

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

FILED
OSAH
JAN 27 2020

██████ by and through ██████ and ██████ :
and ██████ :
Petitioners, :
v. :
HENRY COUNTY SCHOOL DISTRICT, :
Respondent. :

Docket No. ██████-OSAH-DOE-SE-75-Howells

Kevin Westray
Kevin Westray, Legal Assistant

FINAL DECISION

I. INTRODUCTION AND PROCEDURAL BACKGROUND

On July 31, 2019, Petitioners filed a Due Process Hearing Request (“Complaint”) contending that Henry County School District (“District”) violated the Petitioners’ rights under the Individuals with Disabilities Education Act (“IDEA”) related to evaluation, educational placement, and the provision of a Free Appropriate Public Education (“FAPE”). On August 8, 2019, the District filed a motion seeking a ruling on the appropriate “stay-put” placement for ██████. A telephone hearing was conducted that same day. On August 9, 2019, the undersigned issued an Order ruling that the correct stay-put placement was the last uncontested placement that had been implemented prior to Petitioners filing their Complaint.

On September 13, 2019, Petitioners filed a motion for partial summary determination. The District filed its response on October 11, 2019. Petitioners filed a reply brief on October 18, 2019. On October 31, 2019, the court granted Petitioners’ motion in part and denied it in part. Specifically, the court granted Petitioners’ motion as to the District’s failure to conduct an occupational therapy (“OT”) evaluation as part of the multidisciplinary reevaluation it conducted or in response to Petitioners’ request for an Independent Educational Evaluation (“IEE”).

The hearing on the remaining claims was conducted on November 15, 18, 19, 21, and 22 of 2019. Petitioners were represented by Jonathan Zimring, Esq. and Debra Haverstick, Esq. The District was represented by Megan Pearson, Esq. The record was held open until December 20, 2019 for the parties to submit their closing arguments, post hearing briefs, or proposed findings of fact and conclusions of law.

II. FINDINGS OF FACTS

1.

Petitioner [REDACTED] is a twelve-year-old elementary school student with Down Syndrome. He is a resident of the District and eligible under IDEA as a student with a disability. As a result, he has an Individualized Education Program (“IEP”) that describes his present levels of performance, his goals and objectives, and the educational services, supports, and accommodations that he receives. His current categories of eligibility are Mild Intellectual Disability (“MID”), Other Health Impairment (“OHI”), and Speech Language Impairment (“SLI”). (Exs. P-13, P-17.)

2.

[REDACTED] attends East Lake Elementary School (“East Lake”) in the District through the SB10 School Choice Program. He is currently in the fifth grade. He has attended East Lake since kindergarten. (Exs. P-13, P-17; Tr. 277-78, 331.)

3.

During the 2018-2019 school year, [REDACTED] was in the fourth grade. He was placed in a general education class with paraprofessional support for Science and Social Studies, he attended general education classes for Art, Music, and Physical Education. He received his English/Language Arts and Math instruction in a small group resource class.¹ He also received speech therapy (“ST”) in

¹ A resource classroom is a small group setting for students with disabilities. The students are taught by a special education teacher. The disabilities of the students may vary, but they are receiving specialized instruction in a small

thirty-minute increments four times per week and OT once a week for thirty minutes. (Exs. P-23, P-36.)

4.

On October 4, 2018, the IEP team convened a meeting to discuss some behaviors [REDACTED] was exhibiting. He was beginning to display some noncompliant behavior, such as refusing to do his work or talking loudly to his imaginary friend. [REDACTED] teachers expressed that his behavior is impeding his learning. In addition to discussing [REDACTED] behavior, the District suggested reevaluation of [REDACTED] however, Mrs. B. wanted some time to think about it. [REDACTED] last psychoeducational evaluation was conducted in November 2014, when [REDACTED] was in kindergarten. That testing revealed a General Conceptual Ability score of 54, which is significantly below average. (Ex. P-23.)

5.

On October 17, 2018, Mrs. B sent an email to the District administrator Kim Trepanier, teacher Wendy Tanner, and East Lake Principal Jennifer Laughridge agreeing to a reevaluation of [REDACTED]. Specifically, she requested that the District conduct a full re-evaluation of [REDACTED] including a psychological evaluation, functional behavioral assessment (“FBA”), OT evaluation, speech/language evaluation, and assistive technology (“AT”) evaluation. (Ex. P-63 at 687.)

6.

An IEP Meeting was held on October 22, 2018, to address the reevaluation. The District staff at the October 22 meeting agreed to conduct a full reevaluation, that is, a multidisciplinary

group setting. The difference between the resource class and the MID class is that the curriculum is different. In the resource class the students are being taught the general education standards. In the MID class the students are taught the adaptive curriculum. (Ex. P-82 at 9; Tr. 590, 1393, 1413-14.)

reevaluation. Mrs. B. signed the consent forms for the reevaluation that day. (Exs. P-23 at 376, P-50.)

7.

The District's consent form provided for a reevaluation, that the evaluation was to be a "Comprehensive Evaluation," and that the evaluation "may include tests in the following areas: vision, hearing, audiological, motor skills, behavioral, social/emotional, cognitive, achievement, speech/language and/or others." (Ex. P-50.)

8.

On or about November 8, 2018, the District confirmed that it had all of the paperwork it needed for [REDACTED] reevaluation. (Ex. P-63 at 689.)

9.

On November 26, 2018, Ms. Trepanier emailed Mrs. B. to set up a meeting to discuss some observations made by the behavioral intervention coach ("BIC") and the teacher on special assignment ("TOSA"). Mrs. B. emailed Ms. Trepanier back on November 30, 2018, asking for reports from the BIC and TOSA and for contact information to find out when the psychological evaluation would be completed. Ms. Trepanier replied to Mrs. B. later that morning, telling her that the only information she has about the psychological evaluation is a projected eligibility date which is the triennial date on [REDACTED] IEP.² In that email, Ms. Trepanier again asked Mrs. B. for a date to set up a meeting. Mrs. B. responded on December 4, 2018, stating that she would need to get more reports from other evaluations before scheduling a meeting. Thereafter, some correspondence between counsel for the District and Petitioners' counsel ensued. On December 14, 2018 and January 23, 2019, Petitioners' counsel notified the District's counsel that they did

² The most recent eligibility date on [REDACTED] IEP at that time was April 20, 2017. (Ex. P-23.)

not want to have an IEP meeting until all of the evaluations were completed. On March 12, 2019, Petitioners' counsel was notified that the evaluations were completed. (Ex. P-63 at 694, 697; Ex. P-64 at 701, 703.)

10.

As part of [REDACTED] reevaluation, an AT evaluation was conducted in December 2018, an FBA was conducted in January 2019, a psychoeducational evaluation was conducted in February 2019,³ and a speech/language evaluation was conducted in March and April 2019. The District's reevaluation did not include an OT evaluation. (Exs. P-54, P-55, P-57, P-59; Tr. 58-63.)

11.

On April 12, 2019, Petitioners were provided a copy of the psychoeducational evaluation. On April 16, 2019 at approximately 11:10 a.m., Petitioners were provided with a draft IEP, a draft Eligibility Report, a draft Positive Behavior Support Plan, an IEP Progress Report, the reports for the FBA, AT evaluation, and speech language evaluation, and FBA data. (Ex. P-64 at 704; Tr. 287, 307.)

12.

OT is a known area of need for [REDACTED] as he has a history of gross and fine motor coordination issues. He also has sensory processing difficulties impacting his fine and gross motor abilities, his daily living skills, and his instruction and attention for instruction. (Exs. P-17, P-53.)

13.

The District's previous OT evaluation of [REDACTED] conducted on or about October 17, 2013, identified that [REDACTED] was functioning in the "significantly subaverage range" in visual motor

³ The report for the psychoeducational evaluation was completed on March 25, 2019. (Ex. P-55.)

abilities and in the “definite dysfunction range” in sensory processing in the areas of socialization, vision, body awareness and planning, and ideas. (Ex. P-53.)

14.

An IEP team meeting was held on April 17, 2019 to discuss the results of the evaluations, eligibility, and to begin drafting the IEP. ██████ parents were given a copy of their parental rights, at the beginning of the meeting. (Exs. P-6, P-17.)

15.

During the meeting, School Psychologist Stephanie Meddaugh reviewed the results of the psychoeducational evaluation she conducted. To assess ██████ cognitive abilities, Ms. Meddaugh administered the Kaufman Assessment Battery for Children, Second Edition (KABC-II) and the Differential Ability Scales, Second Edition (DAS-II). On the KABC-II, ██████ scored a 45 on the Fluid-Crystalized Index, which is the equivalent of a full-scale IQ score. That score is in the deficient range, and is equal to, or higher than, <0.1% of children the same age as ██████ Similarly, on the DAS-II, ██████ General Conceptual Ability was 47, which is also equivalent to a full-scale IQ score. That score is also in the deficient range, and is equal to, or higher than, <0.1% of children the same age as ██████ (Exs. P-17, P-55; Tr. 892-94.)

16.

To assess ██████ graphomotor functioning, Ms. Meddaugh administered the Beery-Buktenica Developmental Test of Visual-Motor Integration, Sixth Edition (VMI-6). It is an untimed test of fine motor development, perceptual discrimination skills, and hand-eye coordination. ██████ scored a 58 on the VMI-6. That score is in the deficient range, and is equal to, or higher than, 0.6% of children the same age as ██████ His score suggests that visual-motor skills are an area of weakness for him. (Exs. P-17, P-55; Tr. 894-95.)

17.

Ms. Meddaugh administered the Kaufman Test of Educational Achievement, Third Edition (KTEA-3) to assess [REDACTED] educational achievement. On the KTEA-3 [REDACTED] scored a 57 on the Academic Skills Battery, a 64 on the Reading Composite, a 55 on the Math Composite, and a 43 on the Written Language Composite. These scores are all in the deficient range and suggest that [REDACTED] struggles with all areas of academic achievement. (Exs. P-17, P-55; Tr. 895-96.)

18.

To assess [REDACTED] adaptive behavior (i.e., his self-care and life skills), Ms. Meddaugh asked Mrs. B. and two of [REDACTED] teachers, Ms. Wendy Tanner and Ms. Holly Nies, to complete the rating scales. The scores obtained from the rating scale completed by Mrs. B. fell mostly in the average range. [REDACTED] composite score on the Adaptive Behavior Assessment System, Third Edition (ABAS-3), based on Mrs. B.'s responses, was 91, which is in the average range. These scores were not commensurate with [REDACTED] IQ, Ms. Meddaugh's observations of [REDACTED] or the previous adaptive scales completed by [REDACTED] parents. Ms. Meddaugh reached out to Mrs. B. to see if they could meet to discuss the rating scale. Mrs. B. told Ms. Meddaugh that she did not have time to meet. Ms. Meddaugh told Mrs. B. that she had concerns regarding the ratings. She asked Mrs. B. if she would review her ratings to ensure they were accurate. Mrs. B. agreed to do so, but after reviewing it she returned the scale to Ms. Meddaugh and said that she felt like all her responses were correct. One example of a response that Ms. Meddaugh noted was inaccurate pertained to [REDACTED] ability to tell time on an analogue clock. Mrs. B. rated [REDACTED] with a three on that question based on his ability to tell time using a digital clock. Because the question asked about telling time on an analogue clock, Mrs. B. should have rated [REDACTED] as not being able to do so. (Exs. P-17, P-55; Tr. 896-901.)

19.

In contrast to the ratings obtained from Mrs. B., the composite score obtained from Ms. Tanner's rating scale was 62, which is in the deficient range. Similarly, the composite score obtained from Ms. Nies' rating scale was 68, which is also in the deficient range. (Exs. P-17, P-55; Tr. 900-01.)

20.

Ms. Meddaugh also asked Mrs. B., Ms. Tanner, and Ms. Nies to complete rating scales for the Behavior Inventory of Executive Function, Second Edition (BRIEF 2). This rating scale assesses executive functioning, which is the ability to regulate behavior, shift attention or focus, control emotions, and organizational skills. The results from Mrs. B.'s ratings were all in the average range; whereas the scores obtained from the ratings completed by Ms. Tanner and Ms. Nies mostly fell in the clinically elevated range. The overall Global Executive Composite for both Ms. Tanner and Ms. Nies was in the clinically elevated range. These scores indicate that in the school setting, █████ demonstrates difficulty in all areas of executive functioning skills. (Exs. P-17, P-55; Tr. 901-03.)

21.

During the April 17, 2019 meeting, Speech Language Pathologist ("SLP") Annette Kidd discussed the results of her evaluation. Ms. Kidd's evaluation assessed the following five areas: articulation, language (receptive and expressive), voice quality, fluency, and the structure and function of the oral mechanism. While █████ made some errors on the articulation assessment, they were not significant. However, on the language assessment, █████ scored in the deficient range on all the subtests in both receptive and expressive language, except sentence comprehension on which he scored below average. Regarding fluency, █████ did not have any stuttering

characteristics. [REDACTED] voice quality was adequate for his age. Finally, Ms. Kidd noted that [REDACTED] has a mild open bite and cross bite and a high, narrow palate. (Exs. P-17, P-57; Tr. 1191-94.)

22.

The results of the AT evaluation and the FBA were discussed during the meeting. A behavior intervention plan (“BIP”) was not recommended. In addition to a review of the evaluation results, OT data was reviewed, and eligibility was discussed. The teachers in the meeting agreed that [REDACTED] primary eligibility category was MID. Mrs. B. and her attorney disagreed. The team agreed that [REDACTED] other eligibility categories were OHI and SLI. Due to the time, the team decided to end the meeting and reconvene on another day to complete the IEP. (Ex. P-17.)

23.

On May 14, 2019, the IEP team reconvened. The following individuals participated in the May 14, 2019 meeting: Mrs. B.; Mr. B.; Janet Preston, Petitioners’ attorney; Holly Ward, Petitioners’ educational consultant; Annette Kidd, SLP; Janel Mitchell, BIC; Kim Trepanier, student support facilitator; Beverly Jackson, occupational therapist; Julie Beacham, AT teacher; Shirby Thomas, AT teacher; Wendy Tanner, special education resource room teacher (English/Language Arts and Math); Dianna Brame, general education teacher (Homeroom); Holly Nies, general education teacher (Science and Social Studies); Shandra Christopher, exceptional student education coordinator; Jennifer Laughridge, principal; and Megan Pearson, the District’s attorney. At the beginning of the meeting, [REDACTED] parents were given a copy of their parental rights. (Exs. P-5, P-6, P-17.)

24.

Ms. Tanner reviewed [REDACTED] progress in her resource class over the past year, including his progress on his IEP goals. She reported that [REDACTED] progress on his goals fluctuated. According to Ms. Tanner, [REDACTED] can read words well, but he is not able to comprehend what he has read.⁴ Ms. Tanner also reported that sometimes she has to go get [REDACTED] from his previous class and bring him to the resource room. Usually, her resource students come to her classrooms on their own. (Exs. P-5, P-17.)

25.

Ms. Nies reviewed [REDACTED] work in her general education classroom. She allows [REDACTED] to work with her, a paraprofessional, or a peer. She reported that [REDACTED] struggles with working independently, comprehending grade-level material, and making inferences from grade-level material. He also struggles with verbalizing and writing down his thoughts. Transitions are also difficult for [REDACTED]. He must be prompted to complete each task and he employs delaying behaviors if he does not want to do a task. (Ex. P-5, P-17.)

26.

[REDACTED] music teacher provided a report of his present level of performance in her class. She noted that [REDACTED] “does a great job in music class as long as I modify the activities for him.” She frequently has to “lower the activity to a standard that one should be focusing on in the first or second grade.” (Ex. P-17.)

⁴ [REDACTED] reading level on the Fountas and Pinnell test was G, which is the expected level for a first grader. The expected reading level for a beginning fourth grader is level Q. On the Spring 2019 MAP assessment, [REDACTED] Lexile score was BR 80 L – BR 240 L. The expected level for a fourth-grade student is a Lexile range of 740 -1010. (Ex. P-17.)

27.

Mrs. B. raised twelve parental concerns, including [REDACTED] lack of adequate progress in reading, concerns regarding the math curriculum, inconsistency in instruction and support, [REDACTED] not being supported enough to address behavior issues, lack of communication, the timeliness of the reevaluation, her inability to understand the speech evaluation, concerns regarding other kids not being nice to [REDACTED] lack of a system to help [REDACTED] with everyday procedures, her objection to MID being his eligibility category, her disappointment in the specials teachers who appear to find it taxing to accommodate [REDACTED] and his disability, and her objection to Dr. Ward being denied observation of [REDACTED] in the school setting. District staff responded to each of Mrs. B.'s concerns. (Exs. P-5, P-17.)

28.

Ms. Tanner reported that she has seen some noncompliant behavior by [REDACTED] in her resource classroom. Petitioners' attorney announced that the Petitioners were requesting an IEE, including an FBA. The IEP team and Petitioners' attorney agreed that they would wait to develop a BIP after the independent FBA was conducted; however, the team decided to make changes to the Positive Behavior Support Plan. Petitioners' attorney made several suggestions that were incorporated into the Positive Behavior Support Plan. (Exs. P-5, P-17.)

29.

AT recommendations were discussed. Mrs. B., Petitioners' attorney, and her educational consultant participated in the conversation about AT and made some suggestions that were incorporated into the IEP. As a result of the discussion, the following AT was recommended: Core Word Board, First Author, Rainbow Sentences App, digital books, Touch Math, and Kidspiration. (Exs. P-5, P-17.)

30.

Thereafter, the team began drafting goals and objectives. Petitioners' attorney and educational consultant actively participated and contributed to the goals and objectives in the IEP. (Exs. P-5, P-17.)

31.

After goals and objectives were created, the team discussed Student Supports. The following Instructional Accommodations are included in the IEP: extended time (time and a half), preferential seating (close proximity to an adult), repeat/review drill, repetition of directions using visual supports,* graphic organizers, visual supports/task analysis,* small group instruction, test questions and answer choices read aloud for reading passages, read aloud grade level content,* chunking of instructional materials, study guides,* note taking assistance (cloze notes for participation and a copy of notes given after class for studying), preview of content in science and social studies,* manipulatives (hands on materials and visuals),* and calculator.*⁵ (Exs. P-5, P-17, P-23.)

32.

The IEP also included the following Classroom Testing Accommodations: extended time (time and a half), small group setting, use of multiple modalities to demonstrate mastery of standard,* preferential seating (close proximity to an adult), repeat/review drill,* repetition of directions using visual supports,* test questions and answers read aloud for reading passages, read aloud grade level content,* chunking of instructional materials, and calculator.*⁶ (Exs. P-5, P-17, P-23.)

⁵ The items with an asterisk were either added or revised during the May 14, 2019 meeting.

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33.

The following Supplemental Aids and Services are included in the IEP: visual schedule,* access to electronic math manipulatives,* core word board,* read aloud software,* access to digital books,* written expression supports (including word banks, speech to text software, and electronic graphic organizers),* agenda for previewing upcoming class content,* token economy system,* and calculator.*⁷ (Exs. P-5, P-17, P-23.)

34.

After Student Supports were discussed and added to the IEP, the team discussed the criteria for participation in the Georgia Alternative Assessment (“GAA”).⁸ The following questions were asked to determine if [REDACTED] met the criteria for the GAA:

- (1) Does the student require intensive, individualized instruction in a variety of settings?
- (2) Does the student have a significant cognitive disability?
- (3) Does the student require specialized supports to access and participate in the grade-level Georgia Standards of Excellence that require modifications based on the student’s Present Levels of Academic Achievement and Performance?
- (4) Does the student require specialized supports to demonstrate age-appropriate adaptive behavior?

(Exs. P-5, P-17.)

35.

The District staff all answered “yes” to all four questions, concluding that [REDACTED] met the criteria for the GAA.⁹ Some of the teachers clarified that [REDACTED] is not able to access the fourth-

⁷ The items with an asterisk were added during the May 14, 2019 meeting. [REDACTED] prior IEP listed visual checklists/ supports for routines and a behavior sheet.

⁸ In the past, the GAA was a portfolio-based assessment. The student’s teacher would collect work samples and they were sent to be reviewed by someone at the state level. Now it is called the GAA 2.0, and it is a standardized assessment. It is based on the standards and contains questions that the students are asked by the teacher. The teacher records the student’s responses, and the assessment is sent to the state for scoring. (Tr. 1432-33.)

⁹ Mrs. B disagreed with the District staff as to questions 2, 3, and 4. (Exs. P-5, P-17.)

grade standards even with the accommodations he had in place. Ms. Tanner explained that for Math and English/Language Arts, she is working with [REDACTED] on first grade standards. In other words, she is modifying the content such that it no longer resembles the fourth-grade standards. Ms. Nies stated that although she is not modifying the Social Studies or Science curriculum [REDACTED] requires 100% support. Even with that support, [REDACTED] is not able to access the fourth-grade standards. Regarding [REDACTED] adaptive functioning, Ms. Tanner reiterated that he does not come to her classroom independently; she has to bring him to her class. Principal Laughridge stated that [REDACTED] has difficulty opening sealed deli sandwiches and ketchup packets and generally asks for help with those items. Ms. Trepanier noted that [REDACTED] has some difficulty with social situations. (Exs. P-5, P-17.)

36.

After the GAA discussion, the team discussed [REDACTED] services and placement. When asked whether she thought [REDACTED] would be able to access the fifth-grade standards for Science and Social Studies in a general education classroom with all the accommodations that were added to the IEP and with a paraprofessional or a co-teacher, Ms. Nies answered “no.” Similarly, Ms. Tanner expressed her opinion that even with the added accommodations, she did not believe [REDACTED] would be able to access the fifth-grade standards. Ms. Tanner further stated that she no longer believed the resource classroom was appropriate for [REDACTED]. She has seen him struggle more and his deficits are getting bigger than what she can manage with accommodations. Although [REDACTED] made progress on his goals and objectives, Ms. Tanner noted that his goals are not grade level goals. As an example, Ms. Tanner explained that one of the fourth-grade writing standards is writing multiple paragraphs or citing multiple sources; whereas, one of the goals the IEP team wrote for [REDACTED] is to write a sentence using two adjectives. (Exs. P-5, P-17.)

37.

Petitioners' attorney proposed that the team try placing him in co-taught Science and Social Studies classes with all his accommodations for nine weeks and then revisit the issue. The IEP team agreed to her proposal. However, regarding English/Language Arts and Math, the District staff believed that a small group MID class with the adaptive curriculum would be appropriate for [REDACTED] Ms. Beacham previously taught the adaptive curriculum. She explained that it is based on the standards, but it has three levels and uses a lot of visual supports. (Exs. P-5, P-17.)

38.

Ultimately, the IEP team apart from Mrs. B., decided that [REDACTED] placement for the 2019-2020 school year would be in the small group MID class for English/Language Arts and Math.¹⁰ He would receive instruction in Science and Social Studies in a co-taught general education class and he would receive his instruction in specials (i.e., Art, Music, and Physical Education) in a general education classroom with paraprofessional support. He would also be in a general education homeroom and have lunch with general education students. Additionally, [REDACTED] would continue to receive four thirty-minute sessions of ST and one thirty-minute session of OT. For the remainder of the 2018-2019 school year, [REDACTED] would remain in the placement he was in at the time of the meeting. (Exs. P-5, P-17.)

¹⁰ The MID class is no longer a self-contained class. The model changed for the 2019-2020 school year. The students who are assigned to the MID class for part of the day leave the class to participate in the general education setting like students who attend the resource class for part of the day. They also are assigned to a regular education homeroom, and they eat lunch with their regular education homeroom. (Tr. 1390-99.)

39.

A copy of the IEP was provided to Petitioners on May 23 or 24, 2019. (See Petitioners' Amended and Supplemental Complaint ¶ 192; see also Petitioners' Motion and Brief for Summary Determination ¶ 25.)

40.

Petitioners filed their Complaint on July 31, 2019. Mrs. B. emailed Principal Laughridge and other District staff in the afternoon of July 31, 2019, notifying her that the Complaint had been filed and that she was invoking her right to "stay-put." The following day, August 1, 2019, was the first day of school. When Mrs. B. and █████ arrived at school, they were informed by Principal Laughridge that it was the District's position that the stay-put placement was the one that included the MID classroom because the May 14, 2019 IEP had been implemented over the summer.¹¹ (Ex. P-61, at 601; Tr. 378-81.)

41.

Because Principal Laughridge told Mrs. B. that █████ would be going to the MID classroom for English/Language Arts and Math, Mrs. B. left the school with █████ She would not allow him to go into the MID classroom. Mrs. B. asked if █████ could attend his OT and ST, and whether they would send any books or homework home.¹² Principal Laughridge told Mrs. B. that students must be enrolled in school to receive services under an IEP and because he was not there on the first day, he was unenrolled. Therefore, according to Principal Laughridge, █████ could not receive his OT and ST. (Tr. 380-86, 1338-39; Ex. P-61 at 604-08.)

¹¹ As noted above, a telephone hearing was held on August 8, 2019, and the undersigned issued an order on August 9, 2019, rejecting the District's position regarding stay put.

¹² At the hearing, Principal Laughridge testified that they did not have any text books. The school had not had textbooks in thirteen or fourteen years. They finally received a math text book in September 2019. Regarding the homework Principal Laughridge testified that because █████ did not attend the first day of school, he was not officially enrolled, and therefore she could not give him makeup work. (Tr. 1338-39.)

42.

As a result of the District's stay-put position and Mrs. B.'s refusal to allow [REDACTED] to go into the MID classroom, [REDACTED] missed approximately six days of school work and the OT and ST services he would have received on those day. It appears [REDACTED] returned to school after receiving the court's August 9, 2019 Stay-Put Order. The District did not provide a plan for [REDACTED] to make up the days of instruction or the services that he missed while not in school. (Tr. 388.)

43.

At the hearing several of [REDACTED] teachers and District staff testified. Shandra Christopher is an Exceptional Student Education coordinator in the District. She participated in the April 17, 2019 IEP team meeting and the May 14, 2019 IEP team meeting. Ms. Christopher is familiar with the elementary school curriculum. According to Ms. Christopher, [REDACTED] goals during his fourth-grade year were primarily on the level of the kindergarten or first grade standards. One of his math goals was on a second-grade level. (Ex. P-17; Tr. 34, 130-31.)

44.

Kim Trepanier is the Student Support Facilitator for East Lake. She testified that [REDACTED] teachers are modifying the curriculum for [REDACTED]. Specifically, the teachers are using the accommodations in the IEP and that the nature of the accommodations are such that they amount to a modification of the curriculum.¹³ (Tr. 488, 520-23; Exs. P-5, P-17.)

¹³ Dr. Holly Ward participated in the May 14, 2019 IEP meeting and testified at the hearing. She testified that an accommodation is a bridge to access the standards; whereas, a modification changes the standard. However, she also testified that something could be an accommodation under one circumstance, but a modification under another. Dr. Ward explained that a calculator could be an accommodation, but if the standard is performing basic computations, then the calculator becomes a modification, because it has replaced the standard. Dr. Ward also acknowledged that if a child cannot meet the standard even with accommodations, the standard may need to be modified. In an article written by Dr. Ward, she noted that students who have difficulty reading and meeting the performance standard may need a different way to access the information at a lower complexity and that would be considered a modification. In fact, Dr. Ward was instrumental in helping craft some of [REDACTED] goal. She believed that the goals were appropriate for [REDACTED]. She also acknowledged that the standards had to be modified for [REDACTED] because he would not be able to meet the fifth-grade standards. (Tr. 572-73, 581-82, 650-53; Exs. P-5, P-17, P-84 at 982.)

45.

Ms. Nies was [REDACTED] fourth grade Science and Social Studies teacher. In her class she would use the accommodations in his IEP, but the majority of the time he either worked one-on-one with her or the classroom aide. She did not observe him work independently in her classroom. Ms. Nies believed the work she was asking [REDACTED] to do was “extremely difficult” for him. [REDACTED] performance in her classroom was not even close to grade level. (Tr. 936-40.)

The IEE

46.

As part of Petitioners’ requested IEE, Kellie Murphy, Ph.D. conducted a psychoeducational evaluation over the course of four or five testing sessions. Dr. Murphy reviewed the previous evaluation conducted by the school psychologist in February 2019. She noted that the standard scores on two cognitive tests fell in the deficient range and were consistent with a mild to moderate level of intellectual disability. Dr. Murphy noted that “[m]ild intellectual disability is characterized by scores between 55 and 70.” Whereas, “[m]oderate intellectual disability is characterized by scores between 40 and 55.” She also noted the discrepancy between the teachers and Mrs. B.’s ratings of [REDACTED] adaptive behavior. She opined that the parent ratings “seemed to present a somewhat idealized view of [REDACTED] as having few to any struggles, which sometimes happens when parents misunderstand how to complete these measures accurately for a child who has a disability.” Specifically, she stated, “[t]he measures were generally not written with disability accommodations but are based on a neurotypical population of individuals.” (Ex. P-13.)

47.

Dr. Murphy observed that [REDACTED] had some difficulties with eye contact and other aspects of communication. She noted that he would often close his eyes or avert his gaze to avoid looking at

her or the testing materials. He would mumble responses and did not appear to be aware that Dr. Murphy could not hear or understand him. Dr. Murphy noted that [REDACTED] exhibited low motivation to complete tasks. He required prompting and the promise of external rewards to continue working. He quickly fatigued and occasionally would lie on the floor and appear unresponsive, as if he was sleeping. Sometimes [REDACTED] would complete items as quickly as he could with little regard for accuracy. He would also passively refuse to try some tasks by closing his eyes and turning away. [REDACTED] asked for breaks excessively. Dr. Murphy noted that because of [REDACTED] “significant difficulties maintaining focused attention and effortful performing during testing, his scores are best understood as minimal estimates of his true abilities.” (Ex. P-13.)

48.

To assess [REDACTED] cognitive abilities, Dr. Murphy administered the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V). [REDACTED] Full Scale IQ score was 49, which is in the deficient range and is consistent with a moderate level of intellectual ability. His General Ability Index (“GAI”) was 59, which is consistent with a mild level of intellectual disability. Dr. Murphy opined that the GAI may be a better measure of [REDACTED] general intelligence because it removes the impact of cognitive deficits in working memory and processing speed. (Ex. P-13.)

49.

Dr. Murphy also administered the Comprehensive Test of Nonverbal Intelligence, Second Edition (CTONI-2). It is an intelligence test that is appropriate for individuals who have significant language delays or fine motor difficulties. The individual is only required to point to responses for each item. [REDACTED] Full Scale score was 66, which is in the extremely low range and is consistent with a mild level of intellectual disability. (Ex. P-13.)

50.

To assess ██████ academic achievement, Dr. Murphy administered subtests from the Wechsler Individual Achievement Test, Third Edition (WIAT-III) and the Kaufman Test of Educational Achievement, Third Edition (KTEA-3). On the WIAT-III, ██████ earned a total reading score of 71; however, his reading comprehension score was 59, which is equivalent to the first month of first grade. His math composite score was 52. (Ex. P-13.)

51.

Dr. Murphy assessed ██████ adaptive behavior using the Vineland Adaptive Behavior Scales, Third Edition (Vineland-3). The rating scales were completed by ██████ mother and his resource teacher, Ms. Tanner. His scores based on Mrs. B's ratings were as follows: Adaptive Behavior Composite - 78, Communication - 76, Daily Living Skills - 81, and Socialization - 85.¹⁴ In contrast, ██████ scores based on Ms. Tanner's ratings were as follows: Adaptive Behavior Composite - 66, Communication - 64, Daily Living Skills - 69, Socialization - 64. (Ex. P-13.)

52.

To assess ██████ behavioral, emotional, academic, and social skills, Dr. Murphy used the Conner's Comprehensive Behavior Rating Scale (Conner's CBRS). She obtained ratings from Mrs. B., Mr. B., and Ms. Tanner. Mrs. B. and Mr. B. rated ██████ as "having some social problems, elevated to very elevated academic problems, and very elevated problems with perfectionism." They also rated ██████ as "having significant features of the inattentive type of Attention-Deficit/Hyperactivity Disorder (ADHD) and Obsessive-Compulsive Disorder (OCD) with some

¹⁴ Dr. Murphy noted that the parent ratings were initially higher and inconsistent with her observations of ██████ in her office. When Dr. Murphy reviewed each item with Mrs. B, it was discovered that she had rated certain skills as mastered that were actually above ██████ observed ability level. Dr. Murphy asked Mrs. B to review her ratings and edit any that she overestimated. She explained to Mrs. B that unless an item specifically mentioned doing the skill with help, she should rate ██████ on his ability to perform the skill independently. (Ex. P-13.)

features of Autism Spectrum Disorder (ASD).”¹⁵ Ms. Tanner’s rated [REDACTED] “as having very elevated difficulties with upsetting thoughts and physical symptoms, very elevated learning problems, very elevated perfectionistic and compulsive behaviors.” Ms. Tanner also “rated him as having very elevated symptoms of the inattentive type of ADHD, OCD, and ASD. (Ex. P-13.)

53.

Dr. Murphy concluded that the data gleaned from her evaluation is consistent with a Mild Intellectual Disability. She also diagnosed [REDACTED] with ADHD – inattentive type and noted that he has a history of a Language Disorder. She noted that the eligibility categories of MID and SLI seem appropriate and are supported by the evaluation. She also recommended that the IEP team consider the eligibility category of OHI for ADHD. In her opinion, a placement in the general education setting with paraprofessional support would be insufficient to support [REDACTED] due to the severity of his deficits. She noted that [REDACTED] requires specialized instruction from special education teachers. She further stated that [REDACTED] likely benefits from inclusion to help with communication and social development.” Dr. Murphy also made some recommendations concerning [REDACTED] behavior. She recommended modifications of the curriculum, repetition, use of pictures and manipulatives, and alternate test formats. She noted that he will struggle with written tests. Regarding math, Dr. Murphy noted that [REDACTED] would need “to understand quantities and the number system before he can do operations.” According to Dr. Murphy, [REDACTED] “would benefit from specialized instruction in math with concrete (manipulative objects) and representational (picture) examples.” (Ex. P-13.)

¹⁵ Dr. Murphy noted that Mrs. B.’s initial ratings were inconsistent with her observations in the office. Mrs. B. initially rated [REDACTED] “as not having any academic difficulties or any difficulties paying attention for his age.” Dr. Murphy re-explained the scale to Mrs. B. and told her that she was to compare [REDACTED] behaviorally to neurotypical eleven-year-old boys. Mrs. B. re-rated [REDACTED] and the initial results were considered to be invalid. (Ex. P-13.)

54.

Dr. Murphy testified at the hearing. Her testimony was largely consistent with her report of her evaluation. In addition to the opinions in her report, Dr. Murphy opined that [REDACTED] task avoidant behavior is not necessarily due to his intellectual disability. She acknowledged that giving a child with an intellectual disability work that is too challenging may result in some task-avoidant behaviors; however, because [REDACTED] avoided even simple tasks, she believes the behavior is due to his ADHD. (Tr. 780-82.)

55.

Robert Babcock, Ph.D., BCBA-D, is a board-certified behavior analyst and a licensed psychologist. As part of Petitioners' requested IEE, he conducted an FBA. He also testified at the hearing. Dr. Babcock reviewed the FBA conducted by the District and found it to be inadequate, because it only focused on one behavior rather than assessing all the problem behaviors, did not define the behavior for the staff collecting the data, and did not give a hypothesis about the function of the behavior. (Tr. 135,166, 173; Ex. P-9.)

56.

Dr. Babcock acknowledged that he was tasked with analyzing the function of [REDACTED] behaviors; however, when asked if he did so, he stated that to conduct an analysis of [REDACTED] behavior, he would have to come into the school and collect data for ten days. Dr. Babcock also acknowledged that he did not define what would be considered off-task behaviors in his report, and he did not describe the off-task behaviors in which [REDACTED] engaged. (Tr. 220-21.)

57.

Based on his observations of [REDACTED] teachers, Dr. Babcock believed that the attention the teachers gave [REDACTED] by redirecting him when he was engaged in off-task behavior was actually reinforcing that behavior.¹⁶ (Tr. 147-48.)

58.

Dr. Babcock noted that [REDACTED] has difficulty with transitioning from one class to another, in that he routinely arrives ten to fifteen minutes late for class. He observed that [REDACTED] carries a large backpack that contains a three-inch binder that holds spiral note books for science, social studies, and reading/math, a spiral note book with an agenda and a calendar to record comments on academic work for parents, a separate parent communication folder, two pouches for school supplies, a token board, head phones, a chrome book, snacks, water bottles, and his glasses. Additionally, [REDACTED] carried a clipboard with his behavior sheets. Dr. Babcock observed that packing his belongings into his backpack appeared to be a problem for [REDACTED] and caused him to be late to classes. (Ex. P-9; Tr. 156-59.)

59.

On cross-examination, Dr. Babcock agreed that he was able to interpret and understand the evaluations conducted by the school psychologist and Dr. Murphy. He also agreed that the results of the evaluations were consistent with [REDACTED] having a significant cognitive deficit. (Tr. 245-46.)

¹⁶ Dr. Babcock recommended some strategies that [REDACTED] teachers could use. For example, he recommended that when [REDACTED] is engaged in off-task behavior, the teacher should attend to it, but ignore it, and praise a student sitting beside [REDACTED] for being on-task. (Tr. 256-59.)

60.

Occupational therapist Kimberlee Wing conducted an OT IEE of [REDACTED] on October 29, 2019.¹⁷ She also testified at the hearing. Ms. Wing administered various tests and rating scales. Based on the data she gleaned from her evaluation, she concluded that [REDACTED] fine motor skills and manual dexterity were well below average. [REDACTED] had difficulty with precise movements, such as changing direction of lines and reproduction of shapes. He also had difficulty with manual dexterity. [REDACTED] was unable to pick up items using a pincer grasp. During the manual dexterity subtest, Ms. Wing noticed that [REDACTED] sometimes avoided crossing the midline of his body. She noted that [REDACTED] difficulty with precise finger movement for tasks and visual motor integration will impact his ability to write, manipulate small items, tie his shoes, fasten clothing, and handle tools or utensils. She further noted that those difficulties may result in frustration and avoidance of tasks. (Ex. P-11; Tr. 697-701.)

61.

Ms. Wing also determined that [REDACTED] visual-motor integration was well below average, which will likely impact his hand writing and his ability to change directions while writing. She administered the Test of Visual Perceptual Skills – 4 to determine [REDACTED] perceptual strengths and weaknesses. Ms. Wing noted that [REDACTED] was very attentive to the tasks where he felt successful; however, when he was overwhelmed by the visual input, [REDACTED] would impulsively point to a response without analyzing the information. On that test, he exhibited weaknesses in spatial relationships, sequential memory, and figure ground perception. Those weaknesses will manifest

¹⁷ As noted in the court's order granting Petitioners' motion for summary determination in part, the District initially denied the Petitioners' request for an OT evaluation as part of the IEE. In that order, the undersigned concluded that the District's reasoning was flawed, and the District was required to provide the OT evaluation as part of the IEE.

in a tendency to be overwhelmed with too much information on a page, difficulty spelling, and difficulty keeping his place when reading. (Ex. P-11; Tr. 701-04.)

62.

Regarding spatial relationships, [REDACTED] avoids crossing the midline of his body. Ms. Wing noted that he either shifts his posture to compensate or, for example, uses one hand to move objects to the middle and then uses the other hand to complete the task. This compensation is tiring and impacts [REDACTED] speed and efficiency. Additionally, [REDACTED] has poor visual tracking and that together with his difficulty crossing the midline will impact decoding of letters, placing them on a line or under a line, and following directions. (Ex. P-11; Tr. 692-93, 704-05, 708-10, 712-17.)

63.

According to Ms. Wing, [REDACTED] has the presence of some primitive reflexes that are usually present during infancy, but which are later integrated into normal motor patterns. The presence of these residual reflexes impact [REDACTED] ability to self-regulate and contribute to his frustration tolerance, organization, and motor skills. (Ex. P-11.)

64.

[REDACTED] also has low muscle tone. The low muscle tone and his difficulty with fine motor control affect his sitting posture and fine motor precision. In Ms. Wing's opinion, [REDACTED] combined difficulty of internal organization for thought processes, together with inefficient motor skills and processing speed, are likely to cause [REDACTED] anxiety regarding writing and result in avoidance and distractibility. (Ex. P-11.)

65.

Finally, Ms. Wing opined that [REDACTED] requires OT three times per week in thirty-minute sessions "to address the foundational skills of reflex integration, vestibular processing, muscle

tone, motor planning and fine motor control, as well as to improve visual perceptual skills, writing, regulation, and social participation.” The thirty-minute sessions could be a combination of one-on-one, small group, and push-in services. Her report contains a multitude of recommendations of the types of tasks or activities that would assist ██████ in addressing his areas of need. In addition to the three sessions, she recommends OT consultative services, where the occupational therapist would consult with the teaching and support staff to help adapt some of the fine motor activities and address some of his perceptual needs. She suggests starting with once a week for thirty minutes for a month, then decreasing the consultative services to every other week, and eventually to once a month. (Ex. P-11; Tr. 734-38.)

III. CONCLUSIONS OF LAW

1.

The IDEA enables a parent to bring challenges to the “identification, evaluation, or educational placement of the child, or the provision of a free appropriate education to [the] child” by filing a due process complaint. 20 U.S.C. § 1415(b)(6)(A); Shaffer v. Weast, 546 U.S. 49, 62 (2005). The “[IDEA] ‘creates a presumption in favor of the education placement established by a child’s IEP, and the party attacking its terms bears the burden of showing why the educational setting established by the IEP is not appropriate.’” Id.; see Ga. Comp. R. & Regs. 160-4-7-.12(3)(n) (“The party seeking relief shall bear the burden of persuasion with the evidence at the administrative hearing.”). Thus, in this case, Petitioner bears the burden of persuasion and must produce sufficient evidence to support the allegations raised in the Complaint.

Brief Overview of IDEA

2.

The 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 and prepare them for future education, employment, and independent living” 20 U.S.C. § 1400(d)(1)(A).

3.

The IDEA requires school districts to provide a student eligible for student education services a FAPE in the least restrictive environment (“LRE”). 20 U.S.C. § 1412; 34 C.F.R. §§ 300.17, 300.114-300.118. The requirement to provide a FAPE is satisfied by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982). The Supreme Court in Rowley defined a FAPE as follows:

Implicit in the congressional purpose of providing access to a “free appropriate public education” is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child.

Id. at 200-201.

4.

In Rowley, the Supreme Court set out a two-part inquiry to determine if a local education agency satisfied its obligation to provide a FAPE to a student with disabilities. Id. at 206. First, a determination must be made as to whether there has been compliance with the procedures set forth in the IDEA, and second, whether the IEP, as developed through the required procedures, is “reasonably calculated to enable the child to receive educational benefit.” Id. at 206-07.

5.

In 2017, the Supreme Court clarified the second portion of this inquiry: “[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” Endrew F. v. Douglas

Cnty. Sch. Dist., 137 S. Ct. 988, 999 (2017). This requirement does not require that a child’s IEP bring the child to grade-level achievement, but it must aspire to provide more than a *de minimis* educational progress. Id. at 1000-01. If it is not reasonable to expect a child to achieve grade-level advancement, then his IEP need not aim for such. Id. at 1000. Nevertheless, “his educational program must be appropriately ambitious in light of his circumstances.” Id.

6.

In matters alleging a procedural violation of the IDEA, the court may find that a child did not receive a FAPE only if 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. 20 U.S.C. § 1415 (f)(3)(E)(ii); 34 C.F.R. § 300.513(a). In other words, an IDEA claim is viable only if those procedural violations affected the substantive rights of the child or parents. See Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 518 (2007) (holding “parents enjoy rights under IDEA, they are entitled to prosecute IDEA claims on their own behalf).

Prior Written Notice

7.

Petitioners alleged that the District violated the IDEA’s Prior Written Notice (“PWN”) procedural requirement. Specifically, Petitioners allege that the District failed to provide PWN addressing its decision to move ██████ to the MID class, describing the MID placement, or addressing its delay in providing evaluations. The IDEA requires the District to provide written notice meeting certain requirements before it proposes to change the educational placement of a disabled child. 20 U.S.C. § 1415(b)(3). The notice must include the following:

- (1) A description of the action proposed or refused by the agency;

- (2) An explanation of why the agency proposes or refuses to take the action;
- (3) A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;
- (4) A statement that the parents of a child with a disability have protection under the procedural safeguards of this part and if this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;
- (5) Sources for parents to contact to obtain assistance in understanding the provisions of this part;
- (6) A description of other options that the IEP Team considered and the reason why those options were rejected; and
- (7) A description of other factors that are relevant to the agency's proposal or refusal.

34 C.F.R. § 300.503.

8.

Georgia DOE Rules 160-4-7-.09 (5)(a) and (b), entitled "Notice to Parents/Guardian/Surrogate," track this federal regulation. Subsection (5)(c) of Rule 160-4-7-.09 provides as follows:

In most cases, the above Notice requirements can be addressed by providing the parent(s) with a copy of documents such as the consent to evaluate, consent for placement, consent for accessing a child's or parent's public benefits or insurance, evaluation report, eligibility report, invitation to a meeting, the full individualized education program (IEP) (with minutes, if taken), and/or other relevant documents, as appropriate.

Ga. Comp. R. & Regs. 160-4-7-.09(5)(c).

9.

PWN may be provided through either a production of educational records, which provides an explanation of the District's actions in accordance with the above referenced rules and regulations, or within ten days after a party files a due process hearing request. K.A. v. Fulton

Cnty. Sch. Dist., No. 1:11-CV-727-TWT, 2012 U.S. Dist. LEXIS 136327, at *13 (N.D. Ga. Sept. 21, 2012); 20 U.S.C. § 1415(c)(2)(B)(i)(I); 34 C.F.R. § 300.508(e)(1); see A.B. v. S.F. Unif. Sch. Dist., No. C 07-4738 PJH, 2008 U.S. Dist. LEXIS 91298 at *30-31 (N.D. Cal. Oct. 30, 2008 (IEP document can serve as PWN)). .

10.

The record in this case shows that Petitioners, their attorney, and their educational consultant participated in the May 14, 2019 IEP team meeting during which the change in where ██████ would receive his English/Language Arts and Math instruction was thoroughly discussed. Petitioners received a copy of the IEP approximately ten days later. The IEP served as PWN. Petitioners argue that because the IEP was implemented prior to their receipt of the IEP, it could not serve as PWN. Petitioners' argument misses the mark. The portion of the IEP that was implemented from May 15, 2019 through the end of the school year was not a "an action proposed or refused" by the District. Petitioners' did not have a disagreement with that portion of the IEP. Furthermore, Petitioners' have failed to show that their receipt of the IEP document ten days after the meeting impaired the parents' ability to participate or denied ██████ a FAPE.

11.

Furthermore, Petitioners argue that there was no PWN concerning the "delays or failures to conduct evaluations, including the OT evaluation." The undersigned concludes that delays in conducting evaluations do not amount to a "proposed" or "refused" action by the District and therefore there is no requirement for PWN. The failure of the District to conduct the OT evaluation during the reevaluation appears to have been an oversight as opposed to a refusal, and thus will be addressed elsewhere.

Petitioners' Claims Regarding the District's Delay in Conducting the Reevaluation

12.

Petitioners argue that the District's delay in conducting the reevaluation from the time that Mrs. B. signed the consent form on October 22, 2018, until they were provided the reports on April 12, 2019 and April 16, 2019 was unreasonable. Petitioners assert that the delay in conducting the evaluations and providing the reports denied parent participation.¹⁸ Petitioners' provided no evidence that a delay in evaluations actually denied parent participation. Although Petitioners would have preferred the evaluations to be completed sooner and the reports to be provided sooner, they received the reports prior to the IEP team meeting and participated vigorously with the assistance of their attorney and educational consultant.

13.

In addition to Petitioners' assertions regarding the delay of evaluations, they assert that because the AT teachers did not obtain performance data while [REDACTED] was using the AT, the AT evaluation is incomplete and inadequate. Petitioners presented no evidence that the failure to obtain performance data impacted [REDACTED] in any way.

The Determination that [REDACTED] Would Take the GAA

14.

Georgia Department of Education Rule 160-3-1-.07(1)(h) defines the GAA as follows:

[A]n alternate assessment based on alternate achievement standards for students with significant cognitive disabilities identified and served in accordance with the Individuals with Disabilities Education Act (IDEA) and whose IEP team has determined the students are unable to reasonably participate in the regular assessment program. The purpose of the GAA is to ensure all students, including students with significant cognitive disabilities, are provided access to the state-adopted content standards and given the opportunity to demonstrate progress

¹⁸ The undersigned notes that some portion of the delay in having an IEP team meeting to discuss the evaluations was due to Petitioners insisting on having all of the evaluations completed before having a meeting and the schedule of Petitioners' attorney.

toward achievement of the state standards.

Ga. Comp. R. & Regs. 160-3-1-.07(1)(h).

15.

As noted above, the IEP team reviewed the following questions to determine if [REDACTED] should take the GAA:

- (1) Does the student require intensive, individualized instruction in a variety of settings?
- (2) Does the student have a significant cognitive disability?
- (3) Does the student require specialized supports to access and participate in the grade-level Georgia Standards of Excellence that require modifications based on the student's Present Levels of Academic Achievement and Performance?
- (4) Does the student require specialized supports to demonstrate age-appropriate adaptive behavior?

16.

The members of the IEP team, apart from Mrs. B., determined that the answers to all these questions were "yes." This court agrees. It is without question that [REDACTED] requires intensive, individualized instruction in a variety of settings. His general education teachers and his special education teacher explained that they or a paraprofessional must work with him one-on-one. He does not work independently. His reading comprehension requires that many things are read aloud to him. Further, Dr. Murphy opined that [REDACTED] required specialized instruction from special education teachers, due to the severity of his deficits.

17.

[REDACTED] has a significant cognitive disability. Petitioners argue that because his IQ scores are in the MID range, his disability should not be considered significant. As an initial matter, Dr. Babcock agreed that the results of [REDACTED] evaluations are consistent with a significant cognitive disability. Furthermore, significant is not defined for the purposes of the GAA. However, it can

be defined as having meaning, having or likely to have influence or effect, of a notably or measurably large amount, or probably caused by something other than mere chance. Significant, Merriam Webster Online Dictionary, www.merriam-webster.com/dictionary/significant (last visited Jan. 19, 2020). The state and federal regulations define an intellectual disability as, “significantly subaverage general intellectual functioning which exists concurrently with deficits in adaptive behavior that adversely affects educational performance and originates before age 18.” Ga. Comp. R. & Regs. 160-4-7-.05 Appendix (e); see also 34 C.F.R. § 300.8(c)(6) (“Intellectual disability means significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period, that adversely affects a child’s educational performance.”). Significantly subaverage general intellectual functioning is defined as an IQ of 70 or below “as measured by a qualified psychological examiner on individually administered, nationally normed standardized measures of intelligence.” The regulations do not limit the description of significantly subaverage to the moderate or severe levels of intellectual disability. [REDACTED] cognitive disability adversely affects his educational performance. For these reasons, the undersigned concludes that [REDACTED] has a significant cognitive disability.

18.

[REDACTED] requires specialized supports to access and participate in the grade-level Georgia Standards of Excellence. His teachers stated during the IEP meetings and during the hearing that he is not able to access the grade level standards as they are written for his grade level. His IEP goals have modified what he is required to do. For example, one of the grade-level standards is to write a multi-paragraph essay. [REDACTED] cannot do this. Thus, his goal is to write a sentence. Furthermore, [REDACTED] requires additional supports such as modified testing and reading aloud of questions and instructions.

19.

Finally, [REDACTED] requires specialized supports to demonstrate age-appropriate adaptive behavior. His resource teacher explained that sometimes [REDACTED] does not come to her class on his own; she must retrieve him from his previous class. He requires assistance to open certain types of packages, and he struggles socially. While the Petitioners now disagree with the Positive Behavior Support Plan, the District instituted it to assist [REDACTED] with some of his social and noncompliant behavior. For these reasons, the GAA is the appropriate assessment for [REDACTED]

Petitioners' Claims Regarding the District's Failure to Implement the IEP

20.

The Eleventh Circuit has recently adopted a standard regarding implementation cases. Specifically, the court has decided that to be successful on a failure-to-implement claim, the petitioner “must demonstrate that the school has materially failed to implement a child’s IEP.” L.J. v. Sch. Bd., 927 F.3d 1203, 1211 (11th Cir. 2019). The court further clarified that “[a] material implementation failure occurs only when a school has failed to implement substantial or significant provisions of a child’s IEP.” Id.

21.

Petitioners argue that the District’s failure to provide [REDACTED] with a substitute teacher who was trained in the Wilson reading program during the six weeks his teacher was out on family medical leave was a failure to implement his IEP. This court disagrees. Nowhere in the operative IEPs is there any mention of the Wilson reading program except contained in statements made by Mrs. B. or her attorney. The IEP does not specify that the Wilson reading program is part of his IEP.

Petitioners also argue that the District's delays in conducting evaluations and failure to conduct the OT evaluation was a failure to implement the IEP. Petitioners cite no authority to support the proposition that failure to evaluate amounts to a failure to implement the IEP. As noted above, the IDEA enables a parent to bring challenges to the "identification, evaluation, or educational placement of the child, or the provision of a free appropriate education to [the] child" by filing a due process complaint. 20 U.S.C. § 1415(b)(6)(A). A failure to evaluate is a failure to evaluate. It could also be a failure to provide a FAPE. But it does not fall within the failure to implement the IEP category, absent some statement in the IEP that evaluations will be conducted in a specific manner, by a specific individual, or by a specific date.

Petitioners' Claims Regarding LRE

The IDEA states, "[t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."¹⁹ 20 U.S.C. § 1412(a)(5)(A). Congress created an IDEA preference for educating students with disabilities with their typical peers. *Id.*; see 34 C.F.R. §§ 300.114-300.116; Ga. Comp. R. & Regs. 160-4-7-.07. There is a

¹⁹ While there is the requirement to use supplementary aids and services, accommodations, and modifications to mainstream students to the maximum extent appropriate, "the requirement is not limitless." *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989). "States are not required to provide "every conceivable supplementary aid or service to assist the child." *Id.* Nor does the Act require regular education teachers "to devote all or most of their time to one [disabled] child or to modify the curriculum beyond recognition." *Id.*

tension between IDEA's goals of mainstreaming and meeting each child's unique needs. As the Eleventh Circuit has said:

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

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

24.

The Eleventh Circuit adopted a two-part test for analyzing LRE claims:

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

Greer, 950 F.2d at 696 (citations omitted). The analysis "is an individualized, fact-specific inquiry that requires us to examine carefully the nature and severity of the child's handicapping condition, his needs and abilities, and the school's response to the child's needs." Id.

25.

The Eleventh Circuit has provided three factors for analyzing if the student can be educated in a general education placement: (1) The school district may compare the educational benefits the student will receive in the general setting with the benefits he will receive in the special education setting; (2) The school district may consider what effect the presence of the student in a general education setting would have on the education of other students in that setting; and (3) The school

district may consider the cost of the supplemental aids and services necessary to achieve a satisfactory education in general education setting. Greer, 950 F.2d at 697.

26.

In considering the LRE appropriate for a student, the IEP team must consider the continuum of placement options. 34 C.F.R. § 300.115; Ga. Comp. R. & Regs. 160-4-7-.07. Beginning with the least restrictive placement, the options for school-age children are: (1) the general classroom; (2) instruction outside the general classroom; (3) a separate day school or program; (4) home-based instruction; (5) residential placement; and (6) hospital/homebound instruction. Id. Additionally, the District must have available supplementary services “such as resource room[s] or itinerant instruction” to be provided with a regular education class placement. 34 C.F.R. § 300.115(b)(2).

27.

Here, Petitioners argue that the District failed to do the proper analysis before moving ██████ to a more restrictive setting: the MID class. Petitioners have failed to present an LRE claim. ██████ received his English/Language Arts and Math instruction in a resource classroom; a placement that the Petitioners want. That classroom is a special education classroom with a special education teacher and students with disabilities. Petitioners failed to show that moving ██████ from his small group resource classroom to the small group MID classroom would change the amount of exposure he has to nondisabled students. All other access ██████ had to nondisabled peer prior to the proposed change remains the same. He will be in a regular education classroom for Science, Social Studies, homeroom, and specials. He will also eat lunch with his regular education homeroom. Petitioners seem to be concerned about the level of the students’ disabilities and the adaptive curriculum in

the MID class. However, Petitioners cited no authority, and the court found no authority, supporting the proposition that an adaptive curriculum or a change in the type or extent of students' disabilities in the classroom is an LRE issue.

28.

Notwithstanding, even if it is an LRE issue, the District has mainstreamed [REDACTED] to the maximum extent appropriate. The proposed IEP places [REDACTED] in regular education classes for Science, Social Studies, homeroom, and specials. Additionally, he will eat lunch with his regular education homeroom. [REDACTED] English/Language Arts and Math goals are generally on the first-grade level. He is not able to access the grade-level standards even with his accommodations. These modifications have made it such that [REDACTED] is not required to perform at the grade-level standards in English/Language Arts and Math. Furthermore, several of his teachers have said that he requires most if not all of their time. This has an effect on the other students in his regular education classes and his resource class.

Petitioners' Claim that [REDACTED] IEP Denied FAPE

29.

Petitioners argue that the District denied [REDACTED] a FAPE by failing to provide adequate OT services, AT, behavioral supports, accommodations, and modifications. Petitioners presented insufficient evidence that the District failed to provide adequate AT. Similarly, Petitioners presented insufficient evidence that the District failed to provide adequate behavioral supports. Petitioners assert that the District's FBA was deficient. The remedy for a deficient FBA is to request an IEE FBA, which the Petitioners did. However, the court concludes that the IEE FBA conducted by Dr. Babcock was also deficient in that it did not analyze the function of [REDACTED]

behaviors. Petitioners also argue that the absence of a BIP is a denial of a FAPE. Nevertheless, Petitioners, through their attorney, agreed, at the May 14, 2019 IEP team meeting, to wait to develop a BIP after the independent FBA was conducted; however, the IEP team decided to make changes to the Positive Behavior Support Plan. Petitioners' attorney made several suggestions that were incorporated into the Positive Behavior Support Plan. Petitioners cannot have it both ways.

30.

Petitioners appear to be asserting that the IEP denied █████ a FAPE, because the accommodations were insufficient and because there was no modification of the curriculum. The court finds these arguments are without merit. █████ IEP contained a multitude of accommodations, even before the May 14, 2019 IEP team meeting. His teachers testified that they were using the accommodations. Furthermore, during the May 14, 2019 IEP team meeting, Petitioners' attorney and educational consultant actively participated in exploring additional accommodations that were added to the IEP.

31.

Petitioners appear to assert that because there is nothing listed under a heading entitled "Modifications," that there was, in fact, no modification of █████ curriculum.²⁰ That is simply not true. █████ IEP goals represent a modification of the curriculum. He is not required to perform the same grade-level standards that his non-disabled peers are required to perform in English/Language Arts and Math. For example, █████ was not required to write a multi-paragraph essay; rather, one of his IEP goals was to write a sentence using two adjectives. Additionally, as Petitioners' own expert, Dr. Ward, testified, some accommodations become modifications if they

²⁰ Petitioners also rely on conversations with District staff who purportedly told Mrs. B. that the curriculum could not be modified. It is hard to know the context of those conversations; however, it is clear that the District and █████ teachers were modifying the curriculum for him.

replace the grade-level standard. Some of [REDACTED] accommodations fall into that category. Finally, [REDACTED] Music teacher specifically reported modifying his music curriculum.

32.

Notwithstanding, the court agrees with Petitioners that the inadequate OT services in the IEP is a denial of a FAPE. On October 17, 2018, Mrs. B. asked the District to conduct a full reevaluation of [REDACTED] including a psychological evaluation, an FBA, an OT evaluation, a speech/language evaluation, and an AT evaluation. [REDACTED] previous evaluation was conducted in October and November of 2014, when he was in kindergarten. At the time of his mother's request, [REDACTED] was receiving OT for which he had a need. The District conducted some assessments of [REDACTED] but it did not conduct an OT assessment.

33.

While the failure to conduct the OT evaluation may have been an oversight, the District compounded the problem when it refused to conduct an OT IEE. Previously, the court ruled that the District's rationale for its failure to provide the OT IEE was an incorrect statement of the law. Since that ruling, occupational therapist Kimberlee Wing conducted an OT IEE evaluation of [REDACTED] on October 29, 2019. Ms. Wing's report was thorough, and her testimony was persuasive. She determined that [REDACTED] has deficits in fine motor skills and manual dexterity. Additionally, he has difficulty with precise finger movement for various tasks including his ability to write. She noted that these difficulties may result in frustration and avoidance of tasks. [REDACTED] also has deficits in visual-motor integration, spatial, relationships, and sequential memory. The deficits she observed together with processing delays could result in anxiety, task avoidance, and distractibility. Ms. Wing opined that [REDACTED] requires OT three times per week in thirty-minute sessions and consultative services to be weaned over time. Currently, [REDACTED] is only receiving OT services once a week for

thirty minutes. Because [REDACTED] has significant OT needs and because those needs are not adequately being addressed, the undersigned concludes that the IEP denies [REDACTED] a FAPE.

***Petitioners' Claim Regarding Lost Services During the Parties' Disagreement
Over the Correct Stay-Put Placement***

34.

Petitioners seek services for the six days [REDACTED] did not attend school while the parties were disagreeing on the correct stay-put placement. The District asserts that it was Mrs. B.'s refusal to allow [REDACTED] to go to the MID classroom that caused him to miss out on services. The court finds the District's argument to be unfounded. As noted in the Stay-Put Order, the District's argument regarding the correct stay-put placement defeated the purpose of the stay-put provision. Specifically, the District argued that because portions of the IEP had been implemented, the new placement for the 2019-2020 school year was the correct stay-put placement. That placement had not been implemented, and it was that placement that Petitioners' were opposing in their Complaint. Had Mrs. B. allowed [REDACTED] to attend school in the MID classroom, the District may have argued that the new placement had been implemented and was now the stay-put. Mrs. B. was given a Hobson's choice. Her refusal to acquiesce does not amount to unreasonable conduct.

35.

Rather, it was the District's creative position on stay-put that caused [REDACTED] to miss services for those six days. Accordingly, he is entitled to compensatory services for that time period.²¹

Remedy

36.

As set forth above, Petitioners proved, by a preponderance of the evidence, that the District violated IDEA by failing to conduct an OT evaluation during the reevaluation, refusing to provide

²¹ Any claims not specifically addressed herein are denied.

an OT IEE, and failing to provide adequate OT services based on [REDACTED] significant needs. Additionally, the position the District took during the disagreement regarding stay-put caused [REDACTED] to miss six days of services.

37.

The IDEA provides that when a court finds a statutory violation, it “shall grant such relief as the court determines is appropriate.” 20 U.S.C. § 1415(i)(2)(C)(iii). See Cobb Cnty. Sch. Dist. v. A.V., 961 F. Supp. 2d 1252, (N.D. Ga. 2013). The courts have interpreted this to mean that a court has “broad discretion” to “fashion discretionary equitable relief.” Florence Cnty. Sch. Dist. Four v. Carter ex rel. Carter, 510 U.S. 7, 15-16 (1993) (internal quotations and citations omitted); Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1285 (11th Cir. 2008), quoting Sch. Comm. of the Town of Burlington, Mass. v. Dep’t of Educ. of Mass., 471 U.S. 359, 374 (1985). Remedies for a violation of FAPE may include compensatory education, reimbursement, declaratory relief, and injunctive relief. See generally Thomas A. Mayes et al., Allocating the Burden of Proof in Administrative and Judicial Proceedings Under the Individuals with Disabilities Education Act, 108 W. Va. L. Rev. 27, 41 (2005).

38.

“[The Eleventh Circuit] has held compensatory education is appropriate relief where responsible authorities have failed to provide a handicapped student with an appropriate education as required by [the Act].” Todd D. ex rel. Robert D. v. Andrews, 933 F.2d 1576, 1584 (11th Cir. 1991) (citing Jefferson Cnty. Bd. of Educ. v. Breen, 853 F.2d 853, 857 (11th Cir. 1988)). Compensatory education provides services “prospectively to compensate for a past deficient program.” G v. Fort Bragg Dependent Sch., 343 F.3d 295, 308 (4th Cir. 2003). Compensatory education is awarded to account for the period of time that a petitioner student was deprived of his

right to a FAPE. Mary T. v. Sch. Dist. of Philadelphia, 575, F.3d 235, 249 (3d Cir. 2009). This remedy accrues from the point that the school district knew or should have known that an IEP failed to confer a greater than *de minimis* educational benefit to the student. Id. Thus, if compensatory education is appropriate, the calculation for relief should be for a period equal to the period of deprivation, less the time reasonably required for the school district to rectify the problem. Id. A compensatory award should put the child in the position he would have been “but for the violation of the Act.” Draper, 518 F.3d at 1289.

39.

The District is **ORDERED** to provide [REDACTED] with forty (40) thirty-minute sessions of direct OT services. Those services shall be provided at a time that least disrupts [REDACTED] academic classes. They may be provided during school, after school, on the weekends, or during the summer, at Petitioner’s choice. The District may use its own staff to provide the services or at its choice may offer the Petitioners private OT services to be paid for by the District. The services are to address the needs specified in Ms. Wing’s report and employ the methods and tasks she recommended. The District is required to provide the services within a reasonable amount of time, taking into consideration the Petitioners’ schedules.

40.

The District is **ORDERED** to provide [REDACTED] with one (1) additional ST session. Additionally, the District is **ORDERED** to provide [REDACTED] with six days of tutoring in English/Language Arts, Math, Social Studies, or Science. That tutoring should be used to assist [REDACTED] with lessons that he will be working on during the remainder of this school year, at the parent’s choice.

41.

In terms of prospective relief, the Court concludes that [REDACTED] is entitled to an amended IEP, providing three thirty-minute sessions of direct OT services per week. Those services may be a combination of one-on-one, small group, and push-in services, as determined by the IEP team. The services shall focus on the needs described by Ms. Wing and shall incorporate the activities and tasks she recommended to address [REDACTED] needs. In addition to the three sessions, the IEP shall also provide OT consultative services on the schedule recommended by Ms. Wing. The District is hereby **ORDERED** to convene an IEP team meeting of all required members within two weeks of the date of this Final Decision to amend the IEP consistent with the Court's orders.

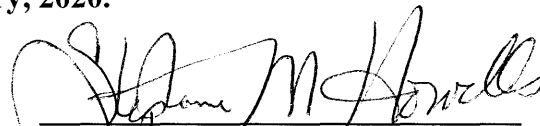
42.

All other requested relief not specifically granted above is hereby **DENIED**.²²

IV. DECISION

For the reasons stated above, the Court finds that the District violated Petitioners' substantive rights under IDEA. Petitioners are entitled to the relief set forth above.

SO ORDERED, this 27th day of January, 2020.


STEPHANIE M. HOWELLS
Administrative Law Judge

²² The Court has not granted the Petitioners an AT IEE as relief; however, because the District previously agreed to provide the AT IEE, the Court expects the District to uphold its agreement.