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IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

Kevin Westray, Legal Assistant

█ by and through █ and █ and :

Plaintiffs,

v.

GWINNETT COUNTY SCHOOL
DISTRICT,

Defendant.

Docket No.:
OSAH-DOE-SE-1301259-67-Schroer
13-278183

FINAL DECISION

I. INTRODUCTION

On July 2, 2012, Plaintiffs █ █ and █ filed a due process complaint pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (“IDEA”). The due process hearing was held before the Office of State Administrative Hearings (“OSAH”) on August 7, 8, 9, 10 and 13, 2012. Chris Vance, Esq. represented Plaintiffs, and Victoria Sweeney, Esq. and Elizabeth Kinsinger, Esq. represented Defendant Gwinnett County School District (“School District”). The record remained open until August 24, 2012, to allow the parties to review the transcript and file post-hearing briefs.

II. FINDINGS OF FACT

A. General Overview

1.

█ is a nine-year-old boy who lives with his mother, █ a registered dietician at █ University, his father, █ a █ AirLines pilot, and his █-year-old sister in Gwinnett County, Georgia. █ has autism, and has significant delays in the areas of communication, fine and gross motor skills, self-help skills, and cognitive abilities. (Tr.

351, 431, 590-93, 1215; Ex. P-3084-87)

2.

Autism is a developmental disorder that is characterized by deficits in three core areas – communication, social relationships, and behavior rigidity. Autism is considered a “spectrum” disorder. That is, a person with autism will display varying degrees of deficits in each of these core areas. Children with autism are placed on the spectrum depending on the severity of their deficits. Generally, █████ falls in the moderate range for autism, although one recent assessment indicates that he functions in the severe range in some settings. Because inconsistency is a “hallmark” of autism, it is difficult to assess the abilities and skills of children with autism, including █████ on any given day using traditional testing protocols. (Tr. 112, 131, 261, 599, 610-11, 617, 667-68, 680-81, 1112-14, 1129)

3.

Children on the autism spectrum learn differently than neuro-typical children. For example, children with autism may rely more heavily on their sense of smell, touch or taste to identify people and objects in their environment. Thus, although children with autism may grow out of this type of behavior, many such children will lick, sniff, or mouth an object or person as a way of gathering information. Children on the autism spectrum often have intellectual disabilities in addition to deficits in the three core areas. These intellectual deficits, coupled with problems communicating, sometimes lead children with autism to use non-verbal means of communicating, including swatting or pushing when they want a person to stop or go away. Addressing inappropriate behaviors and replacing them with appropriate behaviors is an important component of

most educational plans for children with autism. (Tr. 278-79, 600-01, 614-15, 795-97, 1117-19, 1126)

4.

Over the course of the past few years, ■■■ has experienced extended episodes of inappropriate behaviors while in school, such as mouthing or ingesting inedible objects, referred to as “pica,” and toileting problems, including having bowel movements in his pants and attempting to put his feces in his mouth. In addition, his progress on his goals and objectives in school has been slow and, sometimes, fleeting. ■■■’s inability to generalize skills from setting to setting, another hallmark of autism, coupled with his inconsistent performance of tasks and skills from day to day, has made it difficult to determine the extent to which ■■■ has progressed in the school setting. (Tr. 820, 873, 961, 1123-24, 1129)

5.

■■■’s parents have been concerned about the lack of progress and what they considered a dangerous increase in their son’s maladaptive behaviors at school. In March 2012, when ■■■ was in third grade at Craig Elementary School, his parents notified the School District that they intended to place ■■■ in a private school in the fall and seek reimbursement from the School District. ■■■ finished out the 2011-2012 school year at Craig Elementary and received Extended School Year (“ESY”) services from the School District this past summer. In July, ■■■’s parents filed a due process complaint under IDEA. On August 13, 2012, the last day of the due process hearing, ■■■ began school at the Hirsch Academy, a private school in Decatur, Georgia, which uses a methodology known as “DIR” or “Floortime.” ■■■’s parents seek reimbursement for the cost of his

tuition at Hirsch Academy for at least the next two years, as well as reimbursement for other private services they have arranged for [REDACTED]. In addition to placement at Hirsch Academy, [REDACTED]'s parents request that the School District pay for at least twenty-five hours per week of additional after-school and weekend instruction using a methodology known as "Applied Behavioral Analysis." Finally, [REDACTED]'s parents request that the School District pay for an independent functional behavioral assessment and a private assistive technology evaluation for [REDACTED] (Tr. 312, 367, 379, 417-18)

B. Early Educational Background¹

6.

Before his second birthday, [REDACTED] was referred by his pediatrician to the Marcus Institute for delays in speech and motor development. At twenty-two months, [REDACTED] was found to have a severe language disorder, with receptive language in the five-month range and expressive language in the three-month range. He began receiving private occupational therapy ("OT"), physical therapy ("PT"), and speech-language therapy shortly thereafter. Around that time, [REDACTED] was also evaluated through the Babies Can't Wait program and found to be eligible for services due to significant developmental delays in fine motor, gross motor, communication, and cognitive/play skills development. (Tr. 452, 472-73; Ex. P-3512-32; Ex. D-166-69, D-171-77)

¹ The Court sets forth historical facts about [REDACTED]'s educational background "as background material and to provide context for the claims, not to support a violation of the IDEA." *Draper v. Atlanta Indep. Sch. Sys.*, 480 F. Supp. 2d 1331, 1341 (N.D. Ga. 2007), *aff'd* 518 F.3d 1275 (11th Cir. 2008).

1) Special Needs Pre-School (2006-2007)

7.

After he turned three, ■■■ began receiving services through the Gwinnett County School District ("School District"). On or about March 13, 2006, the School District conducted an Individualized Education Program ("IEP") meeting for ■■■ finding him eligible for special education in the areas of significant developmental delay ("SDD") and speech-language impairment. Specifically, ■■■ had delays in the areas of communication, cognitive skills, motor skills, adaptive (self-help) skills and personal-social skills. His IEP team, which included his parents, determined that ■■■ needed small group instruction in a special education pre-school, as well as OT, PT, and speech-language therapy. For the 2006-2007 school year, ■■■s IEP goals included increasing his cognitive/play functioning, improving his personal-social skills, increasing self-help functioning, such as toileting and dressing, and improving gross and fine motor functioning. (Exs. P-14-20, P-205-21, P-3457-65)

8.

In March 2007, ■■■s IEP team met to review the past school year and to develop a new IEP. ■■■ who was then four years old, was described as a "delightful little boy who loves to play with cars, trains, books, puzzles and sing songs throughout the day." His IEP indicated that he had made "significant progress" during the past year. ■■■ had particularly benefited from sensory activities such as using a trampoline, which helped him focus. With respect to cognitive skills, ■■■ was reported to be able to identify basic shapes and some colors, identify his name out of a field of eight, and spell his first name. He had made "great strides" in the area of gross motor skills, including jumping and

climbing stairs, and was able to feed himself and drink from a cup. Although he also had made “significant progress” in speech-language therapy, mastering five of his six speech-language objectives, he was still delayed in this area. The IEP team agreed that ■■■ should continue in a special education pre-school and continue to receive speech-language therapy, OT and PT during the 2007-2008 school year. The IEP team identified new goals and objectives for ■■■ including identifying ten colors, using one-to-one correspondence to count objects, using interactive play with peers, following a schedule for toileting, imitating lines and circles, using spring-loaded scissors, catching and kicking a playground ball, and responding to yes/no questions. (Ex. P-180-204)

2) Special Needs Pre-School (2007-2008)

9.

■■■'s IEP team met again in the spring of 2008. ■■■ then five years old, was described as having “made outstanding progress with goals and objectives this school year. He has mastered 15 out of 21 objectives in the areas of cognitive, social, adaptive, fine and gross motor.” ■■■ was able to identify all colors, basic shapes, numbers 0-10, and most uppercase letters. He had become more social and was initiating and responding to greetings. The IEP indicated that ■■■ had made “great strides” with fine motor activities, such as cutting independently, and his gross motor skills were reported to be “on target.” ■■■ also had become much more independent with his daily living skills at school, including dressing, opening containers, and using the toilet (to urinate) on a schedule with verbal prompts. With respect to communication, although ■■■ had made some progress, he continued to exhibit difficulty using language to appropriately interact

with peers and adults.² The IEP team determined that [REDACTED] remained eligible for special education under the SDD and speech-language impairment categories and that he should continue to receive small-group special education instruction, with speech-language therapy and OT. (Ex. P-147-79)

10.

For the 2008-2009 school year, the IEP team identified a number of areas of continuing need for [REDACTED] including his cognitive functioning, his interactions with peers, his ability to remain on task and follow directives, his cutting and tracing skills, and his expressive language. The team also identified specific goals and objectives for the 2008-2009 school year, including objectives relating to toileting, staying on task, interacting with peers, and other cognitive and academic goals, such as counting objects using one-to-one correspondence and identifying the letters of his name. (Ex. P-147-79)

3) Kindergarten (2008-2009)

11.

[REDACTED] began kindergarten in August 2008 at Camp Creek Elementary School. On October 24, 2008, the IEP team met to discuss placing [REDACTED] in a new SDD kindergarten class with an autism focus.³ Toward the end of kindergarten, the IEP team agreed that [REDACTED] would benefit from ESY services in the summer to help maintain newly acquired skills and address regression of skills. The team also met around this time to review

² A private speech evaluation conducted around this time also concluded that [REDACTED] continued to have significant deficits in communication abilities. (Ex. P-3413)

³ [REDACTED] was not formally made eligible for special education under the autism category until January 2012. However, the IEP documents report that his move to an autism-focused classroom was a positive one for [REDACTED] in terms of his behavior and attention to task. (Ex. D-454; Ex. P-12)

■■■■s IEP and plan for the upcoming 2009-2010 school year. The team reviewed recent evaluations, which continued to indicate significant delays. ■■■■ was described as a quiet child, who was often unfocused, inattentive, and off-task in group settings, which “interfered greatly with his performance. [■■■■] will wander around the room, pick things off the floor, press buttons on CD player, stare at the computer screen, watch the clock while flapping his hands and jump[ing] up and down. In an environment with structured routine, many of these behaviors are greatly reduced.”⁴ (Exs P-122-45, P-3172-75)

12.

During the 2008-2009 school year, ■■■■ needed an adult to assist him in all classroom settings, including the bathroom, due to his lack of focus and off-task behaviors. ■■■■’s parents expressed concerns about ■■■■s performance, particularly his difficulty attending to classroom activities and his limited self-help skills. They reported that ■■■■ was now enrolled in the “Brain Balance” program and was on a gluten-free diet

⁴ In a Psychological Evaluation conducted in February and March 2009, when ■■■■ was six years old, the evaluator noted concerns in the classroom included difficulty attending to tasks, “limited self help skill such as independently asking to use the restroom, and atypical behaviors such as picking fabric from the floor and placing it in his mouth.” Because ■■■■ was unwilling to participate in formal testing, the evaluator used alternative assessment measures, such as parent and teacher rating instruments. Overall, ■■■■s teacher and parents rated ■■■■s’ skills similarly, with skills in various areas commensurate with an average two- to four-year-old. In addition, ■■■■s adaptive skills were rated in the “low” range by both his teacher and parents, and achievement tests scores indicated that ■■■■ was below grade level. Finally, ■■■■ demonstrated behaviors consistent with an autism spectrum disorder, and the evaluator determined that based on the Gilliam Autism Rating Scale (“GARS”) ■■■■ fell in the “very likely range of probability for autism.” (Ex. P-3181-88; Ex. D-196-203; Tr. 586-88)

with supplements in an attempt to “improve his brain chemistry.”⁵ The IEP team found that, in addition to ■■■’s lack of attention and focus, “[h]is need for a sensory diet,⁶ social skills deficits and language deficit hinders communications with peer and adults and his performance in all academic areas.” Based on their review, the IEP team determined that ■■■ needed continued placement in a moderate special education classroom with speech-language therapy and OT services. (Exs. P-3172-75, P-122-45)

4) First Grade (2009-2010)

13.

For first grade, ■■■ was placed in a Level 2 class for children with moderate autism (“ASD class”) at Craig Elementary School. The ASD class served children with autism in kindergarten through second grade. The IEP team developed a number of goals and objectives for ■■■’s first grade year, including goals for following oral directions, improving vocabulary, remaining attentive in a group setting, demonstrating appropriate

⁵ ■■■’s parents explored a number of different approaches to ameliorate the effects of ■■■’s autism, including “functional medical treatment,” which involved various vitamin supplements and hyperbaric oxygen therapy treatment, a casein-free and gluten-free diet, and probiotics to aid in digestion. (Tr. 352, 462-64, 1029; Ex. P-3085)

⁶ A “sensory diet” is a term used to describe a variety of activities or environments that help keep a child’s nervous system focused and calm. Children with autism may have heightened sensory needs, which can be met through a sensory diet that helps “regulate” their nervous system and allows them to pay attention and learn. For example, a child with autism may benefit from taking a break from work and bouncing on a trampoline or swinging on a swing for a short period of time, before returning to a classroom task. A child with a heightened sensitivity to noise may need a quiet, calm environment before he can attend to his school work. Although Dr. Emily Klein, the coordinator for autism programs for the School District, testified that there is no peer-reviewed research to support the effectiveness of sensory strategies with children with autism, she admits that such strategies are widely-used, including by OTs and teachers in the School District. Moreover, ■■■’s teachers, as well as a number of other witnesses, testified that ■■■ had significant sensory needs. (Tr. 66, 188-90, 214-15, 285-87, 625-26, 700-04, 1148, 1186-87)

fine and gross motor skills, using one-to-one correspondence and other math skills, answering questions about a story, and improving his reading skills. (Tr. 687; Ex. P-135-45)

14.

█'s ASD class was taught by Doris Reynierson, who was █'S teacher for both first and second grade. Reynierson's classroom had a bathroom, with visual pictures to help the students with hand-washing and toileting. There was a large central area with a table for group activities, a technology center with computers and an area for one-on-one instruction, and a reading sensory area with pillows, cushions, and books, where students could take a sensory break. Objects in Reynierson's room were labeled with picture symbols and words. In addition, Reynierson's room contained various assistive technology ("AT") devices, which are used to "increase, maintain, or improve the functional capabilities of children with a disability." *See* 34 C.F.R. § 300.5. In addition to the computer and related software, Reynierson's classroom contained pencil grips, a slant board, a reading guide, and an automatic touch control device for communication. (Tr. 698-700, 706-08, 732)

15.

Reynierson loved █ and developed a quick bond with him.⁷ She described him as an attractive, sweet boy. Toward the end of █'Ss first grade year, Reynierson and the IEP team met and discussed █'s strengths and weaknesses, as well as his IEP for second grade. With respect to his strengths, the team described █ as friendly and

⁷ It appears that █'s parents also had a good relationship with Reynierson. Reynierson described █'s parents as "very supportive and complimentary and kind." They gave her gifts and cards of appreciation throughout her two years as █ teacher. (Tr. 722-23; Ex. D-601)

noted that he was able to move around the ASD class and the school independently. ■■■ could follow the class schedule with limited prompting. He enjoyed puzzles, trains, and books. At that time, he was able to “bathroom independently with limited assistance,” but needed prompting for hand-washing. Academically, ■■■ could identify shapes, colors, upper and lower case letters, and phonetic sounds. The IEP team reported that he could count to twenty with 80% accuracy consistently and could identify his numerals from one through twenty. In addition, ■■■ could identify essential elements from simple stories and distinguish between simple differences, such as more and less. He had mastered some pre-reading skills and was building a word bank. Finally, in terms of communication skills, ■■■s speech was intelligible, and he was using simple sentence structure to make comments and occasionally ask spontaneous questions. (Tr. 695; Ex. D-65-68)

16.

Notwithstanding these strengths, ■■■ continued to have significant areas of need. Reynierson described ■■■ as having global delays in communication, adaptive skills, fine and gross motor planning, and cognitive skills, all of which affected ■■■s ability to learn.⁸ In addition, ■■■ had significant problems with paying attention and remaining on task. In the April 2010 IEP, the team described his greatest needs as being “task attention, task initiative and behavior management.” ■■■ required close adult

⁸ The teacher-administered Psycho-educational Profile or “PEP,” which was reported in the April 2010 IEP, indicated varying levels of delay, from a developmental age of twenty-six months in the area of visual-motor imitation to a developmental age of fifty-two months in receptive language. His composite scores indicated a developmental age of forty-three months for communication and thirty-two months for motor, both of which were considered to be in the moderately delayed range. (Ex. D-66-67)

supervision in any group activity to stay on task. Consequently, the IEP team determined that ■ continued to need one-on-one instruction in a small, self-contained classroom, with sensory supports, one-and-a-half hours of speech therapy per week, and occupational therapy for two hours per month. (Tr. 694-97, 730; Ex. D-65-72)

17.

■'s goals and objectives for second grade fell into the following instructional categories – Math (counting, simple addition, and telling time), Language Arts, Reading, Self-help (using the bathroom and reducing bathroom accidents,⁹ using zippers/buttons/snaps, and staying on task), Behaviors (reducing aggression and refraining from eating off the floor), Fine Motor (typing, writing), Gross Motor (balancing and hopping), Money, Receptive and Expressive Communication, and Social Interactions. (Ex. D-73-88)

C. Second Grade (2010-2011)

18.

■ began second grade in August 2010 at Craig Elementary in Reynierson's ASD class. The original IEP for this school year called for him to participate in regular education with neuro-typical peers for five hours per week – thirty minutes for “calendar time” and thirty minutes for “specials,” such as art, music or physical education (“PE”), every day. In addition, ■ attended lunch and recess daily with his regular education

⁹ At the hearing, Reynierson described ■'s problems with “bathrooming” as being “an up and down behavior” in first grade. ■ would do well using the bathroom at school and then would have periods of regression, where he would wet his pants. Often, the regression at school would correspond to a reported regression in bathrooming at home. During first grade, Reynierson collaborated with ■'s parents to develop strategies to help ■ address his bathroom needs appropriately at school and at home. (Tr. 713)

peers. In September 2010, however, Reynierson and [REDACTED] met and agreed to reduce the time [REDACTED] spent in regular education by thirty minutes per day. [REDACTED] was not responding to his regular education peers during calendar time and it was leading to maladaptive behaviors. Thus, Reynierson recommended and [REDACTED] consented to a reduction. (Tr. 560-61, 756-57; Ex. D-100)

19.

By October 2010, Reynierson reported that [REDACTED] was progressing as expected on many of his goals and objectives, had mastered two objectives (reducing bathrooming accidents by 50% and making on topic comments during group activities), but had made only minimal progress on objectives relating to gaining attention appropriately, eating off the floor, using zippers, snaps, and buttons, and improving his fine motor skills, including tracing and writing. Shortly thereafter, at the end of the first semester of second grade, [REDACTED]'s behaviors with respect to eating items off the floor increased. Although the term "pica" was not used at that time,¹⁰ Reynierson observed an uptick in his attempts to eat small pieces of food off the floor.¹¹ Around this same time, [REDACTED]'s mother also reported to Reynierson that [REDACTED] was engaging in similar behavior in the home despite [REDACTED]'s frequent vacuuming. In addition, [REDACTED] told Reynierson that he walked into [REDACTED]'s room

¹⁰ In a strict sense, "pica" occurs when a person repetitively ingests items that are not intended for consumption. In this case, the witnesses and counsel often referred to any inappropriate attempt by [REDACTED] to put an item into his mouth, whether the item was edible or inedible and whether [REDACTED] successfully ingested the item or not, as "pica."

¹¹ Reynierson attributed some of this behavior to the tendency of children on the autism spectrum to use licking and smelling to identify objects. In fact, she has taught several other students with autism that will look on the floor or in the garbage can for edibles. As an educator, she tries to block any attempts to lick or mouth inappropriate objects. In addition, Reynierson observed that the increase in pica-like behaviors corresponded to a change in the food [REDACTED] brought for his lunch. (Tr. 795-67, 800)

and [REDACTED] was eating a glass Christmas ornament. (Tr. 600, 712-13, 720-22, 766, 793-94, 1118; Ex. P-325-342)

20.

To determine how to address this behavior in school, Reynierson kept data about when it occurred and under what circumstances. She determined that [REDACTED] searched for items to eat off the floor primarily during work time, and she hypothesized that he frequently used this behavior to avoid work. She tried a number of different strategies to extinguish the behavior, including providing small food items – such as granola provided by his parents – on his work table. In addition, when [REDACTED] attempted to pick up objects and put them in his mouth, the teacher or para-professional would block his hand. Reynierson discussed her strategies with [REDACTED]’s parents and described these communication as “open” and “positive.” (Tr. 720-21, 780-81, 794)

21.

In January 2011, Reynierson made another interim progress report on [REDACTED]’s goals and objectives. For the most part, she reported that [REDACTED] was still “progressing as expected by the IEP Team” on most objectives. In a few areas, however, he had slipped from “progressing as expected” to “minimal progress.”¹² In other areas, including eating off the floor, [REDACTED] showed improvement, moving from minimal progress to progressing as

¹² [REDACTED] regressed with respect to objectives involving single digit addition, identifying classroom vocabulary words, reading forty words in a repetitive reading program known as Edmark, and hopping. He also continued to show minimal progress in a few areas, including tracing his last name and writing numbers. (Ex. P-325-42)

expected.¹³ Finally, Reynierson reported that he had mastered three of his approximately thirty-six objectives for the year by January 2011, including an objective to reduce the incidents of aggression toward others. (Ex. P-325-42)

22.

█'s IEP team met again on March 7, 2011. By this time, █ had turned eight years old and was described as coming to school with “vigor and possibility.” He enjoyed interaction with his teachers and other adults, but did not interact with his peers without prompting from his teachers. He was now able to rote count to one hundred, with verbal prompting. He continued to be able to identify shapes, numbers, letters and letter sounds, but could only sporadically identify colors. Reynierson reported that █ was learning to tell time and count coins and that he was making some progress in learning to read sight words through the Edmark program. █ had also made good progress writing his first name. (Ex. D-118-126)

23.

█ still exhibited significant needs in the areas of communication, attention and task completion, and processing new skills and retaining learned skills.¹⁴ Reynierson also noted that he lacked intrinsic motivation to do many tasks and that he continued to exhibit maladaptive behaviors. █ continued to require close adult supervision in order

¹³ In addition to the objective regarding eating off the floor, █'s progress improved in the areas of gaining attention appropriately and buttoning, snapping, and zipping.

¹⁴ The March 2011 IEP included the results of a Psycho-Educational Profile completed by Reynierson in February 2011. Based on the raw scores and corresponding developmental age reported, █ showed either very little growth or regression in almost every area tested. However, the Court hesitates to read too much into these scores as the parties did not provide an explanation on how they should be interpreted from year to year. (Ex. D-67, D-119)

to attend and complete tasks, as well as to manage his behaviors. In addition, [REDACTED] continued to have sensory needs and problems with poor muscle strength for fine and gross motor skills. (Tr. 741-42, 750-52; Ex. D-118-126)

24.

[REDACTED] and [REDACTED] had a number of concerns about [REDACTED] that they shared with the team in writing and at the meeting on March 7, 2011. Their first concern related to [REDACTED]'s limited exposure to typical peers. According to R.S.'s parents, [REDACTED] showed "marked progress" when exposed to typical peers who modeled appropriate language, social interaction and behaviors. They wanted his time in school around typical peers to be increased.¹⁵ [REDACTED] and [REDACTED] also indicated that [REDACTED] learns best with a teacher who is "direct and firm." According to his parents, [REDACTED] needed "to know that he is the student and not the one in charge in order for the learning process to occur for him." Third, [REDACTED]'s parents wanted to ensure that [REDACTED]'s sensory needs were being met. Finally, [REDACTED] and [REDACTED] noted that they saw a disparity between [REDACTED]'s reported progress toward his objectives and what they called his "real skills."¹⁶ (Tr. 752-56; Ex. D-120; Ex. P-71)

¹⁵ The IEP minutes indicate that the regular education teacher reported that [REDACTED] did not respond to the typical students in her class. P.S. expressed that interaction with typical peers was an important issue for her and that she did not want to give up on this goal. (Ex. D-149)

¹⁶ This concern appears to be based on [REDACTED]'s difficulty in "generalizing" skills across settings, rather than false or inaccurate reporting by the School District on [REDACTED]'s progress reports. [REDACTED] is skeptical that [REDACTED] actually mastered some of the objectives that Reynierson reported he mastered, such as zipping or buttoning, based on his observations that [REDACTED] could not perform such tasks at home. However, the Court found Reynierson's testimony regarding [REDACTED]'s progress or mastery at school to be highly credible. The Court finds, by a preponderance of the evidence, that [REDACTED] made some progress on his goals and objectives while in Reynierson's classroom, including in the areas of communication, fine motor, gross motor, rote counting, reading, and adaptive skills. Although he did not master the majority of his goals and objectives, and in some cases,

The team determined that ██████'s special education program for the upcoming school year should consist of cognitive and functional academics in an ASD class, weekly community skills instruction, weekly speech-language therapy, and daily participation in general education, accompanied by an adult support, during art, music, PE, lunch and recess. In addition, the team agreed that ██████ needed additional AT, particularly in the area of oral communication, and an AT assessment was made a part of his IEP.¹⁷ Finally, the team developed new goals and objectives for ██████¹⁸ Based on a preponderance of the evidence, the Court finds that ██████'s parents were active participants in the drafting, consideration, and finalizing of ██████'s goals and objectives for the 2011-2012 school year. Moreover, although the goals may have been challenging for ██████ and the level of proficiency needed for mastery may have been ambitious, the Court finds that the goals and objectives were appropriate and the result of a collaborative

he did not retain the skills he appeared to have mastered, ██████ did make progress toward achieving his goals and objectives while in Reynierson's classroom. (Tr. 386-87, 728-30, 765, 775)

¹⁷ The School District has never conducted a formal AT assessment. However, ██████ has had some AT available to him in his ASD class in both second and third grade, and there was no mention of an AT assessment in his next IEP. Plaintiffs argue that they are still entitled to an AT assessment. They have identified some AT – an Apple “iPad,” a stylus, and related applications – that were beneficial to ██████ this summer and have not been provided by the School District. (Tr. 63, 75, 355, 706, 732, 1017; Ex. D-5)

¹⁸ The IEP team developed goals and objectives in the following areas: Math (telling time, counting coins, identifying missing numbers), Language Arts (learning to read five words each nine weeks, identifying vocabulary words and simple story sequences), Fine Motor (writing and typing), Gross Motor (kicking, striking, or throwing a ball), Behavior (following directives and class schedule, reducing eating off the floor, reducing negative responses to non-preferred activities), Community Skills, Self-Help (clothing, shoe tying), Speech-Language, Peer Relationships, and Social Skills. (Ex. D-127-50)

effort between the members of the IEP team, including the parents. (Tr. 445-47; Ex. D-49-50, D-122-24)

26.

Shortly after the March 2011 IEP meeting, ■■■ began exhibiting a new behavior that caused his parents and teachers concern. In or around April 2011, ■■■s parents notified Reynierson that ■■■ had contracted worms, which caused him serious irritation and itching. According to Reynierson, ■■■ would roll upon objects and scratch his anus frequently during this time. As a result of the scratching, ■■■ would sometime get feces on his hands, which he would wipe on himself or try to put in his mouth. Reynierson discussed this behavior with ■■■s parents, who indicated that they were experiencing similar problems in the home. In fact, ■■■s father told Reynierson that one morning ■■■ had gotten feces “all over the place” during the night, and the family had begun to dress ■■■ in a one-piece union suit to prevent this behavior. To address these behaviors in school, Reynierson consulted with the School District’s behavior specialist, Lewis Holbrook, the school nurse, and Dr. Klein. They developed strategies that included close adult supervision¹⁹ and a “trip training schedule,” where ■■■ would go the restroom on a schedule throughout the day. Reynierson encouraged ■■■ to use the trip training schedule by creating a colorful visual reminder system and rewarding him with a favorite toy. (Tr. 713-17)

¹⁹ One of the two para-professional assigned to Reynierson’s ASD class would sit next to or behind ■■■ to monitor him for this behavior. If ■■■ scratched himself and got feces on his hands, they immediately attempted to stop him from wiping his hands or putting them in his mouth. (Tr. 719-20)

D. Third Grade (2011-2012)

1) Wheeler's Class and Instructional Methodologies

27.

For third grade, ■■■ was placed in an ASD class at Craig Elementary for third through fifth graders. His teacher was Leslie Wheeler. There were five children, including ■■■ in Wheeler's classroom in 2011-2012, all of whom had moderate autism. Wheeler also had a full-time para-professional who assisted with the students. (Tr. 896)

28.

The academic demands in Wheeler's class were more challenging than Reynierson's. However, Wheeler used many of the same methodologies and offered similar services and supports as Reynierson. For example, Wheeler, who had past experience as an AT representative for a school district in North Carolina, had numerous AT devices she used with ■■■ in the classroom. She used a special keyboard for typing, a handwriting program on the computer, and the Edmark program for reading. In addition, the OT working with ■■■ in Wheeler's classroom had a touch screen device similar to an iPad that ■■■ used to practice handwriting. Wheeler's class also had a sensory room and other sensory devices such as pencil grips, a compression desk, visual schedules, and stretchy bands across the legs ■■■'s chair. (Tr. 768, 816, 820-31, 833-34, 842, 1034)

29.

Wheeler also used a variety of instructional methodologies to teach ■■■. A primary methodology used by Wheeler was Applied Behavioral Analysis ("ABA"), which involves identifying behaviors, as well as what triggers the behavior (the

antecedents) and what comes after the behavior (the consequences), to determine the function of the behaviors and to develop a plan to reinforce desired behaviors and decrease or eliminate negative behaviors. In addition, Wheeler used a methodology called “joint attention,” where both the child and the teacher focus on an item or activity that the child enjoys and engage in communication and play related to that item or activity. When possible, Wheeler used “naturalistic teaching strategies” with ■■■ – essentially, taking advantage of spontaneous teachable moments that occurred throughout the day to teach ■■■ about socializing with his peers and reciprocal communication. Wheeler estimated that she used up to twenty different methodologies with ■■■ depending on the situation and the objective. (Tr. 82, 832-42)

2) Progress and Behavior Problems

30.

■■■ made some progress while in Wheeler’s classroom, but it was slow and inconsistent.²⁰ For example, ■■■ made progress in making conversation and interacting in groups, using coins to work on one-to-one correspondence, cutting shapes, identifying some sight words, fastening zippers, snaps and buttons on his own clothing, and turning pages in a book. However, he did not reach the level of mastery on many of his goals

²⁰ Dr. Klein, an expert in autism, testified that given ■■■’s global deficits, his progress was likely to be slow and incremental. In addition, the goals and objectives, particularly the academic goals, in the 2011-2012 IEP were challenging for ■■■ and not very meaningful to him. Dr. Klein’s recommendation was that ■■■’s IEP team consider more functional goals for ■■■ rather than such rigorous academic goals. However, according to Wheeler and Klein, it was very important to ■■■ and ■■■ to maintain academic goals for ■■■ such as reading and writing, and the IEP team consented. In addition, both Dr. Klein and Dr. Carter testified that although frank discussions with parents regarding their child’s capacity to learn are important and necessary, it is often a sensitive topic for parents and one that requires a respectful and measured approach by educators. (Tr. 677-78, 1017, 1128-29, 1149-50, 1176)

and objectives, and his mastery of some skills was inconsistent. For example, one day he would appear to have mastered a skill, such as reading sight words, and the next day he could not demonstrate the skill at all. (Tr. 833, 869-74, 960, 1139)

31.

In addition, ██████'s behaviors continued to hamper his progress in school, particularly in the second half of third grade. Throughout the school year, Wheeler kept data on ██████'s problem behaviors, including how often he would eat off the floor, soil his pants, smear his bowel movements, or swat or smack others. At the beginning of third grade, although ██████ exhibited some of these behaviors, they were not occurring with significant frequency.²¹ In fact, in the first fifty or so days of school, ██████ did not have any toileting accidents. However, in January 2012, ██████ began having bowel movements in his pants while at school. When Wheeler determined that this behavior was continuing despite her own interventions, she contacted Holbrook, the School District's behavior

²¹ They were not non-existent, however. For example, on November 2, 2011, ██████ sent Wheeler an email, telling her that ██████ was on a ten-day medication that seemed to be affecting his appetite and making him feel poorly. The next day, Wheeler reported to the parents that ██████ had been constipated and had used his hand to pull out the impacted feces, which were very hard. She reported that "unfortunately he put the feces in his mouth before we got to him." This happened again later that afternoon. Wheeler stated that she believed this was more an attempt to alleviate the discomfort, than a behavior. Moreover, some of the behaviors Wheeler was observing in the classroom in the fall of 2011 were occurring at home as well. On October 24, 2011, ██████ told Wheeler that she thought some of the behaviors were caused by "underlying stomach issues." She also related that ██████ "swatted me at the table tonight and we had actually just been laughing right before it happened." On September 21, 2011, Wheeler sent an email to ██████ describing ██████ "picking things off the floor and putting them in his mouth," as well as touching others, talking to himself, and shrieking. ██████ replied, stating that "[t]hese are all behaviors that [██████] has exhibited at home and, although he has been very oral lately with putting things in his mouth, he was not been eating things off the floor very much.... These problems have escalated for us in the past whenever [██████] can see that he is getting under our skin – he loves to watch people's blood boil! You might want to touch base with Doris [Reynierson] if these continue, as she has dealt effectively with them in the past." (Ex. P-3924, P-3978, P-4001-02; Ex. D-502-03)

specialist. Among other suggestions, Holbrook recommended reinstating the trip training schedule, with a visual schedule for toileting. Wheeler communicated with [REDACTED] and [REDACTED] about the bathrooming issues and periodically provided them copies of her behavior data sheets. In addition, in February 2012, prior to the annual IEP review meeting, Wheeler suggested adding a toileting goal to [REDACTED]'s IEP. [REDACTED] agreed and wanted it implemented right away. (Tr. 371, 848-56, 969-70; Ex. P-4382; Ex. D-151)

3) Reevaluation

32.

Around the time [REDACTED] began having bathrooming problems again, he was due to have his triennial reevaluation under IDEA. Dr. Dale Carter, a licensed school psychologist with the School District, conducted the re-evaluation. Also, because of the behaviors and other parental concerns, Dr. Carter conducted additional comprehensive psychological testing in January and February 2012. On January 24, 2012, [REDACTED]'s IEP team held a Reevaluation Conference to review some of the testing and make a determination about continued eligibility for special education. The team noted that [REDACTED] was making adequate progress on his social and some of his self-help objectives. "However, [REDACTED] is making little progress on academic related objectives. Though he sometimes reaches mastery criteria on these objectives, he cannot maintain performance at mastery." In addition, the results of his testing in speech-language ranged from very poor to profound, with an age equivalence of 2.9 years. In terms of the cognitive testing, [REDACTED] scores were extremely low, falling below the first percentile. Dr. Carter attributed some of his poor performance on [REDACTED]'s language deficits. In addition, [REDACTED] could not complete some testing because he did not appear to understand basic concepts, such as

“same and different.” ■■■ also had extremely low scores on adaptive behavior assessments, and fell in the “extremely likely” range for autism on the GARS rating scale. (On Wheeler’s rating scale, ■■■ scored in the “severe” range for autism.) According to Dr. Carter, using the cognitive testing results to predict academic achievement, ■■■ would be expected to make “very, very limited progress” compared to normally-developing children. (Tr. 396, 575-76, 583, 586, 589-92; Ex. D-214-29, D-268-80; Ex. P-3084)

33.

■■■ was found eligible for continued special education services, but his eligibility category was changed from SDD to ASD.²² Both ■■■ and ■■■ attended the January 24, 2012 meeting and signed and checked that they agreed with the eligibility report. Thereafter, on February 29, 2012, Dr. Carter, as well as an OT and speech-language pathologist, met with ■■■ to review the results of the more extensive testing they conducted after the Reevaluation meeting. They discussed ■■■’s lack of progress toward his goals and objectives, particularly in speech and reading. ■■■ discussed ■■■’s participation in private speech-language therapy with Mary Beth Stark, who used a strategy known as “DIR” or “Floortime” in her therapy sessions with ■■■ which is different than the traditional speech-language therapy used in the School District.²³ They

²² Under IDEA, SDD eligibility is only available for students age three to nine experiencing developmental delays in adaptive behavior, cognition, communication, motor development, or emotional development. 34 C.F.R. § 300.8(b); Ga. Comp. R. & Regs. 160-4-7-.05(h). As ■■■ turned nine in January 2012, he was no longer eligible for special education under SDD. (Tr. 596-97)

²³ The School District’s speech-language pathologist (“SLP”) expressed some interest in the methodologies used by Stark. However, when the School District requested that its representatives be permitted to either observe a session or speak to

also discussed ██████'S difficulties using the Edmark reading program because the comprehension portion was color-based and ██████ only inconsistently recognized colors. (Tr. 396-402, 521, 593)

4) Holbrook's First FBA

34.

The date for ██████'s annual IEP meeting was fast approaching, and ██████'s bathrooming issues continued to be a problem. In addition, the incidents of pica were increasing around this time as well.²⁴ Wheeler sought the assistance of Holbrook. In late February 2012, Holbrook observed ██████ in Wheeler's class and reviewed Wheeler's behavior data. With respect to the pica behavior, Wheeler recorded any time ██████ picked an inedible object off the floor and attempted to eat it. The antecedent to this behavior was noted and the consequence. In most instances, Wheeler was "very successful at blocking." Although she did not always note it in her data, ██████ did not actually put the items in his mouth each time an instance of pica was noted on her data sheet. (Tr. 909-11, 1045-46; Ex. D-290-93; Ex. P1349-58)

Stark directly, ██████ declined. He did not want the SLP's presence in the session to disrupt the positive dynamic between ██████ and Stark, and there was no way for the SLP to observe without being present in the room. In addition, he would not allow the School District to speak with Stark unless he could also participate in the discussion. He was worried something might be "misconstrued." Finally, ██████ did not believe that the School District was truly ready to "invest" in the Floortime methodology. (Tr. 561-64; Ex. D-512)

²⁴ The confluence of these two behaviors led to approximately six instances during the 2011-2012 where ██████ put his feces in his mouth before Wheeler or the para-professional could block him. (Tr. 987-89)

35.

After this observation and the review of Wheeler's data, Holbrook completed a Behavior Support Observation Form. He concluded that the pica behavior was most likely automatically reinforced – meaning that ■■■ enjoyed the act of chewing and eating the items. However, Holbrook also noted that every instance of pica was also followed by some form of verbal attention, so that too could be reinforcing the behavior. With respect to the toileting issues, Holbrook deduced from Wheeler's data that all instances of bowel movement accidents occurred either in the morning, between 7:30 and 9:30 a.m., or after lunch, between 12:30 and 2:30 p.m. Although he could not determine the function of that behavior, he suggested a number of strategies to encourage ■■■ to eliminate in the toilet, including scheduled trips to the toilet during the high-accident periods in the morning and afternoon. (Tr. 1047-49; Ex. D-290-92)

36.

■■■ understood that the observations and recommendations made by Holbrook amounted to a “functional behavior assessment” or “FBA.” First, Wheeler told ■■■ that she was going to do a “functional behavioral analysis on the pica and BM” and that Holbrook would offer strategies to help manage these behaviors. When the IEP team met for its annual meeting on March 7, 2012, Holbrook attended and reported his findings. Although Holbrook initially characterized his work as something short of an FBA, he later acknowledged that “technically” it was an FBA, but noted that FBAs varied in their detail and scope. That is, an FBA can also include a broader, more in-depth examination of a person's behavior, sometimes referred to as an experimental functional analysis or “FA.” During an FA, the evaluator attempts to manipulate the environment to actually

cause the behavior to occur. An FA can also involve the completion of detailed behavior questionnaires by a caregiver or teacher. (Tr. 356-58, 909-10, 1049-51, 1071; Ex. P-1349-58; Ex. D-510-11)

5) March 7, 2012 IEP Meeting

37.

In addition to Holbrook's report to the IEP team on March 7, 2012, the team also held its annual IEP review meeting. The meeting, like many of [REDACTED]'s IEP meetings, lasted several hours. The team reviewed R.S.'s present level of performance, which included many of the recent test results described above. The IEP described [REDACTED]'s strengths and progress over the past year, which included rote counting to 100 and telling time to the hour or half-hour, although inconsistently. [REDACTED] also could read 35 to 50 sight words consistently on his own and recognized his printed name. He could locate all the letters on the keyboard and was managing most clothes fasteners independently. His greatest barriers to learning were described as "his lack of attention to task and motivation to learn." It was also noted that the pica behaviors were a big distraction and his bowel accidents often cut short his instructional time. Finally, the team noted that [REDACTED]'s academic progress was slow, his fine motor skills were delayed, and his communication skills continued to be significantly deficient. (Tr. 489; Ex. D-1-4)

38.

The parents also expressed their concerns during the March 7, 2012 IEP meeting, and were very active participants in all facets of the meeting. Their primary concern at that time was for R.S.'s safety in the school setting. They were concerned about his eating from the trash, putting feces in his mouth, and eating off the floor, which they

considered potentially dangerous behaviors. They also had noticed signs in [REDACTED] that they interpreted as anxiety about going to school, including picking at his ear and being upset getting on and off the school bus. They continued to be concerned with his lack of progress, his dependency on prompting, and his sensory needs. The IEP also noted under AT considerations that [REDACTED]'s parents suggested that the School District explore a reading program other than Edmark that may be more appropriate for [REDACTED]²⁵ (Tr. 93, 370; Ex. D1-4)

39.

The team reviewed proposed goals and objectives, which had been shared with the parents in advance and modified based on their comments and suggestions. Wheeler suggested that the team consider lowering some of the mastery criteria, given [REDACTED]'s inconsistency in demonstrating seemingly mastered skills, but [REDACTED]'s parents did not want them lowered and the team agreed. In addition, [REDACTED] wanted to add an objective, and it was added. The team developed goals and related objectives in the following areas:

- 1) Self-Help/Toileting, including maintaining clean underpants and following a trip training schedule;
- 2) Improved Math Skills, including 1:1 correspondence, identifying "same or different" and "more or less;"
- 3) Improved Fine Motor skills, including turning pages, cutting shapes, tracing, and writing;
- 4) Improved participation and attention;

²⁵ Under the AT Consideration list in the 2012-2013 IEP, the section for listing current AT solutions used, including "light tech" and "high tech," was left blank. However attached to the IEP is an OT supplement to the IEP, which lists a number of AT devices, including the Alphasmart for typing, adaptive pencil grip, various clothing items for practicing fasteners, visual prompts for shoe tying, and other sensory equipment and services. (Ex. D-24, D-27-28)

- 5) Improved reading skills, including sight words, rhyming words, blending phonemes, and answering who, what and where questions;
- 6) Improve independence in the community, including following a shopping list and locating a bathroom;
- 7) Improved social behavior, including reduction in pica and decreased swatting/smacking;
- 8) Improved peer interactions; and
- 9) Gross motor development, including walking backwards and sideways and independently throwing a ball to a peer or target.

(Tr. 447-48, 892-94; Ex. D-11-19)

40.

As the team worked through the IEP's required components, the team discussed placement options in terms of the "least restrictive environment" or "LRE." Specifically, the team is required to consider the various placements options along a continuum from least restrictive (regular education with supports) to most restrictive (residential placement or homebound instruction). At the meeting, Wheeler read through the options and stated why she thought regular education was not appropriate. The parents did not state any objection to the decision that placement in a small group special education classroom was the least restrictive alternative for [REDACTED]. The IEP team also continued weekly speech-language therapy, community skills, and participation in regular education for lunch, recess, and specials. (Tr. 487, 552, 879, 1003; D-7)

41.

Toward the end of the meeting, [REDACTED] stated that he and [REDACTED] wanted to discuss placement again. Specifically, he pointed out that although they talked about LRE, the parents wanted to talk about placement at a private school. In fact, [REDACTED] notified the IEP

team members that the parents intended to place [REDACTED] privately in the fall and seek reimbursement from the School District. They did not provide the name of the private school they had in mind at that time, or any details about the school. However, before there was any substantive discussion about the parents' request, Sharon Reddick, the assistant principal at Craig Elementary, stated that the IEP had to be "locked" and that they would have to meet another day with the director of special education. (Tr. 551-54, 879-81, 1003-06)

6) Private Placement and DIR/Floortime

42.

Notwithstanding Reddick's statement, there is no evidence in the record that the School District ever scheduled another IEP meeting to discuss the parents' request for private placement. Rather, on March 12, 2012, Reddick sent [REDACTED] and [REDACTED] a document entitled "Prior Written Notice." The notice stated that the School District "has provided an IEP that provides FAPE (free appropriate public education) and your son continues to be enrolled at Craig Elementary School. Accordingly, the district declines to reimburse you for private school tuition." (Tr. 379-80, 1005, 1154; Ex. D-3737-39)

43.

Although they did not disclose this to the IEP team, the private placement [REDACTED]'s parents wanted for [REDACTED] was Hirsch Academy, a small private school that serves children ages five to thirteen with special needs, such as autism, mild mood disorders, sensory processing disorders, and Attention-Deficit Hyperactivity Disorder ("ADHD"). [REDACTED]'s parents submitted an application to Hirsch in the fall of 2011 and [REDACTED] was accepted. In January 2012, [REDACTED] put down a \$1,500.00 deposit at Hirsch, although [REDACTED] testified that

they were not “100% committed” to Hirsch at that time and were still looking at other private school options. However, by February 2012, [REDACTED]’s parents were exploring carpooling options to Hirsch. The annual tuition for Hirsch is \$28,500.00 and [REDACTED]’s parents had paid approximately \$14,000.00 at the time of the hearing. (Tr. 276, 414-16)

a) DIR/Floortime Therapy with Mary Beth Stark

44.

[REDACTED]’s parents became interested in Hirsch because of its use of DIR methodologies, which they became familiar with through [REDACTED]’s private speech-language therapist, Mary Beth Stark. [REDACTED] began seeing Stark, a licensed SLP, in July 2011 for one hour per week. In her work with [REDACTED] Stark uses the DIR intervention philosophy, which is based on the theory that all children learn in the context of a relationship. Specifically, DIR, which is often referred to as “Floortime,” stands for a Developmental, Individualized, Relationship-Based approach to learning. In terms of the developmental component, DIR proponents believe that all children must go through six developmental stages in order to achieve social, emotional, intellectual and language growth. The first developmental stage is regulation, which is the ability to remain calm and organized and focused. The second stage is engagement, the third is reciprocal interactions, the fourth is social problem solving, and the last two are emotional and abstract thinking. A DIR approach also focuses on knowing a child’s individual differences and developing a relationship between the therapist and the child. (Tr. 179-83, 185, 188, 194, 226-27, 255-56, 261, 285, 289; Ex. D-211-13)

45.

When Stark first began working with [REDACTED] she observed that he had limited language skills. However, she believed that what interfered most with his communication was not his language deficits but his limited ability to socially engage with other people, have reciprocal interactions with them, and to solve problems in a social, interactive way. [REDACTED] was very “exclusive” in his first sessions with Stark, rarely interacting with her and fixating on the toy trains she had in her office. Stark attempted to build a relationship with [REDACTED] and help him move higher up the developmental levels. Stark does not use formal assessments or keep measurable data of any kind in her sessions with [REDACTED]. Nevertheless, she testified that based on her observations over the past year, [REDACTED] has made significant improvements in communicating and using language. She acknowledged, however, that “effective adult support is still needed for successful interactions.” [REDACTED] now engages with Stark through most of their sessions and participates in more reciprocal, social, and spontaneous interactions with her. Still, he has days when he is more engaged than others, depending on what his day was like before she sees him. (Tr. 195-96, 198-201, 211-13, 223-25, 233)

46.

Stark allows [REDACTED]'s preferences to dictate their interactions. Consequently, many of their sessions revolve around [REDACTED] and Stark playing and talking about the toy trains and trucks in Stark's office or singing, swinging, or jumping. This is essentially what Floortime therapy is – using pleasurable activities and play to work on engagement, reciprocity, language skills and attention. Not surprisingly, Stark does very little academic or non-preferred tasks with [REDACTED] during her time with him. Recently, when she

tried to count cars with [REDACTED] he was able to demonstrate one-to-one correspondence. However, as was often the case in the school setting, he was unable to do so in the next session. (Tr. 201-02, 211-13, 223-24, 233, 326)

b) DIR at Hirsch Academy

47.

[REDACTED] and [REDACTED] believe they have seen “great success” with the DIR method used by Stark in terms of [REDACTED]’s communication skills and his ability to relate, which is why they are interested in Hirsch Academy. Hirsch Academy is a DIR school. It is small, with only four classrooms with approximately six children per class. [REDACTED]’s classroom will have five other students, ages seven to nine and all on the autism spectrum. His class has a lead teacher and an assistant, as well as other adults who will come in and out, such as Floortime therapists, OTs, PTs, and speech therapists. All the children at Hirsch have special needs, however, many are higher functioning than [REDACTED] (Tr. 278, 283, 313-15, 393)

48.

Julie Carnes, a licensed counselor and the clinical director at Hirsch Academy, admitted that the developmental levels reported by Stark in her one-on-one Floortime therapy will be harder for [REDACTED] to reach and maintain in a group setting. [REDACTED]’s first and primary goal at Hirsch will be to learn to sustain engagement and attention in both group and one-on-one settings. Consequently, any academic goals, if he has any, will be secondary. Hirsch Academy does not write down specific goals for any of their students, or make a formal written plan for their instruction or performance. They do not “feel a need to write it all down.” Rather, they take what Carnes describes as a “bottoms up”

approach – focusing on getting a child regulated and moving through the developmental stages. “[T]he whole point of DIR is to start with the things that are interesting and motivating and fun, and to build from there to be able to do things that are harder.” (Tr. 289-90, 297, 328, 330)

49.

Carnes explained that at Hirsch the relationship between academic goals and developmental goals is like “apples and oranges.” According to Carnes, “most children are not going to reach” their academic goals unless they build a foundation for learning through DIR. So, while at Hirsch Academy ██████’s ability to perform academic tasks will not be of great consequence. Rather, the issues they will focus on at Hirsch is whether ██████ can stay regulated and engaged and whether he has “real warmth” and “true reciprocity.” Later, ██████ makes progress through the developmental levels, his teachers will begin working on academic skills, and they have a number of well-regarded programs and curricula to teach academic skills. In addition, if ██████ is capable of participating in formal assessments, Hirsch will conduct them at the beginning and the end of the school year. If ██████ exhibits any behavior issues, such as pica, in the classroom at Hirsch, Carnes testified that his teachers will not take ABA-type data on his behavior. Rather, their intervention will entail simply “being there and watching,” and then trying different approaches that have worked with other children. (Tr. 288-96, 319, 339)

50.

Hirsch is approved for the Special Needs Scholarship in Georgia, and it is accredited through the Georgia Accrediting Commission. However, the DIR method it

employs is considered an “emerging” intervention because it is not supported by peer-reviewed, empirical research. According to Carnes, there is an effort to conduct research on DIR, but it is difficult because DIR therapy and progress along the developmental levels is hard to quantify. One of Plaintiffs’ experts, Hilary Stiff, a behavioral therapist with a private company called Integrated Behavior Specialists (“IBS”), testified that the only research-based intervention that has been proven to help children with autism gain academic, functional and social skills is ABA. Stiff testified that she has not seen any research to support Floortime as a methodology for treating children with autism, and that the DIR methodology is almost “diametrically opposed” to ABA. (Tr. 60, 146, 167, 265-66, 276)

7) Private ABA Therapy

51.

Despite this seeming incongruity between ABA and DIR, Plaintiffs seek reimbursement by the School District for both methodologies through private providers for ■■■. Specifically, Plaintiffs want ■■■ to attend Hirsch Academy during the school day and receive twenty-five to forty hours of ABA therapy with Stiff or another behavior analyst after-school and on the weekends. RS’s parents became familiar with Stiff this past summer, when the School District paid for in-home ABA therapy three hours per week. At the end of the summer, the parents retained Stiff to continue working with ■■■ (Tr. 55, 58-59)

52.

Stiff sees ■■■s greatest educational need to be language development and communication skills. In the one-on-one setting this summer, Stiff believed that R.S did

“fantastic.” He was engaged and motivated to work on academic tasks, and he demonstrated few significant behavior problems. Specifically, she did not observe any bathrooming issues or accidents during her three-hour sessions.²⁶ Moreover, she described incidents of pica as infrequent, notwithstanding that she noted that in one three-hour session [REDACTED] had five instances of pica, and in another, twelve instances. On at least one occasion, [REDACTED] picked a tissue out of the garbage and attempted to eat it. Just as Wheeler and Reynierson did, Stiff blocked most of [REDACTED]’s attempts to put the object or item in his mouth. In addition, Stiff explained that even though her data showed multiple instances of pica on a given day, she still maintained “instructional control” because most attempts were blocked and only lasted a few seconds. (Tr. 56-59, 61, 65, 70, 94, 135, 140-41, 157-58; Ex. D-559-64)

53.

With respect to [REDACTED]’s academic performance over the summer, Stiff testified that [REDACTED] still needed verbal and physical prompts to complete most of his academic tasks. In addition, just as in the school setting, [REDACTED]’s mastery of a skill was not consistent. For example, he could do some skills independently, such as cutting, one day and then need a full physical prompt to complete the task on another day. Stiff agreed that inconsistency was common in children with autism. Moreover, Stiff acknowledged that her work with [REDACTED] was in a one-on-one situation with limited distractions. She has not seen [REDACTED] in a group setting, but she believed he could learn in that environment using the same ABA principles. Stiff recommends that [REDACTED] receive forty hours of ABA therapy per week for

²⁶ Stiff testified that [REDACTED] reported that [REDACTED] had some accidents in the home over the summer, urinating on the floor twice in one day. He was still on a “sit schedule” at home during the summer, but not while Stiff was working with him. (Tr. 137-40)

at least twelve months. (Tr. 67, 125-30, 145-46, 149-50)

8) Parents' Request for Independent FBA

54.

On March 8, 2012, the day after the IEP meeting, [REDACTED] sent an email to Assistant Principal Reddick. In the email, among other things, [REDACTED] requested an independent functional behavior assessment by Dr. Michael Mueller, a private ABA behavioral analyst. [REDACTED] further stated that the independent FBA needed to be done "immediately." On March 12, 2012, Reddick sent [REDACTED] and [REDACTED] the Prior Written Notice. Although the notice first addressed the parents' request for reimbursement of private school tuition, the notice also acknowledged receipt of their request for an independent FBA. The School District notified the parents that they intended to conduct an "additional evaluation" in the area of behavior with the parents' consent. Reddick explained that Holbrook had only observed [REDACTED] one time and the School District wanted to schedule additional visits and an FA as soon as possible. She attached a consent form and stated that the School District "declines to grant your request for an IEE FBA at this time. Your son has been evaluated in all suspected areas of need. The district will reconsider your request of an IEE FBA at the conclusion of our testing and after interpretation of results at a subsequent IEP meeting if requested." (Tr. 359, 360, 363; Ex. P-3941, P-3737-39)

55.

After the School District "declined" to do the independent FBA that [REDACTED] requested, [REDACTED] spoke to Reddick on the telephone. She told him that the School District wanted to do another FBA, one that was "better" and based on more testing. [REDACTED] sent Reddick another email on March 22, 2012, renewing his request for an immediate

independent FBA with Dr. Mueller. Reddick responded to [REDACTED]'s email, stating that "[t]he regulation clearly gives us the right to perform our own assessment first and if you disagree with the assessment, you can then request an IEE." Reddick also stated that if [REDACTED] refused to sign the consent for "additional" behavioral assessments, they would not be conducted and his request for an independent FBA would not be reconsidered. (Tr. 360; Ex. P-4115-17)

56.

This email exchange continued, with [REDACTED] asking Reddick to clarify the School District's position. Understandably, he was confused by Reddick's message, which seemed to say, all in one breath, that (i) the School District had not conducted an FBA, (ii) it had conducted an FBA and it was appropriate, as is, and (iii) it had conducted an FBA, but it could do a better one. Before responding, Reddick sought guidance from John Shaw, the School District's Special Education Director of Compliance. Shaw drafted a suggested response, which explained that an FBA was "a process," which Holbrook had not completed. He also suggested that Reddick deny saying that the School District's assessment could be "better." However, Reddick admitted that she had told [REDACTED] that "by signing consent we would be able to proceed with a better more thorough assessment," and so she changed that portion of Shaw's draft. (Tr. 365-66; Ex. P-4112-14)

57.

[REDACTED] never withdrew his request for an independent FBA with Dr. Mueller. In fact, in the face of the School District's opposition, he suggested that he hire Dr. Mueller at his own expense to observe the School District conduct their "additional, more

thorough” FBA. Reddick refused. Eventually, in April and May 2012, Holbrook conducted a second assessment, what he called an “FA,” which included reviewing behavior questionnaires and additional data, as well as direct, experimental observation of [REDACTED] in Wheeler’s classroom. By the time Holbrook actually began the experimental portion of his FA in May, however, the pica behaviors and bowel accidents were beginning to subside, and Holbrook only observed “low levels” of pica and no accidents.²⁷ Consequently, Holbrook was unable to determine the function of these behaviors, and his FA amounted to what he described as “a whole lot of nothing.” (Tr. 361-63, 970, 1050-58, 1076-77; Ex. D-304-10; Ex. P-1647-86)

58.

On May 31, 2012, Shaw forwarded a copy of Holbrook’s “final behavioral report on [REDACTED]. Further, Shaw stated that after considering the parents’ request for an independent FBA, the School District proposed that [REDACTED] attend ESY school this summer for twelve hours per week,²⁸ with direct behavioral supports from a private company called Integrated Behavioral Solutions (“IBS”), headed by Dr. Coby Lund. While in summer school, Dr. Lund and IBS would train [REDACTED]’s teacher and conduct an FBA targeting pica behaviors. In addition, IBS would provide in-home ABA therapy for three

²⁷ According to Wheeler’s behavior data sheets, the instances of [REDACTED] “soiling his pants” decreased toward the end of third grade. Wheeler attributed this improvement to the trip training schedule. In fact, near the end of the year, [REDACTED] used the toilet for a bowel movement more than once, which he had not done previously in third grade. (Tr. 970, 982-83)

²⁸ This part of Shaw’s offer restated an offer made by the School District and accepted by the parents at a meeting in April 2012, where the School District offered what [REDACTED] termed its “standard ESY program,” consisting of twelve hours per week of group instruction. In addition, [REDACTED] was offered weekly speech-therapy and three hours per week of in-home “functional academic” instruction. (Tr. 408-09; Ex. P-407-11)

hours per week during the summer. (Tr. 411; Ex. D-525)

59.

█ did not consider the amount of ESY services offered to be adequate. However, he was happy for █ to receive anything in the summer and he agreed to the offered services. █ credibly testified that he did not consider his acceptance of these services to constitute a withdrawal of his request for an independent FBA by Dr. Mueller, but he admitted that he did not clarify that with Shaw or the School District. This summer, it appears that Dr. Lund conducted an FBA. However, █'s parents have never received a formal report from Dr. Lund, and neither a report nor any information about Dr. Lund's FBA was put into the record by the School District at the due process hearing. Thus, notwithstanding the parents' initial request for an independent FBA by a private provider of their choice on March 8, 2012, which was never formally withdrawn or challenged by the School District, there is no evidence in the record that the School District has provided Plaintiffs with an independent, completed FBA. (Tr. 408-13, 1219-20, 1223)

III. CONCLUSIONS OF LAW

A. General Law

1.

The pertinent laws and regulations governing this matter include IDEA, 20 U.S.C. § 1400 *et seq.*; federal regulations promulgated pursuant to IDEA, 34 C.F.R. § 300 *et seq.*; and Georgia Department of Education Rules, Ga. Comp. R. & Regs. ("Ga. DOE Rules"), Ch. 16-4-7.

2.

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

3.

Claims brought under IDEA are subject to a two-year statute of limitations. 20 U.S.C. § 1415(f)(3)(C); 34 C.F.R. § 300.507(a)(2). Plaintiffs filed their due process hearing request on or around July 2, 2012. Thus, only events occurring after July 2, 2010 are at issue in this proceeding. See generally W.C. v. Cobb County Sch. Dist., 407 F. Supp. 2d 1351, 1353 (N.D. Ga. 2005); Draper v. Atlanta Indep. Sch. Sys., 480 F. Supp. 2d 1331 (N.D. Ga. 2007), aff'd, 518 F.3d 1275 (11th Cir. 2008).

B. FAPE

4.

Under IDEA, students with disabilities have the right to a free appropriate public education (“FAPE”). 20 U.S.C. § 1412(a)(1); 34 C.F.R. §§ 300.1, 300.100; Ga. DOE Rule 160-4-7-.01(1)(a). “The purpose of the IDEA generally is ‘to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living’” C.P. v. Leon County Sch. Bd., 483 F.3d 1151 (11th Cir. 2007), quoting 20 U.S.C. § 1400(d)(1)(A).

5.

The United States Supreme Court has developed a two-part inquiry to determine whether a school district has provided FAPE: “First, has the State complied with the procedures set forth in the Act? And second, is the individualized education program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits?” Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 (1982). “This standard, ... has become know as the *Rowley* ‘basic floor of opportunity’ standard.” C.P., 483 F.3d at 1152, citing JSK v. Sch. Bd., 941 F.2d 1563, 1572-73 (11th Cir. 1991). See also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1280 (11th Cir. 2008). This standard “provides significant value to the [disabled] child who, before [IDEA], might otherwise have been excluded from any educational opportunities. The IEP and the IEP’s educational outcome need not maximize the child’s education.” JSK, 941 F.2d at 1573. “[T]he intent of the [IDEA] was more to open the door of public education to [disabled] children on appropriate terms than to guarantee any particular level of education once inside.” Rowley, 458 U.S. at 192.

1) Procedural Violations

6.

The first prong under *Rowley* involves the IDEA’s extensive procedural safeguards. However, under Eleventh Circuit case law, “violation of any of the procedures of the IDEA is not a *per se* violation of the Act.” Weiss v. Sch. Bd., 141 F.3d 990, 996 (11th Cir. 1998). In order to prove a denial of FAPE based on a procedural violation under IDEA, Plaintiffs must show that the procedural inadequacies “(i) impeded

the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit." 34 C.F.R. § 300.513(2); 20 U.S.C. § 1415(f)(3)(E). In *Weiss*, the Court held that where a family has "full and effective participation in the IEP process . . . the purpose of the procedural requirements are not thwarted." 141 F.3d at 996.

2) Adequate Educational Benefits

7.

The second prong under *Rowley* requires that the School District develop an IEP that is reasonably calculated to provide educational benefit. As the *Rowley* court pointed out, determining when a student with a disability has received sufficient educational benefits under IDEA can be a difficult problem. 458 U.S. at 202. School districts educate a wide spectrum of disabled children, and "[i]t is clear the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between. One child may have little difficulty competing successfully in an academic setting with [typical] children while another child may encounter great difficulty in acquiring even the most basic of self-maintenance skills." *Id.*

8.

The Eleventh Circuit, in considering the *Rowley* "basic floor of opportunity" standard, has reiterated that a student with a disability "is only entitled to some educational benefit; the benefit need not be maximized to be adequate." *Devine v. Indian River County Sch. Bd.*, 249 F.3d 1289, 1292 (11th Cir. 2001). See *Rowley*, 458 U.S. at

19; Loren F. v. Atlanta Indep. Sch. Sys., 349 F.3d at 1312 n.1 (11th Cir. 2003) (IDEA does not require that a student's potential be maximized; "rather, it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit him to benefit from instruction.") (citations omitted). Moreover, the Eleventh Circuit "has specifically held that generalization across settings is not required to show an educational benefit." Devine, 249 F.3d at 1293, quoting JSK, 941 F.2d at 1573. See also M.W. v. Clarke County Sch. Dist., 2008 U.S. Dist. LEXIS 75278 (M.D. Ga. 2008). Rather, an "appropriate education" under IDEA "means 'making measurable and adequate gains in the classroom.'" L.G. ex. rel. B.G. v. Sch. Bd. of Palm Beach County, 255 Fed. Appx. 360 (11th Cir. 2007), quoting JSK, 941 F.2d at 1573.

9.

The IDEA also does not require a school district to "guarantee a particular outcome." WC v. Cobb County Sch. Dist., 407 F. Supp. 2d. 1351, 1359 (N.D. Ga. 2005), citing Rowley, 458 U.S. at 192. Rather, "[i]n evaluating the appropriateness of an IEP, the Court must determine the measure and adequacy of the IEP at the time it was offered to the student and not at some later date." Draper v. Atlanta Indep't Sch. Sys., 480 F. Supp. 2d 1331, 1345 (N.D. Ga. 2007), aff'd 518 F.3d 1275 (11th Cir. 2008), citing Carlisle Area Sch. v. Scott P., 62 F.3d 520, 535 (3rd Cir. 1995). An "IEP is a snapshot, not a retrospective. In striving for appropriateness, an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, the time the IEP was promulgated." Mandy S. v. Fulton County Sch. Dist., 205 F. Supp. 2d 1358, 1367 (N.D. Ga. 2000). Finally, in the Eleventh Circuit, courts tasked with determining whether a student has received adequate educational benefit under IDEA, "should pay

‘great deference’ to the educators who developed the IEP.” W.C., 407 F. Supp. 2d at 1359, citing JSK, 941 F.2d at 1573.

C. Failure to Provide an AT Assessment Violated IDEA.

10.

The evidence is undisputed that [REDACTED]s March 7, 2011 IEP team concluded that [REDACTED] needed an AT assessment, that the assessment was included in his 2011-2012 IEP, and that an AT assessment was never performed. The School District argues, however, that Plaintiffs failed to prove that [REDACTED] was denied any AT device or service that he needed in order to receive a FAPE. Specifically, the School District points out that in second and third grade, [REDACTED] was provided with a variety of AT devices, including computer-related devices and software programs for reading and handwriting, a special keyboard, pencil grips, an automatic touch control device, and others, and that Plaintiffs have not shown that [REDACTED] needed additional AT devices in order to receive FAPE. See K.C. v. Fulton County Sch. Dist., 2006 U.S. Distr. LEXIS 47652 (N.D. Ga. 2006) (district court denied plaintiffs’ motion for summary judgment when plaintiffs claimed that they were not informed about AT-related services but failed to provide evidence of any technology to which child was denied access).

11.

The School District fails to distinguish between its obligation to provide AT devices and its obligation to provide AT services, both of which are required under IDEA. See 34 C.F.R. 300.105(a)(school districts must “ensure that assistive technology devices or assistive technology services, or both, ... are made available to a child with a disability if required” as part of the child’s special education, related services, or

supplemental aids and services). IDEA defines an “AT service” to include an “evaluation of the needs of a child with a disability, including a functional evaluation of the child in the child’s customary environment....” 34 C.F.R. §§ 300.6(a) & (b). Thus, by failing to provide the AT evaluation that his IEP team determined he needed, the School District denied [REDACTED] an AT service to which he was entitled under IDEA.

12.

This violation, while procedural, is not insignificant. See K.C. v. Fulton County Sch. Dist., 2006 U.S. Distr. LEXIS 47652, at *39; P. Newington Bd. of Educ., 512 F.Supp.2d 89, 109 n.11 (D. Conn. 2007) (failure to perform a timely AT evaluation was a procedural deficiency); K.I. v. Montgomery Pub. Sch., 805 F.Supp.2d 1283, 1293-94 (M.D. Ala. 2011).²⁹ In March 2011, when many of the AT devices touted by the School District were available and being used with [REDACTED] in the classroom, the IEP team decided that [REDACTED] needed additional AT, particularly in the area of oral communication, and that an evaluation should be conducted to determine what his needs were and what additional devices might be required. The School District cannot avoid its obligation to provide an AT evaluation that was agreed upon by the IEP team by arguing that “many of the technology devices and services were in place.” See Woods v. Northpoint Public Schools, Case No. 1:09-cv-243 (W.D. Mich. March 31, 2011) (failure to timely complete

²⁹ The K.I. case involved a student with a rare congenital condition that, among other things, prevented her from speaking. The school district did not conduct either a cognitive evaluation or an AT evaluation and did not provide K.I. with any AT, such as an augmentive communication device. Although the district court held that the failure to evaluate was a procedural violation, which did not automatically constitute a denial of FAPE, it found that the information from the cognitive and AT evaluations was necessary for the development of appropriate educational goals. Accordingly, without such information, the school district was unable to provide K.I. with FAPE. Id. at 1293-94.

an AT evaluation was not excused by school district's argument that the evaluation was ongoing and that child was already receiving many of the AT devices and services).³⁰ Moreover, at the hearing, Plaintiffs did prove that one AT device, namely an iPad (including a stylus and certain applications), was not used regularly with [REDACTED] or included in his IEP, but that such device may "increase, maintain, or improve" [REDACTED] functional capabilities by either assisting in handwriting or academic goals or as a reinforcer for positive behaviors.

13.

Accordingly, the Court concludes that the School District's failure to conduct the AT evaluation included in the March 7, 2011 IEP was a procedural violation of IDEA that impeded [REDACTED]'s right to FAPE.

D. Failure to Provide an Independent FBA Violated IDEA.

14.

Under IDEA, the parents of a child with a disability have the right to obtain an independent educational evaluation ("IEE") of their child at public expense if the parent disagrees with an evaluation obtained by the school district. 34 C.F.R. § 300.502. If a parent requests an IEE at public expense, a school district must take one of two actions "without unnecessary delay." 34 C.F.R. § 300.502(b)(2). Specifically, the school district must either (i) file a due process complaint to request a hearing to show that its evaluation is appropriate or (ii) ensure that an IEE is provided at public expense. *Id.* In this case,

³⁰ A copy of this decision, along with other unpublished decisions, letters from the Office of Special Education Programs, and other sources cited by the parties in post-hearing briefs that were not easily accessible to the Court, was provided by the parties and included in the record of this case.

Plaintiffs proved that the School District conducted an FBA,³¹ albeit a somewhat cursory one, prior to the March 7, 2012 IEP meeting and that █████ requested an “immediate” independent FBA at public expense. The evidence further shows that the School District refused to consider the request until it had a chance to conduct a better, more thorough FBA.

15.

This is not an appropriate response to a request for an IEE. As the Office of Special Education and Rehabilitative Services said in *Letter to Kirby*, IDEA provides no authority to impose preconditions – such as a thirty-day waiting period to allow the school district to correct their evaluation – on the exercise of a parent’s right to obtain an IEE at public expense. 213 LRP 9331 (May 4, 1989) (“This policy is inconsistent with the right of parents to obtain an IEE at public expense, without delay.”). See generally *Indep. Sch. Dist. No. 701 v. J.T.*, 2006 U.S. Dist. LEXIS 8474 (D. Minn. 2006)(where school district adopts a student’s prior district’s evaluation as its own, district court affirmed ALJ award of an IEE at public expense, rejecting school district’s argument that it should have the first opportunity to conduct additional evaluation). In fact, courts have held that school districts that either fail to file or delay filing a due process request to oppose an IEE request waive their right to contest the IEE. See *Pajaro Valley Unified Sch. Dist. v. J.S.*, 2006 U.S. Dist. LEXIS 90840 (N.D. Cal. 2006) (unexplained delay of

³¹ The School District does not dispute that an FBA is an educational evaluation as contemplated by 34 C.F.R. § 300.592. See *Harris v. District of Columbia*, 561 F.Supp.2d 63 (D.D.C. 2008) (In granting plaintiff’s motion for summary judgment and ordering school district to fund an independent FBA and develop an appropriate IEP, district court held that an FBA constitutes an “educational evaluation for purposes of IDEA regulations” and that the school district’s failure to respond to parents request for an independent FBA was not “a mere procedural inadequacy;” rather, “such inaction jeopardizes the whole of Congress’s objectives in enacting the IDEA”).

three months to file due process complaint to contest an IEE request was a procedural violation “and, by itself, warrants entry of judgment in favor of Student”); Evans v. District No. 17, 841 F.2d 824, 830 (8th Cir. 1988) (parents had a right to an IEE at public expense when a school district failed to initiate a hearing to show that its evaluation was appropriate); In re: Kent Sch. Dist., 18 IDELR 1324 (Wash. July 2, 1992) (where school district failed to follow state regulations requiring written notice of intent to initiate a hearing within ten days of IEE request, district required to fund IEE).

16.

In this case, the School District has never filed a due process hearing to prove the appropriateness of Holbrook’s initial FBA. In fact, the School District’s own Prior Written Notice and subsequent correspondence from Reddick acknowledged that the initial FBA, which did not determine the function ██████’s behaviors and did not include an FA, was incomplete and could be better. Moreover, Holbrook’s second FBA, which came about after Reddick told ██████’s parents that the School District would not reconsider the IEE request unless they consented to additional testing by Holbrook, resulted in what Holbrook characterized as “a whole lot of nothing.” Even then, when the IEE request was still pending, the School District did not agree to fund the IEE with the independent evaluator that the parents chose, nor did it file a due process hearing to defend the appropriateness of either of Holbrook’s FBAs.

17.

Rather, the School District proposed an independent FBA conducted by an evaluator of the School District’s choosing. Having reviewed the correspondence between the parties on this issue, the Court views this proposal to be another attempt by

the School District to conduct their own FBA, albeit through an evaluator not directly employed by the School District, rather than provide the parents with an IEE at public expense by Dr. Mueller as they requested on March 8, 2012. Moreover, the Court rejects the School District's argument that Plaintiffs' consent to the Lund FBA should be construed as a withdrawal of their request for an IEE by Dr. Mueller. Even assuming *arguendo* that the School District proved that Plaintiffs' actions constituted an agreement to substitute Dr. Lund for Dr. Mueller, the School District has failed to ensure that the Lund IEE be provided without unnecessary delay. At the due process hearing, which was over sixty days from the date Shaw proposed the Lund FBA, Dr. Lund had still not issued an FBA report. The School District did not explain why the Lund FBA was not completed nor did it call Dr. Lund to testify about his findings. Thus, over five months after Plaintiffs requested an immediate independent FBA at public expense, one has not been completed and provided to the parents.

18.

The Court concludes that the School District violated Plaintiffs' procedural rights to an IEE at public expense without unnecessary delay. Further, the Court concludes that the violation, particularly the failure to provide the IEE in a timely manner, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE to ■■■. As many of the School District's own witnesses pointed out, some of ■■■'s maladaptive behaviors appear to be episodic or cyclical, making it important that the FBA be conducted while the behaviors are actively occurring. The fact that some of the behaviors, such as the bowel accidents, were subsiding at the end of third grade did not excuse the School District from its obligation to provide an independent

FBA in a timely manner. The School District's refusal to consider the IEE request in March 2012 was unjustified, deprived the IEP team of meaningful information about the function of ■■■'s behaviors, and denied the parents access to an independent expert to evaluate the School District's efforts. See generally Schaffer v. Weast, 456 U.S. 49, 60-61 (2005) (IEE "ensures parents access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion. They are not left to challenge the government without . . . an expert with the firepower to match the opposition.").

E. Second and Third Grade IEPs Were Reasonably Calculated to Provide Educational Benefit.

19.

The Court concludes that both the 2010-2011 IEP and the 2011-2012 IEP were specifically designed to meet ■■■'s unique needs and included supports and services that were reasonably calculated to provide him educational benefit. First, the record demonstrates that ■■■'s IEP team carefully considered ■■■'s present levels of academic achievement and functional performance at each IEP annual meeting, including reviewing results of evaluations and assessments, his parents' observations and concerns, and data and reports from his teachers and other service providers. See 34 C.F.R. § 300.320(a)(1). As a team, with the parents' considerable input and collaboration, the IEP team developed measurable goals and objectives. 34 C.F.R. § 300.302(a)(2). As Dr. Klein pointed out, ■■■'s academic goals and objectives were ambitious, but at the time these IEPs were drafted, his parents were still very committed to challenging ■■■ and maintaining high expectations for his academic success. Although in hindsight these academic goals may appear too rigorous for ■■■ the School District has begun to raise

the possibility that ■■■'s IEP needs to move toward more functional goals and objectives and more realistic levels of mastery.

20.

Moreover, although ■■■'s progress toward mastering his goals and objectives was modest and slow, he did show gains in some areas and received some educational benefits from the special education and related services offered through his IEPs. See Bd. of Educ. v. Michael M., 95 F.Supp.2d 600 (W.D. Va. 2006) (“If the child did not make substantial progress, or even if the child regressed during the school year, the school district still meets its statutory mandate so long as the school district can prove that the IEP, when it was created, was reasonably calculated to provide some education benefit.”). The evidence in the record shows that ■■■'s global deficits and serious disabilities have made it difficult for him to consistently demonstrate his mastery of concepts and skills. In fact, Plaintiffs' own preferred private providers – Stark and Stiff – testified that ■■■ demonstrates mastery of a concept one day, such as one-to-one correspondence, and then appears to lose it the next. Although Plaintiffs argue that ■■■ did not receive adequate educational benefit because he mastered so few of his goals and objectives, mastery is not guaranteed or required by IDEA. IDEA “establishes procedures to guarantee disabled students access and opportunity, not substantive outcomes.” Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, (10th Cir. 2008).

21.

The Court credits the testimony of Reynierson and Wheeler that ■■■ made gains while in their classrooms in the areas of communication, fine and gross motor, rote counting, pre-reading, and adaptive skills. Although he did not progress as much and as

consistently as the team or his parents hoped, his IEPs were designed to provide and did provide ■■■ with access to the basic floor of opportunity, addressed his unique disabilities and needs, and were reasonably calculated to provide him with adequate educational benefits. Accordingly, the Court concludes that the IEPs developed by ■■■'s IEP team for the 2010-2011 and the 2011-2012 school years met the School District's duty to provide FAPE to ■■■.

F. **With the Exception of Assistive Technology,³² the 2012-2013 IEP Met IDEA's Procedural Requirements.**

22.

The Supreme Court in *Rowley* held that “congressional emphasis upon full participation of concerned parties throughout the development of the IEP . . . demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.” 248 U.S. at 206. The Court concludes that, with the exception of the procedural violations associated with the failure to complete and consider an assistive technology assessment, the School District met the procedural requirements for developing the 2012-2013 IEP for ■■■'s fourth grade year. First, Wheeler provided the parents with a draft of proposed goals and objectives and made changes based on their comments. During the lengthy meeting held on March 7, 2012, ■■■ and ■■■ were active participants. They participated in the team's discussion of ■■■'s present levels of performances, his strengths, their parental concerns, the results of

³² In developing an IEP, the team is required to “consider whether the child needs assistive technology devices and services.” 34 C.F.R. § 300.324(a)(3). Although the team did consider AT during the March 7, 2012 meeting, its consideration was inadequate in the absence of the information from the missing AT assessment. In addition, it did not include a description of any of the AT devices offered.

the most recent evaluations, and ■■■■■s academic, developmental and functional needs. 34 C.F.R. § 300.324(a). Although the IEP team did not develop a behavioral intervention plan at that time, it did consider the use of positive behavioral interventions and supports to address his behaviors as required by 34 C.F.R. § 300.324(a)(2)(i). In addition, the team revised and approved ■■■■■s goals and objectives for the upcoming school year and identified the special education and related services that would be available to ■■■■■ 34 C.F.R. § 300.320(a)(2), (4). Finally, they considered placement as it relates to LRE and discussed ■■■■■s participation in general education for lunch, recess and specials. 34 C.F.R. §§ 300.114, 300.116, 300.320(a)(5).

23.

The Court concludes that based on the evidence in the record, ■■■■■ and ■■■■■ were full participants at the March 7, 2012 IEP meeting and that the procedural requirements for the development of the IEP were met. The Court further concludes that the School District did not violate Plaintiffs' procedural rights by failing to keep the IEP meeting open when the parents gave notice of their intent to reject the IEP that was just developed and place ■■■■■ in a private school in the fall. First, to the extent that the IEP team must consider appropriate "placement" in developing an IEP, it is in the context of determining LRE. See 34 C.F.R. § 300.116(a). The School District was required to determine the LRE placement for ■■■■■ at least annually, which they did. Id. At the March 7th meeting, the team determined, without objection from the parents, that ■■■■■s LRE placement should be, as it had always been, in a small group special education classroom with participation in general education on a daily basis. At that time, the parents could have

stated that they thought the team should consider a “special school,” such as Hirsch, as the appropriate LRE placement, but they did not.

24.

Thus, at the end of the meeting, when [REDACTED] gave notice of the parents’ intent to privately place [REDACTED] in the fall at public expense, they were protecting their rights to seek full reimbursement for such placement under 34 C.F.R. § 300.148(d), which allows the cost of reimbursement to be reduced or denied if the parents fail to “inform the IEP Team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense.” Although the intent of this provision may be to encourage school districts and parents to continue collaborating even in the face of parental intent to pursue a private placement, IDEA does not mandate such collaboration. Rather, IDEA provides that any disagreements between the parents and the school district “regarding the availability of a program appropriate for the child, and the question of financial reimbursement are subject to the due process procedure. . . .” 34 C.F.R. § 300.148(b).

25.

Accordingly, with the caveat regarding assistive technology, the Court concludes that the School District complied with IDEA’s procedural requirements regarding the development of the 2012-2013 IEP.

G. The 2012-2013 IEP Is Reasonably Calculated to Provide Educational Benefit.

26.

With the exception of failing to adequately describe or consider whether ■■■ needs AT devices and services, as required by 34 C.F.R. § 300.324(a)(2)(v), the Court concludes that the 2012-2103 IEP was reasonably developed by the IEP team to provide ■■■ with educational benefit. First, upon review of the goals and objectives for the upcoming school year, it is evident that the goals were not lifted wholesale from prior IEPs and recycled in the current IEP. New goals and objectives have been added, such as toileting and turning pages, and several goals have been removed, either because they have proven too rigorous for ■■■ such as telling time, counting coins, typing, and tying his shoes, or because he has mastered them, such as managing clothes fasteners. Some objectives have been modified, such as the writing objective, which was changed from writing his name to writing upper case letters and numbers. Others have remained the same, but the level of prompting has changed. For example, the objective for throwing a ball to a peer or target previously had been with “partial physical assistance.” In the 2012-2013 IEP, the objective was for ■■■ to do this task independently. Compare Ex. D-11-19, D-127-41.

27.

The Court concludes that the IEP team developed these goals and objectives in a thoughtful, collaborative fashion. The team solicited and acted on input from ■■■s parents and tailored the goals and objectives to his current developmental, physical, and cognitive abilities. Based on the evidence in the record, the goals and objectives appear appropriate for ■■■ In addition, the 2012-2013 IEP also contains sufficient special

education and related services to allow ██████ to “advance appropriately” toward attaining his goals and objectives, to be involved in general education with typical peers, and to receive educational benefit. 34 C.F.R. § 300.320(a). Finally, the IEP is to be implemented in a small special education classroom, with sensory supports and a teacher who uses a variety of research-based methodologies specifically designed to support instruction of children with moderate autism. Accordingly, with the exception of the AT assessment, the Court concludes that because the 2012-2013 IEP proposed by the IEP team on March 7, 2012 is specifically designed to meet ██████’s unique needs and is supported by services that will permit him to benefit from instruction, it offers FAPE to ██████ as required by IDEA.

H. Remedy

28.

The School District has committed two procedural violations that are serious enough in nature – that is, they either impeded ██████’s right to a FAPE or seriously infringed upon the parents’ opportunity to participate in the decision-making process – that they give rise to a claim for relief under IDEA. 34 C.F.R. § 300.513(2)(i) & (ii). IDEA provides that any relief granted under IDEA shall be “appropriate.” 34 C.F.R. § 300.516(c)(3). The Eleventh Circuit has held that courts may award educational services to be provided “prospectively to compensate for a past deficient program.” Draper, 518 F.3d at 1280, citing G ex. Rel. RG v. Fort Bragg Dependent Sch., 343 F.3d 295, 308 (4th Cir. 2003). Moreover, “equitable considerations are relevant in fashioning relief” under IDEA and courts enjoy “broad discretion” in doing so. Id., quoting Burlington, 471 U.S. at 374.

Having considered the evidence in this case and having weighed the equities, the Court concludes that the appropriate relief is for the School District to pay for the two assessments that they failed to provide. See generally, Aguirre v. L.A. Unified Sch. Dist., 461 F.3d 1114, 1116 (9th Cir. 2006).³³ Specifically, as a remedy for failing to provide the AT assessment, the Court hereby **ORDERS** the School District to pay for a private, qualified evaluator to conduct an assistive technology assessment of [REDACTED] including a functional evaluation of him in his customary environment. See 34 C.F.R. § 300.6(a). Within one week of the completion of the evaluation, the School District shall provide a copy of the report to Plaintiffs and his IEP team. The IEP team shall meet and consider the report, including how to coordinate any recommended AT devices with other therapies, interventions or services called for in the 2012-2013 IEP and whether it is appropriate for any of the AT devices to be used by [REDACTED] or his family in his home. See 34 C.F.R. § 300.6(d). The IEP team shall amend the 2012-2013 IEP to include all appropriate AT devices and services in light of the report. If the School District does not have the AT devices recommended by the evaluator and deemed appropriate by his IEP team, the School District shall promptly purchase, lease, or otherwise provide such AT devices and train [REDACTED] and any other individuals necessary to use or assist [REDACTED] with such devices. 34 C.F.R. § 300.6(b), (e), (f).

³³ On appeal, this case involved attorney's fees. In the proceedings below, a hearing officer found that plaintiffs proved a violation of FAPE due to school district's failure to conduct a timely AT assessment and provide necessary AT devices. The hearing officer found that plaintiffs failed to prove the rest of their claims. The hearing officer awarded eight months of AT devices and services, but not the year's worth of private school tuition and other expenses that plaintiff sought. Id.

30.

With respect to the independent FBA, the Court hereby **ORDERS** the School District to pay for a full functional behavior analysis by Dr. Michael Mueller, or another qualified evaluator identified by Plaintiffs, including any necessary document review, interviews, observations and related testing. Within one week of receiving his report, the IEP team shall meet with Dr. Mueller and review the 2012-2013 IEP in light of the information presented in his report. The IEP team shall amend the IEP to the extent warranted by the new information.

31.

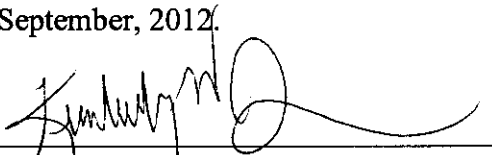
The Court concludes that the above-ordered relief will provide appropriate compensatory relief for the School District's procedural failure to provide the two required evaluations. Draper, 480 F.Supp.2d at 1352-1353 ("Appropriate relief is designed to ensure that the student is appropriately educated within the meaning of IDEA and to provide the educational benefits that the school district should have supplied in the first place."). IDEA does not require or authorize more. The Court specifically concludes that Plaintiffs' request for reimbursement for private school tuition at Hirsch Academy³⁴ and Plaintiffs' remaining requests for relief are not appropriate equitable remedies under the facts of this case, and those requests are hereby **DENIED**.

³⁴ Because the Court has decided that his IEPs offered ■■■ a FAPE and an alternative placement is not warranted, it is not necessary for the Court to decide whether the Hirsch Academy is an appropriate placement.

IV. DECISION

For the reasons stated above, the Court finds that the Gwinnett County School District committed procedural violations that denied Plaintiffs' their rights to a free appropriate public education under IDEA. Plaintiffs are entitled to the prospective relief set forth above.

IT IS SO ORDERED, this 17th day of September, 2012.



KIMBERLY W. SCHROER
Administrative Law Judge