BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

A.V., by and through his parents, W.V. and P.V.; W.V.; and P.V.,	:	
Plaintiffs,	:	
	:	**Docket No.:**
v.	:	**OSAH-DOE-SE-_____-Miller**
	:	
_____ COUNTY SCHOOL DISTRICT,	:	
Defendant.	:	

FINAL DECISION

For Plaintiff:

Chris E. Vance, Esq.
Chris E. Vance, P.C.

For Defendant:

Aric M. Kline, Esq.
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I. SUMMARY OF PROCEEDINGS

On April 27, 2011, the Plaintiffs, A.V. and his parents, W.V. and P.V.., filed a due process hearing request ("Complaint") against the Defendant, the _____ County School District ("District"), under the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA"). The Complaint presented four issues: first, whether A.V.'s Individualized Education Program ("IEP") for the 2010-11 school year offered him a free appropriate public education in the least restrictive environment; second, whether the Plaintiffs should be reimbursed for the costs of A.V.'s private placement at TCS during the 2010-11 school year; third, whether the Plaintiffs should be reimbursed for the costs of private vision therapy and occupational therapy

provided during the 2009-10 school year; and fourth, whether the District improperly withheld A.V.'s educational records.

Following the denial of the District's Motion to Dismiss and the parties' unsuccessful attempt to mediate the dispute, the evidentiary hearing was held over the course of eight days between October 2011 and February 2012.[1] The parties filed their proposed Findings of Fact and Conclusions of Law on March 26, 2012. The record closed on April 13, 2012, following oral argument and the parties' submissions of additional legal authority. The deadline for issuance of this Final Decision was therefore extended to May 14, 2012, pursuant to 34 C.F.R. § 300.515(c) and Ga. Comp. R. & Regs. r. 616-1-2-.27. Subsequently, by Order dated May 7, 2012, the decision deadline was further extended to May 25, 2012.

After consideration of the evidence and for the reasons set forth below, the Court finds that A.V.'s proposed 2010-11 IEP did not offer him a free appropriate public education in the least restrictive environment; that his parents are entitled to partial reimbursement, in the amount of $18,214.05, for the cost of A.V.'s placement at TCS; that his parents are entitled to partial reimbursement, in the amount of $3,043.56, for the cost of the related service of vision therapy; that his parents are not entitled to reimbursement of their expenses for the related service of occupational therapy; and that the District did not improperly withhold A.V.'s education records. Accordingly, the District is **ORDERED** to reimburse the Plaintiffs' expenditures on behalf of A.V. in the total amount of $21,257.61.

[1] The hearing was originally scheduled to be held in August 2011 but was continued due to the emergency medical leave of the District's counsel. Thereafter, due to scheduling conflicts and other issues, including the extended illness and medical leave of the Plaintiffs' counsel, completion of the hearing required an unusual length of time.

II. FINDINGS OF FACT

A. A.V.'s Educational Background

1.

A.V. was born on December 31, 1991. He began attending school in the _____ County School District during the 1996-97 school year, when he was in kindergarten. He was determined eligible for special education services under IDEA during his kindergarten year. A.V. continued to attend school in _____ County and to receive special education services under IDEA until the 2010-11 school year, when he was scheduled to begin his fourth year at _____ High School. At that time, due to a disagreement with the District regarding A.V.'s IEP and diploma track, his parents placed him at TCS, a private school located in _____, Georgia. After completing his senior year at TCS, A.V. graduated with a general education[2] high school diploma in the summer of 2011. (T. 97, 377-78, 414; Exs. P-2, P-4 [863-81, 885-1520], D-4, D-285.)

2.

As a student in the District, A.V. was eligible for special education services under the categories of learning disability and speech/language impairment. A.V. has apraxia, a speech motor planning disorder, and significant deficits across all domains. However, his severely impaired language skills and his deficits in reading and executive functioning, including working memory, are of particular note. Additionally, because his processing speed is very slow, he requires extended periods of time to complete tasks. Beginning in December 2007, when A.V. was fifteen years old, his IEP's transition plan projected that he would graduate from high school with a general education diploma. Following his graduation, A.V. hoped to attend a technical

[2] The terms "general education" and "regular education" are used interchangeably throughout this decision and refer to the education provided to typically developing children.

college, such as Chattahoochee Technical College, and to work as a graphic artist or computer game designer. (T. 378, 441-42, 652-53, 680-83, 696, 1126-27; Ex. P-4 [872-73, 997, 1016, 1029, 1049, 1068-69, 1130-31, 1154, 1174, 1203-04, 1236, 1291, 1385-86, 1413, 1447, 1521-30, 1533-55].)

3.

A.V. has always been a happy and well-adjusted individual. He was also an exceptionally diligent and motivated high school student. Because of these unique personal qualities, together with the supplementary aids and services provided by the District, he was able to achieve passing grades in nearly all of the general education courses he attempted, despite his significant disabilities. However, his IEP team grew concerned that he would have great difficulty passing the Georgia High School Graduation Test ("GHSGT") and several of the regular education academic courses required for receipt of a general education diploma. (T. 413-14, 659, 789, 1008; Exs. P-2 [916-23, 927-32, 1522, 1546], P-A, P-B, P-4 [916-23, 927-32], D-17 [26], D-18 [467], D-22 [514, 517], D-25 [586], D-31 [656], D-32 [664].)

B. <u>Vision Therapy</u>

4.

In January and February 2008, Karen Peay,[3] an occupational therapist employed by the District, conducted an occupational therapy assessment of A.V. During her evaluation, which included an assessment of his visual motor and visual perceptual skills, she noted that A.V.'s convergence[4] and ability to track horizontally while reading short passages were slightly

[3] Ms. Peay testified as an expert in occupational therapy, including the assessment of children with disabilities, the provision of occupational therapy to children with disabilities, and the development of IEPs and occupational therapy programming. (T. 1600; Ex. D-248.)

[4] Convergence occurs when both eyes move inward simultaneously, thereby maintaining focus and binocular vision. (T. 244-45, 1662.)

impaired. She did not assess whether or how these impairments might impact A.V.'s ability to sustain reading for an extended period of time. Ms. Peay recommended a "sensory diet" consisting of various exercises to improve A.V.'s attention and focus. According to Ms. Peay, the "lazy eights," neck roll, and "thinking cap" exercises that she recommended as part of his sensory diet were designed to improve his visual tracking. However, there was no credible evidence that neck rolls or thinking caps (essentially a massaging of one's ears) would do anything to improve visual tracking. Furthermore, the lazy eights exercise, a sensorimotor activity that involves following one's finger around a large, horizontal figure eight, did not specifically address the sustained visual tracking required for reading. (T. 1605, 1627-29, 1645-48, 1661-62, 1668-71, 1684-85; Ex. P-4 [938-47], D-273.)

5.

In March 2009, Mrs. V. asked the District to provide a vision therapy evaluation of A.V. The District declined. Also in March 2009,[5] A.V. began seeing an optometrist, David Cook,[6] for vision therapy. (T. 244, 256, 376; Ex. P-3.)

6.

Dr. Cook evaluated A.V. and determined that he had a convergence insufficiency, which resulted in blurred and double vision and caused print to "dance" on the page when he read, especially when he became fatigued. Dr. Cook provided him with 160 hours of treatment for convergence insufficiency and related vision issues. As a result of the treatment, A.V.'s visual

[5] It is unclear from the record whether Mrs. V.'s request was made before or after A.V. began seeing Dr. Cook. (T. 295-97, 1343-49; Ex. P-3 [839-40].)

[6] Dr. Cook testified as an expert in optometry, vision therapy, ocular motor functioning, vision perception, tracking, convergence, and double vision, among other areas. Dr. Cook completed a one-year residence in vision therapy and is a fellow and former board member of the College of Optometrists in Vision Development., an organization that certifies practitioners in vision therapy. He is also a diplomate of American Academy of Optometry in the binocular vision and perception section and has been appointed to the National Board of Optometry. Dr. Cook's testimony was credible and reliable. (T. 238-42; Plaintiffs' List of Witnesses and Notice of Service of Subpoenas, filed July 21, 2011.)

tracking improved dramatically, from the first percentile to the average range for a child of his age, and he no longer experienced double vision. Mrs. V. observed that after receiving vision therapy, A.V. began reading for pleasure for the first time in his life. Vision therapy is recognized in the field of ophthalmology as an effective treatment for convergence insufficiency. (T. 244-46, 251-54, 256, 266-80, 376-77, 426-27; Ex. P-3.)

7.

Mrs. V. executed a release of Dr. Cook's records on March 25, 2009, but the District was unable to interpret the records that Dr. Cook provided pursuant to the release. In August 2009, the District requested further information from Dr. Cook. Dr. Cook did not respond, and the March 2009 release expired in September 2009. Thereafter, beginning in December 2009, the District made several attempts to obtain a second release for additional records and to get Mrs. V's permission to speak with Dr. Cook,[7] but Mrs. V. declined to execute the release. In February 2010, Mrs. V. provided the District with a one-page summary from Dr. Cook that explained A.V.'s progress in vision therapy. However, the District did not receive a complete copy of A.V.'s vision therapy records until the due process hearing. (T. 295-97, 376-77; 1343-53; Exs. P-3 [838-39], P-4 [1613-14], D-87, D-158, D-159, D-161, D-163, D-164, D-165.)

8.

Mr. and Mrs. V. paid Dr. Cook $5,440.00 for A.V.'s vision therapy, which was completed in August 2010. Additionally, they drove 2,560 miles to transport A.V. to and from Dr. Cook's office, thereby incurring mileage expenses of $1,408.00 at $0.55 per mile. The District declined to reimburse the family for A.V.'s vision therapy expenses, which totaled $6,848.00. (T. 256, 424; Ex. P-3 [835], P-10 [1777].)

[7] The District declined to reimburse Dr. Cook for his time. (T. 1347.)

C. Occupational Therapy

9.

Ms. Peay completed an adult and adolescent sensory profile of A.V. during her December 2008 occupational therapy evaluation. She did not observe any significant sensory deficits that would impact his performance at school. He was able to work in both quiet and in some busy environments, and his sensory sensitivity was similar to most people. He engaged in less sensory seeking and less sensory avoiding than most people, but these issues were mild and did not cause significant sensory processing deficits. (T. 1611-13, Ex. P-4 [941, 946].)

10.

In October 2009, Shelley Margow,[8] an occupational therapist retained by Mr. and Mrs. V., completed an occupational therapy evaluation of A.V. She felt that A.V. had sensory deficits, including low sensory registration, that required therapy through a sensory learning program. The sensory learning program utilized a moving bed, a light box, a computer, and headphones to provide auditory, visual, and vestibular stimulation. During the therapy, A.V. reclined on the moving bed while listening to music at different frequencies and viewing a programmed light display. He underwent therapy for one hour per day for twelve consecutive days. Although the intent of the program is to help the brain process different stimuli, Ms. Margow offered no empirical data to show that the therapy was effective. Further, no occupational therapy governing body has endorsed the sensory learning program. (T. 361-62, 368-70; Ex. P-4 [887-92].)

[8] Ms. Margow testified as an expert regarding, *inter alia*, occupational therapy, neuromotor control and functioning, processing speed, and sensory integration dysfunction. The court did not find her testimony to be particularly credible or reliable. (T. 320; Plaintiffs' List of Witnesses and Notice of Service of Subpoenas, filed July 21, 2011.)

11.

Mr. and Mrs. V. spent $3,000.00 for A.V.'s sensory learning program. They also drove 486.4 miles to transport A.V. to and from Ms. Margow's office, thereby incurring mileage expenses of $267.52 at $0.55 per mile. The District declined to reimburse the family for these expenses. (T. 367, 424-25; Ex. P-10 [1782, 1788].)

D. Neuropsychological Evaluation

12.

On May 2, 2009, Alquin Johnson, Ph.D.,[9] conducted a neuropsychological evaluation of A.V. for the purpose of providing additional information regarding his current functioning. Dr. Johnson's evaluation revealed that A.V.'s cognitive functioning was within the mildly intellectually disabled to borderline range. However, his optimal general intellectual functioning appeared to be within the borderline to low average range. Dr. Johnson also noted that A.V. was functioning academically at a late fourth grade to middle fifth grade range, and that his processing speed, working memory, and sensorimotor functioning were severely impaired. These deficits significantly undermined A.V.'s performance in reading, writing, and mathematics. Based on the results of his evaluation, Dr. Johnson expected A.V. to experience marked difficulty passing the GHSGT or completing a high school curriculum absent accommodations and modifications.[10] (T. 1119, 1123-26, 1130-33, 1136-37, 1144; Ex. P-4 [1521-32].)

[9] Dr. Johnson testified as an expert regarding, *inter alia*, neuropsychological and psychological evaluations of students with disabilities, including learning disabilities, and the interpretation of the results of such examinations. Dr. Johnson is an assistant professor at Emory University and holds a doctorate degree in clinical psychology. He has performed over 1,000 neuropsychological evaluations of students with disabilities. His testimony at the hearing was credible and reliable. (T. 1112-15; Ex. D-251.)

[10] Accommodations are adjustments to a teaching method that do not require alteration of the general education curriculum. Modifications, in contrast, permit curriculum changes and do not require implementation of the Georgia Performance Standards in the particular content area. (T. 1144-46, 1360-61, 1504-05.)

13.

Dr. Johnson's report offered the following recommendations regarding A.V.:

(1) that his IEP should be updated based on Dr. Johnson's evaluation;

(2) that he should continue to receive speech and language therapy;

(3) that he should be provided with assistive technology, such as Microsoft Word, Franklin Speaking Language Master, and/or Draft-Builder software, to reduce his need to write assignments by hand;

(4) that the time allowed for him to complete tasks should be doubled, to address his processing speed impairment;

(5) that he should be allowed to view information, rather than recall it, to decrease demands on his working memory;

(6) that he should be provided with lists of steps required for task completion, as in a recipe;

(7) that his education should be directed toward literal, rather than inferential, questions and responses;

(8) that he should be allowed to use visual aids to assist him with summarizing and retelling paragraph-length information;

(9) that the math goals contained in his IEP should focus on more functional aspects of math, such as using a calculator, making change, balancing a checkbook, etc.;

(10) that his reading goals should focus on accuracy rather than fluency, due to his slow processing speed;

(11) that he should be provided with classroom vocabulary in advance of unit presentation;

(12) that he should be permitted to use graphic organizers to assist him with tasks involving comparisons and contrasts; and

(13) that his family should follow up with his primary care physician to determine whether his processing speed could be increased through pharmacotherapy.

(Ex. P-4 [1529-30].)

E. <u>August 2009 IEP Meeting</u>

14.

Thereafter, on August 5, 2009, A.V.'s IEP team convened to review the results of Dr. Johnson's evaluation. At the meeting, the team discussed whether A.V.'s transition plan should be changed from a projected college preparatory diploma to a career technology or career preparatory diploma. Although any one of the three diploma options would have enabled A.V. to graduate high school, only the career preparatory diploma would not have required him to pass the GHSGT. To receive either a college preparatory or career technology diploma from _____ High School, A.V. would have needed to pass the GHSGT or, in the alternative, obtain a GHSGT waiver from the Georgia Department of Education ("GaDOE"). Both the college preparatory and career technology diplomas are general education diplomas, while the employment preparatory diploma is considered a special education diploma. (T. 764-66, 966-67, 1328-30; Exs. P-1 [413-33], P-4 [1230-61].)

15.

During the August 2009 meeting, Mrs. V. objected to the possible modification of A.V.'s transition plan because she had not been notified that this would be a topic of discussion. The IEP team therefore agreed to defer the issue until A.V.'s annual IEP meeting in December 2009. Additionally, because Mrs. V. disagreed with Dr. Johnson's evaluation, she requested an independent educational evaluation ("IEE"). The District granted the IEE request in September 2009, and Mrs. V. selected Lori Muskat, Ph.D., as A.V.'s independent evaluator. (T. 500-01, 1329-31.)

16.

The IEP team also discussed A.V.'s placement at the August 2009 meeting and selected a combination of general education and small group instruction. More specifically, the team chose the following placement for A.V.: English, mathematics, science, social studies, and foreign language in a general education/co-taught setting; academic electives and related vocational instruction in a general education setting with additional supportive services; non-academic electives in a general education setting without support; reading and study skills in a small group special education setting; and speech and language services for ninety minutes per week. (Ex. P-4 [1247-50].)

F. <u>December 2009 IEP Meeting</u>

17.

On October 28, 2009, shortly after receiving required documentation from Dr. Muskat, the District notified her in writing that she had been approved to conduct the IEE. However, the evaluation was not completed prior to the December 2009 IEP meeting. (T. 504-05, 1339-40; Exs. P-4 [1533-64], D-148.)

18.

The IEP team convened for its annual meeting on December 7 and 19, 2009. At the meeting, the team agreed to defer discussion of A.V.'s transition plan and diploma track until Dr. Muskat's evaluation was completed. Regarding A.V.'s placement, the team again selected a combination of general education and small group instruction. The placement was identical to A.V.'s August 2009 placement, with the following modifications or additions: (1) reading instruction was provided in a one-on-one special education setting rather than a small group setting; (2) the IEP required sixty minutes per month of occupational therapy; and (3) A.V.

would receive 150 minutes per week of one-on-one tutoring in mathematics if he did not enroll in a mathematics course. (T. 1339-43; Ex. P-4 [1394-98].)

G. <u>Independent Educational Evaluation</u>

19.

Dr. Muskat[11] evaluated A.V. over a period of five days, on January 12, 23, and 25, 2010; February 20, 2010; and March 8 and 16, 2010. Her evaluation was generally consistent with Dr. Johnson's evaluation, finding that A.V. had a global neurological impairment with cognitive functioning in the mildly deficient to borderline range. Dr. Muskat noted that A.V. exhibited significant deficits in speech motor planning and output, reasoning and problem-solving, processing speed, reading comprehension, and writing fluency. (T. 652-54, 670-74, 1139-41; Ex. P-4 [1533-64].)

20.

Dr. Muskat's report offered the following recommendations regarding A.V.:

(1) that he should be educated in a highly structured environment with a low teacher-student ratio;

(2) that he should be provided with a modified curriculum emphasizing hands-on, experiential learning;

(3) that he should be given frequent, explicit feedback;

(4) that his instruction should include "scaffolds," which would be systematically removed to maximize his level of independent functioning;

(5) that his instruction should include clear, uncrowded visual referents;

[11] Dr. Muskat testified as an expert regarding, *inter alia*, psychological counseling and assessment, school psychology, and neuropsychology, as well as the education of disabled children from a psychological or neuropsychological standpoint. Dr. Muskat is an assistant professor at Argosy University and holds a doctorate degree in counseling and school psychology from the University of Pennsylvania. She has practiced psychology for twenty-five years. Her testimony at the hearing was credible and reliable. (T. 618-19; Plaintiffs' List of Witnesses and Notice of Service of Subpoenas, filed July 21, 2011.)

(6) that information presented to him should be "chained," to enable him to make associations during instruction;

(7) that he should be taught using a multi-sensory, remedial approach to decoding;

(8) that he should be taught active strategies for reading comprehension, with an emphasis on life skills;

(9) that he should receive remedial instruction in basic math skills, including management of a small budget;

(10) that he should be encouraged to identify possible areas of vocational interest, to allow him to develop an expertise in a particular skill area;

(11) that he should be provided with intervention focused on improving his reading of nonverbal cues; and

(12) that he should be offered a safe environment with opportunities for social interaction, including dating.

(Ex. P-4 [1554-55].)

21.

Dr. Muskat's recommendations were based, in part, on her misunderstanding of A.V.'s existing placement. At the time of her evaluation, she was aware that A.V. had been placed in co-taught academic classes, but she erroneously believed that a co-taught class was a self-contained special education class.[12] However, Dr. Muskat's recommendations could have been incorporated into a placement in the regular education setting. (T. 629, 633, 651-52, 703-04, 1145-46, 1360-61, 1504-05.)

[12] In a co-taught environment, a general education teacher delivers content, while a special education teacher provides additional assistance to students with disabilities. A co-taught class is a general education placement. (T. 1230, 1234-35.)

H. <u>May 2010 IEP Meeting</u>

22.

A.V.'s IEP team reconvened on May 13, 2010, to review his current functioning, discuss the results of Dr. Muskat's evaluation, and revise his IEP, as appropriate. Mrs. V. and counsel for the Plaintiffs elected to participate by telephone. At that time, A.V. had almost completed his third year at _____ High School. (T. 1364; Exs. P-4 [1478], P-A.[13])

23.

The IEP meeting began with a discussion of A.V.'s current functioning. A report from his Spanish teacher indicated that although his reading comprehension was below grade level, his class participation was satisfactory, his writing in Spanish was adequate, and he was progressing in his ability to follow directions.[14] (Ex. P-A.)

24.

A.V.'s personal fitness teacher reported that A.V. experienced some difficulty with the class and that his average test grade was a C. However, class participation brought up his overall grade. (Ex. P-A.)

25.

At the time of the May 2010 IEP meeting, Greg Nixon,[15] A.V.'s reading teacher, had spent approximately 250 hours working with A.V. in a one-on-one setting using "Language!," a research-based one-on-one reading program that focuses on phonemic awareness, vocabulary,

[13] Regrettably, the Court's playback device was unable to identify pinpoint cites for Exhibit P-A, which is a recording of the May 2010 IEP meeting.

[14] At the conclusions of the 2010 spring semester, A.V. received a passing grade of 75 in Spanish I. (Ex. P-B.)

[15] Mr. Nixon testified as an expert regarding, *inter alia*, the provision of special education services to students with disabilities, including learning disabilities; research-based specialized reading and literacy programs; and the Language! Program. (T. 998-99; Ex. D-241.)

grammar, listening, reading, writing, and speaking. Mr. Nixon testified that A.V. had continued to struggle with vocabulary, writing, saliency, and reading comprehension. For example, A.V. defined "candidate" as a person who lived in Canada and "the Cold War" as a war fought in the snow. He had significant difficulty identifying the main idea of a passage and analyzing written information. Additionally, Mr. Nixon observed that A.V. lacked cultural literacy and struggled with certain functional tasks, such as counting change. (T. 1007, 1009, 1011, 1019-22, 1030; Exs. P-A, D-260 [3665-73].)

26.

Jennifer Dorrough,[16] the general education teacher in A.V.'s co-taught U.S. History course, also participated in the May 2010 IEP meeting. At that time, A.V. was failing U.S. History for the second time. Ms. Dorrough testified that A.V. struggled to understand abstract concepts and causal relationships, which were a major focus of her class. For example, he had trouble identifying the causes and effects of the War of 1812 and the Civil War. He also experienced difficulty identifying the precedents established during George Washington's presidency and analyzing Abraham Lincoln's policies and decisions during the Civil War. (T. 1231-54; Exs. P-A, D-232 [3250, 3252].)

27.

In Ms. Dorrough's opinion, A.V. would have failed U.S. History a third time if he had retaken the course in a general education setting. The Court, despite finding Ms. Dorrough to be an exceptionally engaged, enthusiastic, and effective teacher, declines to rely on this testimony, for several reasons. First, the District did not provide A.V. with an audio textbook or a

[16] Ms. Dorrough testified as an expert regarding, *inter alia*, the Georgia Performance Standards for high school social science; the provision of social science instruction to students with disabilities, including learning disabilities; and the provision of social science instruction in a co-taught setting. (T. 1227; Ex. D-243.)

downloaded version that he could listen to using computer software. Given the textbook's reading level and his significant deficits in reading (including decoding, fluency, vocabulary, and comprehension), this was a necessary accommodation.[17] Second, although the District provided A.V. with tutoring beginning in April 2010, pursuant to an IEP amendment, the tutoring came too late in the course to maximize its effectiveness. Ms. Dorrough noted at the May 2010 IEP meeting that tutoring had improved A.V.'s performance in her class, and she testified that it "definitely would have been of benefit" for A.V. to have received tutoring from the beginning of the course. Third, A.V.'s U.S. History grade improved substantially from his first attempt at the course, from a 55 in the first semester of 2009 to a 64 in the second semester of 2010.[18] Finally, Ms. Dorrough is a general education teacher and was primarily responsible for teaching content in A.V.'s co-taught class. Emery Williams, the special education teacher who provided direct support to A.V. in the class, did not testify at the hearing. (T. 126-28, 387-89, 598, 609, 1230, 1234-36, 1253; Exs. P-4 [1391], P-A, P-C [2043-46].)

28.

During the May 2010 IEP meeting, the team also discussed the results of Dr. Muskat's evaluation, which appeared to be consistent with both Dr. Johnson's evaluation and the classroom observations of A.V.'s teachers. However, Dr. Muskat was not invited to attend the IEP meeting.[19] (T. 622; Ex. P-A.)

[17] Furthermore, A.V.'s vision therapy, which would be expected to improve his ability to read for a sustained time period, was not completed until August 2010. (Ex. P-3 [835].)

[18] In the _____ County School District, 70 is considered a passing grade. (T. 1102.)

[19] When the District notified Dr. Muskat that she had been selected to perform the IEE, in a letter dated October 28, 2009, it further requested that she invite District personnel to be present when she reviewed the results of her evaluation with A.V.'s parents. It appears that Dr. Muskat overlooked this request, although she did send a copy of her evaluation to the District. Dr. Turnage contacted Dr. Muskat on May 13, 2010, the date of the IEP meeting, and asked her to share any information she had communicated to A.V.'s parents or Plaintiffs' counsel. At that time, however, Dr. Muskat had not yet spoken with Mr. and Mrs. V. Dr. Muskat advised Dr. Turnage that she did not feel

29.

Following the discussion of A.V.'s current functioning and Dr. Muskat's evaluation, the team moved on to consideration of his transition plan, including his projected diploma. Three diploma tracks were available at that time: (1) college preparatory; (2) career technology; or (3) employment preparatory. (T. 759, 1368, 1373-74; Ex. P-A.)

30.

A college preparatory diploma required successful completion of four English courses, including American Literature; three mathematics courses, including Algebra I; three science courses, including Biology and Lab Science; four social studies courses, including U.S. History, World History, Government, and Economics; two foreign language courses; Health; Personal Fitness; and four electives. To receive a college preparatory diploma, a student was also required to pass the GHSGT or obtain a waiver of the test. (T. 761-64; Ex. P-4 [864-66, 868].)

31.

The requirements for a career technology diploma were nearly identical to the requirements for a college preparatory diploma. However, a student on the career technology diploma track was permitted to substitute World Geography for World History. The career technology diploma also eliminated the foreign language requirement, and instead required four courses in a technical subject area. Like the college preparatory diploma track, a student who sought to graduate with a career technology diploma was required to pass the GHSGT or obtain a waiver from GaDOE. (T. 761-64; Ex. P-4 [864-66, 868].)

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comfortable speaking directly with her and preferred that Mr. and Mrs. V. be participants in the discussion. A meeting was finally arranged in August 2010, after A.V.'s IEP was completed. (T. 624-27, 629-30; Exs. P-A, D-148.)

32.

An employment preparatory diploma, in contrast, required only mastery of a student's IEP goals and objectives. The employment preparatory diploma track focused on life skills, remediation, and vocational interests. This was the only track that allowed a modified curriculum and did not require a student to pass the GHSGT or obtain a waiver. A student on the employment preparatory diploma track would continue to have access to the GHSGT, but would not receive special education support, such as tutoring, through an IEP. (T. 767-68, 980, 1499-1500; Ex. P-A.)

33.

As of the May 2010 IEP meeting, A.V. had received or was expected to receive passing grades in all of the English, mathematics, and science courses he needed to graduate with a college preparatory diploma. He had also received or was expected to receive passing grades in personal fitness, health, Spanish I, and electives. In social studies, A.V. had obtained one of the required three credits by passing World Geography. However, he was expected to fail U.S. History for the second time and had not yet attempted World History, Government, or Economics. He also needed to complete Spanish II. (T. 762; Exs. P-4 [868-69, 1385], P-B, P-C [2083-86].)

34.

As a student with a disability, A.V. was not required to graduate from high school at the end of his fourth year. In fact, he was eligible to continue to his education at the high school level until he was 22 years old. (T. 768.)

35.

A.V. had taken the GHSGT on four occasions prior to the May 2010 IEP meeting, beginning in the spring of 2009. The District provided accommodations as required by A.V.'s IEP, including small group testing, extended time, frequent breaks, reading the test to him, and allowing him to mark his answers in the test booklet. On his fourth attempt, in the spring of 2010 and after he had received math tutoring, he achieved a passing score on the math portion of the exam. He did not achieve passing scores on the writing, English language arts, science, or social studies subtests on any of his four attempts.[20] There is no limit on the number of times a student may take the GHSGT. (T. 525, 776-81, 975-76, 1553-54; Exs. P-4 [1252-53, 1400, 1459, 1467], D-226, D-227.)

36.

The discussion at the May 2010 IEP meeting became contentious. Over the strenuous objections of Mrs. V. and counsel for the Plaintiffs, the IEP team determined that A.V.'s projected diploma should be changed from college preparatory to employment preparatory.[21] The team felt that the employment preparatory track was more appropriate for A.V., based on the results of his recent neuropsychological evaluations and his ongoing struggle with the general education curriculum, particularly the social studies classes required for either a college

[20] It must be noted, however, that A.V. had never taken World History, Government, or Economics, which comprised approximately 35% of the content for the social studies test. He also came within four points of passing the writing section of the test in the fall of 2009. (T. 1288-89; Exs. P-1 [570], P-4 [875].)

[21] GaDOE's policy manual on Georgia's high school graduation requirements provides the following directive regarding the employment preparatory diploma, formerly known as the special education diploma:

> IEP teams should be very cautious when selecting this option. The student and parent who select this option prior to the student reaching the 22nd birthday should be offered an IEP that offers a program specifically planned to provide the instruction and support to allow the student to meet requirements for the regular high school diploma, even if the student plans to receive a special education diploma that will allow him or her to participate in graduation ceremonies at the end of four years. Furthermore, the student and parent should be made aware that the special education diploma, in most circumstances, does not meet the requirements for many types of employment, entry into the military, or admission to post-secondary educational institutions.

(Ex. P-1 [148].) The District did not follow this policy directive.

preparatory or career technology diploma. The team also wanted to ensure that A.V. was eligible to enroll in self-contained special education classes known as "access classes," which offered a modified curriculum that emphasized functional skills and were not available to students on a college preparatory track. However, the team's primary reason for changing A.V.'s diploma track was that it believed he would be unable to pass all sections of the GHSGT. (T. 383-86, 1364-68, 1372-78, 1445-46; Ex. P-A.)

37.

GaDOE permits a waiver of the GHSGT under certain circumstances. More specifically, a child with a disability who is unable to pass a particular section of the test may request a waiver. A waiver may be granted, by majority vote of the State Board of Education, if the child's disability is directly related to his or her inability to pass the section of the test. Local school systems are required to notify students and their parents or guardians of the waiver application process. During the IEP meeting, however, District personnel did not mention the possibility that A.V. could apply to GaDOE for a waiver of a section of the GHSGT based on his disability. (T. 386, 606-07, 715, 955, 966-67, 1441-42; Ex. P-1 [413-22].)

38.

Mrs. V. and Plaintiffs' counsel requested that A.V. be placed at TCS for the 2010-2011 school year, advising the team that students at TCS were not required to pass the GHSGT. However, Elizabeth Turnage, the District's Director of Legal and Policy Issues for Special Student Services, informed the team that the District had previously investigated TCS as a possible placement and that its students were, in fact, required to pass the GHSGT. This information was incorrect. Counsel for the Plaintiffs further advised that TCS would be able to offer A.V. a placement that complied with all of the recommendations of Dr. Muskat's report

while keeping him on either a college preparatory or career technology diploma track. (T. 1368-70; Ex. P-A.)

39.

Dr. Turnage informed the team that any discussion of placement was premature at that time. Instead, the placement discussion would take place after A.V.'s goals and objectives had been determined. The Court notes that although the District insisted, both during the IEP meeting and at the hearing, that A.V.s' diploma track did not drive his placement, these two aspects of IEP development are clearly intertwined. Indeed, if the diploma track were inconsequential, A.V. should have been able to take access classes while on a college preparatory or career technology track. (T. 1370, 1374-76, 1470-71, 1565; Ex. P-A.)

40.

Following the diploma track determination, the team moved on to a discussion of A.V.'s goals and objectives. At 1:00 p.m., the time when the meeting had been scheduled to conclude, Mrs. V. and counsel for the Plaintiffs discontinued their participation. Consequently, the team suspended the meeting, and A.V.'s IEP was not completed on May 13, 2010. Mrs. V. and Plaintiffs' counsel thereafter ceased any further attempts to cooperate with the District in developing A.V.'s IEP, as set forth below. (T. 1368-69; Ex. P-A.)

I. <u>District's Attempts to Reconvene IEP Meeting</u>

41.

By letter dated May 14, 2010, the District's counsel offered possible dates and times for a continuation of the meeting and requested information regarding the availability of Mrs. V. and the Plaintiffs' counsel. Counsel for the Plaintiffs did not respond. (T. 1395; Ex. D-178.)

42.

Also on May 14, 2010, Ms. Young sent an email to Mrs. V., attaching a draft of the IEP amendment and noting that a reconvening of the meeting was necessary to address A.V.'s supportive aids and services and placement, among other components of the IEP. Mrs. V. did respond directly to Ms. Young. However, during a separate chain of email correspondence with Dr. Turnage, on May 14, 2010, Mrs. V. gave notice of her intent to place A.V. privately at public expense. (T. 541-42, 1391; Exs. D-177, D-180.)

43.

Dr. Turnage responded to Mrs. V. by letter dated May 15, 2010, emphasizing that the IEP meeting had not been completed and that A.V.'s placement had not been determined. Dr. Turnage requested that Mrs. V. respond by May 18, 2010, regarding her availability to reconvene the IEP meeting. In response to the letter, Mrs. V. emailed Dr. Turnage on May 18, 2010, stating that she and Mr. V. would "certainly complete" the IEP meeting and that they would "continue to try to work with the school district," but that they rejected the change to A.V.'s diploma track. Mrs. V. did not provide any information regarding her availability for a continuation of the meeting. (T. 542-43; Exs. D-179, D-181 [2976-77], D-182.)

44.

On May 22, 2010, Dr. Turnage sent Mrs. V. a second letter, wherein she reiterated her request for Mrs. V.'s scheduling availability. Dr. Turnage further advised that A.V.'s placement had not yet been determined; that the District was gathering information regarding TCS; and that Mrs. V.'s proposal to place A.V. at TCS had not been rejected. Mrs. V. did not respond, and on May 25, 2010, Dr. Turnage sent her a third letter regarding possible meeting dates. Again, Mrs. V. did not respond. (Exs. D-182, D-183.)

45.

Also on May 25, 2010, counsel for the District wrote to counsel for the Plaintiffs, explaining that he had not received a response to his first letter and again inquiring regarding her availability to reconvene the IEP meeting. Plaintiffs' counsel responded by email the same evening, stating that the District had misinterpreted Dr. Muskat's evaluation. Plaintiffs' counsel further agreed to reschedule the IEP meeting "[o]nce you confirm the district will pay for Dr. Muskat to attend the IEP meeting."[22] (Exs. D-184, D-185.)

46.

By letter dated May 27, 2010, Dr. Turnage informed Mrs. V. that the District was in the process of considering her attorney's request for Dr. Muskat to attend the IEP meeting. Subsequently, on June 4, 2010, counsel for the District wrote a letter to Plaintiffs' counsel, pursuant to which the District agreed to arrange an hour-long meeting with Dr. Muskat to discuss the results of her evaluation. Also in this correspondence, the District's counsel made another request for information regarding the availability of Mrs. V. and Plaintiffs' counsel to continue the IEP meeting. On June 7, 2010, counsel for the Plaintiffs responded, advising that A.V.'s parents had not decided whether to continue the meeting or request a due process hearing. (Exs. D-186, D-189, D-190.)

47.

On June 11, 2010, Dr. Turnage emailed Mrs. V. with yet another request for information regarding her availability to reconvene the IEP meeting. Thereafter, on June 14, 2010, counsel for the Plaintiffs notified the District's counsel by email that A.V. would be privately placed at TCS at public expense. Plaintiffs' counsel further advised that "the district has already decided not to allow [A.V.] to receive a regular education program" and that "[h]aving yet another IEP

[22] Plaintiffs' counsel later clarified that this was merely a request for Dr. Muskat's attendance, not a condition of reconvening the IEP meeting. (Ex. D-187.)

meeting seems futile at this point." (Exs. D-191, D-192.)

48.

By letter dated June 17, 2010, Dr. Turnage notified Mrs. V. that A.V.'s IEP meeting would be reconvened on June 23, 2010. Dr. Turnage encouraged Mrs. V. to participate in the meeting and further advised, "As you are aware, the District intends to discuss your request for private placement at TCS during the course of the IEP meeting when the IEP team reconvenes." By letter dated June 21, 2010, Dr. Turnage reminded Mrs. V. of the meeting date and again encouraged her to participate. Mrs. V. emailed Dr. Turnage on June 22, 2010, stating that she would not attend the IEP meeting. (Ex. D-193, D-194, D-198.)

49.

Dr. Turnage responded to Mrs. V. by letter dated June 22, 2010. In her letter, Dr. Turnage encouraged Mrs. V. to reconsider her decision to decline participation in the meeting. (Exs. D-196 [3056], D-197, D-199 [3065].)

J. <u>June 2010 IEP Meeting</u>

50.

The IEP meeting reconvened on June 23, 2010. The proposed discussion with Dr. Muskat did not take place prior to the IEP meeting, and neither Mrs. V. nor Plaintiffs' counsel attended. The remaining members of the IEP team developed a series of specific, measurable goals and objectives in the areas of writing, math reasoning, basic reading skills, reading, managing personal finances, semantics and literacy, education/training, and adult living skills/post school options. The majority of the goals and objectives were similar or identical to the goals and objectives in A.V.'s prior IEP. However, the team revised his math goals and objectives to emphasize "real-life" problems. The team also added a speech and language objective, revised another speech and language objective, and added goals and objectives

regarding management of personal finances, to address the team's concerns regarding A.V.'s functional math skills. The goals and objectives contained in the June 2010 IEP were designed to meet his needs. (T. 812-16, 1035-38, 1148-50; Ex. P-4 [1388-90, 1486-88].)

51.

Following the development of A.V.'s goals and objectives, the team considered the supportive aids and services that should be offered. The team decided upon the following: provide preferential seating near the point of instruction; ask A.V. to repeat instructions in his own words; encourage him to respond orally to questions; have tests read to him; provide books on tape when available; provide visuals, graphic organizers, and writing webs; remind A.V. to use a visual tracking aid; allow him to write directly on tests; provide copies of notes; provide laptop computer; allow use of calculator; give extended time (50%) for tests, assignments, quizzes, and written work; preview content vocabulary prior to unit presentation; provide organizational help and study guides for tests; "chunk" long-term assignments into shorter segments; allow frequent breaks; do not require A.V. to copy from board; monitor and implement a sensory diet; and provide visually clear and uncrowded materials. These supportive aids and services were designed to meet A.V.'s needs. (T. 1634-35; Ex. P-4 [1489-91].)

52.

The team next considered placement options for A.V. During the discussion, the team reviewed information about TCS that Dr. Turnage had gathered after the May 2010 IEP meeting. Based on this information, the team felt that placement at TCS was not appropriate for the following reasons: (1) it did not offer a research-based one-on-one reading program; (2) it did not offer related services, such as occupational therapy; and (3) it would not maximize A.V.'s interactions with non-disabled peers. Although the team was aware by this time that students

enrolled at TCS were not required to pass the GHSGT to receive a college preparatory diploma, the decision to change A.V.'s diploma track was not revisited. (T. 1371, 1381-89; Ex. D-209.)

53.

After discussion and input from the IEP team members, the team developed the following placement for A.V. for the 2010-11 school year: English, mathematics, and career preparatory classes in a small group special education setting; foreign language in a general education/co-taught setting; academic electives in a general education setting with additional supportive services; non-academic electives in a general education setting without support; reading in a one-on-one special education setting; speech and language services for ninety minutes per week; and occupational therapy for sixty minutes per month. (T. 820-21; Ex. P-4 [1493-95].)

54.

The placement recommended by the IEP team in the proposed 2010-11 IEP was designed to meet A.V.'s needs. In making this finding, the Court relies upon the testimony of the many educators who testified on behalf of the District at the hearing, as well as the recommendations of Dr. Muskat and Dr. Johnson. (T. 821-23, 1040-43, 1146-47, 1273, 1402-03; Ex. P-4 [1529-30, 1554-55].)

55.

The English, mathematics, and career preparatory courses offered to A.V. under the proposed 2010-11 IEP were access classes offering a modified curriculum in a self-contained special education environment. These classes would contain ten students with reading levels ranging from pre-school through sixth grade. The small-group setting would allow A.V.'s teacher to tailor the instruction to his needs and provide one-on-one instruction where appropriate. Access classes offered by the District emphasize experiential, hands-on learning

and provide immediate, explicit feedback within a highly structured environment. This would provide A.V. with opportunities for both remediation and advancement. Students in access classes utilize a computer program that performs vocational assessments and suggests areas of career interest. Other technology, such as computers and the InterWrite board system, is also offered. Finally, students in access courses receive assistance in social pragmatics, whereby teachers assist students with relationships and conflict resolution. (T. 823-25, 1711-12, 1715, 1724.)

56.

The access classes recommended in A.V.'s 2010-11 IEP were designed to meet his needs, as they would provide him with the repetition and feedback necessary for him to understand and learn. Additionally, the career preparatory class would afford him the opportunity to acquire functional skills that he could utilize as a future member of the workforce. A.V.'s goals and objectives, as well as the recommendations of Dr. Muskat and Dr. Johnson, could be implemented successfully in access classes. (T. 820-23, 1040-43, 1273, 1402-03, 1728-32.)

57.

The reading placement proposed in A.V.'s IEP was also designed to meet his needs. The Language! Program offered by the District provided one-on-one, research-based instruction in reading[23] and was consistent with the recommendations of Dr. Muskat and Dr. Johnson. (T. 820, 1042; Ex. P-4 [1554].)

58.

The IEP team's recommendations for A.V.'s participation in foreign language in a co-taught general education setting, academic electives in a general education setting with

[23] Mrs. V. had also requested that the District provide a research-based one-on-one reading instruction program, although she preferred the Lindamood-Bell program. (T. 476, 491, 521, 819, 1457; Ex. D-150, D-153.)

additional supportive services, and non-academic electives in a general education setting without support were designed to meet his needs. A.V. had previously achieved success in these settings, and they would afford him opportunities to participate in activities and instruction with non-disabled peers. (T. 820-22; Ex. P-4 [1494-95].)

59.

The occupational therapy recommended in A.V.'s 2010-11 IEP was designed to meet his needs. The sensory diet developed by his occupational therapist, Ms. Peay, along with sixty minutes of occupational therapy per month (consultative or otherwise) were sufficient.[24] The accommodations itemized in the supportive aids and services section of the IEP were also designed to meet A.V.'s needs. (T. 1633-35; Ex. D-273.)

K. <u>August 2010 Meeting With Dr. Muskat</u>

60.

Following the June 2010 IEP meeting, District personnel provided Mrs. V. with a copy of A.V.'s IEP. Subsequently, in August 2010, a meeting was held between Dr. Muskat, District personnel, Mrs. V., and counsel for both parties. (T. 408-09, 655; Ex. D-199, D-200.)

61.

During the meeting, Dr. Muskat explained that she had erred by assuming that A.V.'s co-taught classes were self-contained special education classes, and that she had been unaware that A.V. had achieved success in the general education curriculum during the 2009-10 school year. She further explained that the best predictor of A.V.'s future performance was his current performance, not his test results. Dr. Muskat offered an example of a young woman she had previously seen whose IQ test results were in the borderline range. Although these scores would

[24] By this time, A.V. had completed vision therapy with Dr. Cook and did not require further intervention in that regard. (Ex. P-3 [835].)

have predicted that she would be unable to succeed in higher education, the young woman completed a college degree and went on to earn a master's degree in public health. (T. 633-34.)

62.

When District personnel expressed concern that placing A.V. in general education classes could be setting him up for failure, Dr. Muskat responded that taking him out of general education classes could be a self-fulfilling prophecy that would ensure his poor performance. In light of his past success, Dr. Muskat conveyed to the meeting participants that she believed A.V. should be permitted to continue in the general education setting if it were his wish to do so. In Dr. Muskat's opinion, the recommendations of her report could be implemented successfully as part of a general education curriculum. However, the District declined to reconsider A.V.'s proposed placement. (T. 634, 636, 1508-09.)

63.

Dr. Muskat's testimony at the hearing was consistent with the information she provided during the meeting. She explained at the hearing that A.V.'s General Intellectual Ability ("GIA") score of 69, which placed him in the mildly deficient to borderline range, should be interpreted with particular caution due to the nature of his disabilities. She further explained that his neurological profile made it difficult to make predictions based on his test results. A.V.'s multiple challenges across domains meant that there were drawbacks to nearly every test that could be used to evaluate him. All of the tests administered included some verbal element that was likely to present a challenge for him. Additionally, A.V.'s composite GIA score did not reflect the peaks and valleys of his scores on particular subtests. For example, his subtest scores ranged from a high in the 71st percentile to a low below the first percentile. These scores spanned more than two standard deviations. (T. 675-78, 686, 711-14; Ex. P-4 [1546-47, 1556].)

64.

Dr. Muskat's opinion, as summarized above, was both credible and reliable. To the extent her testimony differed from that of Dr. Johnson, Dr. Muskat's testimony was more reliable for the following reasons: (1) her evaluation, which occurred over multiple days, was substantially more detailed and thorough; and (2) Dr. Muskat's opinion was not based exclusively on the results of intelligence testing, but also relied on A.V.'s current performance, his exceptional perseverance and motivation, and his own preferences. (T. 643, 636, 687-88, 1166, 1170, 1172-73; Ex. P-4 [1521-32, 1533-64.)

65.

Accordingly, the Court finds that while the placement recommended in A.V.'s 2010-11 IEP was designed to meet his needs, A.V.'s needs could also have been met in a general education/co-taught setting with additional supportive services for English, mathematics, science, and social studies. Additional supportive services would have included, for U.S. History in particular, tutoring and access to an audio textbook.

L. <u>TCS</u>

66.

After Mr. and Mrs. V. rejected the District's proposed placement for the 2010-11 school year, they elected to place him at TCS, a private independent school founded in 1985 by Jacque and John Digieso. TCS was originally conceived as a school for students with attention-deficit hyperactivity disorder, but its mission has since expanded to include students with other types of disabilities and students with no diagnosed disabilities at all. Approximately one-third of its students have not been identified as a student with a disability. Students are carefully screened

prior to admission to ensure that TCS is an appropriate placement where their needs can be met. (T. 74, 76, 80, 95-96, 194.)

67.

TCS is accredited by the Georgia Accrediting Commission, the Southern Association of Colleges and Schools, and the Southern Association of Independent Schools. Its headmistress, Jacque Digieso,[25] has forty-two years of experience in education. The majority of graduating seniors at TCS have gone on to attend colleges and technical schools, such as Emory University, Georgia Tech, University of Georgia, Armstrong State, Perimeter College, Kennesaw State, Chattahoochee Tech, and Lanier Tech. Public school systems in Georgia, including the District, have placed students at TCS. Students have also been placed by court order. (T. 74, 82, 148-50, 152-53.)

68.

TCS does not offer special education classes or any type of special education diploma. Additionally, because it is not a public school, its students are not required (or, in fact, permitted) to take the GHSGT. (T. 90, 129-30.)

69.

TCS implements the Georgia Performance Standards in a general education high school curriculum with small class sizes, content area certified teachers, and a cognitive behavioral program that emphasizes accountability, independence, and responsibility. The learning environment is highly structured, and teachers provide frequent feedback. Students must demonstrate mastery of a particular skill before moving on to the next skill. Each student has a

[25] Dr. Digieso testified as an expert regarding, *inter alia*, education and special education of children with disabilities, including learning disabilities, speech and language disabilities, and attention deficit disorders. Her testimony was both credible and reliable. (T. 83; Plaintiffs' List of Witnesses and Notice of Service of Subpoenas, filed July 21, 2011.)

planner, and lessons are "chunked" into visual, measurable assignments. (T. 76-78, 100-01, 847.)

70.

TCS has adopted a work-based approach to learning, wherein all students dress in business casual attire, clock in to "work," and earn "wages." Students maintain school-based accounts and keep track of all deposits and withdrawals in a checkbook. They advance on a pay scale according to the level of independence and reliability they have displayed, and they may use the money they have earned to exercise certain privileges, such as leaving campus for lunch. (T. 78-81.)

71.

Each student at TCS assists with the development of a road map for his or her education. The resulting document is known as an IEP, but it is not a legally mandated IEP created under IDEA. Instead, TCS's IEP summarizes information about the student's current performance and establishes academic goals, social-emotional goals, and pre-vocational goals. (T. 85-87, 181, 203; Ex. P-2 [790-812].)

72.

A.V. attended TCS during the 2010-11 school year and graduated with a general education high school diploma, successfully completing all of his classes. TCS was able to implement the recommendations of Dr. Muskat's evaluation in the general education setting. He received speech and language therapy[26] and frequent tutoring support. He was provided with digitalized textbooks, which allowed him to access them online from home and allowed his teachers to highlight vocabulary words, ask questions, and embed links. The school also

[26] Speech and language therapy was provided by a consultant who was not on staff at the school. (T. 90, 424; Ex. P-2 [830-31].)

provided him with assistive technology that allowed his textbooks to be read to him. Because school personnel determined that A.V.'s time, given his age and reading deficits, would be better spent learning compensatory reading skills and strategies, he did not receive direct one-on-one or small-group reading instruction through a research-based program. However, reading strategies were emphasized in all of his classes. A.V. also experienced social success at TCS. (T. 97, 104, 106, 120-25, 129, 662-63, 872-73; Exs. P-2 [780-82, 830-31], P-11.)

73.

A.V. took the Stanford Achievement Test in February 2011. His reading scores were uniformly below average, as expected, but many of his scores in math, language expression, science, and social studies fell within the average range. (T. 184-85, 229; Ex. P-2 [818-19.].)

74.

A.V.'s placement at TCS met his needs. In making this finding, the Court relies on the testimony of Dr. Muskat and Dr. Digieso that TCS was an appropriate placement where the recommendations of Dr. Muskat's report could be implemented. The Court recognizes that the curriculum at TCS was less rigorous than the curriculum offered by the District. For example, Dr. Digieso testified that teachers at TCS were permitted to choose which of the Georgia Performance Standards to emphasize, rather than attempting to plan a lesson around each standard. However, this does not render the placement inappropriate, especially where the school is accredited and there was no evidence that A.V. did not receive instruction in the Georgia Performance Standards.[27] The absence of occupational therapy at TCS likewise did not

[27] A.V.'s complete academic record was not available for the hearing, as The Cottage School discarded many of his records when he graduated. This was evidently in error, as the school's policy is to retain records where litigation is pending. The Cottage School was notified of the litigation in this case on July 21, 2011, while A.V. was still in summer school, but neglected to retain his complete records. In any event, it appears from the records that were available that teachers at The Cottage School utilized more multiple choice tests and fewer essays than the District's educators. (T. 173, 837-41, 843; Ex. D-285.)

make it an inappropriate placement. Furthermore, the Court declines to rely on Dr. Turnage's testimony that A.V. did not make academic progress at TCS during the 2010-11 school year. (T. 98-105, 631-33, 847-48, 851-53, 857-59, 1407-08; Ex. D-285.)

75.

Mr. and Mrs. V. incurred expenses totaling $36,428.10 for A.V.'s placement at TCS. These included tuition expenses of $22,381.50;[28] speech and language therapy expenses of $7,440.00; and transportation expenses of $6,606.60 (12,012 miles at a rate of $0.55 per mile). (T. 423-25; Ex. P-10.)

M. The District's Production of Documents

76.

During the 2009-10 school year, Mrs. V. made multiple requests to the District for all documents in its possession that related to A.V. In response, the District provided her with documents that it deemed to be his education records, which the District defined as documents containing personally identifiable information regarding A.V. that were intentionally maintained in his educational file. Consequently, the District did not provide Mrs. V. with copies of email correspondence unless the emails had been printed and placed in his file. In addition, the District did not provide copies of the Language! workbooks that A.V. used in his one-on-one reading program because they contained copyrighted materials.[29] However, the District made the

[28] Mrs. V. testified that her payments to The Cottage School totaled approximately $31,470.00, including the amount paid for speech and language therapy. However, because the purpose of some of the charges is not clearly identified, the Court has not included these expenses in its calculation. (T. 424; Ex. P-10 [1754-74].)

[29] In three separate letters to Mrs. V., Dr. Turnage stated that she was enclosing a copy of A.V.'s education records, with the exception of "copyrighted protocols." It appears that Dr. Turnage erroneously used this term to encompass all copyrighted materials. (T. 1555-57; Exs. D-127, D-128, D-172, D-206.)

workbooks available for inspection, and Mrs. V. did not seek to inspect any copyrighted materials. (T. 1555-57; Exs. D-127, D-128, D-172, D-206.)

77.

When the District did not provide Mrs. V. with copies of emails, she submitted requests under the Open Records Act for those documents. The District responded to each request, estimating the cost for retrieval and redaction of the requested documents at between $210.60 and $996.84, depending on the specific parameters of the request. The District also notified her that the cost of any copies would be $0.25 per page. (Ex. P-6 [1574, 1577-83, 1588-90, 1593-97, 1605-12, 1615-18, 1620-21.)

78.

Mrs. V. elected not to pay for the retrieval and redaction costs. Therefore, she and Plaintiffs' counsel did not review any emails, other than those that were deemed part of A.V.'s education record, prior to the hearing. However, Mrs. V. testified that she was able to participate fully in the IEP process despite her lack of access to these emails. (T. 1577-78, 1583.)

79.

At the hearing, in response to a subpoena, the District appeared with many large boxes of documents that had not been previously provided to the Plaintiffs' counsel. Two of A.V.'s Language! workbooks were not included in these documents, although they were provided to Plaintiffs' counsel at a later date after the hearing began. Neither party maintained an inventory of the documents provided to or received from the opposing party. (T. 1783-84, 1787.)

III. CONCLUSIONS OF LAW

1.

The case at bar is governed by IDEA, 20 U.S.C. § 1400, et seq.; its implementing federal regulations, 34 C.F.R. § 300.01, et seq.; and the Rules of the Georgia Department of Education, Ga. Comp. R. & Regs. r. 160-4-7-.01, et seq.

2.

Claims brought under IDEA are subject to a two-year statute of limitations. 34 C.F.R. § 300.507(a)(2). Here, because the Plaintiffs' Complaint was filed on April 27, 2011, only events occurring after April 27, 2009, are at issue in this proceeding. Id.

3.

The Plaintiff bears the burden of proof in this matter. Schaffer v. Weast, 546 U.S. 49 (2005); Ga. Comp. R. & Regs. rr. 160-4-7-.12(3)(n); 616-1-2-.07. The standard of proof is a preponderance of the evidence. Ga. Comp. R. & Regs. r. 616-1-2-.21(4).

A. Evaluation

4.

IDEA requires school districts to identify and evaluate students who may be eligible to receive special education services. 20 U.S.C. §§ 1412(a)(3), 1414; 34 C.F.R. § 300.111; Ga. Comp. R. & Regs. r. 160-4-7-.04. When conducting an evaluation, a district "must ensure that [] the child is assessed in all areas of suspected disability."

5.

Here, the Plaintiffs' Complaint alleged that the District failed to evaluate A.V. for issues regarding his vision, an area of suspected disability. However, A.V.'s parents ensured that a vision evaluation was completed in March 2009. Given that neither IDEA nor its interpretive case law requires school districts to perform their own evaluations of students, the District was then authorized to accept the private evaluation rather than perform its own. Holland v. District of Columbia, 71 F.3d 417, 422-24 (D.C. Cir. 1995) (school district must familiarize itself with child's needs but is not required to conduct its own evaluation); Hudson v. Wilson, 828 F.2d 1059, 1065 (4th Cir. 1987) (the statutory predecessor to IDEA "nowhere implies that local schools must corroborate private results before using them). Accordingly, no evaluation issue was presented under the facts of this case.[30]

B. Free Appropriate Public Education ("FAPE")

6.

The overriding purpose of IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(d)(1)(A). The statute offers the following definition of FAPE:

> Free appropriate public education. The term "free appropriate public education" means special education and related services that—
>
> (A) have been provided at public expense, under public supervision and direction, and without charge;
>
> (B) meet the standards of the State educational agency;
>
> (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

[30] Further, the private evaluation was completed more than two years before the Plaintiffs filed their Complaint, outside the two-year statute of limitations. 34 C.F.R. § 300.507(a)(2).

(D) are provided in conformity with the individualized education program required under section 614(d) [20 USCS § 1414(d)].

20 U.S.C. § 1401(9).

7.

The United States Supreme Court has developed a two-part test for determining whether a FAPE has been provided. Board of Educ. v. Rowley, 458 U.S. 176, 206 (1982). The first inquiry is whether the school district complied with the procedures set forth in IDEA. Id. The second prong of the test is whether the IEP developed through these procedures is "reasonably calculated to enable the child to receive educational benefits." Id.

1. Procedural Issues

8.

A procedural violation under the first prong of the Rowley test is not a *per se* denial of a FAPE. Weiss v. School Bd., 141 F.3d 990, 996 (11th Cir. 1998). Pursuant to 20 U.S.C. § 1415(f)(3)(E)(ii), this Court is authorized to find that A.V. was deprived of a FAPE based on a procedural defect "only if the procedural inadequacies--

(I) impeded the child's right to a free appropriate public education;

(II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or

(III) caused a deprivation of educational benefits."

20 U.S.C. § 1415(f)(3)(E)(ii); see also 34 C.F.R. § 300.513(2).

9.

In this case, the Complaint alleges that the District committed a procedural violation by withholding certain of A.V.'s education records, consisting of email correspondence and "all computer generated records, such as FTE counts, IEP documentation information, and all other

computer generated records pertaining to [A.V.] and maintained by the [District]." Complaint, at 5. Pursuant to 34 C.F.R. § 300.613(a), a school district "must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the [district]."

10.

It is undisputed that the District failed to provide Mrs. V. with copies of emails regarding A.V. that had not been printed and placed in his educational file. However, such emails were not education records under IDEA.

11.

IDEA defines the term "education records" as "the type of records covered under the definition of 'education records' in 34 CFR part 99 (the regulations implementing the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. 1232g (FERPA))." 34 C.F.R. § 300.611(b); see K.C. v. Fulton County. Sch. Dist., 2006 U.S. Dist. LEXIS 47652, *28 (N.D. Ga. June 28, 2006). Under FERPA, "records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute" are not considered education records. 20 U.S.C. § 1232g (a)(4)(B)(i). The United States Supreme Court, when called upon to interpret FERPA in Owasso Indep. Sch. Dist. v. Falvo, 534 U.S. 426 (2002), observed that "Congress contemplated that education records would be kept in one place with a single record of access" and that "FERPA implies that education records are institutional records kept by a single central custodian, such as a registrar." The emails in question were not printed and kept in a single location, and they remained in the sole possession

of the instructional personnel who sent and received them. Accordingly, they were not education records.

12.

The Plaintiffs failed to present any evidence regarding the District's alleged failure to provide Mrs. V. with "all computer generated records, such as FTE counts, IEP documentation information, and all other computer generated records pertaining to [A.V.] and maintained by the [District]." This allegation is therefore deemed abandoned.

13.

The Plaintiffs presented evidence that the District failed to provide their counsel with access to the Language! workbooks that were used in A.V.'s reading instruction. However, this proffered evidence exceeds the scope of the Complaint and will not be considered. Complaint, at 5.

14.

Moreover, even if the Plaintiffs had proven that the District committed a procedural violation, the record contains no evidence that such a violation impeded A.V.'s right to a FAPE or his parents' opportunity to participate in the decisionmaking process, or that it resulted in a deprivation of educational benefits. 20 U.S.C. § 1415(f)(3)(E)(ii); 34 § C.F.R. 300.513. See also Weiss, 141 F.3d at 996. In fact, as set forth in paragraph 78 of the Findings of Fact, above, Mrs. V. explicitly acknowledged that she was able to participate fully in the IEP process.

2. Substantive Issues

15.

Under the second prong of the Rowley test, known as the "basic floor of opportunity" standard, a school district is not required to provide an education that will "maximize" a disabled

student's potential. Instead, IDEA mandates only "an education that is specifically designed to meet the child's unique needs, supported by services that will permit him to benefit from the instruction." Loren F. v. Atlanta Indep. Sch. Dist., 349 F.3d 1309, 1312 n.1 (11th Cir. 2003) (internal citations omitted); see JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1573 (11th Cir. 1991). In determining whether a student has received adequate educational benefits, "great deference must be paid to the educators who developed the IEP." JSK, 941 F.3d at 1573.

16.

However, IDEA further mandates the provision of a FAPE in the "least restrictive environment." 20 U.S.C. § 1412(a)(5). This means that "[t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(a)(5); see also 34 C.F.R. § 300.114. Further, a school district "must ensure that [] [a] child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum." 34 C.F.R. § 300.116(e); see also Ga. Comp. R. & Regs. r. 140-4-7-.07(2)(e).

17.

In Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036 (5th Cir. 1989), the Fifth Circuit recognized the tension between the sometimes competing goals of meeting a child's unique needs and offering a least restrictive environment, observing that:

> In short, the Act's mandate for a free appropriate public education qualifies and limits its mandate for education in the regular classroom. Schools must provide a

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

Id. at 1045. The Fifth Circuit, attempting to balance these two mandates, articulated a two-part test for determining whether a school district has complied with the least restrictive environment directive, as follows:

> First, we ask whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child. If it cannot and the school intends to provide special education or to remove the child from regular education, we ask, second, whether the school has mainstreamed the child to the maximum extent appropriate.

Id. at 1048 (cits. omitted).

18.

The Eleventh Circuit adopted the Daniel R.R. test in Greer v. City of Rome, 950 F.2d 688, 696 (1991), and offered several non-exhaustive factors that school districts may consider when determining whether education in the regular classroom can be achieved satisfactorily. First, the district "may compare the educational benefits that the handicapped child will receive in a regular classroom, supplemented by appropriate aids and services, with the benefits he or she will receive in a self-contained special education environment." Id. at 697. However, the court explicitly cautioned that:

> '[A]cademic achievement is not the only purpose of mainstreaming. Integrating a handicapped child into a nonhandicapped environment may be beneficial in and of itself.' Accordingly, **a determination by the school district that a handicapped child will make academic progress more quickly in a self-contained special education environment may not justify educating the child in that environment** if the child would receive considerable non-academic benefit, such as language or role modeling, from association with his or her non-handicapped peers.

Id. at 697 (cits. omitted) (emphasis added). Second, a school district may consider the effect the presence of the disabled child may have on the education of other, non-disabled children in the regular education classroom. Id. The third consideration identified in Greer is the cost of the services necessary to educate the disabled child satisfactorily in the mainstream environment. Id. None of these factors support A.V.'s placement in a self-contained special education setting.

19.

Regarding the first factor, the Court finds that A.V. made academic progress in the general education environment at _____ High School, as reflected by the District's own measures: the passing grades he achieved in rigorous academic courses when he was provided with appropriate supportive aids and services. In U.S. History, the only class that he failed during the 2009-10 school year, he did not have access to an audio book and did not receive timely tutoring. Therefore, his failing grade in that class is not evidence that he was unable to succeed in the general education setting with supportive aids and services. The Court acknowledges that in light of A.V.'s significant deficits across domains, the self-contained special education classes proposed in his 2010-11 IEP may have allowed him to progress more quickly and to achieve greater mastery of important functional skills. However, A.V. was still making progress in the general education setting, where he had been placed for the entirety of his high school career to that point. The Court further finds that A.V. received considerable non-academic benefit from his mainstream placement, which was evidenced by his overall happiness and the exceptional perseverance he demonstrated in that setting.

20.

Regarding the second and third Greer factors, the District offered no evidence that A.V.'s presence in general education classes had a negative impact on any other student. Similarly, no

evidence was presented to compare the cost of educating A.V. in the general education environment with supportive aids and services to the cost of educating him in the access classes proposed in his 2010-11 IEP.

21.

Accordingly, the Court finds that education in the regular classroom, with the use of supplemental aids and services, could have been achieved satisfactorily for A.V. Daniel R.R., 874 F.2d at 1048; Greer, 950 F.2d at 696-97. Because A.V. met the standard established in the first prong of the test, there is no need to consider the second component. Id.

22.

The Plaintiffs proved, by a preponderance of the evidence and as set forth in the Findings of Fact, above, that A.V.'s 2010-11 IEP failed to offer him a placement[31] that provided him with a FAPE in the least restrictive environment. Because A.V. could be educated satisfactorily in regular classes with supportive aids and services, the District's proposal to place him in self-contained special education classes pursuant to his 2010-11 IEP was not appropriate. 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114; Daniel R.R., 874 F.2d at 1048; Greer, 950 F.2d at 696-97.

23.

As noted above, FAPE encompasses the provision of both special education and related services. 20 U.S.C. § 1401(9). The term "related services" is defined as "transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education . . . ." 20 U.S.C. § 1401(26)(A); see also 34 C.F.R. § 300.34(a). Vision therapy is a necessary related service for a child whose

[31] Contrary to the Plaintiffs' arguments, A.V.'s diploma track was not part of his educational placement. Livingston v. DeSoto County Sch. Dist., 782 F. Supp. 1173, 1181 (N.D. Mich. 1992); Omidian v. Board of Educ., 2009 U.S. Dist. LEXIS 27193, *67 (N.D.N.Y. Mar. 31, 2009); District of Columbia v. Nelson, 811 F. Supp. 508, 513 (D.C. 2011). However, as noted in the Findings of Fact, above, the selection of his diploma track did impact his placement options.

convergence insufficiency negatively impacts the child's ability to benefit from special education. DeKalb County Sch. Dist. v. M.T.V., 413 F. Supp. 2d 1322, 1328-29 (N.D. Ga. 2005).

24.

The Plaintiffs proved, by a preponderance of the evidence and as set forth in the Findings of Fact, above, that A.V.'s convergence insufficiency and related vision issues negatively impacted his ability to benefit from special education. Accordingly, the District violated the FAPE standard by failing to provide him with vision therapy. 20 U.S.C. § 1401(26)(A); 34 C.F.R. § 300.34(a).; M.T.V., 413 F. Supp. 2d at 1328-29.

C. Remedy

25.

Under IDEA, if a disabled child is enrolled in a private school without the consent of the local school district, "a court or a hearing officer may require the [district] to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the [district] had not made a free appropriate public education available to the child in a timely manner prior to that enrollment and that the private placement is appropriate." 34 C.F.R. § 300.148(c); see also 20 U.S.C. § 1412(a)(10)(C)(ii); Ga. Comp. R. & Regs. r. 160-4-7-.13(2)(a)(2). Further, "[a] parental placement may be found to be appropriate . . . even if it does not meet the state standards that apply to education provided by the State or [school district]." Ga. Comp. R. & Regs. r. 140-4-7-.13(2)(a)(2); see also 34 C.F.R. § 300.148(c).

26.

To be considered appropriate, a private placement need only be "reasonably calculated to enable the child to receive educational benefits." W.C. v. _____ County Sch. Dist., 407 F.

Supp. 2d 1351, 1362 (cits. omitted). "The test for the parents' placement is that it is appropriate, not that it is perfect." Warren G. v. Cumberland County Sch. Dist., 190 F.3d 80, 84 (3d Cir. 1999).

27.

The Plaintiffs proved, by a preponderance of the evidence and as set forth in the Findings of Fact, above, that their private placement of A.V. at TCS was appropriate. The Plaintiffs further proved, by a preponderance of the evidence and as set forth in the Findings of Fact, above, that their private provision of the related service of vision therapy was appropriate. Conversely, the Plaintiffs failed to prove that their private provision of the related service of occupational therapy was appropriate.

28.

This Court may reduce or deny reimbursement upon a finding of "unreasonableness with respect to actions taken by the parents." 20 U.S.C. § 1412(a)(10)(C)(iii)(III); see also 34 C.F.R. § 300.148(d)(3); Ga. Comp. R. & Regs. r. 160-4-7-.13(2)(a)(3)(iv). In this case, A.V.'s parents acted unreasonably by refusing to cooperate with the District to complete A.V.'s 2010-11 IEP, as set forth in detail in the Findings of Fact. When the May 2010 meeting concluded, A.V.'s placement had not been decided. Mrs. V.'s refusal to participate when the meeting reconvened in June 2010 prevented the District from considering her input regarding placement, including the information she and Plaintiffs' counsel had gathered about TCS. While the decision to change A.V.'s diploma track augured a placement that was more restrictive than the general education setting, his placement was by no means finally determined at the May 2010 meeting. A.V.'s parents also acted unreasonably by failing to cooperate with the District's attempts to obtain records of his vision therapy. However, notwithstanding their unreasonableness regarding

these two issues, A.V.'s parents had previously participated in the IEP process and cooperated with the District in reasonable fashion. Accordingly, the Court finds that the Plaintiffs should be awarded reimbursement of 50% of their expenses for TCS and vision therapy.

IV. ORDER

In accordance with the foregoing Findings of Fact and Conclusions of Law, the Plaintiff's request for relief under IDEA is hereby **GRANTED**. A.V.'s parents are entitled to partial reimbursement, in the amount of $18,214.05, for their expenses for A.V.'s placement at TCS. They are further entitled to partial reimbursement, in the amount of $3,043.56, for the cost of the related service of vision therapy.[32] Accordingly, the District is **ORDERED** to reimburse the Plaintiffs' expenditures for A.V.'s education in the total amount of $21,257.61.

SO ORDERED, this _____ day of May, 2012.

KRISTIN L. MILLER
Administrative Law Judge

[32] A.V.'s vision therapy took place over a period of eighteen months, from March 2009 to August 2010. Because two of those months were outside the two-year statute of limitations, the Court has calculated the reimbursement figure by taking 50% of the Plaintiffs' vision therapy expenses, based on a monthly average, for sixteen of the eighteen months.