



and his younger brother.<sup>2</sup> Since third grade, [REDACTED]. has received special education and related services from BCSD as a child with a disability. He is currently enrolled as an eleventh-grade student at [REDACTED] High School in Butts County, Georgia. (Ex. J-3.)

2.

[REDACTED]. has a long history of disciplinary infractions at school, starting in 2011 when he was in kindergarten, and he has a more recent history of psychiatric hospitalizations stemming from out-of-school behaviors, including physical and verbal aggression and suicidal ideations. Around the age of five, [REDACTED]. was diagnosed with attention deficit hyperactivity disorder (“ADHD”), and he has received special education services under the “Other Health Impairments” or “OHI” category since third grade. [REDACTED]. has also been diagnosed with other disorders over the years, including Oppositional Defiant Disorder (“ODD”), Bi-Polar Disorder, Intermittent Explosive Disorder (“IED”), and Disruptive Mood Dysregulation Disorder (“DMDD”).<sup>3</sup> Although his most severe behavioral outbursts occur at home, he has had numerous disciplinary incidents at school due to his behavior. While a student at [REDACTED] Elementary School, [REDACTED].’s disciplinary records reflect multiple problem behaviors, including non-compliance, cursing, verbal threats, theft, destruction of property, and physical aggression toward both students and teachers. BCSD disciplined [REDACTED]. for these behaviors while he was at [REDACTED] through time outs, in-school suspensions, and out-of-school suspensions. (Exs. J-3, J-8; Tr. 312, 365.)

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<sup>2</sup> To protect the identity of the student, this Final Decision refers to the student [REDACTED]., and to his parents, [REDACTED]. and [REDACTED]., by their initials only.

<sup>3</sup> [REDACTED]. was also found to have a “mild presentation of ASD” (“Autism Spectrum Disorder”) at age 12, but more recent evaluations have found that [REDACTED].’s behavior issues, especially in the school setting, are consistent with ADHD, and not ASD. (Exs. J-2, J-3, at 3, 20; Tr. 266-269, 316-17, 530.)

3.

In August 2016, [REDACTED]. began sixth grade at [REDACTED] Middle School, where his problem behaviors continued, including destruction of property, fighting, and calling 911 and making a false report of a shooting at another school. In seventh grade, in December 2017, [REDACTED]. was expelled from [REDACTED] Middle for threatening and intimidating a teacher.<sup>4</sup> This began a series of “back-and-forth placements” between BCSD’s alternative school, New Beginnings Academy (“NBA”), and [REDACTED].’s home schools, as follows:

| DATES                                 | GRADE            | SCHOOL            |
|---------------------------------------|------------------|-------------------|
| August 9, 2017 –<br>December 8, 2017  | 7 <sup>th</sup>  | [REDACTED] Middle |
| December 11, 2017 –<br>May 2018       | 7 <sup>th</sup>  | NBA               |
| August 6, 2018 –<br>January 8, 2019   | 8 <sup>th</sup>  | [REDACTED] Middle |
| January 11, 2019 –<br>May 2019        | 8 <sup>th</sup>  | NBA               |
| August 5, 2019 –<br>December 20, 2019 | 9 <sup>th</sup>  | NBA               |
| January 7, 2020 –<br>March 4, 2020    | 9 <sup>th</sup>  | [REDACTED] High   |
| March 10, 2020 –<br>May 2020          | 9 <sup>th</sup>  | NBA               |
| August 2020 –<br>May 2021             | 10 <sup>th</sup> | NBA               |
| August 3, 2021 –<br>Present           | 11 <sup>th</sup> | [REDACTED] High   |

Each time [REDACTED]. was expelled from school for behavior issues, his Individualized Education Plan

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<sup>4</sup> Petitioner’s mother described sixteen-year-old [REDACTED]. as a “big boy” who can “get very physically aggressive.” He is currently 6’2” or 6’3” and weighs 260 pounds. During the November 9, 2017 incident, BCSD records indicate that [REDACTED]. was being defiant and insulting, and when his teacher tried to redirect him, he “responded by approaching me in a threatening manner, tried to knock the phone out of my hand, and said to me, ‘see what happens if you call [my] mother, I’ll knock your fucking teeth out.’” [REDACTED].’s physically aggressive actions and verbal threats, even as a seventh grader, reasonably were considered intimidating by his teacher. Prior to his expulsion in December 2017, [REDACTED]. engaged in other aggressive and non-compliant behaviors at [REDACTED] Middle, including one incident on August 30, 2017, where an officer from the high school was called to assist. (Ex. P-23; Tr. 318.)

(“IEP”) team found that the behavior was not a manifestation of his disability, and he was placed at NBA.<sup>5</sup> (Exhibits J-3, P-23, R-26; Tr. 283-84.)

4.

On July 27, 2021, Petitioners filed a due process complaint against BCSD, which included a chronological summary of significant events in ██████’s educational history and a list of the following four claims:

- 1) The District failed to develop an IEP that sufficiently addresses ██████’s disabilities,
- 2) The District failed to properly implement proper procedures for ██████’s MDRs [Manifestation Determination Reviews], resulting in his change of placement,
- 3) The District’s decisions to punish ██████. with changes to his placement are contrary to law, and
- 4) The District has consistently failed to provide ██████. with a free appropriate public education in the least restrictive environment.

5.

On September 24, 2021, the Court issued an Order Granting Respondent’s Motion to Dismiss Claims Arising Prior to July 27, 2019, which is incorporated herein by reference. In the Order, the Court found that although information about ██████’s educational background may be relevant in assessing the claims that fall within IDEA’s two-year limitation period, Petitioners were not authorized under IDEA to seek relief for violations that occurred more than two years before the filing of the complaint. See generally K.C. v. Fulton County Sch. Dist., No. 1:03-CV-3501-TWT, 2006 U.S. Dist. LEXIS 47652 (N.D. Ga., June 30, 2006). Accordingly, the remaining Findings of Fact will focus primarily on the allegations in the complaint that occurred

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<sup>5</sup> As discussed further *infra*, if the IEP team had determined that the behaviors were a manifestation of ██████’s disability, the school district would be required to return him to his original placement unless his parents and the district agreed to a change in placement or his behaviors had involved weapons, drugs, or serious bodily injury. See 34 C.F.R. § 300.530(f)(2), (g).

between July 27, 2019, and July 27, 2021.<sup>6</sup>

**B. Ninth Grade (2019 -2020)**

6.

In January 2019, in the middle of eighth grade, ██████. was expelled from ██████ Middle and given the option to attend NBA.<sup>7</sup> As reflected on the chart above, this was ██████.'s second stint at NBA, and he spent seven of nine months there during the 2019-2020 school year. At NBA, students complete their schoolwork using an online learning program called Edgenuity, receiving instruction through online videos. Although Edgenuity is considered the student's "teacher of record," there is also a special education resource teacher present in the NBA classroom to assist with schoolwork and provide special education services to students with IEPs. (Both disabled and non-disabled students attend NBA.) NBA is considered a punitive placement and is provided as an alternative to either home school or private school to some expelled students. While at NBA, students are not permitted to return to their home schools during their expulsion, and they may not participate in extra-curricular activities. At the time of the due process complaint, ██████. had been enrolled at NBA for three out of the last four years. (Exs. R-26, R-27,<sup>8</sup> P-23; Tr. 168, 194-95, 285, 451, 498-99, 509, 547.)

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<sup>6</sup> After Petitioners rested their case, the Court granted Respondent's motion for involuntary dismissal as to some of the allegations in the due process complaint, namely allegations relating to (i) certain disciplinary actions taken by BCSD during the 2019-2020 school year while ██████. was still at ██████ High School (paragraphs 60, 61, and 62 of the due process complaint) and (ii) missed instructional time during the 2020-2021 school year due to ██████.'s hospitalizations, COVID quarantine, and other reasons (paragraphs 66 and 69). As set forth in more detail on the record, Petitioners failed to present prima facie evidence to prove these allegations during their case in chief.

<sup>7</sup> According to the Behavior Detail Report, ██████. used a paperclip to "jimmy" the lock on a computer cart after being repeatedly told not to open the cart. He received an out-of-school suspension pending a disciplinary tribunal, and he was given the option to spend the remainder of the school year at NBA. (Ex. P-23.) This incident occurred before the two-year limitations period, and the manifestation determination is not an appealable issue in this proceeding.

<sup>8</sup> At the Court's request, Respondent submitted a supplemental exhibit on November 1, 2021, which has been included in the record as Exhibit R-27. Exhibit R-27 is a March 4, 2020 Letter from Dr. Darrell Evans to Petitioners regarding the Student Disciplinary Tribunal, which expelled ██████. from BCSD through the end of the

7.

█.'s special education teacher at NBA was William Allen. Mr. Allen first met █. in elementary school and has worked with him on and off for years. By all accounts, Mr. Allen has a good relationship with █. and his family, and █.'s behaviors have generally improved in NBA's smaller, highly structured environment. In addition to providing traditional educational supports and IEP services, such as social skills training, Mr. Allen also helped provide opportunities to █. to participate in recreational activities, such as batting practice, as an incentive for good behavior. Nevertheless, the range of services and activities offered at NBA is limited due to the nature and size of the program. For example, it is difficult for █. to practice social skills in a group of students because the number of students at NBA is so small. In addition, █.'s multiple expulsions and back-and-forth placements at NBA have made IEP planning a challenge for his IEP team and other professionals, who may begin an evaluation at █.'s home school and develop recommendations for services in that setting, only to have such recommendations become obsolete due to a new expulsion. (Tr. 55, 74, 78, 171, 175, 237, 295, 499-500, 509.)

*August 23, 2019 IEP Meeting*

8.

At the beginning of ninth grade, █. was still expelled and attending NBA. On August 23, 2019, █.'s IEP team met to consider an amendment to his current IEP,<sup>9</sup> discuss his parents' concerns, and develop a plan for him to transition to █ High School at the end of the semester. █.'s special education case manager, Laurel Foust, was a special education

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2020-2021 school year, with the opportunity to seek an early return to school at the end of 2020.

<sup>9</sup> The May 2019 IEP was marked as Exhibit P-2, but was not tendered into evidence by either party, and the Court has not considered it in reaching this Final Decision.

teacher at ██████ High School, and she visited ██████. at NBA every other week during the fall semester and consulted with Mr. Allen every week. At the August 2019 meeting, the IEP team reviewed ██████.'s present level of academic achievement, including his performance on the Georgia Milestone tests, as well as the results of recent assessments. According to the 2019 Milestone scores, ██████. was in the "beginning learner" or "developing learner" category in all academic subjects. In the most recent intelligence testing, ██████. was found to be slightly below average or borderline in intellectual abilities, although those scores were viewed with caution because ██████.'s motivation and attitude toward testing may have negatively influenced his performance. The team noted that ██████. was receiving treatment from an outside provider related to several diagnoses, including ASD, ADHD, ODD, IED, and an unspecified mood disorder. (Ex. R.-3; Tr. 68, 70.)

9.

The team also reviewed ██████.'s current academic and behavioral goals and services. According to the August 23, 2019 IEP, ██████. had an 82% grade in math and an 81.9% in English/Language Arts at the beginning of the semester. The team also noted that although his scores had fluctuated in math and reading comprehension in the past year, he had progressed well toward his academic goals in both math and reading. With respect to his social, emotional, and behavioral goals, the IEP team reviewed his past assessments for behavior and adaptive functioning, which, despite some difference between his teachers' and his mother's ratings, consistently showed a clinically significant risk for behavior issues and deficits in social skills and study skills. In addition, the IEP included a report on ██████.'s progress on his behavior goals from January through May 2019 at NBA, and for the most part, his behavior at NBA improved

and he made progress toward his goals.<sup>10</sup> The IEP also contained a description of testing accommodations, numerous instructional supports, and other accommodations, (Ex. R-3; Tr. 70.)

10.

The August 23, 2019 IEP included a list of concerns prepared by ██████'s parents, who prefaced their concerns by acknowledging that the IEP and ██████'s behavior intervention plan or "BIP" "seem[s] to be appropriate for ██████. in the current setting" of NBA, which they described as a "small setting with very little movement from class to class as this over whelms [sic] him and he can't cope with the overstimulation; one teacher/para-pro, highly supervised environment to keep this child on track, very little 'down time.'" However, ██████'s parents wanted the IEP team to develop a plan to successfully transition ██████. to a regular education setting at ██████ High School, including providing services to assist him with organizational skills and social skills.<sup>11</sup> ██████'s parents were also concerned about ██████'s academic performance, which still lagged behind his peers, and they requested tutoring. (Ex. R-3; Tr. 70, 294.)

11.

The August 23, 2019 IEP included a BIP, which identified off-task behavior and aggression as the two target behaviors requiring interventions and listed a number of supports

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<sup>10</sup> ██████'s behavior goals included attending to a non-preferred activity or assignment without protest or avoidance, reduction in non-compliance, appropriate peer interactions, and following instructions from adults independently and without argument. (Ex. R-3.)

<sup>11</sup> ██████'s parents stated in their list of concerns that ██████. "is autistic," and they requested "ABA" therapy for ██████. Although the Court has some familiarity with the concept of ABA or "Applied Behavioral Analysis," there was no probative evidence presented in the record of this case regarding ABA therapy, including what such therapy entails, how it would be delivered to ██████. and how often, and why it would be appropriate or necessary for ██████., particularly in light of the absence of probative evidence to support an autism diagnosis. If Petitioners wished to challenge BCSD's denial of ABA therapy, the lack of evidence on the subject is puzzling given the participation of Dr. Rachel Tullis, who was called by Petitioners as an expert witness on behavior analysis, challenging behaviors, and school discipline, and who performed a Functional Behavioral Assessment ("FBA") on ██████. in 2017. The evidence in the record proved only that ██████'s parents requested ABA therapy at the August 23, 2019 meeting, and that BCSD denied the request "due to the IEE FBA that was completed by Emory Autism" in 2017. BCSD reasoned that it was following the recommendations from the Emory FBA, which did not specify ABA therapy. (Exs. R-3, P-28; Tr. 102, 206.)

and strategies intended to prevent those behaviors. For off-task behaviors, some of the supports included guided notes, specific task lists, preferred activities as incentives, social opportunities with peers, frequent feedback, a behavior contract, a token economy system, and weekly visits with the school counselor, among others. The BIP specifically stated that ██████'s off-task behaviors should be communicated to his parents, "but do not use possibility of calling them as a way to motivate" him. For aggressive behaviors, which the BIP described as occurring up to several times a week, the BIP provided that ██████'s teachers should allow him the option to go to an assigned location to take a break and that he should receive rewards for remaining composed and "bouncing back' quickly and without issue." The BIP also stated that ██████ should meet with the counselor to discuss challenging behavior events and strategies to deal with such events in the future. However, "[i]f ██████'s behaviors violate school rules, he will be subject to school discipline." Again, the BIP specified that although aggressive behavior should be communicated to his parents, teachers should not pick up a phone and say "I'm going to call xx."<sup>12</sup> (Ex. R-3.)

12.

Finally, the ██████ High School counselor shared information with ██████'s parents about a counseling service that is offered to students during the school day, but the parents rejected the services because of a concern regarding the service provider. The IEP stated that the counselor was scheduled to meet with ██████. once a week, and Ms. Foust, the case manager, would visit ██████. every other week at NBA. In addition, the IEP team discussed social skills training and executive functioning curriculum to be implemented at NBA. The team agreed to reconvene in nine weeks to consider whether these services were working. ██████. requested that BCSD conduct a psychological evaluation and an occupational therapy ("OT") evaluation to help plan

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<sup>12</sup> The IEP also noted that ██████. "reacts negatively to being told that his parents or authorities are being called due to behavior issues when it is put as a threat or perceived as a threat." (Ex. R-3.)

for services when he transitions to ██████ High School and requested that ██████ receive tutoring to make up for a three-day out-of-school suspension at the end of summer school. (Exs. P-28, R-3; Tr. 70-71, 294.)

13.

Shortly after the meeting, on August 29, 2019, Lenora Clarkson, the Director of Student Services for BCSD, sent a Prior Written Notice (“PWN”) letter to ██████’s parents. In the PWN, Ms. Clarkson notified Petitioners that BCSD was offering eight hours of tutoring, up from four, as compensation for missed summer school instruction, but was declining to provide ABA therapy. In addition, Ms. Clarkson notified Petitioners that the decision to promote ██████ to ninth grade was not a function of the IEP team. (Ex. P-28; Tr. 71.)

*October 18, 2019 IEP Meeting*

14.

On October 18, 2019, the IEP team met to review ██████’s progress, discuss his parents’ concerns, and consider the need for new evaluations. ██████’s parents noted their concerns that Edgenuity was not an adequate program and that ██████’s academic performance had dropped from its peak in third grade. ██████ also was dissatisfied with the offer of eight hours of compensatory tutoring, as ██████ had missed twelve hours of instruction. The parents remained concerned about ██████’s behaviors, and they wanted ██████ to spend time with Mr. Allen with a small group of same-age students before going to ██████. (Ex. R.-4; Tr. 73-76.)

15.

The team amended the IEP to reflect that ██████ was receiving small group instruction for math, social skills, and reading several times per week with Mr. Allen. The team also discussed the importance of ██████ using a notebook to keep track of his work, which he often leaves at

home, and they agreed to offer him the opportunity to earn batting practice with Mr. Allen if he consistently brings his notebook to school. The team also discussed plans for ██████'s transition to ██████ High School, including possible career pathways, classes, and extra-curricular activities. The team agreed that ██████. would have an occupational therapy ("OT") evaluation and a new psychological evaluation. Ms. Clarkson agreed to the parents' request for twelve hours of compensatory education, which would focus on executive functioning, and BCSD agreed to provide special transportation for these services. (Ex. R-4; Tr. 49-50, 73-76.)

16.

With respect to ██████'s behaviors, the team discussed the difficulty of evaluating ██████'s behaviors while he was at NBA because they were not occurring regularly. The counselor agreed to review behavior data from ██████ Middle School in an attempt to look for patterns, and the IEP notes indicate that ██████'s parents agreed to this approach. Finally, the team agreed that ██████. would participate in small group sessions with other NBA students to help prepare him for attending ██████ High School. (Ex. R-4; Tr. 73-76.)

*December 16, 2019 IEP Annual Review*

17.

On December 16, 2019, ██████'s IEP team met to conduct an annual review of ██████'s IEP. ██████. made progress while at NBA during his first semester of ninth grade, successfully completing his academic classes,<sup>13</sup> mastering his math IEP goals, and achieving 73% to 80% accuracy on his reading comprehension goals. As to his behavior goals, he had successfully achieved mastery on some goals, including goals relating to peer interactions and to maintaining his notebook, and had made progress on others, including following instructions and reducing

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<sup>13</sup> ██████. actually earned five credits while at NBA during his first high school semester, one more than the typical four credits earned in a semester. (Tr. 309.)

non-compliance. The IEP summary stated that “[t]his semester [REDACTED]. has made excellent progress with his behaviors related to successful learning as well as his interactions with both peers and adults.” According to Mr. Allen, [REDACTED]. had no major behavioral issues, and [REDACTED] agreed that [REDACTED]. had been successful in the smaller environment at NBA. The team reviewed the services provided to [REDACTED]. while at NBA to help prepare him for his transition to [REDACTED] High School, including weekly individual counseling with the high school counselor and working with Mr. Allen on social skills and executive functioning.<sup>14</sup> In addition, [REDACTED].’s parents reported that [REDACTED] was receiving wrap-around services in the home, including in-home counseling once a week. (Ex. R-5; Tr. 77-78, 309, 547.)

18.

Procedurally, [REDACTED].’s parents were dissatisfied that their concerns from the past IEP were not carried over into the new IEP. Ms. Foust, [REDACTED].’s case manager, agreed to add them back into the section regarding parental concerns, and asked the parents to notify the team of any current or new concerns, which the parents agreed to provide, in writing, after the December 2019 meeting. However, on January 7, 2020, [REDACTED]. declined to provide an updated list of concerns, preferring to “hold off until the IEP is completed with the changes for our last meeting in December.” Thus, the parents’ list of concerns from May 2019 were copied into [REDACTED].’s new IEP. (Ex. R-5.)

19.

The December 2019 IEP stated that [REDACTED].’s disability affected his access to the general education curriculum due to his inattentiveness, impulsivity, and difficulty with adult and peer interaction. The IEP included a BIP, which appears to be identical to the previous BIP,

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<sup>14</sup> The IEP identified the research-based interventions used by Mr. Allen as “Skill Streaming the Adolescent” by Research Press and the “Executive Functioning Program” by School Specialty. (Ex. R-5.)

addressing off-task behavior and aggression using the same strategies and responses as before. The IEP team modified some of [REDACTED]'s goals and objectives for math and written language, eliminated the goals for reading,<sup>15</sup> and carried over some of his behavioral goals but not others.<sup>16</sup> There were also minor alterations to his instructional accommodations, such as the addition of graphic organizers, the provision of advance notice regarding changes to his routine, and the use of small fidget items. (Exs. R-4, R-5.)

20.

In consideration of his transition to [REDACTED] High School, the IEP team determined that [REDACTED] should receive small group instruction in a resource classroom for math and language arts, but participate in general education for electives and extra-curricular activities. The team decided against having a one-on-one adult escort to assist with [REDACTED]'s transition between classes in order to avoid embarrassing [REDACTED]. Instead, they decided to have a designated adult in visual proximity to [REDACTED] during all class changes. In addition, [REDACTED] would check in and out with Ms. Foust every day and meet with the counselor if he needed to "cool off." [REDACTED]'s parents reported that [REDACTED] was anxious about going to [REDACTED], and that he did not want to get in trouble. The parents approved of the proposed behavior checklists and reinforcement charts, and the team agreed to include in his BIP the use of a point sheet to be completed on a Google Form each day by his teachers, which also identified rewards and incentives for good behavior. (Ex. R-5; Tr. 80-83.)

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<sup>15</sup> Mr. Allen reported to the team that [REDACTED] had mastered 80% of his reading comprehension goals and had been successful in writing, as well. (Ex. R-5.)

<sup>16</sup> Specifically, the goal of limiting non-compliant behavior to no more than 20 minutes per week and the goal to interact with peers appropriately 80% of the time were maintained in the December 2019 IEP. Behavior goals relating to independently following adult instruction and maintaining his notebook were eliminated. (Exs. R-3, R-4, R-5.)

21.

By the time of the December 16, 2019 meeting, Harriet Dumas, an occupational therapist with BCSD, had completed an OT evaluation, but the team had not had a chance to review her report. In addition, Dr. Ashara McKee Williams, a school psychologist, had not completed the psycho-educational re-evaluation, so the team agreed to meet again at the end of January to review the evaluations and ██████'s first month at ██████. (Ex. R-5.)

*January 31, 2020 Eligibility Meeting and IEP Review*

22.

The IEP team met again on January 31, 2020 to receive reports of ██████'s first month at ██████ High School, to review the new evaluations, and to determine his continued eligibility for special education. With respect to his math and writing goals, ██████ appeared to have performed well his first week, but his academic performance fell as the weeks passed because he rushed and refused to make corrections. At the time of the meeting, he was passing all his classes except language arts. On his social, emotional, and behavioral goals, he earned relatively high scores for appropriate peer interactions, but had decreasing scores in following directions, completing work, and limiting non-compliant behavior. According to the meeting notes, he had received two disciplinary referrals during the 2019-2020 school year,<sup>17</sup> and ██████ High had been calling ██████ frequently regarding his behaviors. (Ex. R-6; Tr. 83, 528.)

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<sup>17</sup> According to the Behavior Detail Report, there was one incident on the bus while ██████ was still at NBA in December 2019, and two incidents on January 30, 2020 at ██████: He told one teacher to “fuck off,” and was similarly defiant and disrespectful toward another teacher later in the day, taking a computer without permission and refusing to return it, using profanities and verbal threats, and then storming out of the classroom. He received a one-day in-school suspension for these incidents. (Ex. P-23.)

Dr. McKee Williams reviewed her psycho-education evaluation, which she completed on January 24, 2020. As part of her evaluation, she interviewed [REDACTED] and [REDACTED], administered intellectual functioning and achievement tests, and collected and scored rating scales from [REDACTED] and [REDACTED]'s teachers regarding his social, emotional, adaptive, and executive functioning. First, [REDACTED] scored in the average to slightly below average range for verbal, nonverbal, and spatial reasoning, and his academic achievement was commensurate with these intellectual abilities. Dr. McKee Williams concluded that his relatively poor academic performance in school was a result of his ADHD. With respect to [REDACTED]'s social and emotional functioning, Dr. McKee Williams used the Behavior Assessment System for Children ("BASC-3"), which allows the student, parents, and teachers to rate the student's behaviors in a variety of situations. Based on their responses, Dr. McKee Williams concluded that [REDACTED] was at risk for hyperactivity, aggression, and conduct problems, consistent with his ADHD diagnosis.<sup>18</sup> Dr. McKee Williams used other instruments to measure [REDACTED]'s level of depression and anxiety, which appeared elevated at home, but not in school. (Exs. J-2, R-6; Tr. 249, 254-257.)

In addition, Dr. McKee Williams administered two tests relating to autism, one that used rating scales completed by [REDACTED]'s mother and his teachers to measure behaviors associated with autism ("ASRS"), and one that involved Dr. McKee Williams' diagnostic observations of [REDACTED] ("ADOS-2"). Although [REDACTED] rated [REDACTED]'s behaviors to be in the elevated range for ASD, his

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<sup>18</sup> Other assessment instruments also confirmed [REDACTED]'s elevated scores for hyperactivity, impulsivity, and behavior problems in school and at home, as well as clinically significant deficits in "executive functioning," which impairs his ability to modulate emotional responses appropriately, begin tasks, independently complete work, and transition from one situation to another. Dr. McKee Williams concluded that these scores were also consistent with ADHD and the other evaluations. (Ex. J-2; Tr. 261-262.)

teachers reported few behaviors similar to students with autism. Moreover, Dr. McKee Williams did not detect any ASD-type behaviors during the ADOS-2, such as stereotyped/idiosyncratic use of words, difficulties with social interaction, unusual eye contact, or restricted interests, among others. Although she noted a previous evaluation that indicated mild behaviors related to autism, she took into consideration that [REDACTED]. had not been cooperative with the previous evaluator, but had been cooperative and engaged during her administration of the ADOS-2. She therefore concluded that he did not meet the criteria for a student with autism. (Exs. J-2, R-6; Tr. 83, 258-259, 265.)

25.

Dr. Dumas also reviewed the results of the OT evaluation with the IEP team. Although [REDACTED]. had no deficits in handwriting, which was a concern for his parents, Dr. Dumas found that [REDACTED]. had “weaknesses with sensory processing skills,<sup>19</sup> which are needed to support self-regulation to remain calmer and more attentive in class.” The IEP team discussed that [REDACTED]. was “hyper-sensitive” to sensory stimuli, which is common for students with ADHD. Dr. Dumas recommended 45 minutes to an hour per month of collaborative OT services, to allow her to work with his teachers on developing and implementing a sensory processing plan. (Exs. J-1, R-6; Tr. 83.)

26.

Regarding eligibility, all the IEP team members agreed that [REDACTED]. continued to meet the eligibility criteria for OHI. Although his parents maintained that [REDACTED]. exhibits signs of autism, because those signs were not observed by anyone at the school, the team concluded that he was

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<sup>19</sup> According to the December 2021 IEP, “[s]ensory processing is a student’s ability to take in information from the environment using the five primary senses (touch, taste, smell, hearing and visual) along with 2 other systems (vestibular and proprioception).” (Ex. R-7.)

not eligible for special education under the autism classification. In addition, the team considered, but rejected, the IDEA eligibility classification for Emotional Behavior Disorder (“EBD”).<sup>20</sup> The team agreed to reconvene in thirty days to review the draft of the new IEP based on recent data, and the District agreed to conduct a new FBA during that time to determine if ■■■■■’s BIP needed to be modified. (Ex. R-6; Tr. 528-530.)

*Emory Autism Center Observation – February 20, 2020*

27.

On February 10, 2020, Dr. Sally Delgado, an educational consultant with the Emory Autism Center, did an observation of ■■■■■. at ■■■■■ High School. The purpose of the observation was to provide recommendations to the IEP team for ■■■■■’s educational programming; it was not a formal FBA. Prior to the observation, Dr. Delgado interviewed BCSD staff, including Ms. Foust and ■■■■■’s art teacher, Ms. Jones. On February 10, 2020, Dr. Delgado observed ■■■■■. throughout the school day, in health, math, language arts, and art classes. She reported that in health he fidgeted and tried to pass notes, rather than do his work, but that he was not disruptive. During math, he was frequently disruptive, talking aloud, but he did complete his work with minimal prompting. He also accessed a music video online while doing a group assignment on the computer, made inappropriate noises, and briefly took another student’s belongings at the end of class. In language arts class, his teacher interacted with him immediately, and ■■■■■. responded positively. In addition, when ■■■■■. appeared to disengage, the teacher talked with him directly and offered incentives to have him complete his work. He completed the entire assignment independently. In art class, ■■■■■. initially was disengaged and resisted instructions, but he eventually began his work with the help of another teacher. (Ex. R-

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<sup>20</sup> At the hearing, Petitioners’ attorney confirmed that Petitioners were not challenging the eligibility determination. (Tr. 263.)

1; Tr. 56, 150.)

28.

In a report received after the February 24, 2020 incident discussed below, Dr. Delgado concluded that [REDACTED]. does better when he receives supportive, proactive attention from his teachers that is not contingent on his performance or behavior. Such an approach may help prevent many of his behaviors from occurring. She recommended that his teachers start class by chatting with him and referencing a reward prior to giving an assignment to motivate him to work. If he is disengaged in work, teachers should modify the assignment or offer to help him if he gets stuck. She recommended that teachers provide attention to [REDACTED]. as often as possible, offering verbal praise for good behavior, and that they enter his points for the day immediately to provide prompt feedback. She also provided recommendations on strategies to handle inappropriate behaviors and suggested social skills training to assist with his peer relationships.<sup>21</sup> She made other recommendations about transitions and vocational planning. (Ex. R-1; Tr. 296.)

*February 24, 2020 Incident*

29.

On February 24, 2020, before the IEP team could reconvene to finalize [REDACTED].’s new IEP, [REDACTED]. had a major disciplinary event, which ultimately led to his expulsion and return to NBA.<sup>22</sup>

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<sup>21</sup> Dr. Delgado recommended four possible resources for teachers to use for social skills training, including the PEERS Curriculum for School-Based Professionals, and three others. She emphasized that the training should include evidence-based practices, such as modeling, role-playing, reinforcement, social narratives, facilitated practice with feedback, and practice with trained peers. Dr. Tullis testified that the PEERS Curriculum is an easily-accessible curriculum to teach social skills and could be used in the school setting. BCSD did not use the PEERS Curriculum, however, but chose another research-based social skills program called Skillstreaming, which BCSD witnesses testified includes the same elements identified by Dr. Delgado and Dr. Tullis in the PEERS Curriculum. Ms. Clarkson testified that Dr. Delgado did not advise BCSD that the PEERS Curriculum was the only social skills training program that would benefit [REDACTED]. or that Skillstreaming was not an acceptable program. (Ex. R-1; Tr. 40, 161-163, 166, 190, 209, 238, 512.)

<sup>22</sup> Four days prior to this event, [REDACTED]. received a time out from his first block class due to an incident where he obtained another student’s gaming device and would not return it despite the teacher’s repeated instructions. (Ex. P-23.)

Although no one with personal knowledge of the incident testified at the hearing, the parties both tendered an exhibit that contained a detailed description of the incident by Jonathan Wilson, a teacher at ██████ High School. According to Mr. Wilson's report, ██████. made several inappropriate comments in class, which led to a student asking him to stop talking so loudly, to which ██████. replied, "Make me." ██████. got out of his seat without permission and tried to get an iPad out of a locked cart, slamming the door to the cart when he was told to stop. He was yelling and otherwise being disruptive and disrespectful during the class, and again got up without permission and began touching equipment. When the teacher repeatedly tried to redirect him, he asked, "How can you be so stupid? Fuck this, I am walking out to go see the counselor." ██████. was gone for about twenty minutes, then returned to class, talking loudly and asking another student for her chips. When the student said no, ██████. replied, "Fuck you." Mr. Wilson called Mr. Moody, an administrator and former special education teacher, and asked him to come take ██████. out of the classroom. ██████. continued to use profanities and refused to leave when asked. Two other educators, Mr. Scandrett, a principal, and Coach Myricks, along with the school resource officer ("SRO"), entered the classroom and asked ██████. to exit, but he still refused. Mr. Moody then took the other students out of the classroom, and Mr. Scandrett, called ██████. in ██████.'s presence. (Exs. P-23, R-19; Tr. 87, 532-535.)

30.

According to Mr. Wilson's report, when Mr. Scandrett called ██████., "█████. became very aggressive and began yelling profanity and threatening Mr. Scandrett and Sgt. Smith. He attempted to get in Mr. Scandrett's face in a fighting posture. While waiting on his mother to arrive, ██████. ran out of my back door and entered the school through a different door. ██████. left his backpack in my room and when he came back to get it he entered my room and said 'I am

back to fight you.’ He then picked up his things and left.” (Exs. P-23; R-19.)

31.

Several witnesses who later attended a meeting where the incident was discussed, including Ms. Foust, Ms. Clarkson, and ██████, testified regarding their understanding of the incident, based on the statements of Mr. Wilson and Mr. Moody during the meeting. Ms. Foust and Ms. Clarkson both testified that they understood that ██████ had calmed down after spending some time with the counselor, but that he chose to return to class and become disruptive again. According to Ms. Foust, this was not an impulsive act, but a deliberate choice. ██████ testified that when Mr. Scandrett called her on February 24, 2020, he did not hang up the phone, and she overheard some of the ongoing interactions with ██████. Specifically, she testified that she heard ██████ screaming in the background. When she arrived at the school, the SRO, Mr. Moody, and another teacher escorted ██████ to the reception area. ██████ was agitated, flushed, and angry. She took him into a classroom and, after much effort, got him calmed down. ██████ was suspended from school pending a disciplinary tribunal. (Exs. J-4; Tr. 27, 334-36; 87-89, 531-34, 543, 562.)

#### *Disciplinary Tribunal and Manifestation Meeting*

32.

A disciplinary tribunal was held on March 4, 2020 to consider this incident, and the panel found that ██████ violated the BCSD Code of Conduct, specifically Rule 1 relating to disruption and interference with school and Rule 8 prohibiting assault, battery, threat, or harassment of a BCSD employee. The tribunal expelled ██████ from BCSD for the remainder of the 2019-2020 school year and all of the 2020-2021 school year. However, the tribunal recommended that ██████ be given the opportunity to earn an early return to ██████ High School for the second semester of 2020-2021. ██████ was permitted to attend NBA during his expulsion and was notified of his

right to appeal the tribunal's decision to the Butts County Board of Education.<sup>23</sup> Finally, Petitioners were reminded that ██████. was not permitted on any BCSD property except NBA, including for purposes of attending athletic events, band competitions, and other extracurricular activities. (Ex. R-27; Tr. 551-552.)

33.

Later on March 4, 2020, ██████.'s IEP team met for a manifestation meeting, where the team considered (i) whether ██████.'s conduct was "caused by or had a direct and substantial relationship" to his disability and (ii) whether the conduct was a direct result of BCSD's "failure to implement the child's IEP." Many people attended the manifestation meeting, including ██████., Ms. Clarkson, Ms. Foust, Ms. Castellanos-Akins, and Mr. Moody, as well as two general education teachers, Mr. Smith and Ms. Bell; two special education teachers, Mr. Wilson and Ms. Jones; the attorneys for both the Petitioners and BCSD; and the two BCSD evaluators, Dr. McKee Williams and Dr. Dumas. (Exs. J-4, J-10.)

34.

According to the Manifestation Determination Form, the educators who were present during the February 24, 2020 incident told the IEP team that after ██████.'s initial behaviors, he met with the counselor, Ms. Castellanos-Akins,<sup>24</sup> who "felt he was ready to return to class and

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<sup>23</sup> There is no evidence that Petitioners appealed the decision to the Board, and the tribunal's findings are not the subject of this due process appeal. Mr. Allen testified that a greater than one-year expulsion was not abnormal, although Dr. Tullis testified that it was unfair to discipline ██████. so harshly, especially given that Rule 1, which prohibits disrupting or interfering a class, is violated by students in a regular education setting all the time. It is not clear from the record whether the length of the expulsion was driven by ██████.'s threatening behavior toward his teachers, which appeared to have escalated after his mother was called, or whether his continued defiance, disruption of class, and refusal to leave, which occurred before the call, was the primary factor in the tribunal's decision. Most likely, it was the combination of these behaviors that led to his long expulsion. (Tr. 231, 520.)

<sup>24</sup> ██████. later told an evaluator that he initially was turned away because the counselor was busy, which made him more upset. Ms. Foust testified that although the counselor was busy when ██████. arrived, she did step out to see him, gave him a space to sit and cool down, and then went back to talk with him. She said that the written summary that suggests that ██████. did not see the counselor was incorrect. (Ex. J-3; Tr. 112-113.)

█████ stated that he was OK to go back. When he returned to class, he was calm. Then he started making comments again.” When his behavior escalated a second time, “administration was called. █████. refused to leave. Additional admin. were called.<sup>25</sup> █████. wouldn’t leave. All students were removed. He began threatening adults.<sup>26</sup> Ms. Adams was called. █████. used inappropriate language. He ran out of the room, postured with the SRO.” It was █████.’s decision to return to the classroom after visiting the counselor, and the events that followed, that many members of the IEP team considered unrelated to █████.’s disability. Specifically, Ms. Clarkson testified that █████.’s initial behaviors, when he got up without permission, wandered around the class, touching things and making disrespectful comments, could be related to his ADHD and impulsivity. However, █████. made a choice to return to the classroom and, according to Ms. Clarkson, “wanted” to engage in disruptive and defiant behavior. She further testified that █████.’s BIP identified self-regulation strategies, such as regulated breathing, taking downtime in the classroom, or going to a pre-determined cool down location outside of class, and █████. knew how to use all these strategies. In fact, he had just done so when he independently left the classroom and went to the counselor’s office. Ms. Clarkson opined that when █████. returned to the classroom, became defiant, and then refused to leave, he made a deliberate choice to abandon those strategies and allowed his behaviors to escalate. Ms. Foust agreed with Ms. Clarkson, testifying that █████.’s return to the classroom “is behavior that requires a little bit of a choice to it,” and was not the typical impulsive behavior of a student with ADHD. (Exs. J-4, J-10; Tr. 89,

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<sup>25</sup> According to Ms. Clarkson, the fact that Mr. Wilson decided to call in the school resource officer is evidence that █████.’s aggressive and threatening behaviors had significantly escalated. The school does not generally call an officer “for any little thing.” (Tr. 567.)

<sup>26</sup> This timeline of events in the Manifestation Determination Form on March 4, 2020 differs from Mr. Wilson’s initial Disciplinary Report with respect to when █████. began threatening his teachers. According to Mr. Wilson’s report, the call to his mother triggered █████.’s aggressive and threatening conduct, including his assumption of a “fighting posture” with the SRO. The Manifestation Determination Form suggests that █████. began threatening teachers before his mother was called. (Exs. P-23, J-10.)

534, 541-545.)

35.

Not all the IEP team members agreed. ██████. believed the events on February 24, 2020 were directly related to ██████.'s disabilities, and so did Ms. Bell, ██████.'s art teacher, as well as Ms. Catellanos-Akins, the school counselor who had met with ██████. during the incident.<sup>27</sup> Because the other members of the IEP team did not find that ██████.'s behaviors were caused by or had a direct and substantial relationship with his disability, the team determined that his conduct was not a manifestation. In addition, it appears that all members, with the exception of ██████., agreed that the conduct was not a direct result of BCSD's failure to implement ██████.'s IEP. At the hearing, ██████ testified that ██████.'s IEPs have long contained a provision requiring the school to avoid threatening to call ██████.'s parents because he reacted negatively to such threats. As described earlier, the BIP even specified that "teachers should not pick up a phone and say 'I'm going to call xx.'" ██████. further testified that about a week before the incident, she had told Mr. Scandrett "that he needed to make sure he read the IEP because [calling her] was not going to help him [██████.] calm down." Dr. Rachel Tullis, a professor of special education and an expert in behavior analysis, reviewed the reports of the February 24, 2020 incident, as well his BIP, and testified that the school failed to employ any of the identified de-escalation strategies. Instead, "they just kept gathering more staff members into the room, which I'm unclear what purpose that could possibly serve other than to intimidate the student." According to Dr. Tullis' review of the records, it appeared that ██████.'s teachers either tried to ignore his behaviors or just told him to stop doing them, rather than use the strategies in the BIP, such as offering an

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<sup>27</sup> Regrettably, Ms. Catellanos-Akins was not called as a witness at the hearing, and the meeting notes do not elaborate on the reason for her opinion. As discussed further *infra*, the details surrounding ██████.'s escalating behaviors are important to the Court's consideration of Petitioners' manifestation claim, but there were no witnesses with personal knowledge of the event at the hearing. (Ex. J-4.)

incentive. In any event, at the end of the meeting, the team determined that [REDACTED]'s behavior was not a manifestation of his disability or caused by a lapse in the implementation of his IEP, and the team went on to discuss finalizing his IEP. (Exs. J-4, J-10; Tr. 23, 228-230, 336, 384.)

*Return to NBA, the Pandemic, and 2020 Summer School*

36.

[REDACTED] returned to NBA around March 6, 2020, just a few weeks before the COVID pandemic led to the end of in-person classes and the beginning of remote learning for all BCSD students on March 17, 2020. For the few weeks before remote learning began, Mr. Allen testified that [REDACTED] was completing his work. However, as many witnesses recounted, [REDACTED] struggled with remote learning during the pandemic, and for the first time, he was not successful at NBA. Specifically, he became distracted, did not complete assignments, and had trouble accessing services remotely, such as OT and social skills training.<sup>28</sup> According to Ms. Foust, although all students suffered during the pandemic, [REDACTED]'s difficulties were "more pronounced." [REDACTED] described [REDACTED] as "shutting down" during the pandemic, and he grew very depressed and anxious. (Tr. 61-63, 108, 296, 309, 346-347, 500.)

37.

On April 29, 2020, [REDACTED]'s IEP team met virtually to review the annual IEP and develop a new one. The team reviewed Dr. Delgado's report and Dr. Dumas' OT recommendations. The team also reviewed a medical update report dated January 2020, which continued to list [REDACTED]'s psychiatrist's diagnoses of autism (level 2), ADHD, ODD and IED, as well as the four medications he is prescribed. The IEP also summarized the findings from Dr. McKee Williams' recent psycho-education evaluation. (Ex. J-5; Tr. 90-91, 179-180.)

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<sup>28</sup> OT was offered through Zoom during the pandemic, but [REDACTED] was resistant, and his mother testified that she could not get him to do it. (Tr. 346.)

The April 29, 2020 IEP also contained a long list of new parental concerns, which were submitted in writing by [REDACTED] on May 4, 2020, after the April 29, 2020 meeting had ended.<sup>29</sup> In the new list of concerns, [REDACTED] stated that [REDACTED] did not have the skill set to be successful in the general education environment, and he was sent to [REDACTED] High School without appropriate supports, leading to quickly deteriorating behaviors and another expulsion. [REDACTED] added that now that he was back at NBA, he no longer had access to peers or extra-curricular activities, such as sports. [REDACTED] also stated that 45 minutes of OT per month was not enough to deal with [REDACTED]'s significant sensory issues, and she was also concerned with Dr. Delgado's observation that [REDACTED]'s teachers were unintentionally reinforcing [REDACTED]'s misbehavior by giving him attention when he acted out. [REDACTED] requested "social interaction skills taught in a controlled environment [by trained instructors] to teach him socially appropriate behaviors." [REDACTED] stated that all of [REDACTED]'s teachers needed to be trained in de-escalation strategies, as demonstrated by the mishandling of the February 24, 2020 incident by the administrator who called [REDACTED]'s mother and "set [REDACTED] off even more" despite the provisions in his BIP. [REDACTED] also argued that too many people participated in [REDACTED]'s IEP meetings, including participants who did not know him and had not read the evaluations. She requested an independent psycho-educational evaluation and a formal FBA. She requested new cognitive test results, and she disagreed with the school district's findings that [REDACTED] does not have autism. (Ex. J-5; Tr. 341).

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<sup>29</sup> BCSD responded to the list of concerns on May 11, 2020, by sending a Prior Written Notice. In the PWN, Ms. Clarkson told [REDACTED], among other things, that [REDACTED] had worked on social skills with the counselor and his special education teachers, but that in order to address her concerns, BCSD would invite a representative from Mainstay, a Georgia Network for Educational and Therapeutic Support ("GNETS") program, to provide input on strategies and methods to teach social skills. On July 31, 2020, Ms. Clarkson completed a Request for GNETS Consultation form, seeking GNETS participation in planning for [REDACTED], including observations and feedback. There is no evidence in the record that GNETS conducted an observation or provided any written feedback in response to this request. (Exs. J-11, J-13.)

39.

Ms. Clarkson agreed to mail information to ██████ regarding her request for independent educational evaluations (“IEE”), and the IEP team modified ██████’s BIP, identifying his problem behavior as “attention seeking,” instead of “off-task” and “aggression.” The strategies to prevent this behavior included giving ██████ positive attention at the beginning of class, checking in with him during class, and offering assistance. His teachers should continue to offer him incentives to complete his work. The BIP called for special education teachers to teach self-regulation skills, along with Dr. Dumas. It provided for the continued use of a token economy or point system to reward good behavior,<sup>30</sup> but in the event of negative behaviors, ██████ should be given a ten-minute break, allowed to go to a cool down space, and then sent home with any incomplete work. Finally, if ██████ requests to speak to a counselor, the BIP provided that a counselor would come to NBA from ██████. (Exs. J-5, J-11; Tr. 286-288.)

40.

██████’s IEP goals were also changed. The new IEP listed three annual goals: 1) When verbally prompted, ██████ will recognize his sensory levels and choose a calming tool 50% of the time; 2) Given a first/then statement and a choice of a preferred activity to be earned upon completing a non-preferred task, ██████ will complete the non-preferred task without protesting 70% of the time; and 3) Connor will interact with peers in an appropriate manner 80% of the time. ██████ was to participate in the general education environment, albeit at the alternative school, with the exception of one 45-minute session every month for OT. (Ex. J-5.)

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<sup>30</sup> Mr. Allen agreed to revise the point sheet to reflect ██████’s placement at NBA, and the team agreed that ██████ should carry it with him when he returns for in-person learning. (Ex. J-5.)

41.

Mr. Allen reported on ██████'s distraction during remote learning. Although he seemed to be making progress in math, ██████. was struggling in language arts. The team discussed whether the location of his workspace was contributing to ██████'s lack of focus, and Dr. Dumas suggested lower lighting, frequent breaks, and the use of music. ██████. opined that ██████'s struggles stem from his lack of social skills across the board, and she requested that social skills training be added to his IEP services. The team also discussed ██████. receiving extended school year ("ESY") instruction because of his struggle to complete work during the pandemic. The IEP team wanted to focus on ██████. finishing his academic coursework during the summer, and not on his social, emotional, and behavioral IEP goals. (Ex. J-5; Tr. 553.)

42.

During the summer of 2020, Mr. Allen tutored ██████. and he had access to Edgenuity online, but ██████. continued to be disengaged from instruction. On August 21, 2020, the IEP team met to review ESY instruction and to plan for the resumption of in-person instruction at NBA on September 8, 2020.<sup>31</sup> The team developed a plan to have ██████. meet with Mr. Allen at NBA a few times a week for two weeks before the rest of the students returned. BCSD offered transportation for these four, two-hour sessions, and Mr. Allen offered to bring board games to play as an incentive to get ██████. to come to these special sessions. Dr. Dumas also offered to meet ██████ at NBA to provide OT services. Finally, Ms. Clarkson told the team that she would send information to the evaluator chosen by ██████. to perform the IEE once the parents returned

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<sup>31</sup> ██████. objected to the participation of certain BCSD educators in this IEP meeting. She objected to Ms. Smith, who was the co-chair of special education at ██████ High School, because she had not been listed on the notice of the meeting, and she objected to Ms. Johnson, a general education teacher at ██████, because she has never taught ██████. Ms. Clarkson explained that Ms. Johnson served as the District's general education representative, a required member of the IEP team, and Ms. Smith was invited because she is in charge of services and scheduling at ██████ and takes IEP meeting notes. Despite her objection, ██████ consented to proceed with Ms. Johnson and Ms. Smith in attendance. (Ex. J-6.)

the signed releases. (Ex. J-7; Tr. 94-95.)

**C. Tenth Grade (2020 -2021)**

43.

Unfortunately, when ██████. returned in person to NBA for the 2020-2021 school year, he remained disengaged despite the efforts of Mr. Allen, Dr. Dumas, and others to encourage his participation in school through positive behavioral incentives and tangible rewards, as well as frequent movement, low lighting, and music to create a positive environment. At home, beginning in August 2020, ██████. continued to experience depression, anxiety, and fits of rage, including swearing, threatening others, screaming, physical aggression, elopement, property damage and self-injury, which caused his parents to call law enforcement three times in a six-week period. In October 2020, ██████. became very aggressive, threw off his father who was trying to hold him, and stated that he wanted to harm himself. He was hospitalized on two separate occasions in October, spending several days in the emergency room and then transferring to a short-term residential placement. (Tr. 309, 318-20, 500-501.)

*Independent Educational Evaluation and FBA by Dr. Zawoyski*

44.

Around this time, Dr. Andrea Zawoyski, a psychologist and Board-certified Behavior Analyst from the University of Georgia, began an IEE and FBA at ██████.'s parents' request. Dr. Zawoyski conducted these evaluations on five days from October 23, 2020, to November 20, 2020. She interviewed Ms. Foust, Ms. Allen, and ██████., and also reviewed all of ██████.'s medical and educational records. Dr. Zawoyski also conducted cognitive and achievement testing with ██████. and other evaluations relating to autism and social, emotional, behavioral, executive, and adaptive functioning. With respect to his cognitive functioning, ██████. scored in

the low average range, which was consistent with Dr. McKee Williams' findings and other past evaluations. ■■■■■.'s academic achievement test results reflected a low average range, indicating difficulties with performing math, reading, and writing skills. These results were lower than previous testing, including the January 2020 psycho-educational evaluation, and Dr. Zawoyski. opined that ■■■■■. could be out of practice with math and other academics due to the pandemic. (Ex. J-3.)

45.

Dr. Zawoyski also did ASD screenings, and like Dr. McKee Williams, did not find clinically significant signs of autism. She opined that an evaluation from when ■■■■■. was 12, where he scored above the cutoff for ASD symptoms, may have been influenced by his failure to cooperate with the examination. Overall, Dr. Zawoyski, like Dr. McKee Williams, concluded that ■■■■■. “does **not** present with clinically significant deficits in social communication and social interaction as well as the presence of restricted, repetitive behaviors and interest that would be consistent with a diagnosis of ASD.” As to social and emotional concerns, Dr. Zawoyski observed that there have been “broad concerns for ■■■■■.'s social-emotional and behavioral functioning that have persisted throughout ■■■■■.'s life, and grew from concerns pertaining to outwardly directed behavior (e.g., aggression, ADHD symptoms) to now include inwardly directed behavior (e.g., anxiety/depression).” Dr. Zawoyski's findings on current measures relating to depression mirrored Dr. McKee Williams' findings – that both ■■■■■. and his teachers' ratings placed him the normal range of functioning, but ■■■■■.'s ratings were elevated, “suggesting parent concerns related to ■■■■■.'s mood.” As to ■■■■■.'s adaptive behavior, both past and present evaluations have indicated concerns regarding ■■■■■.'s adaptive skills in the areas of communication, daily living, and socialization, with greater severity observed at home as

compared to school. “Notably, social skills were rated as low to moderately low by all raters.” (Ex. J-3.)

46.

Dr. Zawoyski explained in her report that children with ADHD “often struggle with social skills” and “have difficulty with perspective-taking and self-monitoring during social interactions, present with distractibility during conversation, and have trouble following through with social agreements.” She noted that [REDACTED].’s significant behavioral concerns at home and school include “failure to control aggressive impulses leading to significant behavioral outbursts.” She found that his outbursts were “impulsive or anger-based in nature (i.e., not premeditated) and are not committed to obtain an objective such as money, power, or intimidation.” She concluded that her evaluation suggested that [REDACTED].’s presentation is best explained by his prior diagnoses of ADHD, Oppositional Defiant Disorder, and Intermittent Explosive Disorder. She encouraged the professionals working with [REDACTED]. to be familiar with these diagnoses and be cognizant of ADHD’s impact on brain functioning, including “the prefrontal cortex, which is responsible for judgment, decision making, inhibition, and sustained attention,” and ODD and IED’s impact on the part of the brain related to emotional regulation. Dr. Zawoyski concurred with the finding of the IEP team that [REDACTED]. is eligible for special education under the OHI category, but encouraged the team to consider evidence for eligibility under the EBD category as well, given his history of concerns relating to his mood and anxiety, and his difficulty with peer relationships, disproportional reactions, and learning challenges that are not fully explained by his ADHD diagnosis. (Ex. J-3.)

47.

Dr. Zawoyski also conducted an FBA, first reviewing past behavioral assessments, including Dr. Delgado's observation report, as well as data collected by BCSD staff over 8 days in February 2020, right before his expulsion. For her FBA, Dr. Zawoyski used indirect screening tools, record reviews, interviews, and direct observation of [REDACTED] on three different days. She reviewed [REDACTED]'s Edgenuity records from August 17, 2020 to November 20, 2020, and determined that of the 330 minutes of instructional time available to regular education students per day, [REDACTED] averaged only 79 minutes of actually working, and he completed only 7 of an expected 10 daily tasks.<sup>32</sup> Dr. Zawoyski observed that [REDACTED] slept for most of the morning and was frustrated when Mr. Allen woke him up. He went to the principal's office, and the principal talked with [REDACTED], reminded him of his reinforcers for completing his work, and provided encouragement. [REDACTED] returned to class and worked diligently to earn his reward. Dr. Zawoyski characterized this as a well-managed behavioral incident. (Ex. J-3.)

48.

Dr. Zawoyski concluded that [REDACTED]'s off-task behaviors were likely motivated by his desire to escape work demands. The data also suggested that [REDACTED] is motivated to stay on task by getting attention from the teacher to do so. Although she did not directly observe a behavioral outburst, based on the data she reviewed, she hypothesized that the function of such behavior related to attention, escape, and tangible reinforcement. Dr. Zawoyski made a number of recommendations for [REDACTED]'s teachers, including how to talk to [REDACTED], when to reduce or increase attention to his behaviors, how to use positive reinforcement, and others. She also recommended that the BIP be designed to address the following four target behaviors: 1) off-task behavior, 2)

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<sup>32</sup> Dr. Zawoyski did not testify at the hearing, and it is unclear from her report how she determined when [REDACTED] was idle and when he was working based solely on his Edgenuity log-in data. Accordingly, the Court gives this calculation less weight than other parts of Dr. Zawoyski's thorough report.

attempts to contact parent or leave school, 3) disruption, and 4) verbal aggression/behavioral outbursts. She suggested that [REDACTED]'s BIP be modified to include a contingency contract, written in an "if/then" format for earning rewards. Dr. Zawoyski found that it was imperative for the IEP team to identify appropriate and potent reinforcers for appropriate behavior. To address [REDACTED]'s reluctance to attend school, Dr. Zawoyski recommended enriching his school environment with additional attention from teachers, starting his day with a preferred activity, and including unique rewards when he arrives. She suggested the team consider a shortened school day or allowing [REDACTED] to earn a day of remote learning at home if he meets certain behavior or academic goals while at school. Finally, Dr. Zawoyski found that [REDACTED] would likely benefit from supported interactions with peers who share similar interests, and she directed the IEP team to the peer role model program mentioned by Dr. Delgado and encouraged the team to continue weekly sessions with the counselor. (Ex. J-3.)

49.

With respect to [REDACTED]'s parents, Dr. Zawoyski encouraged them to consider "outside social skills supports for [REDACTED] through the UCLA PEERS Program at GSU." In addition, Dr. Zawoyski concluded her report with an observation that [REDACTED] might benefit from Dialectical Behavior Therapy ("DBT"), which she described as "a highly specialized therapy" that is not available through schools, but can support adolescents with emotional regulation, mood concerns, and impulsivity. She identified a private provider that offers DBT through a virtual intensive outpatient program and in-home therapy. (Ex. J-3.)

*December 11, 2020 IEP Meeting*

50.

On December 11, 2020, the IEP team met to review Dr. Zawoyski's IEE and FBA. Dr.

Zawoyski was present and went over her findings and conclusions with the team. The team agreed to schedule another meeting to discuss how to incorporate Dr. Zawoyski's recommendations into the IEP and BIP. ██████'s parents told the team that ██████ wanted to stay at NBA even though he was permitted to request an early return to ██████ High School. The team agreed to allow ██████ to stay at NBA for the time being and to schedule a review meeting at a later date. (Ex. R-7; Tr. 96.)

*February 19, 2021 IEP Meeting*

51.

██████ did not attend NBA in person in January 2021 due to an extended COVID quarantine. On February 19, 2021, about a week after he returned to NBA, the IEP team met to consider Dr. Zawoyski's recommendations. Dr. Zawoyski was present. The team went through each recommendations and discussed how to incorporate them into the IEP and BIP if they were not already included. Dr. Zawoyski told the team that she had not observed Mr. Allen start each class period with a positive interaction or use the "if/then" format to introduce assignments, but thought that it was a good idea to include such strategies in the IEP. The team discussed having ██████ and Mr. Allen work on drafting the contingency plan using a template from Dr. Zawoyski. ██████ was concerned that even if the plan was well-written, it would not be faithfully implemented. ██████, who was in attendance, stated that he felt he was being set up to fail when he returns to ██████ High. Ms. Clarkson told ██████ that the team was trying to identify services that would help him be successful, which was why they had invited a representative of GNETS, the Georgia Network for Educational and Therapeutic Support, along with Dr. Zawoyski and Dr. Delgado, to provide input on the plan.<sup>33</sup> (Ex. J-7; Tr. 356.)

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<sup>33</sup> As discussed in more detail below, ██████ objected to GNETS' involvement, stating that she was not asking for a therapeutic setting for ██████, just a smaller setting with fewer transitions. The team agreed to try Dr.

The team also discussed modifying the BIP to include the more specific target behaviors suggested by Dr. Zawoyski. They agreed to incorporate a program called “zones of regulations,” which uses a set of “sensory tool cards” to help students manage their behaviors, including options such as deep breathing, a music station, journaling, and an exercise circuit, perhaps through an Xbox game. Dr. Zawoyski recommended that they keep “fidelity data” on implementing these recommendations, and the team agreed that Mr. Allen would do so. The team discussed ██████’s sleeping in class, and Dr. Zawoyski recommended taking breaks after smaller chunks of work and discussing with ██████ the importance of working toward his goals for after graduation. The team also reviewed ██████’s transcript, credits earned, and academic progress, and discussed all of Dr. Zawoyski’s other recommendations, including those relating to contacting his mother during the day, increasing school-home communication, crisis planning, transition to ██████ High School, and use of technology. They discussed the challenges of having ██████ practice his social skills with his peers while at NBA, but Mr. Allen agreed to include another student in some of the social skills training he does with ██████,<sup>34</sup> and Dr. Zawoyski suggested having the counselor facilitate peer interactions with students at ██████ High over Zoom before he returned to ██████. (Ex. J-7.)

██████’s parents told the IEP team that they were looking into DBT therapy with a private provider and working with the Marcus Autism Center for parent coaching. They have also put

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Zawoyski’s recommendations and evaluate his progress with those supports. (Tr. 102-103.)

<sup>34</sup> At the administrative hearing, Mr. Allen testified that he taught social skills through a program known as Boy’s Town, as well as the Skillstreaming program, which he described as a social skills curriculum that uses role playing, modeling, social narratives, and peer interactions. (Tr. 502.)

█'s name on a wait list for enrollment in Marcus' severe behavior program, an intensive twelve-week therapy program. In the meantime, they are attending a support group through Marcus and have developed a crisis plan to avoid explosive behaviors at home, which essentially involves placing █ in another room and "keeping him happy."<sup>35</sup> (Ex. J-7.)

*March 12, 2021 IEP Meeting*

54.

Mr. Allen, with the assistance of Dr. Dumas, attempted to implement Dr. Zawoyski's recommendations, but █ did not make progress. █ requested that █ be permitted to attend NBA remotely on the days that his father was home, in an attempt to encourage him to re-engage with school. The team reconvened on March 12, 2021, to discuss this request. █ attended the meeting and stated that he did not like the new contingency contract suggested by Dr. Zawoyski because it was too hard. The team agreed to the parents' request and developed a modified attendance schedule. █ was allowed to attend NBA in person two to three days per week, and work from home the other days. He could earn an extra day at home every other week if his behaviors at NBA were satisfactory. Although this schedule reduced the number of major behavioral problems, his academic engagement did not improve. (Ex. J-8; Tr. 34, 501-502.)

*April 2021 IEP Meeting*

55.

█'s annual IEP review was held on two days in April 2021. On April 16, 2021, the team met to begin the review, but █ wanted an opportunity to review some of the new documentation, so the team rescheduled the meeting for April 22, 2021. The team considered

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<sup>35</sup> According to the meeting notes, █ stated that Marcus had advised them to "let █ do whatever he wants in the meanwhile in order to keep the peace until he can get into their Severe Behavior program." █ stated that this approach likely would not work in the school setting. (Ex. J-7.)

Mr. Allen's report that he had attempted to implement the recommendations for OT supports,<sup>36</sup> social skills training, the contingency contract, and other provisions in [REDACTED]'s IEP and BIP, but they had not been successful in helping [REDACTED] engage. [REDACTED]'s parents reported that [REDACTED] often refused to get ready for school or leave on the bus. He has told them that he wants to remain a virtual student and stay at home with his father. His parents told the IEP team that [REDACTED] screams, uses profanity, and melts down in the morning, and that on one occasion, he became enraged, refused to leave the house, and would not let [REDACTED] leave either. [REDACTED] had to call her husband, who enlisted the assistance of sheriff deputies with whom he worked to come home with him to calm [REDACTED] down. (Ex. J-8; Tr. 104, 501-504.)

56.

The team discussed [REDACTED]'s behavioral goals and objectives, including demonstrating self-control, attempting a non-preferred task for at least ten minutes, and increasing his in-person attendance to 70%. They discussed modifications to the contingency plan and other services and accommodations for the 2021-2022 school year, as well as the need to work on OT, academics, and other IEP goals during the 2021 summer. In addition, BCSD offered compensatory services during the summer to make up for lost instruction time during the pandemic. (Ex. J-8.)

*GNETS*

57.

At the end of the meeting, the team discussed [REDACTED]'s transition from NBA to a new placement. [REDACTED] stated that [REDACTED] needed to be with only one teacher and one para-

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<sup>36</sup> Dr. Dumas helped Mr. Allen add a number of sensory items to the NBA classroom, including a light cover, alternate seating, a jump rope for physical breaks, hand fidgets, stress balls, putty, and an Xbox game. [REDACTED] worked briefly with Dr. Dumas on the zones of regulation curriculum, but then he refused to speak to or look at Dr. Dumas when she came to meet with him. [REDACTED] stated that [REDACTED] was embarrassed when Dr. Dumas came into class to pull him out for OT. Instead of working directly with [REDACTED], Dr. Dumas began to consult with Mr. Allen to help [REDACTED] practice emotional regulation skills. [REDACTED] objected to reducing or eliminating Dr. Dumas' direct time with [REDACTED] and requested that she work with him one on one, without any other students present. (Exs. J-8, P-20; Tr. 235, 342-346.)

professional “with very limited transition and movement.” The other team members agreed that [REDACTED] does best in a smaller, more structured setting. However, as Ms. Clarkson explained at the hearing, it is not possible to have one teacher teach all academic subjects because high school teachers must be certified in a particular content area, and no single teacher is certified in all subjects. Ms. Clarkson proposed a placement at Mainstay Academy, a GNETS program that serves Butts County students with behavioral difficulties and is located in Griffin, Georgia.<sup>37</sup> Ms. Clarkson is a former GNETS teacher, and testified that the BCSD students who attend Mainstay are very successful, with a high percentage graduating from high school. In addition, because Mainstay is not a punitive placement, like NBA, BCSD students who attend Mainstay may return to [REDACTED] High School to participate in clubs, sports, and other extra-curricular activities. In addition, some students spend a portion of the school day at Mainstay and the rest of the day at [REDACTED]. BCSD also sends some of its staff, such as speech therapists and OTs, to Mainstay to work with BCSD students who need those services. (Tr. 185-187, 191-193.)

58.

According to Ms. Clarkson, BCSD has tried all less restrictive alternatives to meet [REDACTED]’s special needs, including consultative instruction, supported instruction, co-teaching, and small group or resource classroom in a general education setting. BCSD tried the supports and services recommended by Dr. Zawoyski and Dr. Delgado, including social skills training, a sensory processing plan, and even a modified school day, but [REDACTED] has regressed since the beginning of the pandemic. Similarly, Ms. Foust testified that BCSD has tried everything in the school system’s toolbox and has “maxed out” the services they could offer at [REDACTED] High

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<sup>37</sup> Mainstay serves students ages three through twenty-one from Butts, Lamar, Pike, Upson, and Griffin-Spalding school districts in Georgia. There are two elementary classes, three middle school classes, and three high school classes. All these students are in general education classes; there are two additional self-contained classrooms for students with intellectual disabilities. (Tr. 475.)

School. Nevertheless, [REDACTED]. has not made any progress toward graduation. Mr. Allen also agreed that Mainstay was the proper placement for [REDACTED]. He told the IEP team and testified at the hearing about his own attendance at a therapeutic school in Florida, similar to GNETS, which he credits for his successes later in adult life. Mr. Allen believes that [REDACTED]. too will benefit from placement at Mainstay and that it is the most appropriate environment for [REDACTED]. at this time. (Ex. J-8; Tr. 106-109, 156, 190, 500-505.)

59.

Although all the other BCSD members of the IEP team concurred with a placement at Mainstay, [REDACTED].’s parents objected, believing that it was a punishment and expressing their concerns about the graduation rate from GNETS and the long bus ride, up to an hour each way. Dr. Zawoyski, who was in attendance at the meeting, stated that she would like to try a gradual transition back to [REDACTED] High School using the accommodations, supports, and services the team had discussed before considering a more restrictive placement such as GNETS. Similarly, [REDACTED]. asserted that the proper supports and services have not been implemented “with fidelity” by BCSD in the past and that [REDACTED]. is entitled to try to participate in a general education setting with the appropriate supports in place. [REDACTED]. conceded that without such supports and services, [REDACTED]. will not succeed at [REDACTED] High School, and she would prefer he return to NBA, if the only other option was to go to GNETS. (Ex. J-8; Tr. 298, 359-361, 381-382.)

60.

Elizabeth King, a special education teacher at Mainstay since 2014, testified at the hearing about the GNETS program at Mainstay. The purpose of the program is to help students who are struggling with behavioral disabilities<sup>38</sup> by keeping them from even more restrictive

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<sup>38</sup> Mainstay serves students who have an EBD eligibility classification, but also students with autism and OHI. (Tr. 490).

placements, such as home-based or residential, and ultimately preparing them to transition back to a regular education setting, if appropriate. GNETS is a program unique to Georgia, which provides students a smaller, more supportive school-like environment to learn and practice social skills while maintaining their academics. High school students at Mainstay have breakfast with their homeroom class and then attend classes on a block schedule. The classes are small, usually between three to seven students, and are highly structured, with well-defined routines and expectations. The high school teachers at Mainstay are trained in social skills, de-escalation, trauma-informed care, and other emotional and behavioral-related curricula, and are also certified in particular content areas, such as science and language arts. In addition to academics, the teachers work on teaching the students how to disagree appropriately, how to work independently and ask questions, and how to use self-regulation techniques, among other skills. Mainstay has a teacher and para-professional in each classroom, two full-time social workers, a full-time and a part-time counselor, who meet at least weekly with every student, and a full-time behavior interventionist. (Tr. 472-483.)

**D. Eleventh Grade (2021 -2022)**

61.

At the end of the IEP meeting on April 22, 2021, Ms. Clarkson concluded that notwithstanding the objection of [REDACTED]'s parents and Dr. Zawoyski, the consensus of the team was that Mainstay was the appropriate placement for [REDACTED] for the 2021-2022 school year. [REDACTED]'s parents notified the IEP team that they intended to invoke their "stay-put" rights under IDEA, thereby preventing the disputed placement at Mainstay until a due process hearing was held. As a result, [REDACTED] began eleventh grade at [REDACTED] High School in August 2021, after Petitioners filed a due process complaint on July 27, 2021. He only attends [REDACTED] High School

on a modified schedule for two class periods – a co-taught physics class and an English class in a special education resource classroom. He often sleeps through physics class and has begun to sleep in English too. Upon the advice of Dr. Delgado from the Emory Autism Center, who is consulting with BCSD on ██████'s case, ██████ High staff do not try and wake him up.<sup>39</sup> (Tr. 378, 469.)

62.

Although ██████ believes ██████ is making improvements this school year with the modified schedule and the supports suggested by Dr. Delgado, the BCSD educators disagree. They concede that his behavior issues have subsided, but they attribute that to the fact that he is allowed to sleep most of the time he is in school. There is no evidence, according to BCSD, that ██████ has begun to engage with the curriculum or the school environment in any significant way. Still, ██████ has observed a marked decrease in severe behaviors at home as well as at school during the fall semester, and she considers this a positive development. (Tr. 351-353, 450, 452.)

### **III. CONCLUSIONS OF LAW**

#### **A. General Law**

1.

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

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<sup>39</sup> Dr. Tullis disagreed with Dr. Delgado’s recommendation, and opined that allowing ██████ to sleep for half of his academic day was not appropriate. To the extent that Dr. Tullis’ testimony relates to this past semester at ██████ High School, it is outside the scope of this due process complaint. To the extent that it relates to reports that ██████ was sleeping while still at NBA last year, the evidence does not show that NBA allowed ██████ to sleep without attempting to wake him up. Rather, the IEP team addressed the sleeping issue in February 2021, providing that Mr. Allen should try to use exercise breaks, shorter chunks of work, and music to try to keep him awake and engaged. (Tr. 227, 306-307.)

2.

Petitioners bear the burden of proof in this matter. Schaffer v. Weast, 546 U.S. 49 (2005); Ga. DOE Rule 160-4-7-.12(3)(n); OSAH Rule 616-1-2-.07. The standard of proof on all issues is a preponderance of the evidence. OSAH Rule 616-1-2-.21(4).

3.

The goals of IDEA are “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” and “to ensure that the rights of children with disabilities and parents of such children are protected.” 20 U.S.C. § 1400(d)(1)(A) – (B); J.N. v. Jefferson Cty. Bd. of Educ., 12 F.4th 1355, 1362 (11th Cir. 2021). In addition, IDEA includes a “specific directive” that disabled children be placed in the “least restrictive environment” or “LRE.” Greer v. Rome City Sch. Dist., 950 F.2d 688, 695 (11<sup>th</sup> Cir. 1991), withdrawn, 956 F.2d 1025 (11th Cir. 1992), reinstated in part, 967 F.2d 470 (11<sup>th</sup> Cir. 1992). Specifically, IDEA provides that

(2) Each public agency must ensure that –

(i) To the maximum extent appropriate, children with disabilities . . . are educated with children who are nondisabled; and

(ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the uses of supplementary aids and services cannot be achieved satisfactorily.

34 C.F.R. § 300.114(a)(2); 20 U.S.C. § 1412(a)(5)(A).

4.

IDEA also contains special provisions relating to discipline of disabled children who violate a student code of conduct. See 34 C.F.R. § 300.530-.536. In particular, if school

personnel intend to discipline a student with a disability by removing the student to an alternative educational setting for more than ten days, relevant members of the student’s IEP team must determine whether the conduct was a manifestation of the student’s disability. 34 C.F.R. § 300.530. If the district, the parent and the relevant members of the IEP team make a determination that the behavior was a manifestation, the IEP team must either conduct a new FBA or review and modify an existing BIP, and must return the child to the original placement unless the parents and the district agree to a change in placement as part of the modification of the BIP. 34 C.F.R. § 300.530(f).

5.

In this case, Petitioners have claimed that BCSD has violated IDEA by failing to develop appropriate IEPs, by failing to use proper procedures in conducting its manifestation review, by punishing ██████. by changing his placement, and by failing to provide FAPE in the least restrictive environment. The Court will address each of those claims in turn.

**B. ██████’s IEPs Were Reasonably Calculated to Enable Him to Make Progress.**

6.

The Individualized Education Plan or IEP is the “centerpiece” of IDEA’s extensive procedural framework. J.N. v. Jefferson Cty. Bd. of Educ., 12 F.4th at 1362, citing Honig v. Doe, 484 U.S. 305, 311 (1988); 20 U.S.C. § 1401(9)(D); see also Andrew F. ex rel. Joseph F. v. Douglas Cty. School Dist. RE-1, 137 S. Ct. 988, 994 (2017). An IEP is “a written statement that describes the child’s academic performance and how the child’s disability affects her education, states measurable educational goals and special needs of the child, establishes how the child’s progress will be measured and reported, and states the services available, based on peer-reviewed research, to enable the child to attain the goals, advance educationally, and participate with

disabled and nondisabled children.” A.L. v. Jackson Cnty. Sch. Bd., 635 Fed. Appx. 774, 777 (11th Cir. 2015), quoting K.A. ex re. F.A. v. Fulton Cty. Sch. Dist., 741 F.3d 1195, 1201 (11th Cir. 2013). In order for an IEP to meet the standards for FAPE under IDEA, it must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” Endrew F., 137 S. Ct. at 1001; see also L.J. v. Sch. Bd., 927 F.3d 1203, 1211 (11th Cir. 2019). “The ‘reasonably calculated’ qualification reflects recognition that crafting an appropriate program of education requires a prospective judgment by school officials.” Endrew F., 137 S. Ct. at 999 (citation omitted). Thus, “a court cannot evaluate whether an IEP is reasonably calculated to provide a FAPE solely in terms of what a student actually achieves.” S.S. v. Cobb Cty. Sch. Dist., 1:18-DV-00313-JPB, 2021 U.S. Dist. LEXIS 37154, at \*5 (N.D. Ga. March 1, 2021). Rather, the Eleventh Circuit has recognized that the development of an IEP is a “fact-intensive exercise”<sup>40</sup> and the resulting “IEP is a snapshot, not a retrospective.” Mandy S. ex rel. Sandy F. v. Fulton County Sch. Dist., 205 F.Supp.2d 1358, 1367 (N.D. Ga. 2000) (quoting Roland M. v. Concord Sch. Comm., 910 F.2d 983, 992 (1<sup>st</sup> Cir. 1990) (“actions of school system cannot . . . be judged exclusively in hindsight”)).

7.

This guidance is particularly relevant in this case, where ██████’s IEP team had to adjust to many changing circumstances, including ██████’s expulsion, the sudden switch to virtual learning due to the pandemic, and ██████’s unforeseen refusal to participate in almost all aspects of instruction. As discussed further below, the Court concludes that ██████’s IEPs were specially designed to meet his unique and changing needs, and that the special education and related services provided to ██████ were reasonably calculated to allow him to “‘advance appropriately toward attaining the annual goals,’ and, when possible, ‘be involved in and make progress in the

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<sup>40</sup> L.J. v. Sch. Bd., 927 F.3d 1203, 1207 (11<sup>th</sup> Cir. 2019) (quoting Endrew F., 137 S. Ct. at 999).

general education curriculum.” Endrew F., 137 S. Ct. at 994 (citing 20 U.S.C. § 1414(d)(1)(A)(i)(IV)). The fact that [REDACTED] has not met all his goals does not render his IEPs inadequate. “IDEA requires states to provide a disabled child with meaningful access to an education, but it cannot guarantee totally successful results.” A.R. v. Katonah Lewisboro Union Free Sch. Dist., No. 18-CV-9938, 2019 U.S. Dist. LEXIS 203446 (S.D.N.Y. Nov. 21, 2019), (quoting Waczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 133 (2<sup>nd</sup> Cir. 1998)).<sup>41</sup> Of course, in the face of a “lack of expected progress toward the annual goals” or a change in a student’s “anticipated needs,” IDEA requires the team to revise a student’s IEP, which [REDACTED]’s IEP team did in this case. 20 U.S.C. § 1414(d)(4).

8.

First, the IEP in place on July 27, 2019, was designed for [REDACTED] while he was still at NBA. His parents stated that they believed this IEP was appropriate for [REDACTED] in that setting, but they wanted the team to develop a transition plan for his anticipated start at [REDACTED] High School in January.<sup>42</sup> The team met three times before the transition – in August, October, and December – and added services and supports to his IEP to help [REDACTED] adjust to [REDACTED], including small-group social skills training, extra tutoring on executive functioning, and weekly counseling with the high school counselor.<sup>43</sup> At the end of the semester, he had successfully completed his academic

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<sup>41</sup> See also Plainville Bd. of Educ. v. R.N., No. 3:09-CV-241(RNC), 2012 U.S. Dist. LEXIS 46995, at \*27 (D. Conn. March 31, 2012)(citing B.L. v. New Britain Bd. of Educ., 394 F. Supp. 2d 522, 537 (D. Conn. 2005) (the adequacy of an IEP must be evaluated in light of the information available at the time the IEP is created)).

<sup>42</sup> Courts in the Fourth Circuit have held that parents may not assert claims as to agreed-upon IEPs, or portions of IEPs with which they did not disagree at the time they were developed. See XXXXXX v. Arlington Cty. Sch. Bd., No. 1:20-cv-817, 2021 U.S. Dist. LEXIS 106816, at \* 34 (E.D. Va. June 7, 2021) (citing Schaffer v. Weast, 554 F.3d 470, 475-77 (4th Cir. 2009)).

<sup>43</sup> Although BCSD declined to provide ABA therapy as part of [REDACTED]’s IEP during this time, the Court concludes that Petitioners failed to present sufficient evidence to prove that ABA therapy was an appropriate service for [REDACTED], or that BCSD’s refusal to provide it denied him FAPE. See generally L.M.P. v. Sch. Bd., 879 F.3d 1274 (11th Cir. 2018). In L.M.P., the Eleventh Circuit considered a twelve-year battle by parents to obtain a specific type of ABA therapy for their children under IDEA and noted that “ABA is not a method of instruction or a method of

course load, earning five credits toward graduation, and had either mastered or made progress toward his behavioral goals. At the December 16, 2019 IEP meeting, ██████'s mother agreed that ██████ had had a successful semester in the smaller, structured environment at NBA.<sup>44</sup> In addition, the Court concludes that the IEP team made appropriate plans to support ██████ once he arrived at ██████, including placement in a resource classroom for math and language arts, discrete adult oversight of his transitions between classes, a point system to encourage on-task behavior, daily check-ins with his case manager, and a designated cool down location. Finally, BCSD had completed an OT evaluation and had begun the psycho-education reevaluation process to add further insights into services and needs to help ██████ transition successfully to a general education environment. The Court concludes that the IEP developed through the fall of 2019 was reasonably calculated to enable ██████ to make appropriate progress at ██████ in light of his unique needs and circumstances.

9.

By the end of January 2020, about one month into the new semester, ██████ was showing some signs of regression on his behavior goals and in his academics. He had two disciplinary referrals on January 30, and he was not passing language arts. The team met on January 31, 2020, and made plans to seek input from the Emory Autism Center, to conduct an FBA in order to determine the function of ██████'s negative behaviors, and to revise his BIP. The team also

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teaching,” but “a broad umbrella under which numerous intervention strategies fall.” *Id.* at 1277 (citation omitted.) “There is no singular technique that must be used in all circumstances. There are hundreds of different ABA intervention strategies that can be provided.” *Id.* In this case, there is very little evidence in the record regarding ABA therapy in general or which intervention Petitioners were requesting and how it applies to ██████'s disabilities; there is only evidence that Petitioners requested it, and BCSD denied the request, which is not enough to meet the burden of proof on this claim.

<sup>44</sup> Although ██████'s parents voiced procedural objections regarding the IEP process in December 2019 and at other IEP meetings, their objections were not included in the due process complaint. Moreover, the Court concludes that based on the evidence in the record, Petitioners failed to prove an actionable procedural violation relating to the development of ██████'s IEPs.

reviewed the OT evaluation results, agreed to add OT services and develop a sensory processing plan, and determined that ██████. was still eligible for special education under the OHI classification, but not autism or EBD.<sup>45</sup> Shortly after this meeting, Dr. Delgado conducted her observation, and BCSD collected behavior data for the FBA, expecting to present their results to the IEP team at the end of February. However, before the team could meet again to review this new information, ██████ was involved in the February 24, 2020 incident that led to his expulsion. The Court concludes that the IEP team's response to ██████'s start at ██████ High School was appropriate under the circumstances. Specifically, the team's plan to gather data on ██████'s re-emerging off-task and defiant behavior and to reconvene in thirty days was reasonable, especially in light of the supports and services already in place under the December 2019 IEP.

10.

Almost immediately following ██████'s expulsion and his return to NBA,<sup>46</sup> BCSD, like school districts across the state and the country, moved classes online due to the COVID pandemic. Approximately six weeks after this sea change, in April 2020, the IEP team met virtually to review ██████'s IEP. They made changes to his BIP in response to Dr. Delgado's report and the OT evaluation, and discussed ██████'s difficulties with remote learning and possible changes to his home environment that might help him engage. In order to compensate for the

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<sup>45</sup> The Court was persuaded by Dr. Zawoyski's report and the evidence in the record that there is a distinct possibility that ██████. also meets the eligibility requirements under the Emotional Disturbance or, as it is called in Georgia, the EBD classification, which includes students who have, among other characteristics, inappropriate types of behavior or feelings under normal circumstances to a marked degree and over a long period of time that adversely affects a student's educational performance. See 34 C.F.R. § 300.8(c)(4); DOE Rule 160-4-7-.05(d) (Georgia's definition of EBD is "an emotional disability," which, among other things, is characterized by "a consistent or chronic inappropriate type of behavior or feelings under normal conditions" that is not adequately explained by other factors). However, as the Petitioners did not raise eligibility in their due process complaint and specifically disavowed such claims at the hearing, the Court makes no definitive findings or conclusions on EBD eligibility. However, the parties are encouraged to reconsider Dr. Zawoyski's observations and recommendations on this issue. See generally *Sch. Comm. of Burlington v. Dep't of Educ.*, 736 F.2d 773, (1st Cir. 1984), *aff'd* 471 U.S. 359 (1985) ("Congress indicated its concern regarding the misclassification of disabled children and ordered the establishment of special evaluation procedures") (citations omitted).

<sup>46</sup> The manifestation determination is addressed below in Section III.C.

negative impact of the abrupt change to online instruction, BCSD offered extended school year services to ██████. over the summer and began the process of arranging for an independent evaluation at BCSD's expense, which occurred in the fall of 2020. The team met again in August 2020 to plan for ██████.'s return to in-person learning at NBA, offering additional services to help ease the transition. The Court concludes based on the evidence in the record that the services offered in the August 21, 2020 IEP were reasonably calculated to enable ██████. to make appropriate progress toward his goals at NBA for the 2020-2021 school year.

11.

There is no dispute that ██████. suffered greatly as the pandemic dragged on, demonstrated by his escalating aggressive behaviors at home, which led to law enforcement involvement and two hospitalizations, as well as his increased disengagement at school. The IEP team met five times during the 2020-2021 school year to review and revise ██████.'s IEP, working closely with the independent evaluator, Dr. Zawoyski, and other professionals.<sup>47</sup> During the middle of the school year, Petitioners notified the IEP team that ██████. wished to remain at NBA rather than exercise his right to seek an early return to ██████ High School, and the team agreed to his continued placement at NBA and amended his IEP to include additional OT and behavior supports. The team also agreed to Petitioners' request for a modified schedule in the spring of 2021, allowing ██████. to attend school remotely two to three days a week as suggested by Dr. Zawoyski. The Court concludes, based on the preponderance of the evidence in the record, that the amendments to ██████.'s IEP throughout the 2020-2021 school year, many of which were made

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<sup>47</sup> In the due process complaint, Petitioners allege that "few, if any of [Dr. Zawoyski's] recommendations were incorporated and/or implemented correctly in ██████.'s IEP." However, the evidence in the record proved that the IEP team went through the recommendations one-by-one with Dr. Zawoyski in December 2020 and February 2021, and added them to the IEP if they were not already included, such as the contingency plan, modifications to the target behaviors in the BIP, and others.

at the recommendation of the independent evaluator or at the request of ██████'s parents, were reasonably calculated to enable ██████ to make appropriate progress toward his goals while at NBA.<sup>48</sup>

12.

Finally, as the Court of Appeals for the Eleventh Circuit recognized in 2019, “even where an IEP as written may satisfy the IDEA, schools can also fail to meet their obligation to provide a free appropriate public education by failing to implement the IEP *in practice*.” L.J. v. Sch. Bd., 927 F.3d at 1211 (emphasis in original). Accordingly, that court held that in order for petitioners “to prevail in a failure-to-implement case, they must demonstrate that the school has materially failed to implement a child’s IEP.” Id. In this case, although Petitioners often alleged during the hearing that BCSD failed to implement various provisions of the IEP “with fidelity,” the due process complaint only specified one implementation failure: the failure to correctly implement Dr. Zawoyski’s recommendations.<sup>49</sup> At the hearing, however, Petitioners did not present evidence on all of Dr. Zawoyski’s recommendations or BCSD’s failure to implement them, but focused on BCSD’s failure to implement a specific social skills training program Dr. Zawoyski recommended called PEERS. The evidence in the record proved that Dr. Zawoyski recommended that BCSD continue the weekly meetings with his counselor and incorporate the social skills trainings endorsed by Dr. Delgado, which included PEERS among three other possibilities. The evidence further proved that the program chosen by BDSO to teach social

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<sup>48</sup> As the Court of Appeals for the Sixth Circuit has observed, a parent may “naturally” not “use the fact that the District complied with their wishes as a sword in their IDEA action.” Cleveland Heights Univ. Heights City Sch. Dist. v. Boss, 144 F.3d 391, 398 (6th Cir. 1998) (referring to a parental request to defer development of IEP until November); see also MM v. Sch. Dist., 303 F.3d 523, 533 n.14 (4th Cir. 2002) (“As a general matter, it is inappropriate, under the IDEA, for parents to seek cooperation from a school district, and then to seek to exact judicial punishment on the school authorities for acceding to their wishes.”)

<sup>49</sup> “The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint . . . unless the other party agrees otherwise.” 34 C.F.R. § 300.511(d).

skills, although not among Dr. Delgado’s four suggested programs, was a research-based program that contained all the elements identified by Dr. Delgado. Finally, Dr. Zawoyski did not specifically recommend that BCSD offer the PEERS program to [REDACTED] as part of his IEP. Rather, she stated that [REDACTED]’s parents “may consider seeking outside social skills supports for [REDACTED] through the UCLA PEERS Program at GSU.”<sup>50</sup>

13.

Based on the preponderance of the evidence in the record of this case, the Court concludes that Petitioners failed to prove that the IEPs developed for [REDACTED] from July 27, 2019 through the April 22, 2021 IEP failed to address his disabilities in violation of IDEA. Accordingly, Petitioner’s claim is hereby **DENIED**.

**C. The February 24, 2020 Incident Was a Manifestation of [REDACTED]’s Disabilities.**

14.

“Under the IDEA, any decision to change the placement of a child with a disability based on a violation of a code of conduct requires the IEP team to hold a ‘manifestation determination’ meeting to determine if the child’s disability caused or had ‘a direct and substantial relationship’ to the conduct or if the conduct was the direct result of the educational agency’s failure to implement the IEP.” A.H. v. Jackson-Olin High Sch., No. 2:18-cv-02081-ACA, 2020 U.S. Dist. LEXIS 77633 (N.D. Al. May 4, 2020) (citing 20 U.S.C. § 1415(k)(1)I(i)). Within ten days, the manifestation determination must be made by the school district, the parent, and relevant members of the child’s IEP team, who must review the student’s file, including the IEP, any teacher observations, and any relevant information provided by the parent. 34 C.F.R.

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<sup>50</sup> This was similar to Dr. Zawoyski’s recommendation relating to DBT, which Dr. Zawoyski said was not an in-school therapy, but an intensive out-patient or in-home therapy. In any event, Petitioners failed to present sufficient evidence regarding DBT for the Court to make a finding regarding whether [REDACTED] needed DBT to enable him to make progress toward his IEP goals.

§ 300.530(e). If the determination is that it was a manifestation, “the default rule is that the child must be returned ‘to the placement from which [he or she] was removed.’” Olu-Cole v. E.L. Haynes Pub. Charter Sch., 930 F.3d 519, 524 (DC. Cir. 2019) (citing 20 U.S.C. § 1415(k)(1)(F)(iii); 34 C.F.R. § 300.530(f)(2)). “If, on the other hand, the misconduct was not tied to the student’s disability, then the school can pursue the same disciplinary procedures that ‘would be applied to children without disabilities[.]’” Id. (citing 20 U.S.C. § 1415(k)(1)(C)).

15.

Unlike the review of the appropriateness of an IEP, “a manifestation determination is by its very nature retrospective, for it looks back at the child’s behavior and attempts to determine if the child’s disability impaired his ability to understand and control his behavior.” Richland Sch. Dist. v. Thomas P., No. 00-C-0139-X, 2000 U.S. Dist. LEXIS 15162, at \*27 (W.D. Wisc. May 24, 2000) (finding that the hearing officer “is to take the place of the IEP Team and make his own independent determination of whether the agency has shown that the child’s behavior was a manifestation of his or her disability”). Manifestation determination review teams or MDRs “must do more than consider a student’s disability ‘in light of what is typical for students with [the disability].’” J.H. v. Rose Tree Media Sch. Dist., No. 17-4766, 2018 U.S. Dist. LEXIS 157803, at \*8 (E.D. Pa. Sept. 17, 2018) (quoting Bristol Twp. Sch. Dist. v. Z.B., 2016 U.S. Dist. LEXIS 4626 (E.D. Pa. 2016)). “In other words, MDRs must ‘consider the specific circumstances of the incident and the alleged conduct.’” Id. Finally, the MDR team’s role is not to review the merits of the disciplinary tribunal’s findings of whether and how a student violated the code of conduct but is to determine only whether the conduct was a manifestation of the student’s disability. Danny K. v. Dep’t of Educ., No. 11-00025 ACK-KSC, 2011 U.S. Dist. LEXIS 111066, at \*40 (D. Haw. Sept. 27, 2011).

As a preliminary matter, the Court concludes, based on the record in this case, that BCSD complied with IDEA's procedural requirements in conducting the MDR. The MDR meeting was held within ten days of ██████'s suspension for the February 24, 2020 incident by a team composed of his parents, BCBS representatives, and relevant members of the IEP team. Although there were many participants from BCSD present at the meeting, the Court concludes that the composition of the MDR team was proper under IDEA. See 20 U.S.C. § 1415(k)(1)(E)(i); Fitzgerald v. Fairfax County Sch. Bd., 556 F. Supp. 2d 543, 552 (E.D. Va. 2008). In addition, the Court concludes that the MDR team reviewed appropriate information from ██████'s file, including his IEP, direct information regarding the incident from two teachers that were present, and information regarding his most recent psycho-educational evaluation. Finally, ██████'s parents and their attorney were full participants in the meeting and expressed their opinion, which was shared by both ██████'s counselor and one of his general education teacher, that his conduct was a manifestation of his disabilities. As the Fitzgerald court held, "parents have a right to participate and be heard in the MDR hearing, but these proceedings may become adversarial, as parents may well disagree with the school's decision to discipline their child." 556 F. Supp. 2d at 558. Thus, if consensus cannot be reached after the MDR, the school district must make the decision, and the parents' recourse is to appeal that determination, as they have in this case, although not under the expedited review process established by IDEA. Id. See also 34 C.F.R. § 300.532.<sup>51</sup>

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<sup>51</sup> Under the expedited review procedures, if an administrative law judge finds that the student's misconduct was a manifestation of his disability, the administrative law judge can return the child to the placement from which the child was removed. 34 C.F.R. § 300.531(b)(2)(i). That remedy is not available in this case because the expulsion and alternative placement ended at the end of the 2021-2022 school year.

17.

In terms of the substantive decision of the MDR team, the Court first considers ■■■.'s disabilities. ■■■. has been diagnosed with ADHD, as well as Oppositional Defiant Disorder, and Intermittent Explosive Disorder, among other disorders, and he has been found eligible by the IEP team for special education as a student with an Other Health Impairment. OHI is defined as “having limited strength, vitality or alertness including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that (1) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, or heart condition, hemophilia, lead poisoning, leukemia, rheumatic fever, sickle cell anemia, and Tourette Syndrome, and (2) Adversely affects a child’s educational performance.” DOE Rule 160-4-7-.05 (Appendix g); 34 C.F.R. § 300.8(c)(9). The Georgia Department of Education regulation also provides that in some cases, students with OHI will have difficulties with starting, staying on and completing task; making transitions between task; **interacting with others; following directions**; producing work consistently; and organizing multi-step tasks.” *Id.* (emphasis added).

18.

Petitioners proved, by a preponderance of the evidence, that ■■■.'s misconduct was caused by or had a direct and substantial relationship to his disability. See 34 C.F.R. § 300.530(e)(i). The February 24, 2020 incident involved ■■■.'s failure to follow directions and stay on task, while being disruptive and disrespectful, making threatening comments to his peers and teachers, and escalating verbal aggression and physical posturing. ■■■.'s IEP from December 16, 2019 identified off-task behaviors and aggression as behaviors that interfered with

his learning and the learning of others, explicitly targeted those behaviors in his BIP, and provided interventional strategies for his teachers to prevent or manage them. Although the Court has considered the opinions of Ms. Clarkson and Ms. Foust that ██████'s behaviors, especially when he chose to return to class and continue his misconduct, were “a choice” and not a product of his disabilities, the evidence in the record proves otherwise. As Dr. Zawoyski found in her report, there have been “broad concerns” for ██████'s behavioral functioning throughout his life, particularly regarding aggression and ADHD symptoms, and BCSD has targeted such behaviors with special education services and supports since he was in third grade. The Court also is persuaded by Dr. Zawoyski's explanation that students with ADHD often have difficulty with emotional regulation and are unable to control aggressive impulses, which can lead to significant behavioral outbursts, such as what occurred on February 24, 2020. The Court further credits the evidence in the record that ██████'s counselor, who saw him in the middle of the incident and met with him on a weekly basis, as well as one of ██████'s general education teachers, also considered ██████'s conduct to have a direct and substantial relationship to his disabilities.

19.

Finally, the Court has taken into consideration that the most severe conduct on February 24, 2020, which led to the more serious code of conduct violation, occurred after Mr. Scandrett called ██████'s mother in ██████'s presence, a clear violation of a long-standing provision in ██████'s IEPs. Although BCSD argued that the call was appropriate in light of ██████'s escalating behavior, there was simply no explanation for why Mr. Scandrett placed the call in front of ██████, particularly after ██████'s mother had recently reminded him of the specific provision in his BIP. According to the Disciplinary Report and the MDR Report, at least two adults – the SRO and a

coach – were both still in the otherwise empty classroom with ■■■■■, and Mr. Scandrett could easily have stepped outside to call ■■■■■’s mother outside ■■■■■’s presence. Moreover, despite the conflict between the two reports regarding whether ■■■■■ began threatening teachers before or after the call, the preponderance of the evidence proved that the call triggered a significant escalation of his misconduct, which included posturing with the SRO, running out of the school, and returning to Mr. Wilson’s classroom, threatening to “fight him.” Accordingly, the Court concludes that a significant portion of “the conduct in question” was a direct result of the school’s failure to implement a material provision of his IEP. See 34 C.F.R. § 300.530(e)(ii).

20.

Under IDEA’s discipline procedures, when the conduct in question is a manifestation of a student’s disability, the IEP team must either conduct a new FBA or consider modifications to an existing BIP. See 34 C.F.R. § 300.530(f). In this case, notwithstanding the team’s erroneous manifestation determination, the Court concludes that BCSD fulfilled this requirement. Specifically, there was already a BIP in place at the time of the incident, Dr. Delgado had already conducted her observation, and BCSD had already begun collecting FBA data. Within two months of the incident and less than six weeks after the pandemic’s upheaval of in-person learning, the IEP team revised ■■■■■’s BIP, taking into account Dr. Delgado’s recommendations and the new data. The IEP also modified ■■■■■’s IEP goals and added OT services. In addition, after ■■■■■ returned to in-person learning in September 2020, BCSD paid for Dr. Zawoycki to conduct an independent educational evaluation and FBA at Petitioners’ request. Thus, although the MDR team did not reach the proper manifestation determination, the Court concludes that it nevertheless provided the services required under 34 C.F.R. § 300.530(f)(1).

21.

The harder question is to what extent BCSD violated the provisions in IDEA that required the IEP team “to return [█.] to the placement from which [he] was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.” 34 C.F.R. § 300.530(f)(2). The Court concludes that, under the unique circumstances of this case, █.’s placement at NBA was not a violation of FAPE. First, the Court has considered that █.’s parents did not avail themselves of the expedited appeal procedures in IDEA, which provide for a hearing within 20 school days. 34 C.F.R. § 300.532. Although by foregoing their right to an expedited appeal Petitioners did not forfeit their right to challenge the placement of █. at NBA as a FAPE violation, the Court concludes their inaction and later request that █. be permitted to stay at NBA, rather than return to █ High School in December 2020, can reasonably be construed as an agreement to a change in placement under 34 C.F.R. § 300.530(f)(2).

22.

Even if BCSD’s failure to return █. to █ High School is considered an actionable violation of IDEA, IDEA provides that the Court “shall grant such relief as the court determines is appropriate.” 20 U.S.C. § 1415(i)(2)(C)(iii). See Cobb County Sch. Dist. v. A.V., 961 F. Supp. 2d 1252, 1263 (N.D. Ga. 2013). The courts have interpreted this to mean that 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) (internal quotations and citations omitted); Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1285 (11th Cir. 2008) (quoting Burlington, 471 U.S. at 374). The appropriate relief is “determined by balancing the equities. Factors that should be taken into account include the parties’ compliance or noncompliance with state and

federal regulations pending review, the reasonableness of the parties' positions, and like matters." Burlington v. Dep't of Educ., 736 F.2d 773, 801-802 (1st Cir. 1984), aff'd sub nom. Burlington, 471 U.S. at 359. As stated above, the IEPs and services developed for [REDACTED] while at NBA were reasonably calculated to enable [REDACTED] to participate in the general education in an alternative, and for some portion of the time, virtual setting, and Petitioners acquiesced and later affirmatively chose to keep [REDACTED] at NBA rather than have him return to [REDACTED]. Consequently, the Court concludes that based on the equities, Petitioners are not entitled to relief as a result of violations of the manifestation and discipline provisions of IDEA, and their claim for relief on these grounds is hereby **DENIED**.

**D. Petitioners Failed to Prove that BCSD Punished [REDACTED] by Changing His Placement in Violation of IDEA.**

23.

Petitioners alleged in the due process complaint that BCSD's "decisions to punish [REDACTED] with changes to his placement are contrary to law." To the extent that this claim relates to changes in placement prior to July 27, 2019, the claim is barred by the statute of limitations. Similarly, claims relating to bus suspensions, in-school suspensions, and time-outs after July 27, 2019 were involuntarily dismissed following the presentation of Petitioners' case in chief. Finally, the claim relating to [REDACTED]'s placement at NBA is addressed above, and BCSD's proposed placement at GNETS is discussed below. There is no other evidence in the record regarding a decision by BCSD that was intended to punish [REDACTED] by changing his placement in violation of IDEA. Accordingly, this claim is **DENIED**.

**E. The Proposed GNETS Placement is Appropriate and Does Not Violate IDEA’s Least Restrictive Environment Mandate.**

24.

Petitioners contest BCSD’s proposed placement at Mainstay Academy on both procedural and substantive grounds. First, Petitioners allege that BCSD conducted a “surreptitiously obtained evaluation” to support the proposed placement at Mainstay. The evidence in the record does not support this allegation. Rather, the preponderance of the evidence proved that Ms. Clarkson provided prior written notice to Petitioners on May 11, 2020, notifying them that BCSD intended to invite a representative of Mainstay to provide input on ■■■■■’s case. A few months later, Ms. Clarkson and Ms. Foust completed a GNETS Consultation form, asking GNETS to participate in ■■■■■’s IEP planning, including observation and feedback. Although Petitioners appear concerned that someone from GNETS conducted a secret observation or evaluation of ■■■■■ that was not disclosed to his parents, there is no evidence in the record that any such observation or evaluation occurred. Moreover, Petitioners have provided no authority to support a claim that the mere completion of the consultation form, or indeed, an effort by members of the IEP team to, in fact, consult with GNETS was prohibited by IDEA, or that it denied them the right to fully participate in the IEP process.

25.

Further, Petitioners’ substantive objection to the proposed placement centers on the IDEA’s requirement that students with disabilities be educated in the least restrictive environment. 20 U.S.C. § 1412(a)(5)(A); see also 34 C.F.R. § 300.114(a)(2). “This provision is also known as the IDEA’s ‘mainstreaming’ requirement, which provides that school districts provide a ‘continuum of alternative placements’ to meet the needs of disabled students, including ‘instruction in regular classes, special classes, special schools, home instruction, and

instruction in hospitals and institutions.” M.W. v. Clarke County Sch. Dist., No. 3:06-CV-49(CDL), 2008 U.S. Dist. LEXIS 75278 (M.D. Ga. Sept. 29, 2008) (citing 34 C.F.R. § 300.551). Under IDEA, students with disabilities should be educated with children who are not disabled “to the maximum extent possible,” and should be removed from the regular educational environment only “when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C. § 1412(a)(5)(A).

26.

On the other hand, courts have recognized the tension between mainstreaming and meeting each child’s unique needs. Greer v. Rome City School Dist., 950 F.2d at 695. Thus, although there is a preference for educating children with a disability in the general education setting, Congress also recognized that a general education classroom will not be suitable for all children with disabilities, and if that is the case, the presumption in favor of mainstreaming is overcome. Id. In Greer, the Eleventh Circuit adopted a two-part test to determine whether a school district is offering education in the LRE: “First, we ask whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily. See 20 U.S.C. 1412(5)(B). If it cannot and the school intends to provide special education or to remove the child from regular education, we ask, second, whether the school has mainstreamed the child to the maximum extent appropriate.” Id. at 696.

27.

When considering these questions, Greer cautions courts to consider no single factor dispositive. Id. Rather, courts should conduct an “individualized, fact-specific inquiry,” including the nature and severity of the disability, the student’s needs and abilities, and the

schools' response to those needs. Id. (citations omitted); see also S.M. v. Gwinnett County Sch. Dist., No. 1:14-CV-247-MHC, 2015 U.S. Dist. LEXIS 194582 (N.D. Ga. May 29, 2015). In addition, Greer identifies three factors to consider in determining whether a regular education placement is appropriate:

- 1) compare the educational benefits in general vs. special education,
- 2) consider the effect of the student's presence on the education of other students, and
- 3) consider the cost of supplemental aids and services in the general education setting.

Id.

28.

Having considered these factors, the Court concludes that the placement at Mainstay is appropriate and complies with IDEA's LRE mandate. First, both the parents and the School District agree that [REDACTED]. cannot satisfactorily receive education in a general education classroom. [REDACTED].'s mother told the IEP team at the April 2021 IEP meeting that [REDACTED]. needed to be with one teacher and one paraprofessional with very limited transition and movement, and the other team members agreed that [REDACTED]. needed a small, structured setting. Petitioners also agreed that it is imperative that all of the educators that interact with [REDACTED]. be highly-trained on de-escalation strategies and other behavior management interventions, and the Mainstay staff are. The Court has also considered that [REDACTED]. currently receives little if any educational benefit in the regular education setting at [REDACTED] High School because his behaviors are being managed by letting him sleep most of the day,<sup>52</sup> and that his disruptive behaviors have had a negative impact on other [REDACTED] High students in the past. Finally, the Court has considered the testimony of Ms. Foust, Ms. Clarkson, and Mr. Allen, as well as the history of services offered to [REDACTED]. in the past

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<sup>52</sup> It is more likely than not that [REDACTED]. is also missing out on most of the "non-academic" benefits of mainstreaming since he is mostly sleeping during the short time he is in school. See S.M., 2015 U.S. Dist. LEXIS at \*17.

to support his participation in the general education setting, and concludes that BCSD has attempted to mainstream [REDACTED] to the maximum extent appropriate, and those attempts, even with supplemental aids and services, have been unsuccessful.

29.

Consequently, the Court concludes that Mainstay Academy is an appropriate placement for [REDACTED] and is the least restrictive environment in which he can reasonably be expected to make appropriate progress given his unique circumstances. Although the Court understands Petitioners' opposition to Mainstay, the preponderance of the evidence proved that [REDACTED] needs a therapeutic environment in order to learn the self-regulation and social skills necessary for him to participate in a general education setting. At Mainstay, he will have the opportunity to participate, when appropriate, in the extra-curricular activities at his home school, and the IEP team may determine that it is appropriate for [REDACTED] to spend part of his school day attending classes at [REDACTED] while still receiving structured behavioral support at Mainstay. The Court was persuaded by the testimony of Ms. King and others that the services available at Mainstay are well-suited to [REDACTED]'s need for intense social skills and behavioral training and will allow him to continue to access the regular education curriculum while gaining these skills.

**IV. DECISION**

For the reasons stated above, Petitioner's claims for relief under IDEA are hereby **DENIED**.

**SO ORDERED**, this 18th day of January, 2022.

*Kimberly W. Schroer*

**Kimberly W. Schroer**  
**Administrative Law Judge**

