics constitute a patently unreasonable approach to the IEP-development process, rather than the collaborative or interactive approach envisioned by the IDEA. See, e.g., 20 U.S.C. § 1412(a)(10)(C)(iii)(III) (in tuition reimbursement cases under the IDEA, reimbursement may be reduced or denied if parents do not make child available for evaluation). In the same vein, the undersigned encourages the parties to work together to select appropriate evaluators satisfactory to both parties. Should the parties be unable to agree upon a designated evaluator, BCSS shall provide the Respondents a list of five qualified evaluators and the Respondents shall choose one evaluator from the list. If the evaluators determine that they can only perform these assessments in a school setting, [REDACTED] must attend [REDACTED] during the

course of the evaluations.

Compensatory Education

39.

Within the court's discretion is the ability to order compensatory educational services. Draper, 518 F.3d at 1280.¹⁹ An inquiry into compensatory relief must be "qualitative, fact-intensive, and above all tailored to the unique needs of the disabled student." Reid ex rel. Reid v. Dist. of Columbia, 401 F.3d 516, 527 (D.C. Cir. 2005) (holding that child who was "[n]eglected by the school system charged with affording him free appropriate education" was entitled to compensatory instruction in an amount not "predetermined by a cookie-cutter formula, but rather [by] an informed and reasonable exercise of discretion regarding what services he needs to elevate him to the position he would have occupied absent the school district's failure"); see also Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt (Nesbitt II), 583 F. Supp. 2d 169, 172 (D.D.C. 2008) (holding that compensatory relief must be "a well-articulated plan that reflects [the student's] current educational abilities and needs and is supported by the record"). Although "ordinary [educational programs] need only provide 'some benefit,' compensatory awards must do more—they must *compensate*." Reid, 401 F.3d at 525 (italics in original).

40.

█'s refusal to send her son to school for over a year is unconscionable. However, BCSS also has unclean hands. The failure to perform IDEA-mandated assessments in a reasonably timely manner led to the development of an IEP that Dr. R█ deemed "useless." Be

¹⁹ See Miener v. Missouri, 800 F.2d 749 (8th Cir. 1986) (compensatory education allowed even when parent withdraws child from school).

it the result of BCSS's failure to provide [REDACTED] with FAPE, or his extended absences, [REDACTED] has a lot of catching up to do. However, the extent of this deficiency is not ascertainable from the record as it stands. Ms. Cr [REDACTED]'s evaluation was performed in February 2017, almost two years ago, and before [REDACTED], tragically, had missed over a year of school. "[W]ithout an adequate record . . . [a student's] needs cannot be accurately measured or an award properly individualized." Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt (Nesbitt I), 532 F. Supp. 2d 121, 124 (D.C.C. 2008) (citing Branham v. Dist. of Columbia, 427 F.3d 7, 12 (D.D.C. 2005)).

41.

In order to ascertain an appropriate award of compensatory education, a hearing officer has the authority to order that additional assessments be performed. Lopez-Young v. Dist. of Columbia, 211 F. Supp. 3d 42, 57 (D.D.C. 2016) (citation omitted). Based on the circumstances, the undersigned finds that another psychoeducational evaluation is necessary to accurately assess [REDACTED]'s educational needs. The Court **ORDERS** BCSS to pay for a private, qualified evaluator to conduct a thorough psychoeducational evaluation and prepare a written assessment. Again, the undersigned encourages the parties to work together to select an evaluator satisfactory to both parties.

42.

The assessment should be sufficiently fact-specific so as to provide the parties with a reasonable estimation of the educational benefits that likely would have accrued had [REDACTED] been receiving uniquely tailored special education services for the 2017-2018 academic year, and the corresponding compensatory educational services that would be appropriate. This period represents the time that BCSS failed to offer [REDACTED] FAPE. The evaluation also should assess

potential supports, interventions and accommodations, including the continuum of alternative placements under IDEA regulations. It should also evaluate whether related services, as defined by 34 C.F.R. § 300.34, should be provided to [REDACTED]. Related services may include “developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology . . . psychological services, physical and occupational therapy, recreation, including therapeutic recreation . . . counseling services, and medical services for diagnostic or evaluation purposes . . .” 34 C.F.R. § 300.34. Services also may include parent counseling and training. *Id.* The psychoeducational evaluation should be scheduled without delay, so that a report will be made available to the parties as soon as possible. **The undersigned cautions the Respondents that a parent’s unreasonable conduct may cause an award of compensatory education to be reduced, or even denied.**²⁰ See *R.L.*, 757 F.3d at 1192 (court may deny compensatory education, based on the equitable factor of the parents’ failure to consider less restrictive unilateral placement for their child); see also *Hogan v. Fairfax County Sch. Bd.*, 645 F. Supp. 2d 554, 566, 572-73 (E.D. Va. 2009) (parents’ conduct is one factor in deciding award of compensatory education).²¹ Should the parties be unable to agree upon a designated evaluator,

²⁰ Whereas IDEA specifically allows the judge to reduce or deny reimbursement awards due to a parent’s “unreasonable” actions, there is no corresponding statute for compensatory education relief. See 20 U.S.C. § 1412(a)(10)(C)(iii)(II); 34 C.F.R. § 300.148(d)(3). But see *Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1317-19 (11th Cir. 2003) (addressing a parent’s unreasonable conduct in a case involving reimbursement); *G.J. v. Muscogee County Sch. Dist.*, 704 F. Supp. 2d 1299, 1309 n.9 (M.D. Ga. 2010); (citing to *Loren F.* for the proposition that if a parent’s actions are unreasonable or they frustrate the school’s efforts, courts generally conclude that the school is not liable under IDEA) *aff’d*, 668 F.3d 1258 (11th Cir. 2012).

²¹ BCSS’s reliance on *Garcia v. Bd. of Educ. of Albuquerque Pub. Schs.*, 520 F.3d 1116 (10th Cir. 2008), in its post-hearing brief is misplaced. In *Garcia*, the Tenth Circuit concluded only that the district court did not abuse its discretion by taking into account the student’s truancy when deciding the issue of compensatory education. *Garcia*, 520 F.3d at 1126-31. When it came to the question of whether the student’s behavior stripped the school district, which unlike BCSS had a steady history of providing the student with a FAPE, of its liability under the IDEA, the court explicitly declined to issue a definite answer. *Id.* at 1120, 1131.

BCSS shall provide the Respondents a list of five qualified evaluators and the Respondents shall choose one evaluator from the list.

Further Proceedings

43.

Accordingly, the hearing record will be reopened for the limited purpose of the presentation of additional evidence and argument regarding an appropriate compensatory education award. The additional evidence presented shall include the results of the psychoeducational evaluation ordered as part of this Decision. This hearing will take place on **December 10, 2018 at 10:00 a.m.** at the Office of State Administrative Hearings, 225 Peachtree Street NE, Suite 400, Atlanta, Georgia 30303.²²

SO ORDERED, this 1st day of November, 20 18.



Ronit Walker
Administrative Law Judge

²² [redacted]'s reentry into an educational program is of paramount importance. If the parties are prepared to proceed with the hearing earlier than December 10, 2018, they should notify the undersigned so that the hearing can be rescheduled to the earliest date possible.