

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

█ **BY AND THROUGH** █.; AND

Petitioner,

v.

BUTTS COUNTY SCHOOL DISTRICT,
Respondent.

**Docket No.: 2010941
2010941-OSAH-DOE-SE-18-Schroer**

Agency Reference No.: 2010941



01/14/2020

FINAL DECISION

Meredith Spears
Meredith Spears, Legal Assistant

On or about October 2, 2019, █, by and through his guardian █, and █ (“Petitioners”) filed a due process complaint pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (“IDEA” or “Act”), 20 U.S.C. §§ 1400 to 1482, and its implementing regulations, 34 C.F.R. Part 300, against Respondent Butts County School District (“BCSD” or the “District”). A hearing was held at the Office of State Administrative Hearings on November 4-5, 2019. Petitioners were represented by Eugene Choi, Esq., and Legal Associate Taylor Loynd. The District was represented by Megan Pearson, Esq., and Matthew Collum, Esq. The record remained open until December 2, 2019, to allow the parties to file post-hearing briefs. After careful consideration of the evidence of record in this case, and for the reasons stated below, Petitioners’ request for relief is **GRANTED** in part and **DENIED** in part.

I. FINDINGS OF FACT

A. *Background*

1.

█ is a fourteen-year-old student enrolled in the District as an eighth-grader, though he is currently expelled. He has attended District schools since kindergarten. (Testimony of █. at

Transcript [hereinafter, “T.”] 122-23, 210-11, 366; DPHR ¶ 1; Respondent’s Defenses of Law and Answer to Petitioners’ Due Process Hearing Request [hereinafter, “Answer”] ¶ 1.)

2.

█ is █ grandmother and guardian. She has been █ caregiver since he was three months old. (Testimony of R.S. at T. 122, 182.)

3.

At age three, █ was diagnosed with Attention Deficit Hyperactivity Disorder (“ADHD”) and Oppositional Defiance Disorder (“ODD”). He is currently being treated by a physician for ADHD and Disruptive Mood Dysregulation Disorder (“DMDD”). (Testimony of █ at T. 123-24, 499; Ex. P-5.)

4.

█ began exhibiting behavior problems in elementary school as early as kindergarten. For example, as a kindergartner in January of 2012, █ pushed a student against a wall and put his hand to the student’s throat as if to choke her. (Ex. P-24.)

B. Fifth Grade: Efforts to Address Intensifying Behaviors

5.

In September of 2016, when █ was ten years old and in fifth grade at Daughtry Elementary School, concerns about his increasingly aggressive and disrespectful behavior led to the establishment of a Tier 2 Response to Intervention (“RTI”) Plan.¹ His behavior escalated and became more aggressive over the next few months, and in February of 2017, he was moved to Tier 3. Notes from the Tier 3 Review include an observation by the team that “there doesn’t seem to be a rhyme or reason or specific trigger—other than the bus in the morning. Although the violent

¹ See Ga. Comp. R. & Regs. 160-4-7-.03(2) (setting forth interventions prior to referral for special education).

outbursts are unpredictable, the defiant behavior is an all-day every day occurrence.” (DPHR ¶ 7; Answer ¶ 7; Testimony of [REDACTED] at T. 127-28, 133-36, 196; Ex. P-7 at 386.)

6.

On February 7, 2017, [REDACTED] consented to academic screening, hearing/vision screening, and a functional behavioral assessment for [REDACTED]. School psychologist Dr. Brandi Wells completed a Psychoeducational Assessment Report, dated March 20, 2017. [REDACTED] performance on the Woodcock-Johnson IV Tests of Cognitive Abilities and a related subtest, the Comprehension-Knowledge Cluster, ranged from average to low-average. Results of the Developmental Test of Visual-Motor, Sixth Edition were in the low range and suggested “difficulties with visual spatial organizing, planning, and attention to visual details.” Results of the Woodcock-Johnson IV Tests of Achievement were average. Dr. Wells also administered the Behavior Assessment System for Children, Third Edition (“BASC-3”). Results of the teacher and parent ratings on the BASC-3 indicated “clinically significant scores in the Behavioral Symptoms Index[,] suggesting problematic behaviors that may interfere with [REDACTED] daily functioning and school performance.” [REDACTED] perception of his own social and emotional functioning, as reflected by the BASC-3 Self-Report of Personality, indicated “average and age-appropriate behaviors in most of the areas assessed” and “at-risk ratings” in Inattention/Hyperactivity. Dr. Wells noted that [REDACTED]. displayed elevated levels of inattentiveness, impulsivity, and hyperactivity,” had “difficulty with sustaining his attention during lectures,” “does not seem to listen when spoken to directly,” “avoids and is reluctant to engage in tasks that require sustained attention,” and “is forgetful.” She opined that “results from this evaluation indicated that [REDACTED] behavior difficulties adversely impacts [*sic*] his overall school performance and social, interpersonal relationships with others.” (DPHR ¶¶ 10-11, 13; Answer ¶¶ 10-11, 13; Ex. P-8, P-9, R-4.)

7.

Around the same time, in February of 2017, as the behaviors intensified, [REDACTED] was told by school officials that [REDACTED] should attend school only for a half-day. The school day for [REDACTED] ended around noon. Records show that the half-day plan was “temporary” and that the team intended to meet “the week before Spring Break to determine a transition plan to a full day.” (Testimony of [REDACTED] at T. 139-40, Ex. P-10 at 603, 605.)

8.

On April 13, 2017, an IDEA eligibility meeting was held. The team determined that [REDACTED] was not eligible for special education; instead, it concluded that a Section 504 accommodation plan would adequately address [REDACTED] ADHD. (DPHR ¶ 15; Answer ¶ 15; Ex. P-10 at 614, P-11.)

9.

Records of behavior incidents from [REDACTED] fifth grade year, as reported in the Behavior Detail Report, include, but are not limited to, pushing a student and pretending to punch him, disrespectful and/or threatening comments directed at students and staff, yelling at others, cursing loudly at students and teachers in the classroom, refusing to do work or follow instructions, bullying a student on social media, and hitting other students. (Ex. P-24 at 24-34.)

10.

In June of 2017, in connection with proceedings in Juvenile Court related to charges of bullying, [REDACTED] was evaluated for competency by Dr. Alan Williams, a psychologist and consultant to the Department of Behavioral Health and Developmental Disabilities. Dr. Williams reviewed records, interviewed [REDACTED] and [REDACTED], and administered assessments including the Kaufman Brief Intelligence Test, Second Edition; Wide Range Achievement Test, Fourth Edition; Test of

Auditory Reasoning and Processing Skills; and Reynolds Child Depression Scale. In a report dated July 12, 2017, Dr. Williams included diagnostic impressions of ADHD, conduct disorder, and relative academic weakness in math. (Ex. R-5.)

C. Sixth Grade: Diagnosis of DMDD and Continuing Concerns Regarding Behavior

11.

████ entered sixth grade at Henderson Middle School in the fall of 2017. In August of 2017, █████ notified the District that █████ had been diagnosed with DMDD. Specifically, █████ provided the District with a letter from Lindsey Stevens, the Director of the Butts County Counseling Center, stating that █████ was enrolled in their services and under the care of a psychiatrist, Dr. Johnson, and further stating that █████ was diagnosed with ADHD and DMDD. As set forth in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (“DSM-5”), DMDD is characterized in part by “[s]evere recurrent temper outbursts manifested verbally (e.g., verbal rages) and/or behaviorally (e.g., physical aggression toward people or property) that are grossly out of proportion in intensity or duration to the situation or provocation,” and “[t]he mood between temper outbursts is persistently irritable or angry most of the day.” The DSM-5 specifies that DMDD “cannot co-exist” with ODD (or certain other disorders). (DPHR ¶¶ 16-17; Answer ¶¶ 16-17; Testimony of Dr. Sara Deckelbaum at T. 57-61; Ex. P-3, P-12.)

12.

Records of behavior incidents from █████ grade year include, but are not limited to, insubordination, disrespectful comments directed at students and teachers, yelling at others, cursing loudly at students and teachers in the classroom, threatening staff, sending an image of a gun via electronic message to a student, disrupting class (such as by yelling or making loud noises), and becoming loud and argumentative when redirected. (Ex. P-24 at 15-24.)

13.

In December of 2017, ■■■ was referred to a disciplinary tribunal after acting aggressively towards five students and pushing a teacher. ■■■ was suspended, and in January of 2018 he began attending the District's alternative school, New Beginnings Academy ("NBA"). At NBA, instruction is computer-based; students complete all assignments on a computer, using a program called Edgenuity. A teacher is available if a student requests assistance. A 2017-2018 Grade 6 Progress Report for the fourth quarter of the year shows that, by the end of the year, ■■■ was failing three of his four subjects at NBA. (Testimony of W. Allen at T. 225-32; Ex. P-15, P-24 at 15, R-3.)

D. Seventh Grade: Further Assessments and Continuing Concerns Regarding Behavior

14.

In August of 2018, as ■■■ seventh grade year began, a Functional Behavioral Assessment ("FBA") was conducted, at the request of ■■■.² The report was prepared by William Allen, who is a homeroom teacher and special education coordinator at NBA. Mr. Allen received a brief (possibly one-day) training in conducting FBAs approximately three years ago by the District. The FBA focused on three target areas: not focusing, task avoidance, and refusal to follow directions. Mr. Allen also participated in creating a Behavior Intervention Plan ("BIP"), which was informed by the FBA, and which included improving the targeted behavior of "physically touch[ing] someone with hands or objects." (Testimony of W. Allen, T. 224, 234, 236, 311-12; Ex. P-16, P-

² The record indicates that ■■■ first requested an FBA in February of 2017, when ■■■ was in the fifth grade. Another request appears to have been made by ■■■ during a Section 504 meeting on August 1, 2018. There is no explanation that the Court can find for the lapse between the initial February 2017 request and the eventual August 2018 FBA conducted at the beginning of seventh grade. (Testimony of R.S. at T. 221-223.)

17, P-30 at 3.)

15.

In a psychological evaluation dated September 13, 2018, Dr. Julie Medlin, a psychologist and Director of the Medlin Treatment Center, administered various assessments to gain information from both [REDACTED] and [REDACTED], including the Piers-Harris 2 Self-Concept Scale; Child Depression Inventory (“CDI-2”); Child Behavior Checklist for Ages 6-18; BASC-3 Self Report; Attention Deficit Disorders Evaluation Scale, Home Version; and Personal Problems Checklist, Age 12-18. Dr. Medlin concluded that [REDACTED] met the diagnostic criteria for ODD, and that he continued to have “significant attention problems despite his current psychotropic medication” for ADHD.³ Dr. Medlin noted that, based on ratings by [REDACTED], [REDACTED] “has significant symptoms of anxiety,” but that [REDACTED] himself did not report such symptoms and “appeared to minimize the extent of his emotional and behavioral difficulties.” (Ex. R-6 at 9.)

16.

In October of 2018, [REDACTED] threatened suicide and was required to complete a risk assessment before returning to school. [REDACTED] threatened suicide again in December of 2018. In connection with the December threat, [REDACTED] was seen by Dr. Rohit Khanna, a physician at Riverwood Behavioral Health System, and diagnosed with major depressive disorder. (Testimony of [REDACTED] at 153-56; Ex. P-18.)

17.

On April 5, 2019, Butts County school psychologist Dr. Ashara McKee-Williams conducted a psychoeducational evaluation of [REDACTED]. She administered the Reynolds Intelligence

³ Dr. Medlin noted her review of records of various behavioral issues including a May 2018 incident in which [REDACTED] made “terroristic threats toward the high school principal and the juvenile court.” (Ex. R-6 at 2.)

Assessment Scales, Second Edition; Woodcock-Johnson Tests of Achievement, Fourth Edition; CDI-2; Revised Children's Manifest Anxiety Scale, Second Edition; and the BASC-3. Dr. McKee-Williams also reviewed records, including the March 2017 Wells Report, the June 2017 Williams report, the September 2018 Medlin Report, developmental and social history (including a medical update form completed by Dr. Asad Naqvi, who manages [REDACTED] medication), an interview with teacher Mr. Henderson, and an interview with [REDACTED]. As part of her written report, Dr. McKee-Williams offered her opinion that "it appears that [REDACTED] does not meet the eligibility requirements for emotional behavior disorder," also referred to as EBD.⁴ She reasoned that [REDACTED] could not meet the criteria for EBD because the "emotion piece," which she considered to be depression and/or anxiety, was missing. Regarding the eligibility category of Other Health Impairment ("OHI"), Dr. McKee-Williams further stated in her report, "While there were some indications of difficulties with attention[,] they do not appear to have an adverse impact on his acquiring of academic skills." Dr. McKee-Williams concluded that [REDACTED] was choosing not to do his work and that his behavior was not a result of any disability. She explained that this conclusion was based on (1) her interview with [REDACTED], (2) reports she received from teacher Mr. Allen that [REDACTED] would make such statements as "I'm getting ready to eat my breakfast" or "I'm going to sleep" instead of doing his work, and (3) Mr. Henderson's response on the BASC questionnaire. (Testimony of A. McKee-Williams at T. 398-402, 442, 489-93, 577-79; Ex. P-4, R-4, R-5, R-6, R-7, Ex. R-29.)

18.

⁴ The Georgia Department of Education's definition for EBD, as set forth in Ga. Comp. R. & Regs. 160-4-7-.05, is provided below in the Conclusions of Law. The IDEA's terminology for the same category is "serious emotional disturbance" or "emotional disturbance." See 34 C.F.R. § 300.8(c)(4)(i). For sake of consistency, the Court will use the term "EBD" throughout, unless otherwise noted.

A second IDEA eligibility meeting was held on April 24, 2019. Dr. McKee-Williams participated and presented her conclusions. Among the topics of discussion were ■■■ failure to complete work in two of his four first-semester classes and his twenty-three behavioral referrals for the year. Additionally, the team discussed whether his behavior was “choice-driven.” The team determined ■■■ was not eligible for special education under the categories of EBD (based on the diagnosis of ODD)⁵ or OHI (based on the diagnosis of ADHD). (DPHR ¶ 40, 44; Answer ¶ 40, 44; Ex. R-1, P-21, P-22, P-23; Testimony of ■■■ at T.160-61.)

19.

At the hearing, District witnesses who were involved in the April 2019 eligibility meeting explained that they believed ■■■ behavior is his choice and thus is not related to or caused by a disability. NBA principal Derek Vander Ven stated that, in 2018, he overheard ■■■ tell a paraprofessional at school, “I can behave; I choose not to.” This statement in part led Mr. Vander Ven to conclude that ■■■ behavior is not caused by a disability. In addition, Mr. Vander Ven stated that in March or April of 2019, he decided to try a different approach to disciplining ■■■ instead of suspending ■■■ and sending him home, Mr. Vander Ven assigned detention and kept ■■■ later at school for three consecutive afternoons. According to Mr. Vander Ven, ■■■ thereafter made the choice that he did not want to stay after school and was able to avoid further behavior incidents for over a month until his next referral on May 21, 2019. Teacher Mr. Allen testified that “[t]here would be days where ■■■ would choose not to work, or say he wasn’t working. Then, in addition to that, he had days where we’d have to redirect him because he would get off task. When we did, and he didn’t become defiant, he could complete his tasks and was successful.”

⁵ Witnesses who were present at the April 2019 eligibility meeting indicated that the diagnosis of DMDD, which had been conveyed to the District by ■■■ in the fall of 2017, was not discussed or considered. See Testimony of W. Allen at T. 255, A. McKee-Williams T. 502-03.

As noted above, Dr. McKee-Williams also concluded that [REDACTED] was choosing not to do his work and that his behavior was not a result of any disability. (Testimony of D. Vander Ven at T. 318-19, 336-37; W. Allen at T. 283; A. McKee-Williams at T. 489-93.)

District witnesses also categorized [REDACTED] behavior as not involving “emotionality,” which they believed to be a distinguishing feature of EBD. Mr. Allen testified as to his understanding that [REDACTED] behaviors “did not seem to be emotionality-based,” but were instead “conduct.” He further stated that not completing work is a choice “because when redirected, he will say no.” When asked whether the unspecified mood disorder or DMDD could be the cause of [REDACTED] refusing to complete assignments, Mr. Allen stated that he did not know all the details. Mr. Vander Ven also testified that he “do[es] not see the emotionality that would result in an EBD eligibility.” He explained, “When I think of EBD, I think of a child who has a very—something that you don’t see coming, an emotional outburst that, quite often, catches you off guard, that they are then remorseful about later.” Regarding relationships with peers and teachers, Mr. Vander Ven testified that he has “seen where [REDACTED] has been able to have good conversations and work on those relationships.” Ariel Woodruff, a teacher at Henderson Middle School,⁶ noted that the team considered [REDACTED] improved relationship with Mr. Vander Ven and discussed “cultural factors that surround [REDACTED], and living in a home with multiple people present and socioeconomic factors that go into that.” Tracie Miles, another teacher at Henderson Middle School,⁷ testified that, in her experience, the “emotional

⁶ Ms. Woodruff participated in the eligibility meeting of April 24, 2019, as a representative of Henderson Middle School. She has not interacted with [REDACTED] in any classroom setting and did not further explain her comments regarding “cultural factors.” The Court is troubled by her suggestion that a household consisting of a single grandparent raising her grandchildren is a legitimate “cultural” factor to justify excluding a child from Georgia’s definition of EBD. *See infra*, p. 16. The Court also notes that “cultural” factors are not included in the factors identified under the federal regulations defining the category of “emotional disturbance” and questions whether Georgia’s inclusion of “culture” as an “exclusionary factor” for EBD would withstand federal scrutiny. *See* 34 C.F.R. § 300.8(c) (4) (disability of “emotional disturbance” includes “inability to learn that cannot be explained by intellectual, sensory, or health factors”), *see generally* 34 C.F.R. § 300.306(c)(1) (“social or cultural background” can be considered as a source of information when determining eligibility, but is not identified as an “exclusionary” factor). Nevertheless, because the Court finds that the preponderance of the evidence does not support a finding that “cultural factors” adequately explain [REDACTED] “excesses, deficits, or disturbances of behavior,” such factors do not exclude him from eligibility under the EBD category.

⁷ Ms. Miles participated in the eligibility meeting of April 24, 2019, as a representative of Henderson Middle School. She has not interacted with [REDACTED] in any classroom setting.

piece” of EBD involves “students that were not in instructional control, which means they would lack the self-control to be rational. The behavior looks very different than a defiance issue.” Ms. Miles stated that, when the team discussed [REDACTED] behavior at the April 2019 meeting, “there was no emotional—emotionality brought forth as far as part of the misbehavior.” According to Ms. Miles, emotionally-based behavior involves physical aggression. (Testimony of W. Allen at T. 303-04, 308, 310; Vander Ven at 338, 340-42; Miles at 588-89, 602-04; Woodruff at 617-18.)

21.

Student progress data collected from Edgenuity for [REDACTED] seventh grade year indicates that [REDACTED] inconsistently completed his assigned work. He completed a greater percentage of work during the first semester than he did during the second semester. In the first semester of seventh grade, his completion rates and grades on the completed work (not factoring in the uncompleted work) were as follows:

- Life Science A: 100% Complete Overall Grade: 79.3%
- World Area Studies A: 100% Complete Overall Grade: 88.1%
- English Language Arts A: 31.7% Complete Overall Grade: 78%
- Mathematics A: 44.2% Complete Overall Grade: 78.5%

In the second semester of seventh grade, his completion rates and grades on the completed work were as follows:

- Life Science B: 0.8% Complete Overall Grade: 0%
- World Area Studies B: 100% Complete Overall Grade: 80.4%
- English Language Arts B: 1.6% Complete Overall Grade: 85.7%
- Mathematics B: 4.6% Complete Overall Grade: 80.5%

(Testimony of W. Allen at T. 226-29, 292-300; Ex. P-23.)

22.

An FBA dated May 2019 was conducted by Dr. Dana Zavatkay, Board-Certified Behavior Analyst, in response to a request made by [REDACTED] on January 24, 2019. This FBA concerned the targeted behaviors of non-compliance/work refusal, off task/low work completion, aggressive behaviors, and verbal aggression or threatening language. The report explains that “it is not possible to determine a firm functional hypothesis currently,” in large part because the targeted behaviors were not observed. Dr. Zavatkay noted that it was difficult to make recommendations for interventions to be used in a general education setting when she was observing [REDACTED] in a very different setting at NBA; instead, she provided general recommendations. Dr. Zavatkay conducted no further observations or analysis. (Testimony of [REDACTED] at T.160; DPHR ¶¶ 31-32; Answer ¶¶ 31-32; Ex. P-20.)

23.

Records of behavior incidents from [REDACTED] seventh grade year include, but are not limited to, disrespectful comments directed at students and teachers, yelling at others, cursing loudly at students and teachers in the classroom, threatening students and staff, invading other students’ personal space, being a “CONSTANT disruption” (emphasis in original), refusing to follow directions, touching another student’s butt, making multiple inappropriate sexual comments to a student, and poking a student with a pencil. (Ex. P-24 at 4-15.)

E. Eighth Grade: Further Assessments, Intensifying Behaviors, and Expulsion

24.

[REDACTED] returned to Henderson Middle School for eighth grade in August of 2019. Shortly thereafter, he was expelled for violations of the District’s Code of Conduct as a result of criminal

charges based on incidents occurring off-campus.⁸ He was given the option to attend NBA beginning in January 2020. During his short time attending Henderson Middle School in August of 2019, he was cited for behavior incidents including disrupting the learning environment with outbursts toward other students, being loud and disrespectful, cursing loudly, being disrespectful to a paraprofessional, making threatening comments, and arguing with and threatening to fight a female student. (Testimony of [REDACTED] at T.122, 126, 210-11; Testimony of C. Gordon at 365; Ex. P-21, P-24 at 2, 3.)

25.

Dr. Sara Deckelbaum conducted an independent education evaluation (“IEE”), dated August 30, 2019. Her assessment procedures included the following: Achenbach Child Behavior Checklist for Ages 6-8; Achenbach Youth Self-Report for Ages 11-18; Barkley Deficits in Executive Functioning Scale – Children and Adolescents; Beery Developmental Test of Visual-Motor Integration, Sixth Edition; Child Interview; California Verbal Learning Test, Children’s Version; Conners’ Rating Scale, Third Edition (Parent: Long Form); Conners’ Rating Scale, Third Edition (Self-Report: Short Form); Delis-Kaplan Executive Function System; Gray Oral Reading Tests, Fifth Edition; Psychosocial/Developmental History Questionnaire; Records Review; Rey Complex Figure Test and Recognition Trial; Sentence Completion Technique; Test of Memory and Learning, Second Edition; Test of Word Reading Efficiency, Second Edition; Wechsler Individual Achievement Test, Third Edition; and the Wechsler Intelligence Scale for Children, Fifth Edition. Dr. Deckelbaum confirmed the diagnoses of ADHD, DMDD (noting his severe, frequent outbursts at home and school and his being irritable and angry much of the time),⁹ and

⁸ The charges involve theft of a firearm and theft of a motor vehicle. At the hearing, Petitioners’ counsel noted that the expulsion is currently on appeal before the State Board of Education. (T. 15-16, 210-11.)

⁹ Dr. Deckelbaum explained that DMDD, rather than ODD, was the appropriate diagnosis because physical and verbal

unspecified depressive disorder (noting his suicidal threats and general irritability). She also diagnosed a Specific Learning Disability with Impairment in Math. Dr. Deckelbaum opined that “it is evident that psychological symptoms clearly impact academic functioning.” She also testified that [REDACTED] has trouble initiating or sustaining friendships. According to Dr. Deckelbaum, [REDACTED] diagnoses suggest his behaviors are not volitional, and the accommodations in the current Section 504 plan are not sufficient to address [REDACTED] disabilities, particularly his dysregulation.¹⁰ (Testimony of S. Deckelbaum at T. 42-43, 46-47, 50, 55, 60, 63-67, 69, 71-72, 99-101, 105; Ex. P-1.)¹¹

26.

A third IDEA eligibility meeting was held on September 17, 2019. Among the information considered was the IEE conducted by Dr. Deckelbaum and [REDACTED] state assessment scores in math and English language arts for the years 2015 through 2019, which have trended downward to the lowest category of proficiency. The team determined that [REDACTED] was not eligible for special education. (Ex. P-27.)

F. Petitioners’ Proposed Remedies

27.

As set forth in their DPHR and post-hearing brief,¹² Petitioners seek compensatory and prospective relief, including an order that the District (1) find that [REDACTED] is eligible for special

aggression are not among the criteria for ODD. (Testimony of S. Deckelbaum, T. 99-101, 117-20; Ex. P-1.)

¹⁰ As noted, the Section 504 Plan was intended to address [REDACTED] ADHD.

¹¹ In testimony, Dr. McKee-Williams questioned the appropriateness of certain assessments that Dr. Deckelbaum chose to administer. (See T. 454-56.) The Court, however, found Dr. Deckelbaum’s explanation for administering these particular assessments to be reasonable under the circumstances.

¹² As discussed in the Conclusions of Law, certain specifics of the relief requested set forth in the Petitioners’ post-hearing brief were neither provided in the DPHR nor identified at the hearing.

education services under a primary category of EBD and a secondary category of OHI, (2) fund a meaningful FBA by a BCBA, (3) conduct preliminary steps to determine whether [REDACTED] is eligible for services under SLD with Impairment in Math, (4) gather a team comprised of all appropriate individuals to develop an IEP and BIP, including participation of the BCBA, Dr. Deckelbaum, and private school staff at the District's expense, to be used in a private school setting of [REDACTED] choosing, (5) educationally compensate [REDACTED] by funding private school tuition and related services, such as transportation, if applicable, for [REDACTED] for a period of not less than two academic years (seventh and eighth grade), and (6) upon return to the District, complete steps 1-4 to ensure [REDACTED] receives a free appropriate public education ("FAPE") in this general education setting.

II. CONCLUSIONS OF LAW

1.

Petitioners bear the burden of proof in this matter. Schaffer v. West, 546 U.S. 49, 62 (2005). The standard of proof is a preponderance of the evidence. Ga. Comp. R. & Regs. 616-1-2-.21(4).

2.

At the hearing, the parties represented to the Court that the narrow issue to be decided at this time is whether [REDACTED] is eligible for special education services under the IDEA.¹³ To be eligible,

¹³ The parties stated that, if [REDACTED] were to be found to be eligible for special education services under the IDEA, it would likely be necessary to present further evidence as to the appropriate relief. Additionally, during the hearing, the Petitioners withdrew their claims related to prior written notice. Regarding the claim by Petitioners (DPHR ¶¶ 91, 131) that certain requested records were not provided, the Court observes that no evidence or argument was presented. As such, the Court considers the claim to have been abandoned. (T. 12-13, 15, 386.)

The complaint also alleges violations of rights under Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act, which Petitioners state are included for the purpose of exhaustion of administrative remedies. (Due Process Hearing Request [hereinafter, "DPHR"] ¶¶ 132-42.) OSAH's jurisdiction in an IDEA due process hearing does not extend to causes of action that arise under other federal laws. See Atlanta Indep. Sch. Sys. v. S.F., 2010 U.S. Dist. LEXIS 141552, *21-22 n.4 (N.D. Ga. February 22, 2010) ("There is nothing in the Georgia Administrative Code section applicable to IDEA dispute resolution that suggests that the impartial due process hearing is an appropriate venue for raising non-IDEA claims.") (citation omitted). When a petitioner's claims under Section 504 or the ADA seek relief that is also available under the IDEA, federal law requires that the petitioner

a student must be a “child with a disability,” defined by statute as follows:

(3) Child with a disability.

(A) In general. The term “child with a disability” means a child—

(i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this title [20 USCS §§ 1400 et seq.] as “emotional disturbance”), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and

(ii) who, by reason thereof, needs special education and related services.

20 U.S.C. § 1401(3)(A).

3.

Here, the Petitioners claim that ██████ should have been found eligible in the primary category of EBD and the secondary category of OHI. The Court agrees.

A. *The Category of EBD*

4.

EBD is defined in the rules of the Georgia Department of Education as follows:

first exhaust the IDEA’s administrative procedures. See *Durbrow v. Cobb Cty. Sch. Dist.*, 887 F.3d 1182, 1190 (11th Cir. 2018) (“Since the only remedy available under the IDEA is injunctive relief for the wrongful denial of a FAPE, any such claim must undergo an administrative hearing before proceeding to state or federal court, whether the claim arises under the IDEA, § 504, the ADA, or any other federal law.”) (citing *Fry v. Napoleon Cmty. Sch.*, 137 S.Ct. 743, 750 (2017); see also *M.T.V. v. DeKalb Cty. Sch. Dist.*, 446 F.3d 1153, 1158 (11th Cir. 2006) (“[T]he philosophy of the IDEA is that plaintiffs are required to utilize the elaborate administrative scheme established by the IDEA before resorting to the courts to challenge the actions of the local school authorities.”) (citation omitted). The exhaustion requirement does not expand OSAH’s jurisdiction or confer authority on OSAH to resolve all legal claims between parties regardless of the origin of such claims. Evidence in this Final Decision regarding Section 504 plans or accommodations is considered only to the extent that it relates to Petitioners’ claim that the District failed to determine that ██████ is eligible for services under IDEA.

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

- (i) An inability to build or maintain satisfactory interpersonal relationships with peers and/or teachers. For preschool-age children, this would include other care providers.
- (ii) An inability to learn which cannot be adequately explained by intellectual, sensory or health factors.
- (iii) A consistent or chronic inappropriate type of behavior or feelings under normal conditions.
- (iv) A displayed pervasive mood of unhappiness or depression.
- (v) A displayed tendency to develop physical symptoms, pains or unreasonable fears associated with personal or school problems. [34 C.F.R. § 300.8(c)(4)(i) (A - E)]

A child with EBD is a child who exhibits one or more of the above emotionally based characteristics of sufficient duration, frequency and intensity that interferes significantly with educational performance to the degree that provision of special educational service is necessary. EBD is an emotional disorder characterized by excesses, deficits or disturbances of behavior. The child's difficulty is emotionally based and cannot be adequately explained by intellectual, cultural, sensory general health factors, or other additional exclusionary factors.

Ga. Comp. R. & Regs. 160-4-7-.05 (Appendix d).

5.

Similarly, Emotional Disturbance is defined in the federal regulations as follows:

- (i) Emotional disturbance means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:
 - (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
 - (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

(C) Inappropriate types of behavior or feelings under normal circumstances.

(D) A general pervasive mood of unhappiness or depression.

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under paragraph (c)(4)(i) of this section.

34 C.F.R. § 300.8(c)(4)(i), (ii).

6.

The evidence presented at the hearing shows that ■■■ exhibits more than one of the characteristics of EBD and that the duration, frequency, and intensity of these characteristics interfere significantly with his educational performance. Specifically, the Court concludes that the evidence is more than sufficient to show that ■■■ exhibits an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; consistent and chronic inappropriate behavior under normal conditions; and a pervasive mood of unhappiness or depression. These characteristics have been exhibited for a long period of time and to a marked degree. ■■■ disruptive, disrespectful, and defiant behavior, as chronicled in the Behavior Detail Report and described by school staff and ■■■ is constant and consistent, a daily occurrence that has gone on for years. Coupled with his two threats of suicide and the diagnoses of DMDD and unspecified depressive disorder, this behavior cannot be dismissed as poor conduct. Over time, the behavioral symptoms have interfered with ■■■'s educational performance to the point where he has failed to complete much of his assigned work, and his milestone scores have trended downwards to the lowest category. See *Indep. Sch. Dist. No. 284 v. A.C.*, 258 F.3d 769, 775-76

(8th Cir. 2001) (“Read naturally and as a whole, the law and the regulations identify a class of children who are disabled only in the sense that their abnormal emotional conditions prevent them from choosing normal responses to normal situations.”); Muller ex rel. Muller v. Committee on Special Educ., 145 F.3d 95, 103-104 (2nd Cir. 1998) (distinguishing between “inappropriate types of behavior or feelings under normal circumstances” and “a mere conduct disorder”).

7.

The District takes the position that ■■■ does not exhibit the characteristics of EBD, but instead is only “socially maladjusted,” which by definition would exclude ■■■ from coverage under the category of EBD. In post-hearing briefing, the District argued that ■■■ behavior must be considered maladjusted, relying on Springer v. Fairfax Cty. Sch. Bd., 134 F.3d 659 (4th Cir. 1998); R.B. v. Napa Valley Unified Sch. Dist., 496 F.3d 932 (9th Cir. 2007); and N.C. v. Bedford Cent. Sch. Dist., 300 F. App’x 11, 13 (2d Cir. 2008). The undersigned concludes that these cases are distinguishable from the case at hand. First, in Springer, the court found that the seventeen-year-old student had “lots of friends,” was “respectful of teachers and appropriate,” and had been diagnosed with a “low-grade depression,” according to a “sketchy” and “incomplete” letter from a doctor. 134 F.3d at 665-65. Ultimately, the Springer court determined there was a “paucity of evidence that [the student] suffered any sort of emotional disorder.” Id. at 666. In discussing the student’s onset of juvenile delinquency in eleventh grade and the carving-out of social maladjustment from the definition of EBD, the Springer court observed, “Teenagers . . . can be a wild and unruly bunch.” In R.B., the reviewing court deferred to findings by the hearing officer that the sixteen-year-old student had overcome her struggles with interpersonal relationships and inappropriate behavior, which ceased to be pervasive and ongoing and did not adversely affect her educational performance. 496 F.3d at 944-46. Finally, in N.C., the court found that the evidence

was insufficient to show that the student’s nine-point decline in GPA was attributable to emotional disturbance; instead, the court cited a conclusion by one of the student’s therapists that the student’s acknowledged drug use was the root of his problems in school. 300 F. App’x at 13.

8.

In contrast, as previously discussed, the preponderance of the evidence shows that [REDACTED] behavioral symptoms have been exhibited for a long period of time—since at least age ten—and to a marked degree, and they have interfered with [REDACTED] educational performance. See, e.g., Hansen v. Republic R-III Sch. Dist., 632 F.3d 1024, 1027 (8th Cir. 2011) (finding student to be “emotionally disturbed” within the meaning of 34 C.F.R. § 300.8(c)(4)(i) where he “received numerous disciplinary referrals over a four-year period for threatening students and teachers, fighting with other students, and treating his peers and teachers with disrespect”). [REDACTED] behaviors were documented throughout his elementary school years, and their intensification at age ten and beyond is something different than the general “unruliness” of a socially maladjusted teenager. As far back as 2017, when [REDACTED] was a fifth-grader, Dr. Wells recognized that [REDACTED] behavior—noted to be an “all-day, every day occurrence”—was impacting his performance in school. The District’s assertion that an “emotional piece” is missing in the case of [REDACTED] is not persuasive. For one thing, the Court does not find among the characteristics listed in the definition of EBD that this elusive “emotional piece” is required. Moreover, the one-time statement by [REDACTED] that “I can behave; I choose not to” is belied by the litany of behavior incidents in the Behavior Detail Report through the years as well as the findings by Dr. Deckelbaum and other evidence. Finally, the Court notes that is possible for a student to be socially maladjusted and also to satisfy the criteria for EBD. See 34 C.F.R. § 300.8(c)(4)(ii); Ga. Comp. R. & Regs. 160-4-7-.05(Appendix d(3)); H.M. v. Weakley Cnty. Bd. of Educ., No. 13-1060, 2015 U.S. Dist. LEXIS 31028, at *27-36 (W.D. Tenn.

Mar. 13, 2015). In other words, even if certain aspects of [REDACTED] behavior might be considered more indicative of social maladjustment (such as the incidents involving the theft of a vehicle and a firearm, which were not discussed at this hearing, and regarding which the Court makes no determination), the Court finds that preponderance of the evidence supports the conclusion that [REDACTED] meets the criteria for EBD.

B. *The Category of OHI*

9.

OHI is defined in the rules of the Georgia Department of Education as follows:

Other health impairment means 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 deficient hyperactivity disorder, diabetes, epilepsy, or heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette Syndrome, and

(2) Adversely affects a child's educational performance.
[34 C.F.R. § 300.8(c)(9)]

In some cases, heightened awareness to environmental stimulus results in difficulties with starting, staying on and completing tasks; making transitions between tasks; interacting with others; following directions; producing work consistently; and, organizing multi-step tasks.

Ga. Comp. R. & Regs. 160-4-7-.05 (Appendix g).

10.

OHI is defined in the federal regulations as follows:

Other health impairment means 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 –

- (i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and
- (ii) Adversely affects a child’s educational performance.

34 C.F.R. § 300.8(c)(9).

11.

It is undisputed that [REDACTED] has a diagnosis of ADHD. The evidence shows that he has difficulty with starting, staying on, and completing tasks; making transitions between tasks; interacting with others; following directions; and producing work consistently. See Ga. Comp. R. & Regs. 160-4-7-.05 (Appendix g). Such characteristics were observed by evaluators, teachers, staff, [REDACTED], and even [REDACTED] himself. The undersigned finds that [REDACTED] educational performance, which, as noted, has trended downwards, is adversely affected by his ADHD. See Hansen, 632 F.3d at 1027-28. In no small part, [REDACTED] Edgenuity coursework, including the abysmal completion rates, illustrates this effect. As Dr. Deckelbaum noted, the current Section 504 plan, which was intended to address ADHD, is not sufficient to address [REDACTED] disabilities.

C. [REDACTED] *Is a Child with a Disability and Therefore Eligible for Special Education Services*

12.

Having established that [REDACTED] meets the criteria for EBD and OHI, the Court further concludes that he is also a child with a disability because, due to EBD and OHI, he needs special education and related services. See 20 U.S.C. § 1401(3)(A)(ii). “[N]either the IDEA nor the federal regulations’ define what it means to ‘need’ special education and related services.” Lisa M. v. Leander Indep. Sch. Dist., 924 F.3d 205, 216 (5th Cir. 2019). Courts must consider the “‘unique facts and circumstances’ of each case, including ‘parent input, and teacher

recommendations, as well as information about the child’s physical condition, social or cultural background, and adaptive behavior,’ rather than only grades and test scores.” Id. (citing Alvin v. Indep. Sch. Dist. V. A.D. ex rel Patricia F., 503 F.3d 378, 383 (5th Cir. 2007); see also 34 C.F.R. §§ 300.306(c)(1). The undersigned has carefully considered all of the testimony and documentary evidence presented at the hearing and agrees with the Petitioners that the information from these sources supports a conclusion that ■■■■ needs special education and related services.¹⁴

13.

Under both the IDEA and Georgia law, children with disabilities have the right to a free appropriate public education, or FAPE. See 20 U.S.C. § 1412(a)(1); 34 C.F.R. §§ 300.1- 300.102; Ga. Comp. R. & Regs. 160-4-7-.01(1)(a). By failing to determine that ■■■■ was eligible as a child with a disability and denying him an appropriate IEP to address his needs for special education, the Court concludes that the District violated IDEA, and Petitioners are entitled to appropriate compensatory relief. 20 U.S.C. § 1415(f)(3)(e)(ii)(II). See Cobb County Sch. Dist. v. A.V., 961 F. Supp. 2d 1252 (N.D. Ga. 2013). In determining the appropriate remedy, this 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 Sch. Comm. Of the Town of Burlington, Mass. v. Dep’t of Educ. of Mass., 471 U.S. 359, 374 (1985)). However, the task of determining the appropriate equitable remedy to compensate Petitioners for the District’s failure to provide FAPE to ■■■■ for the two years prior to the filing of the due process complaint in October 2019 is a complicated one. At this time, based on the evidence presented at the hearing, the

¹⁴ As stated at the hearing, a finding of eligibility before this tribunal will have bearing on whether various disciplinary measures imposed on ■■■■ were appropriately determined. Such issues are beyond the scope of this hearing and this Court’s role at present.

undersigned has a basis to award only a portion of the relief requested by the Petitioners. (1) As stated herein, the Court finds that [REDACTED] is eligible for special education services under a primary category of EBD and a secondary category of OHI. (2) The Court agrees that a meaningful FBA is necessary and hereby **ORDERS** the District to fund the same, as set forth further below.¹⁵ (3) The Court also agrees that the inconclusive information about [REDACTED] abilities in math warrant further assessment to determine whether he may be eligible for special education services under the category of SLD with Impairment in Math; therefore, the Court further **ORDERS** the District to fund such as assessment, as set forth more fully below. As for Petitioners' requests (4) through (6), the Court requires further information to determine whether two years in an as-yet-undetermined private school, with tuition funded by the District, with an expectation that the private school will adhere to an IEP created by the team specified by Petitioners, and with an eventual return of [REDACTED] to the District after those two years, is an appropriate or feasible plan.

14.

Based on the above rulings, the hearing record will be reopened for the limited purpose of receiving the two assessments ordered above and for the parties to present any relevant additional evidence regarding the appropriate educational setting—whether at a District school or a private school (with specifics provided as to which private school, the amount of the school's tuition and other costs, and any other such details to aid in this determination). Specifically, as to the independent FBA ordered above, within one week of the date of this Final Decision, Petitioners'

¹⁵ As the Court of Appeals for the D.C. Circuit has observed, “[i]n carrying out the complicated work of fashioning such a remedy, the district court or Hearing Officer should pay close attention to the question of assessment. Assessments sufficient to discern [the student’s] needs and fashion an appropriate compensatory education program may now exist. But it may also well be that further assessments are needed. If so, the district court or Hearing Officer should not hesitate to order them, including if appropriate on the updated record, assessment at a residential treatment facility.” *B.D. v. District of Columbia*, 817 F.3d 792, 800 (D.C. Cir. 2016). See also 34 C.F.R. § 300.502(d) (“If a hearing officer requests an independent educational evaluation as part of a hearing on a due process complaint, the cost of the evaluation must be at public expense.”)

counsel shall contact the following two board certified behavior analysts to determine their availability and willingness to conduct an FBA pursuant to this Final Decision:¹⁶

Michael M. Mueller, PhD., BCBA
Southern Behavioral Group
1950 Spectrum Circle
Suite 400
Marietta, Georgia 30067
888-759-7706

Scott Ardoin, Ph.D., BCBA
Department Head
Department of Educational Psychology
University of Georgia
323C Aderhold Hall
110 Carlton Street
Athens, Georgia 30602
706-542-4110

Within ten days of the date of this Final Decision, Petitioners' counsel shall provide a written status report to the Court regarding the estimated timeline for the completion of an evaluation by each analyst, the estimated cost of such evaluation, and any other material considerations, including recommendations from Drs. Mueller and Ardoin of other board certified behavior analysts for the Court to consider if they are not available to conduct the FBA themselves.

15.

On **January 31, 2020, at 11:00 a.m.**, the Court will conduct a telephone conference with counsel for the District and Petitioners to discuss the FBA and other matters relevant to a final determination of the appropriate compensatory education and prospective relief, including details relating to the identity and qualifications of an evaluator to conduct the math assessment and Petitioners' request for private school placement. OSAH's calendar clerk will contact counsel for

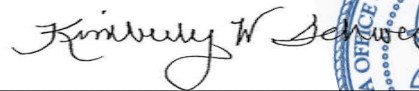
¹⁶ Petitioners' counsel may provide Drs. Mueller and Ardoin a copy of this Final Decision and any other relevant exhibits from the record, provided that they agree in writing to keep the Final Decision and other documents confidential.

the parties by email prior to the conference call to provide a call-in conference telephone number.

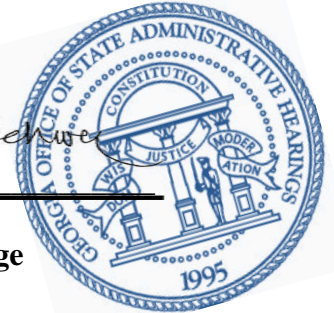
III. DECISION

As set forth herein, the Petitioners' request for relief is **GRANTED** in part and **DENIED** in part, and the hearing record shall be reopened for the limited purpose outlined above.

SO ORDERED, this 14th day of January, 2020.



Kimberly W. Schroer
Administrative Law Judge





NOTICE OF FINAL DECISION

Attached is the Final Decision of the administrative law judge. The Final Decision is not subject to review by the referring agency. O.C.G.A. § 50-13-41. A party who disagrees with the Final Decision may file a motion with the administrative law judge and/or a petition for judicial review in the appropriate court.

Filing a Motion with the Administrative Law Judge

A party who wishes to file a motion to vacate a default, a motion for reconsideration, or a motion for rehearing must do so within 10 days of the entry of the Final Decision. Ga. Comp. R. & Regs. 616-1-2-.28, -.30(3). All motions must be made in writing and filed with the judge's assistant, with copies served simultaneously upon all parties of record. Ga. Comp. R. & Regs. 616-1-2-.04, -.11, -.16. The judge's assistant is Kevin Westray - 404-656-3508; Email: kwestray@osah.ga.gov; Fax: 404-818-3724; 225 Peachtree Street NE, Suite 400, South Tower, Atlanta, Georgia 30303.

Filing a Petition for Judicial Review

A party who seeks judicial review must file a petition in the appropriate court within 30 days after service of the Final Decision. O.C.G.A. §§ 50-13-19(b), -20.1. Copies of the petition for judicial review must be served simultaneously upon the referring agency and all parties of record. O.C.G.A. § 50-13-19(b). A copy of the petition must also be filed with the OSAH Clerk at 225 Peachtree Street NE, Suite 400, South Tower, Atlanta, Georgia 30303. Ga. Comp. R. & Regs. 616-1-2-.39.

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Docket No.: 2010941-OSAH-DOE-SE-18-Schroer

EUGENE CHOI
104 MARIETTA STREET
SUITE 240
ATLANTA, GA 30303

JAMILA POLLARD
GA DEPT OF EDUCATION
205 JESSE HILL JR DR
SUITE 1870 TTE
ATLANTA, GA 30334

MEGAN M. PEARSON
SMITH, WELCH, & BRITTAIN LLP
117 BROOKWOOD AVE
JACKSON, GA 30253-3023

M. CHASE COLLUM
SMITH, WELCH, WEBB & WHITE, LLC
PO BOX 10
2200 KEYS FERRY COURT
MCDONOUGH, GA 30253