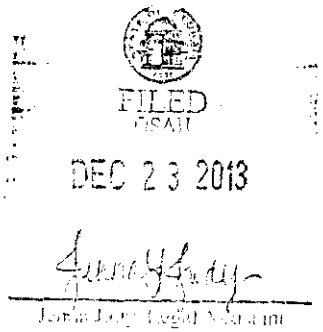
BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[redacted] **Plaintiff,**	:	
	:	**Docket No.**
v.	:	**OSAH-DOE-SE-1404095-67-Howells**
	:	
GWINNETT COUNTY SCHOOL DISTRICT,	:	
Defendant.	:	

FINAL DECISION



For Plaintiff:

Torin Togut, Esq.

For Defendant:

Victoria Sweeny, Esq.
Melissa Stewart, Esq.
Thompson, Sweeny, Kinsinger & Pereira, P.C..

I. INTRODUCTION AND PROCEDURAL BACKGROUND

Plaintiff, [redacted] is a student eligible for services under the under the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA").[1] On July 31, 2013, Plaintiff's father ("Mr. [redacted] and Plaintiff's mother ("Mrs. [redacted] filed a Due Process Hearing Request ("Complaint") on behalf of [redacted] contending that Gwinnett County School District ("District" or "Defendant") violated her rights under IDEA. Specifically, the Plaintiff alleges that the proposed Individualized Education Program ("IEP") for the 2013-2014 school year fails to provide her with a Free and Appropriate Public Education ("FAPE") in the least restrictive

[1] In 2004, the act was reauthorized and renamed as the Individuals with Disabilities Education Improvement Act of 2004. 108 P.L. 446. For the sake of simplicity, the undersigned will continue to refer to the act at the Individuals with Disabilities Education Act (i.e., IDEA).

environment ("LRE"). Plaintiff also alleges that the District committed procedural violations which impeded the parents opportunity to participate in the decision making process.[2]

On August 9, 2013, the District filed its Response to Plaintiff's Complaint, denying that it violated IDEA. The hearing was conducted on September 11 and 12, and October 21, 22, and 23. The record closed on November 22, 2013 when the parties submitted their proposed Findings of Fact and Conclusions of Law.

II. FINDINGS FACT

Plaintiff's Disability, Eligibility for Services, and Previous IEPs

1.

Plaintiff is [redacted] years old (D.O.B. [redacted]). She was diagnosed with Down's syndrome in April 2008. (J. 6, pp. 103-104.)

2.

Plaintiff's parents and the staff at the Babies Can't Wait program referred Plaintiff to the Fulton County School System for an evaluation due to developmental delays associated with her Down's syndrome. (J. 6, p. 109.) The Fulton County School System conducted developmental, speech and language, physical therapy, and occupational therapy evaluations. (J. 6, pp. 109-128.) As a result, Plaintiff was found to be eligible for special education services under two IDEA eligibility categories, significant developmental delay and speech/language impairment. (*See* J. 6, p. 143.)

3.

Plaintiff's primary exceptionality is significant developmental delay. (Tr. 868.) To meet this IDEA eligibility standard, a student's scores must be two standard deviations below the

[2] In her proposed Findings of Fact and Conclusions of Law, Plaintiff acknowledges that she was unable to prove some of the alleged procedural violations. (*See* Plaintiff's Proposed Findings of Fact and Conclusions of Law at ¶¶ 103, 105.)

mean in at least one of the five critical areas of development or one and a half standard deviations below the mean in two or more areas. (Tr. 964.) The five areas are: cognitive, social/emotional, communication, adaptive, and motor. (Tr. 867-868.) These are critical areas because of their essential relationship with a student's rate of learning. (Tr. 965.) Plaintiff meets the standard across all five areas. (Tr. 964.)

4.

After the evaluation by the Fulton County School System, an IEP committee convened to develop an IEP for Plaintiff. She was initially placed in a special education pre-kindergarten class at New Prospects Elementary School two mornings a week. (J. 14, p. 744.) At that time, Plaintiff's parents continued to send her to a private pre-school two mornings a week. (*Id.*) On or about May 7, 2009, Mrs. [redacted] requested that Plaintiff's time in the special education pre-k class be increased to 15 hours per week (i.e., three days per week). (J. 14, p. 758.)

5.

For the 2009-2010 school year, Plaintiff continued to be served in the special education pre-kindergarten class at New Prospects Elementary School three days per week. (J. 14, p. 820.) She also continued to attend private preschool with typical peers two days per week. (*Id.*; Tr. 329-30.)

6.

In or about August 2010, Plaintiff's family moved to Gwinnett County. Initially, Plaintiff was served in an interim placement at the Monarch School, where she attended pre-school in a co-taught general education classroom. (J. 13, pp. 574-597.) Thereafter, for the remainder of the 2010-2011 school year, Plaintiff continued to be served in the co-taught general education pre-school class at the Monarch School. (J. 13, pp. 598-620.)

7.

For the 2011-2012 school year, Plaintiff attended Burnette Elementary School. She was transitioned into a Significantly Developmentally Delayed ("SDD") kindergarten class for part of the day, and was in the general education setting for the remainder of the day. (J. 13, pp. 660-677.) During her kindergarten year, the school district collected data which showed Plaintiff's progress in the special education setting, but also illustrated behavioral difficulties, unhappiness and frustration in the larger general education classroom. IEP meetings were held to discuss these findings and Plaintiff's educators recommended increasing her time in the special education setting from 14.75 hours per week to 24.75 hours per week. (J. 13, pp. 640-711.) Plaintiff's parents disagreed with the recommendation and filed a due process complaint. The parties reached a settlement in mediation. (Tr. 337.) Pursuant to the settlement agreement, Plaintiff's IEP was modified so that she would attend math, language arts, and writing in the SDD-1 class at Simpson Elementary for the 2012-2013 school year. (J. 4, pp. 49-55.)

8.

Near the end of Plaintiff's kindergarten year, a meeting was held during which Plaintiff's parents were offered the option of allowing Plaintiff to remain at Burnette Elementary because an SDD-1 program was going to be opened there; however, they declined that option and chose instead to transition Plaintiff to Simpson Elementary.[3] (Tr. 724.)

9.

Plaintiff transitioned easily and, by all accounts, had a successful first grade year at Simpson Elementary.[4] (Tr. 693-694, 1096; J. 15, May 3, 2013, 00:04:40-00:04:57.) Her

[3] Simpson Elementary is in close proximity to the private school where Plaintiff's siblings were enrolled. (Tr. 359-360.)

[4] "[S]he had a great year in SDD with th – with that combination of the SDD pullout and the resource – I mean, and the gen. ed." (Tr. 1096.)

program included 16.5 hours in the special education setting (self-contained SDD-1) for reading, writing, math, and speech therapy with the remaining 16 hours in the general education setting. (J. 4, pp. 53-54.)

10.

She made progress, although somewhat slow, on the majority of her goals and objectives. (J. 1; J. 2; Tr. 264; J. 15, May 3, 2013, 03:41:55-03:42:25.) Mrs. [redacted] was actively involved at school, serving as room mom for the SDD-1 class and sometimes attending class parties and lunch. (Tr. 339.) Communication between the parents and school was open and frequent. (Tr. 303-304.) In short, the parent-school relationship was positive all year. (Tr. 304.)

The May 2013 IEP

11.

Plaintiff's IEP team met on May 3, 2013 to develop an IEP for the 2013-2014 school year. Nearly six hours were devoted that day to developing an IEP for Plaintiff. The educational members of the team believed the substance of the IEP to be complete by the end of the meeting, but when Plaintiff's parents and their attorney objected to the location of the program and stated that the team would need to reconvene, the meeting was adjourned and the team agreed to meet again on May 10, 2013. (Tr. 370, 688, 690, 696-697, 821, 822, 831, 892, 980-981; J. 15, May 3, 2013, 05:24:26-05:24:51, 05:39:25-05:42:50.) The team spent an additional two hours on May 10 completing the discussion about Plaintiff's educational planning. (*See* J. 15, May 10, 2013.)

The IEP Team

12.

The IEP team members included: Mrs. [redacted] and Mr. [redacted] Plaintiff's parents; Torin Togut, Plaintiff's attorney; Carol Gaffey, regular education teacher; Stephanie Kaminsky Wells, special

education teacher; Nikki Pollack, occupational therapist; Deidra Eubanks, coordinator of the mild intellectual disabilities program; Kristin Hill, assistant principal and local education agency representative; Melissa McClelland, instructional coach for the elementary interrelated resource, self-contained specific learning disabilities, and kindergarten and first grade significant developmental delay programs; Catherine Followill, Defendant's attorney; Patrick Kane, coordinator of compliance; and Candy McMahon, speech/language therapist.[5] (J. 1; Tr. 662-663, 796.)

13.

In addition to being represented by legal counsel at the May IEP meetings, Plaintiff's parents were in consultation with Dr. Angela Delvin-Brown by telephone and text messaging. Plaintiff's parents have used Dr. Delvin-Brown's services to assist them with educational planning for Plaintiff since the 2011-2012 school year. (J. 1; Tr. 419, 559-561.)

Plaintiff's Progress and Present Levels of Performance

14.

The team began by discussing Plaintiff's progress on her then-current goals and objectives and Plaintiff's present levels of performance. (J. 1, pp. 2-3, 24-25.) This is a critical component because it drives the development of the rest of the IEP. (Tr. 71.)

15.

The educators were pleased generally but noted that progress in some areas was slow and prompting was required. (J. 1, p. 24; J. 5.) Evaluation results showed that Plaintiff's achievement was below average; however, it was consistent with her cognitive ability which testing has shown to be in the intellectually disabled range. (J. 1; J. 6; J. 15, May 3, 2013, 00:20:30-00:32:22.)

[5] Ms. McMahon was excused from the May 10 meeting with agreement of Plaintiff's parents. (J. 1.)

Plaintiff's Strengths

16.

Plaintiff has many strengths. She is social, kind, and confident. She knows all of her letter sounds and can read 17 sight words. She can identify consistently numbers 1-12 (although she sometimes confuses 6 with 9) and can identify numbers 1-20 67% of the time.[6] She does well following preferred routines. (J.1, p. 3.)

17.

Plaintiff transitions well from the general education setting to the special education setting. (J.1, p. 3; Tr. 253, 970.)

18.

Plaintiff is an eager and active participant in small group speech sessions. (J.1, p. 3.) She especially likes to talk about her family and ballet lessons. (J.1, p. 3.)

Plaintiff's Needs

19.

Plaintiff has a number of academic, functional, and developmental needs. (J.1, p. 4.) She requires repetitive, explicit, systematic instruction; she has not yet developed implied learning. (Tr. 347, 671.) Even with specialized instruction in a small group setting, at the end of her first grade year, Plaintiff's academic skills were significantly below those expected of a typical first grade student. (J. 15, May 3, 2013, 03:50:00-4:00:00; Tr. 623-632, 671-672, 675.)

20.

Although transitioning to a preferred activity is one of Plaintiff's strengths, transitioning to a non-preferred activity is difficult. (J. 1, p. 4; J. 15, May 3, 2013, 00:59:05-00:59:55.)

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[6] Typical students in kindergarten and first grade are expected to be able to count up through 100 or 120. (Tr. 675.)

21.

Within the weeks just prior to the May 2013 IEP meetings, Plaintiff's social interactions had begun to be affected by behaviors such as sticking out her tongue and taking materials from other students. (J. 1, p. 4; J. 15, May 3, 2013, 00:59:55-01:01:59; Tr. 622.) When educators observed that the behaviors were beginning to isolate Plaintiff from her peers in the general education setting, they began taking data in order to assess the function of the behaviors. (Tr. 764.)

Parental Concerns

22.

Plaintiff's parents' concerns were documented and addressed throughout both days of the IEP development. (J. 1, p. 4.)

23.

The team implemented a "parking lot" strategy to ensure that issues and concerns which arose during the meeting but were not immediately before the group for discussion were not forgotten. (J. 15, May 3, 2013, 00:12:55-00:13:27; Tr. 815-817.) For example, if a team member asked a question about a goal that the team had not yet addressed, the issue or concern was written down on a list kept by Ms. McClelland so that the team could discuss it at the appropriate time. (Tr. 815-817.)

24.

By the end of the May 10, 2013 meeting, the IEP team had addressed all issues in the "parking lot." (Tr. 851-856; J. 1, pp. 32-34.)

Goals and Objectives

25.

Proposed goals and objectives were drafted and sent home for review prior to the May 2013 IEP meetings. (Tr. 266-267.)

26.

Even so, the team spent nearly two hours reviewing, discussing, and revising the goals and objectives on May 3, 2013. The team spent another several minutes on May 10, 2013 adding an additional goal to address a parental concern about expressive language. (J. 15, May 3, 2013, 01:10:50-03:00:12; J. 15, May 10, 2013, 01:14:10-01:25:58.) Plaintiff's parents and attorney were instrumental in the development of the goals and objectives. (J. 15, May 3, 2013, 01:10:50-03:00:12; J. 15, May 10, 2013, 01:14:10-01:25:58.)

27.

Plaintiff's goals and objectives were developed based on her needs as identified in the present levels of performance and concerns expressed by her parents. (J. 1; Tr. 266-267; J. 15, May 3, 2013, 01:10:50-03:00:12; J. 15, May 10, 2013, 01:14:10-01:25:58.)

28.

The team discussed and agreed upon the content of each goal and objective as well as the way in which progress would be measured and reported.[7] (J. 15, May 3, 2013, 01:10:50-03:00:12; J. 15, May 10, 2013, 01:14:10-01:25:58.)

Accommodations and Supports

29.

Accommodations and supplementary supports were discussed at length by the IEP team and were included in the IEP. (J. 1, p. 20; Tr. 278, 732.)

[7] Counsel for Plaintiff conceded at the hearing that the goals and objectives are not in dispute. (Tr. 1125.)

30.

Plaintiff's mother and attorney participated throughout the discussion. (J. 15, May 3, 2013, 03:21:13-03:32:18.)

31.

Among the supplementary aides and services discussed by the IEP team was a peer buddy. (Tr. 746.) Plaintiff's mother indicated that she did not wish to include a peer buddy in the IEP but rather would prefer it to occur naturally. (Tr. 683; J. 15, May 3, 2013, 03:24:37-03:25:17.) The team agreed and did not include a peer buddy in the IEP. (Tr. 683.)

32.

At the request of Plaintiff's parents, the team agreed to add the support of a one-to-one adult assistant for Plaintiff's time in the general education setting for at least the first 12 weeks of the school year. (J. 1, p. 7; Tr. 993-996; J. 15, May 10, 2013, 00:02:10-00:57:20.)

33.

Neither the parents nor their attorney expressed any questions or concerns about the accommodations and supports or made any requests for additional accommodations or supports during the IEP development. (J. 15, May 3, 2013, 03:32:00-03:32:18.)

Assistive Technology

34.

Plaintiff's occupational therapist explained to the team that she did not recommend any writing or typing devices because Plaintiff needs to continue to make progress with her handwriting. (J. 1, p. 28; J. 15, May 3, 2013, 03:05:06-03:06:41.)

35.

The team discussed that Plaintiff does well with a computer but is working on pen-paper skills such as proper letter sizing and needs to continue to work on her developmental handwriting. (J. 1, p. 28; J. 15, May 3, 2013, 03:05:06-03:06:41.)

36.

Nonetheless, at the request of Plaintiff's attorney, the team agreed to provide Plaintiff with an assistive technology evaluation. (J. 1, p. 28; J. 15, May 3, 2013, 03:07:57-03:09:27.)

Extended School Year

37.

The team, including Plaintiff's parents and attorney, agreed that extended school year ("ESY") services would be appropriate for Plaintiff. (J. 2, pp. 22-23.)

38.

Despite their agreement, Plaintiff's parents did not allow Plaintiff to participate in the ESY program. (Tr. 579-580.) Plaintiff's mother stated in an email to the family's educational consultant, Dr. Delvin-Brown, that she had learned the ESY teacher was from Sycamore Elementary and was concerned that if Plaintiff attended ESY their case might be "adversely affected." (Tr. 579; D. 10.)

The Proposed Placement

39.

Plaintiff's father asked during the first day of the IEP meeting what types of settings were available for Plaintiff for second grade. In response, the team reviewed the continuum of placements. (J. 15, May 3, 2013, 04:00:00-04:02:4; Tr. 870-872.) The team discussed that even though there is no program called "SDD-2" the placement options remain the same, beginning

with general education, then general education with support, and continuing with instruction outside the general education classroom. (J. 15, May 3, 2013, 04:00:00-04:02:4; Tr. 693.)

40.

Later in the meeting, the continuum of placements was reviewed for a second time. (J. 15, May 3, 2013, 04:48:50-04:50:13.)

The General Education Classroom

41.

The team discussed that the general education classroom is the least restrictive of the placement options. (Tr. 730.) The team agreed that Plaintiff would benefit from time in the general classroom and determined that the general education setting would be appropriate for Plaintiff for non-foundational skill segments such as health, specials, lunch, and recess. (J. 1; Tr. 632, 650, 682, 824-829, 889, 890-892, 898-899, 969, 977-980.)

General Education Classroom with Support of Co-teacher

42.

The collaborative and co-teaching models were described and discussed in detail. (J. 15, May 3, 2013, 04:10:06-04:04:12:37; Tr. 819-820.) Ms. McClelland explained that in the collaborative model the special education teacher collaborates with the general education teacher and may or may not be in the general classroom for the entire segment. The co-teaching model is similar except that the special education teacher is in the general classroom for the entire segment. (J. 15, May 3, 2013, 04:10:06-04:04:12:37; Tr. 819-820.) The team determined that the co-teaching model would be appropriate for Plaintiff for science/social studies. (J. 1, pp. 6, 29-30.) Utilizing this model, Plaintiff will remain in the general education classroom but will

have the added support of a special education teacher in the classroom for the entire class time.[8] (Tr. 819-820.) In addition, the team determined that the speech and language pathologist would work with Plaintiff on relevant vocabulary in order for Plaintiff to have a greater opportunity to access the curriculum.[9] (Tr. 787-788, 791-792.)

Specialized Service Hours Outside the General Classroom

43.

The team also discussed in detail why the general education setting would not be appropriate for Plaintiff for reading, writing, and math. (Tr. 272-277, 730.)

44.

Plaintiff's learning style includes difficulty with attention, memory, and generalization. As a result, she has difficulty acquiring basic skills. (Tr. 971-972.)

45.

Core skill sets must be developed in order to establish automaticity; otherwise, learning becomes very difficult going forward. (J. 15, May 3, 2013, 03:58:00-03:58:56.)

46.

Information must be encoded in the brain, consolidated, assimilated. (Tr. 971.)

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[8] Again, as discussed above, the team developed accommodations that would be in place across settings and also added one-on-one adult assistance for at least the first 12 weeks of school for science/social studies/health, specials, lunch and recess. (J. 1, pp. 20, 32.) Initially, the District had proposed that Plaintiff have an adult assistant in specials only. However, due to the parents' concerns, the adult assistant was added to science/social studies/health, lunch and recess and the time period was increased from 9 weeks to 12 weeks. (J. 1, pp. 31-32.)

[9] Language development is a weakness for children with Down's Syndrome. Along with the delayed language development is a lack of ability to comprehend language and vocabulary assignments. (Tr. 1036-1037.) Rehearsal and repetition are encouraged to address verbal memory issues. (Tr. 1037.) Plaintiff requires direct instruction to help develop vocabulary; she does not acquire it simply by being present in an environment where it is being used. (Tr. 1030.)

47.

The degree of automaticity is directly related to the pace and scope of instructional activity; a student needs to be able to access information quickly in order to keep pace. (Tr. 971.)

48.

Drill and repetition establish core skill sets and build synaptic pathways. (J. 15, May 3, 2013, 03:58:00-03:58:56.) Early intervention is critical. (J. 15, May 3, 2013, 03:58:00-03:58:56; Tr. 484-486, 573-574.) The earlier those pathways are established, the better the opportunity for automaticity. (Tr. 973-974.)

49.

The brain begins to lose plasticity around age 9 or 10. (Tr. 975.) Thus, Plaintiff's window of opportunity for establishing the synaptic pathways will remain open for about two more years.[10] (Tr. 1061.)

50.

Plaintiff requires a level of specially designed instruction that is not provided in the general classroom for foundational skills. (J. 15, May 3, 2013, 03:50:00-03:51:57.) The skills necessary for reading, writing, and math build on each other. A child must acquire the underlying, or foundational, skills before progressing on to higher level skills. In science/social studies, a student does not need the same kind of foundation because new topics and skills are introduced each year. (Tr. 792.)

51.

If Plaintiff is not pulled out of the general classroom to receive the direct, specialized instruction she needs for developing the foundational skills in reading, writing, and math, during

[10] Thereafter, the focus may shift to independent living skills. (J. 15, May 3, 2013, 03:58:00-03:59:23.)

the window of opportunity, then learning will become much more difficult for her and the opportunity may be lost. (Tr. 970-977.)

52.

Plaintiff's performance academically, behaviorally, and socially is better in the small-group specialized setting than in the general education setting. (Tr. 755, 763, 769-770.)

53.

Plaintiff's struggles in the general classroom were demonstrated by her dependence on the paraprofessional assigned to assist her in that setting. (J. 15, May 3, 2013, 01:04:16-01:08:44.) The more the paraprofessional backed off, the less work Plaintiff was able to complete. (J. 15, May 3, 2013, 01:07:27-01:07:30.) Conversely, in the special education setting, where no paraprofessional was assigned directly to her, Plaintiff did not demonstrate the increased level of dependency. (J. 15, May 3, 2013, 01:04:16-01:08:44; Tr. 201, 895.)

54.

Similarly, data shows that Plaintiff is sometimes successful with the goal of remaining in a designated area in the general classroom but her success is greater in the special education setting. (J. 15, May 3, 2013, 03:47:08-03:48:15.) Specifically, Plaintiff has a tendency to get out of her seat and sit on the floor or under her desk. (*See* J. 9.)

55.

Plaintiff's learning style makes it difficult for her to engage and participate in the instruction appropriately in the general classroom. (Tr. 617-618, Tr. 961-964.) She is more engaged and has more of an interest in the material, in a small group setting than in a large group setting. (J. 15, May 3, 2013, 03:45:35-03:46:31; Tr. 642-643.) A student's ability to be engaged is critical to learning. (Tr. 673, 970.)

56.

Plaintiff is, at best, an emergent reader. She has some sight word recognition, but has significant difficulty establishing blends. This prevents her from decoding words. Without a strategy to decode words, she cannot develop fluency; consequently, the decoding process interferes with comprehension. There is a significant disparity in her ability to read compared with that of her general education peers. (Tr. 968-969.)

57.

Plaintiff is a concrete learner; she must have something she can see, touch, or feel to connect with a concept. (Tr. 885-886.)

58.

Plaintiff's work product is significantly different than that of her general education peers. (Tr. 960-961; J. 15, May 3, 2013, 03:49:02-03:49:30.)

59.

It is unlikely Plaintiff would be able to engage in the second grade curriculum because the content would be above her instructional level and she would not have the necessary vocabulary. (Tr. 673-674.)

60.

In order for Plaintiff to receive the type of instruction her learning style requires for reading, writing, and math in the general classroom, the instruction would have to be modified to a degree that it would be unrecognizable when compared to that of her general education peers. (Tr. 889.) It would have to be provided one-on-one. (Tr. 674-675, 678-679.)

61.

Most likely, Plaintiff would be isolated in the general classroom because her social language, academic skills, and pace of instruction are so different than those of the general education students. (Tr. 763.)

62.

Plaintiff is not benefitted by placement in a situation where she is unable to access the instruction. (J. 15, May 3, 2013, 03:41:41-03:42:25.)

63.

Research has shown that explicit, direct, systematic instruction outside the general education classroom is a superior instructional approach for basic skills for children with intellectual disabilities. (Tr. 976.)

64.

It is important to strike a balance between ensuring that a student's instructional needs are met and ensuring that the student has an opportunity to participate with non-disabled peers. (Tr. 1039.) Providing specialized instruction in the core areas of reading, writing, and math with time in the general classroom for the remainder of the school day provides Plaintiff with access to typical peers for communication and social skills benefits and also addresses her needs in the foundational academics areas where skills build on each other. (Tr. 792-793; J. 15, May 3, 2013, 03:55:50-03:39:57.)

65.

Plaintiff needs to be with a small group of students with similar learning styles where she can receive explicit instruction for reading, writing, and math. (Tr. 889, 899.)[11]

66.

Deidre Eubanks, coordinator of the mild intellectual disabilities ("MiID") program, described the program to the team and explained how it is very similar to the SDD-1 program Plaintiff attended for reading, writing and math for the first grade.[12] (J. 15, May 3, 2013, 04:03:45-04:09:41; Tr. 270, 685, 711, 1090.)

67.

The team specifically discussed that the term "self-contained" describes the classroom and does not mean that a student in a self-contained classroom remains in the setting for the entire school day.[13] The team discussed further that the SDD-1 program is a self-contained setting; thus, Plaintiff was in a self-contained setting for 16.5 hours per day for reading, writing, math, and speech/language therapy during her first grade year. (J. 15, May 3, 2013, 04:21:04-04:22:23; Tr. 283, 966-967.) Plaintiff's parents indicated no confusion about this terminology. (J. 15, May 3, 2013, 04:21:04-04:22:23.)

68.

There were no questions about the MiID program that Ms. Eubanks was not able to answer. (Tr. 888, 890.)

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[11] Plaintiff's counsel seemingly conceded, at least in part, in his closing argument that Plaintiff requires instruction outside of the general education classroom for her core academics by requesting that this tribunal require Defendant to create an "SDD-2" class for Plaintiff. (Tr. 1124-1125.)

[12] In fact, Plaintiff's mother commented at the IEP meeting that the MiID program is very similar to, just not called, SDD. (J. 15, May 3, 2013, 04:09:33-04:09:41.)

[13] In Georgia, a child may be considered to be in a self-contained setting even if in a co-taught general education classroom all day. (Tr. 60, 79.)

69.

Melissa McClelland, instructional coach for the inter-related resource ("IRR") program, described the IRR program in detail at the meeting. (J. 15, May 3, 2013, 04:10:21-04:14:30; Tr. 815, 819.)

70.

Ms. McClelland explained that one of the primary differences between the MiID program and the IRR program is that the students are with peers who have the same learning profile in the MiID program while, in the IRR program, typically, the age ranges and ability levels are more varied and the students need to be more independent in transitioning between settings. (J. 15, May 3, 2013, 04:10:21-04:14:30.)

71.

The most appropriate setting for Plaintiff to be able to participate in a collaborative learning group would be in the MiID program. (Tr. 695.)

72.

The IEP team recommended that Plaintiff receive 16.5 hours of special education services per week for the 2013-2014 school year. (J. 1, p. 6.) Those services included 1.5 hours per week of speech and language therapy in the special education setting; 10 hours per week of specialized instruction in language arts (reading and writing) in the special education setting; and 5 hours per week of specialized instruction in math in the special education setting.[14] (J. 1, p. 6.) The remainder of Plaintiff's school day would be spent in the general education classroom. (J. 1, p. 6.)

[14] Plaintiff's expert opined that the District's proposed placement regarding language arts (i.e., reading and writing) and math was not appropriate. (Tr. 465.) However, the only rationale she offered to support her opinion was that the regular education classroom with supplementary aids and services should be "tried first." (*Id.*) She provided no substantive testimony or evidence showing that the regular education classroom would be appropriate to address Plaintiff's unique needs. Plaintiff's expert further opined that Plaintiff should remain in the general education setting for at least one year, even if no progress is made. (Tr.564-67.)

73.

A school week is 32.5 hours for all Gwinnett County public elementary schools; thus Plaintiff's time in the general classroom would be 16 hours per week. (Tr. 143-46, 230, 256-257; J. 1.) Although Defendant initially miscalculated the time to be spent in the general education setting as 12.5 rather than 16 hours per week, the mistake was corrected by written correspondence to Plaintiff's parents once Defendant realized the mistake had been made. (D. 9, p. 227.) The IEP clearly states that the time Plaintiff would spend outside the general classroom totals 16.5 hours per week. (J. 1, p. 6.)

74.

Plaintiff's parents stated explicitly that they wanted the 2012-2013 educational plan replicated for the 2013-2014 school year.[15] (Tr. 222, 225, 377-378, 978-979.)

75.

The special education service hours recommend for the 2013-2014 school year are identical to the service hours provided for the 2012-2013 school year. (J. 1, p. 6; J. 4, 53; Tr. 216, 694.)

76.

The IEP team, including Plaintiff's parents, agreed with the special education services offered in the May 2013 IEP. (J. 15, May 3, 2013, 04:24:21-04:24:41, 04:38:23-04:38:38; Tr. 632, 650, 682, 824-829, 889, 890-892, 898-899, 969, 977-980.)

[15] Questioning by Mr. Togut: "Q. And isn't it true that [Plaintiff's] mother, said, we want the same thing that [Plaintiff] was getting at Simpson; right? She said that? A. Yes, she did. And that's ultimately what we determined." (Tr. 222.)

Location of Plaintiff's IEP Services

77.

Plaintiff's parents expressed no objection to any portion of the IEP until the issue of location arose almost five and a half hours into the meeting on May 3, 2013. (Tr. 370, 688, 690, 696-697, 821, 822, 831, 892, 980-981.)

78.

When Plaintiff's counsel learned that Plaintiff's IEP would not be implemented at Simpson Elementary he stated: "If you want to move her from this school, then we're going to have to meet again." (J. 15, May 3, 2013, 05:24:26-05:24:51; Tr. 988-990.)

79.

Plaintiff's parents want Plaintiff to remain at Simpson Elementary.[16] (Tr. 698-99, 1058.)

80.

The IEP team discussed that the determination of the location of the school building is outside the scope of the IEP process. (J. 15, May 3, 2013, 04:23:53-04:24:11.)

81.

Team members explained that the educational program designed for Plaintiff was not offered at her home school, Level Creek Elementary, but the feeder school (i.e., the school closest to the home school) for the program is Sycamore Elementary. (J. 15, May 3, 2013, 05:25:30-05:05:26:02.)

[16] Questioning by Mr. Togut: "Q. They wanted [Plaintiff] to continue there, if possible, at Simpson for this school year, the 2013-2014 school year; right? A. Yes." (Tr. 1058.)

82.

After Plaintiff's attorney asked what programs were available at Simpson Elementary, the team discussed that it must build the IEP around Plaintiff's unique needs rather than around the type of program available at a particular school location. (Tr. 832.)

83.

Although Plaintiff's father had stepped out of the meeting and missed a portion of the conversation, he made it clear upon his return that he was unhappy with the fact that Plaintiff was being "bounced" from Simpson Elementary. "[N]ow is where game on, because it's not what we want to do...." (J. 15, May 3, 2013, 05:33:00-05:35:10; Tr. 993-996.)

84.

Plaintiff's siblings attend a private school located in Norcross, Georgia, in close proximity to Simpson Elementary. (Tr. 359-360.)

85.

Plaintiff's mother drives Plaintiff's siblings to and picks them up from their private school each day. Defendant provides Plaintiff transportation to and from school. (Tr. 360.)

86.

The bus ride from Plaintiff's home to Simpson Elementary is approximately one hour. (Tr. 697-698.)

87.

As discussed at the IEP meeting, Plaintiff's bus ride would be cut in half if she attends Sycamore Elementary. (Tr. 698.)

88.

"The biggest concern was the location of the program. The parents would have difficulty getting home in time for [Plaintiff] to get off the bus because their boys went to school south of where they lived, and the school, Sycamore, is north of where they lived." (Tr. 898.)

89.

Plaintiff's father stated at the IEP meeting on May 10, 2013: "Is there anything in the law on a hardship that you really can't go to that proximity, challenging the proximity being north? What defines proximity? Because it's truly a hardship, and it truly can't be done." (J. 15, May 10, 2013, 01:45:10-01:45:25.) "If she has to pick up – they don't provide transportation at the other school. So, if she has to pick up the children and the bus is dropping the child off and beating it back there, now she can actually be – she can pick up the other children and get home before the bus drops [Plaintiff] off." (J. 15, May 10, 2013, 01:45:10-01:46:08.)

90.

Plaintiff's attorney provided the team with a statement of why the parents were rejecting the IEP. It was copied onto the IEP document verbatim. (Tr. 835.) Nowhere in the statement is placement mentioned. (J. 1, p. 9.)

91.

At the end of the May 10, 2013 IEP meeting, Plaintiff's parents disagreed with the school location, not the placement. (Tr. 859-860.)

Plaintiff's Due Process Complaint and Hearing

92.

Plaintiff's parents rejected the May 2013 IEP. Nonetheless, Plaintiff's parents were provided the opportunity to visit the MiID class at Sycamore Elementary, meet with an

administrator, and ask questions. (Tr. 561-63, 1100.) Defendant provided Plaintiff's parents with Prior Written Notice of the action being proposed on May 23, 2013. (J. 2.) Plaintiff's due process complaint was filed July 29, 2013. Plaintiff challenged the appropriateness of the May 2013 IEP and requested that she be provided with regular education and/or resource classes for the majority of the school day with the full range of supplementary aids and services so that she can be educated with nondisabled children to the maximum extent appropriate. Plaintiff requested that the school system continue to allow her to attend Simpson Elementary or another elementary school as close as possible to her home that is the least restrictive environment to meet her needs. (Docket No.: OSAH-DOE-SE-1404095-67-Howells, Due Process Complaint, p. 32.)

III. CONCLUSIONS OF LAW

1.

IDEA enables a parent to bring challenges to the "identification, evaluation, or educational placement of the child, or the provision of a free appropriate education to [the] child" by filing a due process complaint. 20 U.S.C. § 1415(b)(6), (c)(2)(Á). In this case, Plaintiff's Complaint raised several procedural violations and a claim that the proposed 2013-2014 IEP fails to provide Plaintiff with a FAPE in the LRE.

2.

Plaintiff, as the party seeking relief in this matter, bears the burden of proof. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); Ga. Comp. R & Regs. 160-4-7-.12(3)(n). In order to prevail, Plaintiff must show by a preponderance of evidence that Defendant failed to offer her a free appropriate public education ("FAPE") in the least restrictive environment ("LRE") appropriate

to meet her unique needs. *Id.* With regard to the alleged procedural violations, Plaintiff must prove the violations occurred and that there was harm as a result of the violations.

3.

The IDEA "creates a presumption in favor of the educational placement established by [a child's] IEP, and the party attacking its terms should bear the burden of showing why the educational setting established by the IEP is not appropriate." *Devine v. Indian River Cnty. Sch. Bd.*, 249 F.3d 1289, 1291-1292 (11th Cir. 2001).

4.

In general, the IDEA bars recovery for any alleged wrong that occurred more than two years from the date of the request for a due process hearing. 20 U.S.C. § 1415(b)(6)(B); 34 C.F.R. § 300.507(a)(2). Accordingly, any claim arising more than two years prior to July 31, 2013 is statutorily time-barred.

5.

Further, the doctrine of res judicata bars review of any issue arising prior to February 6, 2012 when Plaintiff withdrew with prejudice a previously filed due process complaint and the Court entered a Final Decision and Dismissal. *Norfolk S. Corp. v. Chevron, U.S.A., Inc.*, 371 F.3d 1285 (11th Cir. 2004); *N. Ga. Elec. Membership Corp. v. City of Calhoun*, 989 F.2d 429 (11th Cir. 1993); *Piedmont Cotton Mills, Inc. v. Woelper*, 269 Ga. 109 (1998); *Helmuth v. Life Ins. Co. of Ga.*, 194 Ga. App. 685 (1990); *Katz v. Timberlane Reg'l Sch. Dist.*, 184 F. Supp. 2d 124, 127 (D.N.H. 2002).

6.

More important to this matter, the issues for this tribunal's review are limited to those raised in Plaintiff's due process complaint. The IDEA expressly prohibits a plaintiff from raising

an allegation for the first time at a due process hearing. 20 U.S.C.A. § 1415(f)(3)(B); *DeKalb Cnty. Sch. Dist. v. J.W.M.*, 445 F. Supp. 2d 1371 (N.D. Ga. 2006). The allegations raised in Plaintiff's due process complaint limit this tribunal's review to the sufficiency of the IEP developed for Plaintiff in May 2013, and any alleged procedural violations. For the reasons stated below, the undersigned concludes that the IEP at issue offers Plaintiff a FAPE in the LRE and the alleged procedural violations were either not proven or did not result in any harm.

7.

The purpose of the IDEA is to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs. . . ." 20 U.S.C. § 1400(d)(1)(A). The IDEA requires school districts to provide to a student eligible for special education services a free appropriate public education in the least restrictive environment. 20 U.S.C. § 1412; 34 C.F.R. §§ 300.114 – 300.118.

8.

The IEP is the written document developed by the IEP team that serves as the roadmap for a student's special education services. *Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); 20 U.S.C. § 1414; Ga. Comp. R. & Regs. 160-4-7-.06.

Sufficiency of the IEP

9.

The United States Supreme Court established a two-part test to determine the sufficiency of an IEP; the test has been adopted by the Eleventh Circuit. *Rowley, supra.*; *J.S.K. v. Hendry Cnty. Sch. Bd.*, 941 F.2d 1563 (11th Cir. 1991). A court must consider (1) whether there has been compliance with the procedures set forth in the IDEA and (2) whether the IEP is reasonably

calculated to enable the child to receive educational benefit in the least restrictive environment. *J.S.K.*, 941 F.2d at 1571, (*citing Rowley*, 458 U.S. at 206-7).

10.

Where, as here, an IEP has not been implemented, "'the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date . . . . Neither the statute nor reason countenance "Monday Morning Quarterbacking" in evaluating the appropriateness of a child's placement.'" *O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233*, 144 F.3d 692, 701-02 (10th Cir. 1998) (quoting *Fuhrmann v. E. Hanover Bd. of Educ.*, 993 F.2d 1031, 1040 (3d Cir.1993)); *see also Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir.1990) ("An IEP is a snapshot, not a retrospective.") (other citations omitted).

Procedural Requirements

11.

The first prong of the test requires a determination of whether any harm has resulted from a technical violation of the procedural requirements set forth in the IDEA. *Rowley,* 458 U.S. at 2006-7; *J.S.K.*, 941 F.2d at 1571; 20 U.S.C. § 1415; Ga. Comp. R. & Regs. 160-4-7-.09. While the IDEA's procedural safeguards are complex, the Eleventh Circuit has rejected the notion that violation of a procedural requirement is a *per se* denial of FAPE. Rather, the Eleventh Circuit has held that a petitioner must show actual harm as a result of the procedural violation in order to be entitled to relief. *See Weiss v. Sch. Bd. of Hillsborough Cnty*, 141 F.3d. 990 (11th Cir. 1998); *Doe v. Ala. Dept. of Educ.*, 915 F.2d 651, 662-63 (11th Cir 1990). Technical deviations from the procedural requirements "do not render an IEP entirely invalid; to hold otherwise would 'exalt form over substance.'" *O'Toole*, 144 F.3d at 701-2, (quoting *Urban v. Jefferson Cnty Sch. Dist.*

R-1, 89 F.3d 720, 726 (10th Cir. 1996); *see also Roland M. supra.*; *Weiss,* 141 F.3d at 994, 996; *Doe,* 915 F.2d at 662-63.

The IEP team

12.

The IEP team is the group of individuals responsible for developing, reviewing, and revising an IEP. The IDEA states with specificity the individuals who are required team members. 20 U.S.C. § 1414; Ga. Comp. R. & Regs. 160-4-7-.06. They are: the child's parent(s); at least one regular education teacher if the child is or may be participating in the regular education environment; at least one special education teacher; a representative of the local educational agency; a person who can interpret the instructional implications of evaluation results; others who may have knowledge or expertise regarding the child; and the child, when appropriate. *Id.*

13.

The IDEA does not require Defendant to ensure that a representative of every program and/or every elementary school that Plaintiff could possibly attend be present at the IEP meeting. 20 U.S.C. § 1414; Ga. Comp. R. & Regs. 160-4-7-.06. The individuals required by the IDEA were present: the parents (along with their attorney); Plaintiff's regular education teacher, Ms. Gaffey; Plaintiff's special education teacher, Ms. Kaminsky Wells; a local educational agency representative, Ms. Hill; persons who could interpret the instructional implications of evaluation results, Mr. Kane, Ms. Kaminsky Wells, Ms. Eubanks, Ms. McClelland, Ms. McMahon, and Ms. Pollock.

14.

In her Complaint, Plaintiff asserted that the IEP team was not composed properly because there were no representatives present from Sycamore Elementary or Level Creek Elementary. However, in her proposed Findings of Fact and Conclusions of Law, she conceded that there was no procedural violation regarding the composition of the IEP team.[17]

The IEP Components

15.

The IDEA states specifically the components necessary to the development of an appropriate IEP. 20 U.S.C.§ 1414; Ga. Comp. R. & Regs. 160-4-7-.06. The IEP must include: (1) a statement of the child's present levels of academic and functional performance; (2) a statement of measurable annual goals; (3) a description of how the child's progress will be measured and reported; (4) a statement of the special education and related services and supplementary aids and services to be provided or available to the child and a statement of the program modifications or supports for school personnel that will be provided to the child; (5) an explanation of the extent, if any, to which the child will not participate with nondisabled children; (6) a statement of any individual appropriate accommodations; (7) the projected date for the beginning of the services and the anticipated frequency, location, and duration of the services; (8) beginning at the first IEP when the child is 16, post-secondary and transition services and transfer of rights. 20 U.S.C. § 1414; Ga. Comp. R. & Regs. 160-4-7-.06.

16.

The May 2013 IEP at issue in this case contains each of the components required by the IDEA. 20 U.S.C. § 1414; Ga. Comp. R. & Regs. 160-4-7-.06.

[17] Similarly, in her Complaint, Plaintiff asserted that the Prior Written Notice issued by the District was deficient. But, in her proposed Findings of Fact and Conclusions of Law, she conceded that there was no procedural violation with regard to the Prior Written Notice issued by the District.

17.

The IEP contains a statement of Plaintiff's present levels of performance including progress on her goals and objectives, evaluation and assessment results, strengths, and needs. Plaintiff's parents were happy with her progress and expressed no questions or concerns during the development of this portion of the IEP.

18.

The IEP contains a statement of measurable annual goals and a description of how they will be measured and reported. The IEP team spent approximately two hours developing the goals and objectives for Plaintiff's 2013-2014 school year even though drafted goals and objectives had been provided to the parents prior to the IEP meetings. The team agreed on the content of each goal and objective as well as on the way progress would be measured and reported.

19.

The IEP contains the accommodations and supports to be provided to Plaintiff. Although Plaintiff suggests the IEP is deficient because it states on page 5 "No supplementary aids and services are needed at this time," this single statement cannot be found to result in a denial FAPE when, in fact, an entire page of the IEP is devoted to student supports. Moreover, Plaintiff's parents and their attorney were active participants in determining the accommodations and supports and expressed no questions or concerns about them.

20.

Once the necessary components of the IEP were complete, the IEP team determined Plaintiff's placement for 2013-2014 school year. Placement is "based on the child's IEP." 34 C.F.R. § 300.116; Ga. Comp. R. & Regs. 160-4-7-.07(2)(b). The placement determination

cannot be finalized before the remainder of the IEP is completed. IEP objectives must be written before placement is determined. *Spielberg v. Henrico Cnty. Pub. Sch.*, 853 F.2d 256, 259 (4th Cir. 1988). An IEP team cannot pre-determine placement then build an educational plan around it. *Id.; Bd. of Educ. of Twp. High Sch. Dist. No. 211 v. Michael R.*, No. 02 C 6098, 2005 U.S. Dist. LEXIS 17450, at *42 (N.D. Ill. Aug. 15, 2005); *Deal v. Hamilton Cnty. Bd. of Educ.*, 392 F.3d 840, 857 (6th Cir. 2004).

21.

During the hearing, through the presentation of evidence, Plaintiff seemed to suggest that the IEP team should determine a placement for each goal. However, such an approach is counter-intuitive. Goals and objectives likely will be worked on across settings during a school day. For example, as in this case, a vocabulary goal may be worked on with the speech therapist in the special education setting as well as with the general or special education teacher in the co-taught science/social studies general education classroom. A behavior goal may be worked on in all settings. A child's placement must be based on the whole of the IEP; it cannot be finalized before the other parts of the IEP are complete.

22.

The special education services to be provided to Plaintiff are stated clearly in the IEP along with their anticipated frequency, location,[18] and duration. The IEP provides for 16.5 hours per week in the special education setting. Defendant admittedly miscalculated the hours Plaintiff would spend in the general education setting. However, the IDEA's focus is the provision of special education services; it does not require that the number of hours a child will spend in general education be included in the IEP. 20 U.S.C. §§ 1400, 1414; Ga. Comp. R. & Regs. 160-

[18] "Location" in this context refers to the setting in which the services will be delivered; i.e., general education versus special education. *See* Section IV below for discussion of "location" as it relates to site selection.

4-7-.06. Since a statement of the number of hours in the general education setting is not a necessary component of an IEP, the miscalculated number does not result in a procedural defect. Further, Plaintiff presented no evidence of any actual harm as a result of the miscalculation.

23.

The May 2013 IEP, though not perfect, satisfies the procedural requirements of the IDEA.

Development of the IEP

24.

As an additional procedural violation, Plaintiff argues that the District denied Plaintiff's parents the opportunity to participate in the decision making because the placement was predetermined. However, it is clear that school districts are allowed to prepare for IEP meetings, including drafting proposed placements. *Michael R.*, 2005 U.S. Dist. LEXIS 17450, at *43.

25.

IDEA merely requires school officials to "come to the IEP table with an open mind." *Id.* at *45. "[T]hey need not come with a blank mind." *Id.* (citation omitted).

26.

Here the parents and Plaintiff's attorney participated in the IEP meeting. Goals and objectives were discussed and amended, and there was a modification to the supplementary support of an adult assistant to address the parents' concerns. The fact that the parent's choice of location was not adopted does not lead to the conclusion that they were denied participation. *Id.* at *46.

Substantive Requirements

27.

The second prong of the *Rowley* test requires a determination of whether Plaintiff has been provided with an educational program reasonably calculated to enable her to receive educational benefit in the least restrictive environment. *Rowley*, 458 U.S. at 204, 206-07; *J.S.K.*, 941 F.2d at 1572.

Educational Benefit

28.

Plaintiff does not dispute that the May 2013 IEP would provide her with educational benefit. (*See* Docket No. OSAH-DOE-SE-1404095-67-Howells, Due Process Complaint.) Plaintiff's parents were happy with the progress Plaintiff made during the 2012-2013 school year and requested the same program for 2013-2014. The May 2013 IEP, in fact, meets that request and offers Plaintiff the same hours of special education services she was provided the year before and adds the co-teaching model for science/social studies. The blend of general education and specialized services provides Plaintiff with access to typical peers for communication and social skills benefits and also addresses her needs in the foundational academic areas where skills build on each other. In the absence of any evidence to the contrary and in light of the educational progress Plaintiff made when provided with substantially the same special education services during the 2012-2013 school year, the undersigned concludes that the May 2013 IEP was reasonably calculated to provide Plaintiff with educational benefit.

Least Restrictive Environment

29.

After considering whether the IEP is designed to confer educational benefit, the issue of least restrictive environment must be considered. *Rowley*, 458 U.S. at 202-03. The IDEA states that schools must establish procedures to assure that:

> To the maximum extent appropriate, children with disabilities. . . are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5)(A).

30.

Congress created in the IDEA a preference for educating students with disabilities with their typical peers yet recognized that general education is not always an appropriate setting. 20 U.S.C. § 1412(a)(5)(A); *see also* 34 C.F.R. §§ 300.114 – 300.116; Ga. Comp. R. & Regs. 160-4-7-.07 "Thus, there is a tension within the Act between two goals: mainstreaming and meeting each child's unique needs. As the Eleventh Circuit has said:

> In short, the Act's mandate for a free appropriate public education qualifies and limits its mandate for education in the regular classroom. Schools must provide a free appropriate public education and must do so, to the maximum extent appropriate, in regular education classrooms. But when education in a regular classroom cannot meet the handicapped child's unique needs, the presumption in favor of mainstreaming is overcome and the school need not place the child in regular education.

Greer ex. rel. Greer v. Rome City Sch. Dist., 950 F.2d 688, 695 (11th Cir. 1991) *opinion withdrawn*, 956 F.2d 1025 (11th Cir. 1992), *and opinion reinstated in part*, 967 F.2d 470 (11th Cir. 1992) (citing *Daniel R.R. v. State Bd of Educ.*, 874 F.2d 1036, 1045 (5th Cir.1989)).

31.

The Eleventh Circuit has adopted the Fifth Circuit's two-part test for analyzing LRE claims. "First we ask whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily. 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." *Greer*, 950 F.2d at 696 (citations omitted). The analysis "is an individualized, fact-specific inquiry that requires us to examine carefully the nature and severity of the child's handicapping condition, his needs and abilities, and the school's response to the child's needs." *Id.*

32.

Three factors useful in evaluating the first part of the LRE analysis have been provided by the Eleventh Circuit: (1) The school district may compare the educational benefits the student will receive in the general setting with the benefits she will receive in the special education setting; (2) The school district may consider what effect the presence of the student in a general education setting would have on the education of other students in that setting;[19] and (3) The school district may consider the cost of the supplemental aids and services necessary to achieve a satisfactory education in general education setting.[20] *Greer*, 950 F.2d at 697.

33.

In considering the least restrictive environment appropriate for a student, the IEP team must consider the continuum of placement options. 34 C.F.R. § 300.115; Ga. Comp. R. & Regs. 160-4-7-.07. Beginning with the least restrictive placement, the options for school-age children

[19] While there was some evidence that Plaintiff's behavior did not interfere with her learning or the learning of other students, there was also evidence that Plaintiff exhibited more behavioral issues in the general education setting. Notwithstanding, the evidence as to the second *Greer* factor is insufficient to tip the balance in either direction.
[20] The parties did not present any evidence regarding the third *Greer* factor.

are: (1) the general classroom; (2) instruction outside the general classroom; (3) a separate day school or program; (4) home-based instruction; (5) residential placement; and (6) hospital/homebound instruction.[21] *Id.*

34.

Plaintiff's IEP team considered the placement options appropriate for Plaintiff beginning with general education. The team determined that Plaintiff could obtain educational benefit in the general classroom with appropriate supports for all but the three foundational skills classes (reading, writing, and math) and speech therapy. The team spent many hours carefully crafting an IEP with appropriate aids and services to support Plaintiff in the general education setting including an entire IEP page dedicated to student supports as well as the provision of a one-on-one adult assistant during Plaintiff's time in the general education setting and the co-teaching model[22] for the science/social studies class.

35.

For foundational skills, however, Plaintiff's IEP team determined that she could not be educated appropriately in the general classroom. The team's discussion and determination focused on Plaintiff's unique abilities and needs and on the type of environment in which she would be able to make progress on her goals and objectives. Plaintiff's learning style makes it difficult, at best, for her to benefit from instruction in the general classroom. A relatively short time remains for her to be able to acquire the core skills she needs for reading, writing, and math. Her learning style requires direct, explicit, systematic, small-group instruction with drill and

[21] The IDEA "does not require that every child with a disability be placed in the regular classroom regardless of individual abilities and needs. This recognition that regular class placement may not be appropriate for every child with a disability is reflected in the requirement that LEAs make available a range of placement options, known as a continuum of alternative placements, to meet the unique educational needs of children with disabilities." 71 Fed. Reg. 46587.

[22] The co-teaching model is a direct service that falls under the general classroom placement option. Ga. Comp. R. & Regs. 160-4-7-.07.

repetition. The instruction she requires for reading, writing, and math is so different from that of the second grade general education classroom that it would be unrecognizable in comparison and would have to be provided one-on-one. The IDEA does not require that level of accommodation. *Daniel R.R.*, 874 F.2d at 1049-50; *see also Beth B.*, 211 F. Supp. 2d 1020, 1032-34 (N.D. Ill. 2001) *aff'd*, 282 F.3d 493 (7th Cir. 2002).

36.

When the curriculum becomes so modified that it is unrecognizable, then any academic benefit gained in a general education classroom is a result of the specialized instruction and not a result of the general education curriculum. *Daniel R.R.*, 874 F.2d at 1049; *Beth B.*, 211 F. Supp. 2d at 1032. The provision of a parallel curriculum requiring specialized instruction in a general education setting may result in a more restrictive placement than would the provision of an appropriate curriculum in a self-contained setting where the student is provided the opportunity to interact with other students. *Beth B.*,211 F. Supp. 2d at 1035. "[M]ainstreaming would be pointless if we forced instructors to modify the regular education curriculum to the extent that the handicapped child is not required to learn any of the skills normally taught in regular education." *Daniel R. R.*, 874 F.2d at 1049.

37.

Plaintiff failed to present any substantive evidence that she could be satisfactorily educated in the regular education classroom with supplementary aids and services for her foundational classes (i.e., math, reading, and writing). *K.I. v. Montgomery Pub. Schs.*, No. 2:06-cv-905-MEF, 2011 U.S. Dist. LEXIS 94927, at *30 (M.D. Ala. Aug. 24, 2011). Rather, Plaintiff's expert offered conclusory opinions that the District's proposed placement was inappropriate and that the regular education classroom should be "tried first" before other

options are explored. While it is true that the District must *consider* the regular education classroom first, IDEA does not require experimentation without any basis. Such an approach ignores the requirement that Plaintiff should be placed in the LRE to the maximum extent *appropriate*. In other words, Plaintiff's unique needs must be considered and when "education in a regular classroom cannot meet the [] child's unique needs, the presumption in favor of mainstreaming is overcome and the school need not place the child in regular education." *Greer*, 950 F.2d at 695.

38.

The evidence in the record indicates that, at this time, Plaintiff cannot be satisfactorily educated in the regular education classroom for her foundational classes (i.e., math, reading and writing). Comparing the benefits that Plaintiff will receive in the regular education classroom with those that she would receive in the special education setting further supports this conclusion.

39.

While it is true that language and role modeling are potential benefits to be achieved by associating with non-disabled peers in the regular education classroom, the proposed IEP places Plaintiff in science/social studies/health, specials, lunch, and recess with non-disabled peers. Further, it is unlikely that she will gain any additional benefit in a regular education classroom for math, reading and writing. The nature of Plaintiff's deficits in these areas is such that the curriculum would need to be modified beyond recognition. Additionally, Plaintiff would require one-on-one instruction. She would essentially be in a class of one within a larger classroom. For the most part, she would not be interacting with other students in the class and thus would not be benefitting from physically being in the regular education classroom.

40.

On the other hand, Plaintiff has a narrow window to obtain these foundational skills. She requires the explicit, direct and repetitive instruction that she can get in the special education setting. Further, the evidence shows that she is more engaged and performs better in the small group special education setting. On balance, the benefits that she would receive in the special education setting for these foundational classes outweigh any potential benefits she may obtain from briefly associating with non-disabled peers in these classes.[23]

41.

Plaintiff is unlikely to receive any educational benefit from placement in a classroom where she is unable to engage and participate in the instruction. [24] Placement in the general education classroom for reading, writing, and math would not meet Plaintiff's unique needs. Further, any non-academic benefit that Plaintiff might obtain by being placed in the general education classroom for these three classes pales in comparison to the benefits she is likely to receive in the special education setting. For these reasons, this tribunal concludes that the special education setting for reading, writing, and math is the least restrictive environment appropriate for Plaintiff.

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[23] As noted above, Plaintiff will have an opportunity to be educated and associate with non-disabled peers in her other classes and during lunch and recess.

[24] Plaintiff's expert testified that Plaintiff should remain in the general education setting for at least a year even if no progress is made. That opinion is inconsistent with the IDEA's mandate that schools offer an educational program reasonably calculated to ensure that the student is able to receive educational benefit. If the student is not able to benefit from the program, it is not appropriate. The IDEA "would be worthless if handicapped children received no benefit from the 'free appropriate public education.'" *J.S.K.*, 941 F.2d at 1572 (citing *Rowley* 458 U.S. at 200).

School Location and Other Educational Policies and Methods

42.

One of the purposes of the IDEA is to provide parents with the ability to meaningfully participate in their child's educational planning. *Loren F. v. Atlanta Indep. Sch. Syst.*, 349 F.3d 1309, n.2 (11th Cir. 2003). However, a parent's right to provide meaningful input is not the right to dictate an outcome. *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 380 (5th Cir. 2003); *Lachman v. Ill. State Bd. of Educ.*, 852 F. 2d 290, 297 (7th Cir. 1988); *Renner v. Bd. of Educ. of the Pub. Sch. of Ann Arbor*, 185 F.3d 635 (6th Cir. 1999); *Barnett v. Fairfax Cnty. Sch. Bd.*, 927 F.2d 146 (4th Cir. 1991); *Daniel R.R.*, 874 F.2d at 1051.

43.

When enacting the IDEA, Congress deliberately "chose to leave the section [sic] of educational policy and methods where they traditionally have resided--with state and local school officials." *Barnett*, 927 F.2d at 152 (citing *Rowley*, 458 U.S. at 207-08) . "We believe that a congressional mandate that dictates the substance of educational programs, policies and methods would deprive school officials of the flexibility so important to their tasks. Ultimately, the Act mandates an education for each handicapped child that is responsive to his or her needs, but leaves the substance and the details of that education to state and local school officials." *Id.*

44.

Decisions such as the location of the school, the selection of personnel, and the choice of educational methodology are left to the purview of the local educational agency. "Once *Rowley* compliance is established, the school system has considerable latitude in choosing a location for the provision of services." *Marietta City Sch. Sys.*, 34 IDELR 280 (SEA GA April 30, 2001);

Flour Bluff Indep. Sch. Dist. v. Katherine M., 91 F.3d 689 (5th Cir. 1996); *Kevin G. v. Cranston Sch. Comm.*, 130 F.3d 481 (1st Cir 1997).

45.

Likewise, "once a court determines [whether] the requirements of the [IDEA] have been met, questions of methodology are for resolution by the States." *Rowley*, 458 U.S. at 207-208.[25] Even if a particular methodology could be shown to maximize a student's learning, the IDEA does not require that the methodology be utilized; instead, "methodology decisions are appropriately within the domain of the educational agencies with respect to their choices on which methodologies to use in school programs." *Prince George's Cnty. Pub. Schs.*, 3 ECLRP 224 (SEA Md. July 3, 1998).

46.

Choices of personnel and training are also left to the local educational agencies. *See Renner supra.*; *Lachman supra.*; *Kuszewski v. Chippewa Valley Schs.*, 131 F. Supp. 2d 926 (E.D. Mich. 2001); *In Re: Sarah M.*, 28 IDELR 571 (SEA NH June 16, 1998); *Freeport Sch. Dist.145*, 34 IDELR 104 (SEA IL March 9, 2000); *Spring Branch Indep. Sch. Dist.*, 2 ECLPR 223 (SEA TX April 12, 1996).

47.

"Parents cannot compel these choices, no matter how strong their preference." *In re: Student with a Disability*, 34 IDELR 22 (SEA Mich. May 12, 2000).

48.

Plaintiff's parents complain that they were not provided sufficient information about the program at Sycamore Elementary because they did not know what the reading program would be

[25] *See also Erickson v. Albuquerque Pub. Schs*, 199 F.3d 1116 (10th Cir. 1999); *Tucker v. Calloway Cnty. Bd. of Educ.*, 136 F.3d 495 (6th Cir. 1998).

or what the "class would look like." (Docket No. OSAH-DOE-SE-1404095-67-Howells, Due Process Complaint, p. 29.) However, the IDEA does not entitle them to that information. The choices of teacher, methodology, class make up, and class name are administrative decisions exclusively within the school's control. Even so, Defendant provided Plaintiff's parents with detailed information about the MiID program and even allowed Plaintiff's parents to visit, observe, and ask questions of school administrators. "There is no language in the IDEA requiring a school board to allow parents to visit the school of the proposed placement. Rather, the statute requires merely that the parents be active partners in the process." *Hanson v. Smith*, 212 F. Supp. 2d 474, 487 (D. Md. 2002). Plaintiff's parents were active partners in the development of Plaintiff's May 2013 IEP. Even if they had not been provided with any information about the MiID class, the teacher, or the methodology, and had not been allowed to observe, there would have been no denial of FAPE because these matters fall outside the scope of the IDEA.

49.

Moreover, a placement is not a "program." "'Educational placement' under the IDEA is a term of art: it encompasses the characteristics of a child's educational plan under an Individualized Education Plan (IEP) and 'does not refer to a specific location or program.'" *M.S. v. New York City Dept. of Educ.*, 734 F. Supp. 2d 271, 274 (quoting *K.L.A. v. Windham Southeast Supervisory Union*, 371 Fed. Appx. 151, 154 (2nd Cir. 2010)). In other words, the program that Plaintiff requires for her instructional needs, the MiID program, is not Plaintiff's placement. It is a program name designated by Defendant. "Though the IDEA requires the 'educational placement' decision to be made by a group of people including the parents,

'educational placement' within the meaning of IDEA does not refer to a specific location or program." *Carrie v. Dept. of Educ.*, 869 F. Supp. 2d 1225, 1239 (D. Haw. 2012).

50.

Plaintiff's parents want Plaintiff to remain at Simpson Elementary. That desire is the crux of this case. Plaintiff's parents expressed no objection to the May 2013 IEP until the school location was discussed five and a half hours into the meeting on May 3, 2013. School location, like other administrative decisions, is exclusively within the school system's control. School location is not a part of the placement consideration; it falls outside the scope of the IEP process. "Historically, we have referred to 'placement' as points along the continuum of placement options available for a child with a disability, and 'location' as the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services." 71 Fed. Reg. 46588. In this case, the placement recommendation for Plaintiff is 16.5 hours in the special education setting. Plaintiff's parents not only agreed with this placement, they requested it. No matter how strong their preference or compelling their reason, Plaintiff's parents have no authority to dictate school location and Plaintiff's IEP cannot be invalidated because her parents object to the location.

51.

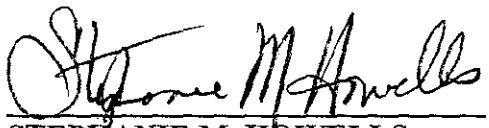
"[T]he IDEA does not require that parental preferences be implemented, so long as the IEP is reasonably calculated to provide some educational benefit." *Bradley v. Arkansas Dep't of Educ.*, 443 F.3d 965, 975 (8th Cir. 2006). The IDEA does require, however, that "[t]he child's placement is determined at least annually, is based on the child's IEP and *is as close as possible to the child's home*." Ga. Comp. R. & Regs. 160-4-7-.07 (emphasis added); *see* 34 C.F.R. § 300.116(b)(1)-(3). Plaintiff's home school, Level Creek Elementary, does not have an MiID

program. The feeder school for the program is Sycamore Elementary; it is the school closest to Plaintiff's home with the appropriate program. Although the choice of school location is an administrative determination left to the school, Defendant's decision to implement Plaintiff's IEP at Sycamore Elementary complies with the IDEA's requirement that placement be in the school closest to Plaintiff's home where the services are available.

IV. DECISION

For the foregoing reasons, Plaintiff's request for relief is **DENIED**.

SO ORDERED, this 23rd day of December, 2013.



STEPHANIE M. HOWELLS
Administrative Law Judge