UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[redacted]., through [redacted] and [redacted] and [redacted] and [redacted]

Plaintiffs,

v.

HENRY COUNTY SCHOOL DISTRICT,

Defendants.

CIVIL ACTION NO. [redacted]

ORDER

This matter came before the Court on Plaintiffs [redacted] through [redacted] and [redacted] and [redacted] and [redacted]s (collectively "Plaintiffs") motion for Final Judgment ("Motion"). ECF No. 61. Having reviewed and fully considered the papers filed therewith, including the administrative agency record below, the Court finds as follows:

I. BACKGROUND

[redacted] was a student at East Lake Elementary School ("East Lake") in the Henry County School District ("HCSD" or the "District") at the time the action giving rise to this Motion was filed. [redacted] has Down Syndrome and is eligible for services under the Individuals with Disabilities Education Act ("IDEA" or the "Act") as a student with a disability. His categories of eligibility were Mild Intellectual Disability ("MID"), Other Health Impairment ("OHI") and Speech

Language Impairment ("SLI"). As such, [redacted] 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.

During the 2018-2019 school year, [redacted] was in the fourth grade. He was placed in general education classes for Art, Music and Physical Education ("Specials"); general education classes with paraprofessional support for Science and Social Studies; and a small group resource class ("IRR") for Language Arts and Math. The IRR classroom is a small group instructional setting for students with disabilities. The disabilities of the students in the classroom may vary, but students receive specialized instruction from a special education teacher. [redacted] also received thirty minutes of speech therapy ("ST") four times per week and thirty minutes of occupational therapy ("OT") once per week.

On October 4, 2018, the IEP team convened a meeting to discuss some behaviors [redacted] was exhibiting at school. This included some noncompliant behavior, such as refusing to do his work or talking loudly to an imaginary friend. [redacted]s teachers expressed that his behavior was impeding his learning.

On October 17, 2018, [redacted] consented to a reevaluation of [redacted] Specifically, she requested that the District conduct a full re-evaluation of [redacted] to include

psychological, functional behavior ("FBA"), OT, speech/language and assistive technology ("AT") assessments.

As part of [redacted]s reevaluation, an AT evaluation was conducted in December 2018, an FBA was conducted in January 2019, a psychoeducational evaluation was conducted in February 2019 and a speech/language evaluation was conducted in March and April 2019.

An OT evaluation was not completed even though OT is a known area of need for [redacted] The District's previous OT evaluation of [redacted] conducted in 2013, identified that [redacted] was functioning in the "significantly subaverage range" in visual motor abilities and in the "definite dysfunction range" in sensory processing (socialization, vision, ideas and body awareness and planning).

On April 12, 2019, Plaintiffs were given a copy of the psychoeducational evaluation, and on April 16, 2019, Plaintiffs were provided with a draft IEP, a draft Eligibility Report, a draft Positive Behavior Support Plan, an IEP Progress Report, FBA data and reports and the AT and speech language evaluations.

An IEP team meeting was held on April 17, 2019, to discuss the results of the evaluations and [redacted]s eligibility for services and to begin drafting the IEP.

To assess [redacted]s cognitive abilities, School Psychologist, 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, which is the equivalent of a full-scale IQ score, [redacted] scored 45 on the Fluid-Crystalized Index. That score was in the deficient range and was in the 0.1 percentile of children the same age as [redacted] On the DAS-II, which is also equivalent to a full-scale IQ score, [redacted]s General Conceptual Ability score was 47. That score was also in the deficient range and was in the 0.1 percentile of children the same age as [redacted]

To assess [redacted]s 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. [redacted] scored 58 on the VMI-6. That score was in the deficient range and was in the 0.6 percentile of children the same age as [redacted]

Ms. Meddaugh administered the Kaufman Test of Educational Achievement, Third Edition (KTEA-3) to assess [redacted]s educational achievement. On the KTEA-3, [redacted] scored 57 on the Academic Skills Battery, 64 on the Reading Composite, 55 on the Math Composite and 43 on the Written Language Composite. These scores were all in the deficient range.

To assess [redacted]s adaptive behavior (*i.e.*, his self-care and life skills), Ms. Meddaugh asked [redacted] and two of [redacted]s teachers, Ms. Wendy Tanner (IRR) and Ms. Holly Nies (Social Studies and Science), to complete the rating scales. [redacted]s composite score on the Adaptive Behavior Assessment System, Third Edition (ABAS-3), based on [redacted]s responses, was 91, which is in the average range. This score was not commensurate with [redacted]s IQ, Ms. Meddaugh's observations of [redacted] or the previous adaptive scales completed by [redacted]s parents. One example of a response that Ms. Meddaugh noted was inaccurate pertained to [redacted]s ability to tell time on an analog clock. [redacted] 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 analog clock, [redacted] should have rated [redacted] as not being able to do so.

In contrast to the ratings obtained from [redacted] the composite score obtained from Ms. Tanner's rating scale was 62, and Ms. Nies' score was 68. These scores are in the deficient range.

Ms. Meddaugh also asked [redacted] 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 exhibit organizational

skills. The results from [redacted]s ratings were all in the average range whereas the scores obtained from Ms. Tanner and Ms. Nies mostly fell in the clinically elevated range. Clinically elevated scores indicate that in the school setting, [redacted] demonstrates difficulty in all areas of executive functioning skills.

Annette Kidd, a Speech Language Pathologist, assessed [redacted] in the following five areas: articulation, language (receptive and expressive), voice quality, fluency and the structure and function of the oral mechanism. While [redacted] made some errors on the articulation assessment, they were not significant. On the language assessment, however, [redacted] scored in the deficient range on all the subtests, except sentence comprehension on which he scored below average. Regarding fluency, [redacted] did not have any stuttering characteristics. [redacted]s voice quality was adequate for his age.

On May 14, 2019, the IEP team reconvened. The following individuals participated in the meeting: [redacted] [redacted] Janet Preston, Plaintiffs' attorney; Holly Ward, Plaintiffs' educational consultant; Annette Kidd, Speech Language Pathologist; Janel Mitchell, Behavior Intervention Coach; Kim Trepanier, HCSD Student Support Facilitator; Beverly Jackson, Occupational Therapist; Julie Beacham, AT teacher; Shirby Thomas, AT teacher; Wendy Tanner, Special Education teacher (IRR Language Arts and Math); Dianna Brame, general

education teacher (Homeroom); Holly Nies, general education teacher (Science and Social Studies); Shandra Christopher, HCSD Exceptional Student Education Coordinator; Jennifer Laughridge, Principal; and Megan Pearson, the District's attorney.

[redacted]s teachers reported on his performance in their classrooms. Particularly relevant to this appeal, Ms. Tanner reported that [redacted]s progress on his goals fluctuated.[1] Further, although [redacted] made progress on his goals and objectives, the goals were not set at his grade level. Ms. Tanner explained that she was working with [redacted] on first grade standards for Math and Language Arts. As an example, Ms. Tanner stated that one of the fourth grade writing standards is to write multiple paragraphs or cite multiple sources, whereas one of the goals the IEP team wrote for [redacted] is to write a sentence using two adjectives. Ms. Tanner stated that even with accommodations, she did not believe that [redacted] could access the fifth grade standards. She expressed that the IRR classroom was no longer appropriate for

[1] Plaintiffs contend that the ALJ should not have considered statements Ms. Tanner made during the IEP meetings because they constitute hearsay. However, the transcripts of the IEP meetings, which contain Ms. Tanner's statements, along with those of the other meeting participants, would qualify for admittance under the business records exceptions to the hearsay rule. *See* Fed. R. Evid. 803(6); *Braggs v. Dunn*, No. 2:14-CV-601, 2017 WL 426875, at *1 (M.D. Ala. Jan. 31, 2017) (finding that meeting minutes were admissible under the business records exception to the hearsay rule). Notably, Plaintiffs, themselves, have submitted for the Court's consideration the transcript of the IEP team's January 8, 2021 meeting.

[redacted] She had witnessed [redacted] struggle more, and his deficits were expanding beyond what she could manage with accommodations.

Ms. Tanner also reported that sometimes she had to pick [redacted] up from his previous class to take him to the IRR room, even though her IRR students were expected to travel to her classroom on their own.[2]

The IEP team also discussed whether it was appropriate to begin using the Georgia Alternative Assessment ("GAA") test for [redacted]s assessments instead of the Georgia Milestones Assessment, which is used in general education classes.

Plaintiffs and their attorney and education consultant shared concerns, objections and proposals during the course of the meeting. They also requested independent evaluations of [redacted]

Ultimately, the IEP team, with objection from Plaintiffs, decided that [redacted]s placement for the 2019-2020 school year would change from the IRR classroom to

[2] Shandra Christopher, the Exceptional Student Education Coordinator for the District, who participated in the April 17, 2019 and May 14, 2019 IEP team meetings testified at the hearing that [redacted]s goals during his fourth grade year were primarily at kindergarten or first grade standards. One of his math goals was on the second grade level. Similarly, Kim Trepanier, the Student Support Facilitator at East Lake testified that the nature of the accommodations in [redacted]s IEP amounted to modifications of the curriculum for [redacted] Ms. Nies, [redacted]s fourth grade Science and Social Studies teacher testified that [redacted] either worked one-on-one with her or the classroom aide most of the time, and the work was "extremely difficult" for him. She stated that [redacted]s performance in her classroom was not close to grade level.

the MID class for Language Arts and Math. The MID classroom is a self-contained classroom that uses an adaptive or modified curriculum. Students in that classroom take the Georgia Alternate Assessment instead of the standard Georgia Milestones test. The classroom employs a mix of whole group and individualized instruction.

The record shows that the MID classroom consisted of students in third through fifth grade and would include students that had more impairments than [redacted] However, the MID classroom teacher explained to [redacted] during an IEP meeting that the students are challenged academically. She stated that the curriculum is simply paced and modified to support the students' cognitive and adaptive deficits.

In addition to placement in the MID class for Language Arts and Math, the updated IEP contemplated that [redacted] would be placed in a co-taught general education classroom for Science and Social Studies and in a general education classroom with paraprofessional support for Specials. [redacted] would also be assigned to 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 per week.

The updated IEP also provided for instructional accommodations, some of which were part of [redacted]s previous IEP. This included 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, etc. Classroom testing accommodations (some new) included the use of multiple modalities to demonstrate mastery of standard, repetition of directions using visual supports, test questions and answers read aloud for reading passages, read aloud grade level content, calculator, etc. All changes and/or revisions to the existing IEP would take effect in the 2019-2020 school year.

Plaintiffs rejected the updated IEP. On July 31, 2019, they filed a Complaint alleging that HCSD had violated [redacted]s right under IDEA to a free and appropriate public education ("FAPE") in the least restrictive environment ("LRE"). [redacted] informed the school that Plaintiffs had filed a Complaint and that she was invoking her right to "stay-put."[3]

[3] 20 U.S.C. § 1415(j) provides that during the pendency of proceedings to enforce IDEA rights, "the child shall remain in the then-current educational placement of the child," unless "the State or local educational agency and the parents otherwise agree."

The following day, August 1, 2019, was the first day of school. When [redacted] and [redacted] arrived at school, Principal Laughridge informed them of the District's position that the stay-put placement for Math and Language Arts would be in the MID classroom because the May 14, 2019 IEP had been implemented over the summer. [redacted] refused to allow [redacted] to be placed in the MID classroom. She asked if [redacted] could attend his OT and ST sessions and whether the school would send any books or homework home. Principal Laughridge responded that students must be enrolled in school to receive services under an IEP. She concluded that [redacted] was disenrolled because he did not attend the first day of school. He therefore could not receive OT and ST services.

As a result of the District's interpretation of the stay-put requirement and [redacted]s refusal to allow [redacted] to be instructed in the MID classroom, [redacted] missed approximately six days of school and the OT and ST services he would have received on those days. [redacted] returned to school after the Administrative Law Judge in the action below ("ALJ") entered an order interpreting the "stay-put" position as the IEP in place prior to the May 2019 update. This meant that [redacted] would be placed in the IRR room until the Complaint was resolved. The District did not provide a plan for [redacted] to make up the days of instruction or the services that he missed while he was away from school.

As part of Plaintiffs' requested independent evaluations, Dr. Kellie Murphy conducted a psychoeducational evaluation of [redacted]. Dr. Murphy noted that due to [redacted]s "significant difficulties maintaining focused attention and effortful performing during testing, his scores [were] best understood as minimal estimates of his true abilities." [redacted]s 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") score 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]s general intelligence because it removes the impact of cognitive deficits in working memory and processing speed.

To assess [redacted]s academic achievement, Dr. Murphy administered subtests from the Wechsler Individual Achievement Test, Third Edition (WIA T-III) and the Kaufman Test of Educational Achievement, Third Edition (KTEA-3). On the WIAT-III, [redacted] 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. Dr. Murphy employed various other tools in her evaluation of [redacted]

Dr. Murphy concluded that the data obtained from her evaluations is consistent with a Mild Intellectual Disability. She also diagnosed [redacted] with

Attention Deficit/Hyperactivity Disorder ("ADHD") – inattentive type and noted that he has a history of a language disorder. Dr. Murphy noted that the IDEA eligibility categories of MID and SLI seemed appropriate for [redacted] and are supported by the evaluation. She also recommended that the IEP team consider the eligibility category of Other Health Impairment ("OHI") for ADHD.

In Dr. Murphy's opinion, a placement in the general education setting with paraprofessional support would not be sufficient 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 recommended modifications of the curriculum, repetition, use of pictures and manipulatives and alternate test formats as ways to serve [redacted]

Dr. Robert Babcock, a board-certified behavior analyst and a licensed psychologist, conducted an FBA of [redacted] as part of the independent evaluations. Dr. Babcock noted that [redacted] had difficulty with transitioning from one class to another in that he routinely arrived ten to fifteen minutes late for class. He agreed that the results of the evaluations were consistent with [redacted] having a significant cognitive deficit.

Occupational therapist Kimberlee Wing conducted an OT independent evaluation of [redacted] Ms. Wing administered various tests and rating scales. Among other observations, she concluded that [redacted]s fine motor skills and manual dexterity were well below average. Ms. Wing further determined that [redacted]s visual-motor integration was well below average. [redacted] also exhibited weaknesses in spatial relationships, sequential memory and figure ground perception.

In Ms. Wing's opinion, [redacted]s combined difficulty of internal organization for thought processes, together with his inefficient motor skills and processing speed, are likely to cause him anxiety regarding writing and result in avoidance and distractibility. Ms. Wing recommended that [redacted] undergo three thirty-minute OT sessions per week. She also recommended a period of OT consultative services, wherein the occupational therapist would consult with the teaching and support staff to help adapt some of the fine motor activities for [redacted] and address some of his perceptual needs.

The ALJ held a hearing regarding Plaintiffs' Complaint over the course of five days in November 2019. In an opinion dated January 27, 2020, the ALJ found (and as relevant to this appeal) that (i) there was no evidence that the delay in securing the evaluations of [redacted] impacted him negatively; (ii) the GAA was the appropriate assessment for [redacted] (iii) [redacted]s placement in the MID classroom as

opposed to the IRR classroom did not violate mainstreaming or LRE obligations; (iv) inadequate OT services was a denial of FAPE; and (v) [redacted] was entitled to compensatory services for the six missed days of school during the stay-put disagreement and for the missed OT evaluation.

Accordingly, the ALJ ordered that the District provide the following to [redacted] 40 thirty-minute sessions of direct OT services and one additional ST session; six days of tutoring in Language Arts, Math, Social Studies or Science; and an amended IEP, providing three thirty-minute sessions of direct OT services per week and OT consultative services.

Plaintiffs appealed the ALJ's order to this Court on April 24, 2020. The main points of contention in Plaintiffs' appeal are that: (i) the ALJ used the wrong legal standard in finding that [redacted]s placement in the MID class was appropriate; (ii) the ALJ incorrectly found that the GAA was appropriate for [redacted] and (iii) the ALJ's award of damages for the FAPE violation was insufficient.

II. ANALYSIS

A. Standard of Review

Under 20 U.S.C. § 1415(j), a party may seek district court review of a state administrative agency's decision on an IDEA complaint. "The burden of proof in

an administrative hearing challenging an IEP is properly placed upon the party seeking relief." *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

"[T]he district court conducts an entirely de novo review of the ALJ's findings and has the discretion to determine the level of deference it will give to [those] findings." *Sch. Bd. of Collier Cnty. v. K.C.*, 285 F.3d 977, 982–83 (11th Cir. 2002) (citation omitted). "To that end, administrative findings are considered to be prima facie correct, and if a reviewing court fails to adhere to them, it is obligated to explain why." *Stamps v. Gwinnett Cnty. Sch. Dist.*, 481 F. App'x 470, 471 (11th Cir. 2012) (citation and punctuation omitted).

"Since no IDEA jury trial right exists, the Court . . . decide[s] an IDEA case even when material facts are in dispute and . . . base[s] its decision on the preponderance of the evidence." *Gwinnett Cnty. Sch. Dist. v. A.A.*, No. 1:09-CV-445-TWT, 2010 WL 2838585, at *2 (N.D. Ga. July 16, 2010). The district court's decision is thus "better described as judgment on the record." *Loren F. ex rel. Fisher v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1313 (11th Cir. 2003).

It is important to note that the authority to review the judgment below "is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206 (1982).

As the *Rowley* court explained, "[t]he very importance [that] Congress has attached to compliance with certain procedures in the preparation of an IEP would be frustrated if a court were permitted simply to set state decisions at nought." *Id*.

B. Overview of IDEA

The overall purpose of the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment[] and independent living." 20 U.S.C. § 1400(d)(1)(A). "A FAPE, as the Act defines it, includes both 'special education' and 'related services.'" *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 390 (2017). "'Special education' is 'specially designed instruction . . . to meet the unique needs of a child with a disability'; 'related services' are the support services 'required to assist a child . . . to benefit from' that instruction." *Id*. The state must thus provide a disabled child with special education and related services as required by the child's IEP. *See id*. at 390-91.

FAPE

"To provide a FAPE, a school formulates an [IEP] during a meeting between the student's parents and school officials. An IEP must be amended if its

objectives are not met, but perfection is not required." *Loren*, 349 F.3d at 1312 (citations omitted). Reviewing courts simply "ask whether: (1) the school complied with the IDEA's procedures; and (2) the IEP developed through those procedures is reasonably calculated to enable the student to receive educational benefits." *Id*. "A 'yes' answer to both questions ends judicial review." *Id*.

In matters alleging a procedural violation of the IDEA, a court may find that there has been a denial of FAPE only if the violation "(i) [i]mpeded the child's right to a FAPE; (ii) [s]ignificantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE . . . ; or (iii) [c]aused a deprivation of educational benefit." 34 C.F.R. § 300.513.

Mainstreaming

"In addition to the mandate that all [disabled] children be provided with a free appropriate public education, the Act also contains a specific directive regarding the placement of [disabled] children." *Greer By & Through 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). The Act provides that:

> [t]o the maximum extent appropriate, children with disabilities . . . are [to be] 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.A. § 1412. "With this directive, which is often referred to as 'mainstreaming' or placement in the '[LRE],' Congress created a statutory preference for educating [disabled] children with non[disabled] children." *Greer*, 950 F.2d at 695.

"Congress also recognized, however, 'that regular classrooms simply would not be a suitable setting for the education of many [disabled] children.'" *Id.* "[W]hen education in a regular classroom cannot meet the [disabled] child's unique needs, the presumption in favor of mainstreaming is overcome and the school need not place the child in regular education." *Id.*

"[B]efore the school district may conclude that a [disabled] child should be educated outside the regular classroom, it must consider whether supplemental aids and services would permit satisfactory education in the regular classroom." *Id.* at 696. The district "must consider the whole range of supplemental aids and services, including resource rooms and itinerant instruction." *Id.* "Only when the [disabled] child's education may not be achieved satisfactorily, even with one or more of these supplemental aids and services, may the [district] consider placing the child outside of the regular classroom." *Id.*

The IDEA does not "contemplate an all-or-nothing educational system in which [disabled] children attend either regular or special education. Rather, the Act and its regulations require schools to offer a continuum of services." *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1050 (5th Cir. 1989). The continuum of placement options identified by statute 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 or homebound instruction." *S.M. v. Gwinnett Cnty. Sch. Dist.*, No. 1:14-CV-247-MHC, 2015 WL 12910925, at *9 (N.D. Ga. May 29, 2015), *aff'd*, 646 F. App'x 763 (11th Cir. 2016) (citing 34 C.F.R. § 300.115; Ga. Comp. R. & Regs. 160-4-7.07).

There is no prescribed formula for where a child may be placed on the continuum. A school "must[, however] take intermediate steps where appropriate, such as placing the child in regular education for some academic classes and in special education for others, mainstreaming the child for nonacademic classes only[] or providing interaction with non[disabled] children during lunch and recess." *Daniel*, 874 at 1036. "The appropriate mix will vary from child to child and, it may be hoped, from school year to school year as the child develops." *Id*.

To determine whether a school has complied with the Act's mainstreaming requirement, the Eleventh Circuit Court of Appeals employs a two-part test. The

court looks at (i) whether "education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily" and (ii) if not, "whether the school has mainstreamed the child to the maximum extent appropriate." *Id.* at 696.

As to the first prong of the mainstreaming test, a court may (i) "compare the educational benefits that the [disabled] 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;" (ii) "consider what effect the presence of the [disabled] child in a regular classroom would have on the education of other children in that classroom;" and (iii) "consider the cost of the supplemental aids and services that will be necessary to achieve a satisfactory education for the [disabled] child in a regular classroom." *Greer*, 950 F.2d at 697. Consideration must also be given to "any potential harmful effect on the child [of the placement] or on the quality of services that he or she needs." 34 C.F.R. § 300.116(d).

It does not appear that the Eleventh Circuit has specified factors for the second prong of the mainstreaming test. However, the court has emphasized that "no single factor will be dispositive." *Greer*, 950 F.2d at 697. "Rather, [the] analysis is an individualized, fact-specific inquiry that requires [the court] to

examine carefully the nature and severity of the child's [disability], his needs and abilities[] and the schools' response to the child's needs." *Id*.

C. Plaintiffs' Contentions

With the foregoing legal principles in mind, the Court turns to the substance of Plaintiffs' contentions of error.

1. Whether the ALJ used the wrong legal standard in determining that [redacted]s placement in the MID classroom was appropriate

Plaintiffs contend that the IRR (as opposed to the MID) classroom is the least restrictive environment for [redacted] They argue that the IRR is less restrictive because it provides access to the general education standards, and the students assigned to that classroom are not as impaired as the students in the MID classroom. According to Plaintiffs, the IRR classroom would give [redacted] exposure to social role models that the MID classroom could not because the MID classroom lacked "typical functioning peer models." ECF No. 61-1 at 28.

In Plaintiffs' view, "[t]he test of whether [redacted] can be educated 'satisfactorily' in the less restrictive IRR class [and thus remain there] is whether, with all his supports, he can make progress in his IEP program, maintaining access to instructional standards." ECF No. 61-1 at 16-17. Plaintiffs argue that

"progress" toward his IEP goals and "access" to grade level standards are the only considerations in the analysis. *Id*. at 6.

The ALJ found that Plaintiffs failed to state an LRE/mainstreaming claim because they could not show that moving [redacted] from his small group IRR classroom to the small group MID classroom would change the amount of exposure he had to nondisabled students. ECF No. 18-13 at 2579. The ALJ reiterated that the access [redacted] had to nondisabled peers prior to the proposed change remained the same. *Id*. He would be in a regular education classroom for Science, Social Studies, Homeroom and Specials, and he would eat lunch with his regular education homeroom. *Id*. The ALJ further noted that Plaintiffs cited no authority, and the court found none, 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. *Id*. at 2580.

Additionally, the ALJ explained that even if the intra special education change were an LRE issue, the District had mainstreamed [redacted] to the maximum extent appropriate. The ALJ pointed out that the proposed IEP placed [redacted] in regular education classrooms for Science, Social Studies, Homeroom, Specials and Lunch. Further, [redacted] was not able to access nor required to perform to grade-level standards with his accommodations. Finally, the ALJ noted that [redacted]s presence in

the general education and IRR classrooms had a negative effect on the other students in the classroom due to the amount of teacher attention that was necessary to serve him.

Like the ALJ, this Court has not found any precedent that concludes that a decision between two possible special education placements is a mainstreaming or LRE issue. The only relevant case in this Circuit that the Court found ruled to the contrary.

In *S.M.*, as in this case, the plaintiffs alleged that the school failed to place a student with Down Syndrome in the least restrictive environment when her IEP team proposed a change in her placement from the Significant Developmental Delay ("SDD") classroom, where she received Math, Language Arts and Writing instruction to the "MilD" intellectual disabilities program for instruction in the same subjects. 2015 WL 12910925 at *2-3. Both were special education programs, but the MilD program was a self-contained classroom. *See id*. The court concluded that S.M. could not be satisfactorily educated in the general education for classroom for Math, Reading and Writing because her "deficits" in those areas were such that the curriculum would need to be modified beyond recognition for her to remain there. *Id*. at 12.

Although the court recognized that "language and role modeling are, indeed, potential benefits to be achieved by associating with non-disabled peers in the regular classroom," it found that placement in the MilD classroom for Math, Reading and Writing was appropriate and the least restrictive environment for S.M. The court reasoned that S.M. was concurrently placed in general education for Science, Social Studies, Health, Specials, Lunch and Recess, where she would have access to social role models. *Id*. The court noted the evidence in the record showing that S.M. was more engaged and performed better in the small group special education setting. *Id*.

Like [redacted]s parents, S.M.'s parents had questions and concerns regarding the curriculum, composition of students and other aspects of the MilD program as compared to the SDD program. The district court, however, declined to consider those arguments or analyze them as an LRE issue because it concluded that "the particular program in which S.M. is to be educated is not a factor under *Greer*." *Id*.

Here, the Court similarly finds that the mainstreaming question under the IDEA focuses on the right of disabled students to be educated in the *general* education environment to the maximum extent appropriate. *See* 20 U.S.C. § 1412(5)(A). The Act requires schools to consider a continuum of placements,

including instruction in regular classes, special classes and special schools. *See* 34 C.F.R. § 300.115(B)(1). The Court is not aware of any authority, and Plaintiffs have provided none, interpreting a program selection question (*e.g.*, IRR vs. MID or SDD vs. MilD) within a placement on the continuum (special education) as a mainstreaming issue.

Indeed, the Eleventh Circuit has admonished that "courts lack the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy [and] must be careful to avoid imposing their view of preferable educational methods on the [s]tates." *JSK by and through JK v. Henry Cnty. Sch. Bd.*, 941 F.2d 1563, 1573 (11th Cir. 1991) (citations and punctuation omitted). The *JSK* Court "stress[ed] that it seems highly unlikely that Congress intended courts to overturn a [s]tate's choice of appropriate educational theories in a proceeding conducted pursuant to § 1415(e)(2)" and that "great deference must be paid to the educators who developed the IEP." *Id.*

At bottom, the issue presented here is not the extent to which [redacted] should be mainstreamed. [redacted]s placement in the general education classroom did not change. His continued placement in the general education classrooms for Science, Social Studies, Homeroom, Specials and Lunch meant he had the same access to his nondisabled peers before and after the update to the IEP.

Rather, at the core of Plaintiffs' appeal is a request for this Court to decide a methodology or program selection question, *i.e.*, determine which classroom within the school's special education program is appropriate for [redacted] But the Act does not require the Court to make this determination, and such a decision is best left to those with the appropriate educational expertise.

Notably, none of the cases Plaintiffs cite in support of their position concern a program selection question within the special education program. For example, in *A. B. by & through Jamie B. v. Clear Creek Indep. Sch. Dist.*, 787 F. App'x 217, 222–23 (5th Cir. 2019), the court considered whether it was appropriate to transfer a third grade student from *general* education classes into a special education program. The Fifth Circuit affirmed the district court's decision to allow the student to remain in general education classes because the "[t]he record demonstrate[d] that [the student] can be, and has been, educated satisfactorily in the regular classroom." *Id*. at 222. Consequently, the court found that the proposed move to a special education program would violate the IDEA's requirement that students be educated in the "least restrictive environment." *Id*.

Similarly, in *D. R. by & through R. R. v. Redondo Beach Unified Sch. Dist.*, 56 F.4th 636, 643 (9th Cir. 2022), the issue was whether the school district could reduce the time the student spent in the *general* education classroom. Prior to the

proposed change in the IEP, the student was spending 75% of his day in the general education classroom. *See id*. at 642. The updated IEP would have required the student to spend 56% of his day in the special education classroom, thereby reducing his time spent with general education peers to less than 50%. *See id*.

By contrast, the parties in this case agree that [redacted] should be placed in special education for his Math and Language Arts periods. The disagreement centers on what program within special education was appropriate.

Based on the foregoing analysis, the Court finds that Plaintiffs have not stated an LRE claim.

But even if [redacted]s proposed placement in the MID classroom presented an LRE issue, the Court is not convinced that Plaintiffs should prevail. The Eleventh Circuit's LRE test evaluates (i) whether education in the *general* education classroom can be achieved satisfactorily; and (ii) if not, whether the school has mainstreamed the child to the maximum extent appropriate. *See Greer*, 950 F.2d at 696.

With respect to the first prong, the parties agree that the general education setting is not appropriate for [redacted] with respect to Math and Language Arts.

Therefore, the only remaining question would be the second prong of the test—whether [redacted] has been mainstreamed to the maximum extent appropriate.

As to the second prong, a court must undertake an individualized, fact-specific inquiry that examines the nature and severity of the child's disability, his needs and abilities and the schools' response to the child's needs. *See Greer*, 950 F.2d at 697. The Eleventh Circuit has expressly stated that "no single factor will be dispositive." *Id*. Therefore, Plaintiffs' contention that [redacted]s progress towards his IEP goals is conclusive and resolves the LRE issue in their favor is without merit.

Here, the independent expert evaluation of [redacted] confirms what the school's personnel found. [redacted] has significant deficits across the board that impact his placement within the general and special education programs. He had significantly deficient scores in his cognitive, graphomotor functioning, educational achievement, language and executive functioning assessments.

Further, [redacted]s IRR teacher explained that although [redacted] made progress on his IEP goals and objectives, his goals were not set at the fourth grade level. For example, [redacted] was working on first grade standards in Math and Language Arts.

In response to [redacted]s demonstrated needs, the record shows that the District took a stepped approach wherein [redacted] was initially placed in the IRR room for

Math and Language Arts with most of his day spent in general education. The IEP team considered the MID room only after it understood that the nature and severity of [redacted]s disabilities and his needs and abilities required a different approach.

Under these circumstances, the Court alternately finds that the District has satisfied its LRE obligations under the IDEA.

2. Whether the ALJ incorrectly found that the GAA was appropriate for [redacted]

Plaintiffs contend that the ALJ incorrectly found that the GAA was the appropriate assessment for [redacted] However, this issue is now moot because Plaintiffs state that the District has since determined that [redacted] does not meet the criteria issued by the Georgia Department of Education for the new GAA assessment. Accordingly, [redacted] would not be required to take the GAA assessment.

Plaintiffs nevertheless ask this Court to "declare that the definition under IDEA of 'significant' modifying the scope of impairment which must exist to remove a student from testing" is determined "by the intent of Congress *i.e.*, a 1% or less incident of disability which makes the assessment impossible to administer." Given that this issue is resolved and there is no remaining controversy, the Court declines to issue an opinion on the matter. *See Carney v. Adams*, 592 U.S. 53, 58 (2020) ("The Constitution grants Article III courts the power to decide 'Cases' or 'Controversies.' Art. III, § 2. We have long

understood that constitutional phrase to require that a case embody a genuine, live dispute between adverse parties, thereby preventing the federal courts from issuing advisory opinions.").

3. Whether the ALJ's award of damages for the FAPE violation was insufficient

Plaintiffs contend that the District did not fully comply with the ALJ's order regarding compensatory services for the six days of attendance [redacted] lost while the parties' disagreement regarding the "stay-put" mechanism was being resolved by the ALJ.[4] Plaintiffs further argue that the ALJ failed to award relief for the District's alleged failure to allow modifications for [redacted] and for the delay in obtaining his evaluations. Plaintiffs seek an award of $25,000 to be used on "therapies and instruction" for [redacted] at his parents' discretion and $25,000 to cover the cost to add private consultants to [redacted]s IEP team.

Plaintiffs' contentions with respect to modifications lack merit. As the ALJ noted, [redacted]s IEP contained a multitude of accommodations, even before the May 14, 2019 IEP team meeting, and his teachers did employ accommodations and modified the curriculum to address [redacted]s needs.

[4] The only evidence Plaintiffs offer to show the District's alleged failure to comply with the ALJ's order is a transcript of a meeting during which the implementation of that order was discussed. The information in the transcript is not sufficient to prove the allegation by a preponderance of the evidence.

Further, in matters alleging a procedural violation of IDEA, a FAPE violation is found only if the procedural inadequacies impeded the child's right to FAPE; impeded the parent's opportunity to participate in the decision-making process; or caused a deprivation of educational benefit. 34 C.F.R. § 300.513.

Here, the Court appreciates that a delay in seeking an evaluation of a student could result in a deprivation of educational benefit, since evaluations are the foundation of an IEP. But, with the exception of the District's failure to obtain an OT evaluation of [redacted] Plaintiffs have not demonstrated in a concrete or particularized way, and by a preponderance of the evidence, any detrimental effect of the District's actions. For example, Plaintiffs have not shown that the length of time between the ordering and completion of [redacted]s evaluations was excessively long under the circumstances or otherwise caused a deprivation of educational benefit.

Consequently, the Court is not persuaded that Plaintiffs are entitled to more relief than what the ALJ has already ordered to compensate for the failures related to the OT evaluation and the stay-put disagreement.

III. CONCLUSION

Based on the foregoing analysis, the Court finds that: (i) [redacted]s placement in the MID classroom did not violate the District's LRE obligations under the

IDEA; (ii) the issue of whether [redacted] must be assessed under the GAA is moot, and the Court may not issue an opinion on the matter; and (iii) Plaintiffs are not entitled to more relief than what the ALJ has already ordered.

Accordingly, the judgment of the ALJ is **AFFIRMED**, and the Court issues judgment on the record in favor of the District. The Clerk is **DIRECTED** to close the case.

SO ORDERED this 29th day of March, 2024.

J. P. BOULEE
United States District Judge