



08/08/2022

Devin Hamilton

Devin Hamilton, Legal Assistant

IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

█ BY AND THROUGH █ and █ :

Petitioners, :

v. : **Docket No.:** █

COWETA COUNTY SCHOOL DISTRICT, :

Respondent. :

█ -OSAH-DOE-SE-38-SCHROER

FINAL DECISION

I. INTRODUCTION

On February 7, 2022, Petitioners filed a due process complaint pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (“IDEA”). The due process hearing was held before the Office of State Administrative Hearings (“OSAH”) on May 11, 13, and 16, 2022. Nathan Lee, Esq. represented Respondent Coweta County School District (“District” or “Respondent”). Tim Schwarz, Esq. represented Petitioners. The record remained open following the conclusion of the hearing in order for the parties to file post-hearing briefs. The deadline for the issuance of this decision was extended pursuant to 34 C.F.R. § 300.515(c) and Ga. Comp. R. & Regs. (“OSAH Rule”) 616-1-2-.27.

After careful consideration of the evidence and for the reasons set forth below, Petitioner’s request for relief is hereby **GRANTED in part and DENIED in part.**

II. FINDINGS OF FACT

A. Introduction

1.

█ is seventeen and lives in █, Georgia with his aunt, █ and his uncle, █. █ is the older sister of █’s biological mother, and she was present in the

hospital room when [REDACTED] was born in [REDACTED]. [REDACTED] and [REDACTED] spent time with [REDACTED] and his siblings over the years and took formal guardianship of [REDACTED] in March 2020. According to [REDACTED] her sister is an alcoholic and neglected and ignored [REDACTED] who was born with significant developmental delays. Sometime in 2019, [REDACTED]'s biological mother disappeared, leaving [REDACTED]'s stepfather to care for [REDACTED] and his younger brother and sister. [REDACTED] and [REDACTED] whose two sons are successful adults, agreed to take guardianship of [REDACTED] and to oversee his care and education. (Tr. 402-03, 436-42, 494.¹)

2.

At age three, [REDACTED] was diagnosed at the Marcus Autism Center with autism spectrum disorder, pervasive developmental delays (“PDD”), and a speech and language impairment.² He also has been diagnosed with attention deficit hyperactivity disorder. [REDACTED] is non-verbal, and, until recently, communicated primarily by using gestures and other body language, vocalizations, physical proximity, and aggressive behaviors. For example, [REDACTED] might push away or throw an object he does not like or he might try to run away or “elope” from an undesirable task. Similarly, he uses gestures or physical proximity to indicate an item he wants, like a drink or something to eat. [REDACTED] and [REDACTED] describe [REDACTED] as a happy and funny kid, who is ambulatory and likes to go on trips to see new places, such as to Disney World, New York City, or the park. However, as a child with severe autism, [REDACTED] also likes to be by himself and will not look people in the eye. When the family goes to crowded places like Disney, [REDACTED] sits in a wheelchair with a seatbelt to make him more comfortable and help prevent him from running off. (Exs. P-1, P-8, P-

¹ The transcript from the hearing will be cited as “Tr. [page number],” and admitted exhibits will be cited as “Ex. [J-#, R-#, or P-#].”

² Cognitive assessments of [REDACTED] have consistently resulted in scores in the extremely low range, and his full-scale IQ score of 40 “indicates that he is functioning similarly to or about ≤0.1% of his same age peers.” Ex. J A-21, at pp. J0286-287; Ex. P-13.

12; Tr. 27, 424-28, 439-40, 531, 542.)

3.

█ was enrolled in the Coweta County School District at age three and has been eligible for special education as a child with a disability since that time. The District’s witness, Chrissy Dement, the current special education director, described █ as a “sweet young man,” who loved his school routines and his teachers. Although he did not actively engage with his peers, he was used to being around them in class and appeared to enjoy participating in community activities, going to the playground, and being around familiar adults at school. In 2019, when █ and █ became more involved in █’s life and education, █ was attending the Westside School, a small, separate school for disabled students in Coweta County.³ █ was placed in a self-contained autism classroom at Westside with two other similarly-aged students, a special education teacher, and two para-professionals. Although █ and █’s sons attended District schools, they were unfamiliar with the District’s special education program. Soon after they became █’s guardians, █ and █ grew dissatisfied with the District’s provision of special education services to █ particularly after the Covid pandemic caused the upheaval of public education across the country and in Coweta County. (Ex. P-12; Tr. 311, 376, 448, 508, 530-34, 537, 638-40, 711.)

4.

█ like all students in the District, participated in school virtually from the start of the pandemic through the end of the school year in May 2020. █ also participated in virtual learning over the summer and attended school virtually for the first fifteen days of the 2020-2021 school year. He returned to in-person instruction on September 3, 2020, and attended Westside School

³ Westside also houses the District’s Georgia Network for Educational and Therapeutic Support (“GNETS”) program, which is known as Burwell. (Tr. 535.)

until the end of the semester on December 18, 2020. When classes resumed in January 2021, [REDACTED] and [REDACTED] decided to keep [REDACTED] at home and provide services and therapies through private providers. Although [REDACTED] and [REDACTED] have participated in various IEP meetings, [REDACTED] has not attended school in the District for a year and a half. (Tr. 94-97, 101, 203-04, 221, 414, 533; Ex. P-5.)

5.

On February 7, 2022, Petitioners filed a due process complaint against the District. They requested relief on their claims, including reimbursement for services provided in the home, placement at a home-based education program provided by staff selected by Petitioners, compensation to his guardians for time spent supervising [REDACTED] during attempts at virtual education; payment for additional educational services such as music or equine therapy, and attorney's fees. (Due Process Complaint, filed on February 7, 2022.)

6.

As noted, the due process hearing took place over three days in May 2022. Petitioners called three witnesses. Petitioners [REDACTED] and [REDACTED] testified, but the majority of Petitioners' case was presented through the testimony of the District's current director of special education, Chrissy Dement, as well as a number of documentary exhibits and audio recordings. After two days, Petitioners rested their case, and the District recalled Ms. Dement, who was the District's only witness. On July 1, 2022, the parties submitted post-hearing briefs, and the record closed.

B. August/September 2019 IEP

7.

In September 2019, [REDACTED] was fourteen and still in the custody of his biological mother. On September 26, 2019, she participated in a meeting to amend his current IEP, which was originally developed in August 2019.⁴ The September 2019 IEP begins with a summary of [REDACTED]'s present levels of academic achievement and functional performance in different categories, including cognitive, communication, daily living, math, reading, and social, emotional, and behavioral functioning. In all areas, [REDACTED] was significantly delayed.

Currently, [REDACTED] exhibits global developmental delays in areas of communication, cognition, social/emotional behavior, and fine and gross motor skills. [REDACTED] loves to find items around the classroom that he can stem with. He likes to find items that he can tap with his hands or chew on. He prefers items that have a string that has plastic on them. He puts most of the items into his mouth and chews on them. [REDACTED] likes routines and does not like to do tasks that are unfamiliar to him. [REDACTED] needs hand over hand support in all activities.

(Ex. P-1; Tr. 28, 44, 542.)

1. Present Levels of Performance

8.

In the section on communication, the September 2019 IEP noted that [REDACTED] is non-verbal and that he communicates primarily through “physical proximity, body language, vocalizing, and aggressive behaviors.” However, even these non-verbal means were limited, and he did not routinely use any form of communication to request comfort or permission, greet adults or peers,

⁴ The District held a meeting on August 28, 2019, to develop an annual IEP for [REDACTED] and to determine whether he needed new evaluations. The team concluded that [REDACTED] should have a new cognitive evaluation, and it developed an IEP to cover [REDACTED]'s special education, supports, and services through August 2020. As discussed *infra*, IDEA's two-year limitation period applies to this case, and thus Petitioners may seek relief on those claims that arose between February 7, 2020, and February 7, 2022. The Court includes information about [REDACTED]'s August 2019 IEP, as amended in September 2019, as it reflects the IEP in effect at the start of the limitations period. See generally K.C. v. Fulton County Sch. Dist., No. 1:03-CV-3501-TWT, 2006 U.S. Dist. LEXIS 47652 (N.D. Ga., June 30, 2006). (Exs. R-1, P-1; Tr. 539-40.)

or provide personal information. The IEP also noted that ■■■ had “been introduced to different types of communication using picture symbols but is reluctant to imitate/follow adults’ models or to accept physical prompting to either point to individual picture symbols, point to symbols on an adapted core AAC communication board, and/or press on a cell to activate a speech generating device (SGD).” The IEP reported his performance on some of his communication goals from the past year, which appeared to show modest, although inconsistent, improvement. (Ex. P-1; Tr. 27.)

9.

In the section on daily living, the September 2019 IEP indicated that ■■■ took his clothes off when entering the restroom and would not put them back on without prompting and adult assistance. He also became aggressive when adults tried to help him with bathroom hygiene and would run away from the sink instead of washing his hands. In the math section, the September 2019 IEP stated that ■■■ did not understand the concept of numbers, shapes, time, weather, the five senses, distinguishing between living and non-living things, or identifying plants or animals. In the reading section, the IEP indicated that although ■■■ is working on matching letters, he needs physical prompting and hand-over-hand instructions. When presented with a book, ■■■ will tilt his head sideways and look at other objects in the room. In the section on social, emotional, and behavioral functioning, the IEP indicates that ■■■ has difficulty expressing his wants and needs and will avoid a task by throwing or slamming an item, and will bite, run, slap, or push away from things he does not want. The IEP notes that ■■■ does not imitate or initiate play with his peers, and “physical and verbal redirection is needed at all times.” (Ex. P-1; Tr. 31-34.)

2. Parent Concerns

10.

The September 2019 IEP also had a section on parent concerns. ■■■'s biological mother told the team that she thought that ■■■ tended to be lazy, and she wanted the school to push him to work on personal hygiene skills, like brushing his teeth, using the restroom, and getting dressed independently. ■■■'s biological mother believed that his difficulties with communication were the root of his frustrations, and she requested additional information about autism, which the District provided. (Ex. P-1.)

3. Special Factors

11.

The team identified certain special factors that affected ■■■'s IEP, including his need for assistive technology (“AT”) devices to help with communication and his need for a Behavior Intervention Plan (“BIP”). The BIP described ■■■'s obsessive interest in specific sensory inputs and his negative behaviors when presented with a non-preferred item. The IEP proposed to manage these behaviors by avoiding frustrating items, using different communication devices, keeping his environment and routine familiar, and giving verbal and physical support during activities. With respect to AT, different uses of AT are discussed throughout, such as the use of picture boards or voice output devices, but the IEP did not call for an assistive technology evaluation at that time. (Ex. P-1.)

4. Goals and Objectives

12.

The September 2019 IEP identified eight annual goals for ■■■ each with two distinct objectives or benchmarks. Under the Cognitive category, the IEP team established an annual goal

for ■■■ to identify common signs, such as stop signs, with 80% accuracy using a picture board, gestures, or vocalizations. The two objectives associated with this goal were 1) pointing to pictures of body parts, colors, and objects with 80% accuracy and 2) making a decision between two choices each day by using a picture board, gesture, or vocalization with 80% accuracy. There were two goals in the Communication category, both in the area of “Communicating with Assistive Technology.” The first communication goal was for ■■■ to use total communication, “including verbalizations, gestures, and/or picture symbols presented on a communication board or a speech generating device (SGD) to express his wants and/or needs out of a choice of 2 to 3 pictures 75% of the time. (Current Level: 52%).” The two objectives associated with this goal were to use a communication board to answer yes/no questions with 75% accuracy and to use a communication board to express his wants or needs, such as when he is hungry or when he is finished, with 80% accuracy with no more than two prompts. The second communication goal was for ■■■ to “name” a familiar object or character by selecting the correct picture symbol or photograph on a picture board or SGD, out of a field of 2 to 3 choices, with 80% accuracy. His baseline on this goal was listed as 0%. The two objectives for this goal were to identify objects by pointing and to identify picture symbols of objects according to their function, both with 80% accuracy. There were also two Daily Living goals, one relating to putting on his clothes and one relating to tooth brushing. Both these goals targeted developing “independent” skills, as his biological mother had requested, and specified that mastery of the goal would be achieved when ■■■ could complete the task 80% of the time with no more than 2 prompts. He also had one goal and two objectives in the categories of Math, Reading, and Social/Emotional/Behavioral Functioning.⁵ (Ex. P-1.)

⁵ ■■■'s math goal was to identify numbers 1 through 10 and sort shapes and colors. His reading goal was to identify personal information like his name and phone number, as well as upper- and lower-case letters. His social/emotional/behavioral goals were to use a communication board to express his emotions, comply with class rules without aggression, and to stay in his area at times of transition with no more than two prompts. All these goals

13.

Although a few of the goals in the September 2019 IEP mentioned limiting the number of prompts used to encourage █ to complete a task, most of the goals did not. However, the section of the IEP that identified Student Supports specified the “use of prompting during instruction” and testing, and the earlier sections on his present levels also indicated that █ required verbal prompting to put his clothes back on and hand-over-hand physical prompting to match letters. According to Ms. Dement, the IEP team did not specify a prompt level on all of █’s goals because the IEP clearly stated that █ required visual, verbal, and sometimes physical prompts to complete tasks. The team only included prompt levels in the goals if the team had decided it was reasonable and appropriate to try and reduce the prompts. Otherwise, as the IEP stated, █ required frequent prompting to complete any task. In addition, Ms. Dement testified that the District generally attempts to set challenging IEP goals, but ones that can reasonably be achieved in one year, after taking into account a student’s history, his present levels of performance, and other factors.⁶ (Ex. P-1; Tr. 68-71, 149-154, 297, 300, 362, 652-53.)

5. Supports and Services

14.

The IEP listed accommodations and modifications to support █’s special education, including a special education classroom at the GNETS facility, one-to-one testing, use of a picture board or speech generating device throughout his day, prompting, reinforcers, and discrete trial training (“DTT”). His teachers also had additional supports, including applied behavior analysis

identified 80% accuracy as the target for mastery.

⁶ Neither party submitted █’s past IEPs, although Petitioner █ alleged that █ has been working on the same goals relating to using the restroom and brushing his teeth since he was 3. (Tr. 463, 470.)

training, mindset training for de-escalation, support from a behavior specialist, and consultation with an occupational therapist and speech pathologist. In addition, the IEP called for [REDACTED] to have one thirty-minute session with a speech/language therapist in a small group and special transportation. (Ex. P-1; Tr. 721.)

6. November 2019 Progress Report

15.

On November 27, 2019, the District issued a Progress Report on [REDACTED]'s goals and objectives. On special education progress reports, the District assigns a number to indicate the level of progress. A “1” indicates the student is at the initial stage and has not worked on the objective, a “2” indicates the skill is emerging, but the student performs the objective less than 50% of the time, a “3” indicates the student is progressing and performs the objective 50% or more of the time, and a “4” indicates mastery of the objective. In November 2019, the District reported that [REDACTED] was performing at level 2 on all his goals and objectives and provided specific data on each objective.⁷ With respect to the communication goals particularly, [REDACTED]'s progress on selecting the correct picture symbol or photograph was listed at 25%, up from 0% at the beginning of the year, and using a picture board or SGD to express his wants or needs out of a choice of 2 to 3 pictures was listed as 55%, up from 52% at the beginning of the year. On the objective for answering yes or no with a picture board, [REDACTED] was listed as 50% for yes and 50% for no. For using a picture

⁷ The Court has reviewed the progress reports and concurs with Petitioners that the mastery levels are not particularly enlightening. For example, on the objective regarding tooth brushing, the District assigned a “2” for an emerging skill despite reporting specific data that [REDACTED] was brushing his teeth independently with less than 2 prompts 0% of the time; rather, the IEP states that he “will turn the water on and run away from the sink.” Petitioners also found [REDACTED]'s report cards, which reflected number grades for literature, American government, and the like, to be a “farce.” Ms. Dement explained that all high school students, regardless of disabilities or special education, receive instruction in certain content areas, like math and reading, and the content is adjusted to their functional level and needs. For example, in math, [REDACTED]'s grades might reflect work done tracing a number with hand-over-hand assistance. Nevertheless, the Court understands Petitioners’ confusion over the purpose of the report cards and the progress reports as they related to [REDACTED]'s actual learning and his progress toward his goals. (Exs. P-3, R-58; Tr. 460, 500, 658-65, 745.)

board for expressing needs like hunger or thirst, he was between 30% and 50%. (Ex. P-3; Tr. 59, 181.)

7. February 3, 2020 Progress Report

16.

On February 3, 2020, the same day ■■■■■'s IEP team met to discuss amendments to his IEP, the District issued a second progress report. Since the last report in November, ■■■■■'s progress had been mixed, at best. For example, for his social/emotional/behavioral goal, he remained on level 2, but his aggression during activities actually increased from 65% to 70%, while his performance on the two objectives remained mostly the same. ■■■■■'s progress toward one of his reading objectives (identifying personal information) and his cognitive goal (identifying common signs, body parts, and colors) was downgraded to level 1, with the District reporting that he did not progress beyond the initial level, and needed visual cues and verbal prompts to complete these tasks. On his communication goals, ■■■■■ remained on level 2, but the District noted that his progress was slow and that it depended on his level of attention and compliance on a given day. On a few of his objectives, the District increased the level of performance to level 3; however, the District noted again that his performance depended on whether he paid attention and complied with the teacher's request.⁸ (Ex. R-3.)

⁸ Specifically, ■■■■■'s progress on answering yes/no questions when presented with three answer choices (yes, no and blank) was 33%. His progress on expressing his wants and needs was changed to level 3, which indicated performing the task 50% of the time or more; however, the report noted that ■■■■■ "still primarily uses physical proximity and gestures" and is resistant to hand-over-hand instruction on using the picture board or SGD, so his teachers had difficulty getting him to follow modeling. With respect to the objective relating to naming objects, ■■■■■ did so with 23% accuracy out of a field of 3 answer choices and could identify an object when given its function or category with 55% to 57% accuracy out of a field of 2. As Petitioners argued at the hearing, ■■■■■'s selecting the correct card 50% of the time out of a field of two (or 33% out of a field of 3) is equivalent to correctly selecting cards at random, and thus there is at least a question about the reliability of the data as indicators of actual progress toward mastery of these goals.

C. February 3, 2020 IEP Meeting

17.

On February 3, 2020, the IEP team met at the request of [REDACTED]'s biological mother to discuss concerns regarding his progress. By this time, [REDACTED] and [REDACTED] had agreed to accept guardianship of [REDACTED] and had begun to actively seek outside services and assessments for him. They attended the IEP meeting, along with [REDACTED]'s biological mother. The family told the team that [REDACTED] had a new pediatrician⁹ and was taking a new medication for focus and attention. In addition, [REDACTED] and [REDACTED] had arranged for [REDACTED] to begin private speech therapy and occupational therapy ("OT") once a week. During the meeting, [REDACTED] and [REDACTED] asked the team why [REDACTED] could not perform basic activities, like answer yes or no, brush his teeth, or open a water bottle. [REDACTED] testified that the current Director of Special Education, Melissa Casablanca, responded, "Back in my day, they called it mentally retarded, and . . . he's just not capable of learning." [REDACTED] and [REDACTED] further testified that they asked the team why [REDACTED] did not have a communication device, and Stacey Barnett, a Special Education Specialist, laughed and asked if [REDACTED] even knew how to type or spell.¹⁰ (Ex. P-4; Tr. 404-06, 451.)

⁹ At or around the time of the February 2020 IEP meeting, the family gave the District a letter from [REDACTED]'s new pediatrician, dated January 7, 2020. In the letter, the physician opined that [REDACTED] "needs physical, occupational and speech therapy, along with extensive ABA behavioral intervention. At this time, Coweta County is not equipped for the specialized care needed with his autism. It is my medical opinion that his needs would best be met with care in an in-house facility." The District disagreed with the letter, and the physician did not testify at the hearing. Moreover, there is no probative evidence in the record of this case regarding the physician's knowledge of [REDACTED]'s IEP, the District's resources, facilities, or services, or what is meant by an "in-house facility." Although Petitioners alleged in their due process complaint that the District retaliated against the physician for providing this medical opinion, Petitioners presented no probative evidence to support this claim. However, [REDACTED] credibly testified that when she first brought up an "out of district" placement with various District officials, including with [REDACTED]'s principal and the special education director, she was met with what she perceived to be an arrogant and condescending attitude. (Ex. R-2; Tr. 89, 443-51, 505-06.)

¹⁰ [REDACTED] testified that the District's special education administrators sometimes snickered and laughed at them when they tried to advocate for [REDACTED] or inquire about his program. [REDACTED] testified that she and [REDACTED] were "ignorant" regarding the educational needs of a child with [REDACTED]'s severe disabilities, and she appears to harbor a great deal of anger toward the District for not doing more for [REDACTED] over the years. The District objected to the testimony regarding Ms. Casablanca's statements as hearsay, but the Court overruled the objection. First, hearsay is an out-of-court statement offered to prove the truth of the matter asserted. O.C.G.A. § 24-8-801 (emphasis added). Ms.

18.

Ms. Dement testified at the hearing that by the time [REDACTED] and [REDACTED] became [REDACTED]'s guardians, the District knew [REDACTED] very well, having provided special education services to him since he was three. According to Ms. Dement, the District understood how he communicated and what his behaviors were, but [REDACTED] and [REDACTED] were just getting to know him. Further, the District pointed out that prior to February 2020, they had included [REDACTED]'s biological mother in IEP planning decisions, and she had not specifically requested training on a communication device or any of the other services that [REDACTED] and [REDACTED] were now seeking for [REDACTED] (Tr. 450, 541, 564.)

19.

As a result of the February 3, 2020 meeting, the team made some updates to [REDACTED]'s IEP, including a notation that [REDACTED]'s difficulties in attending to tasks had led to inconsistent performance. He still relied on physical proximity, gestures, and vocalizations to communicate, and he had been unsuccessful at using any speech-generating device because he swiped or tapped at the devices without looking at them. The IEP team also noted that [REDACTED]'s dislike of being touched made using hand-over-hand guidance with such devices difficult. The team updated the IEP to indicate that [REDACTED] had made some progress in getting redressed after using the restroom and in matching numbers and colors but was still resistant to brushing his teeth and struggled to understand the basic concepts of letters and words. The IEP also was updated to note [REDACTED]'s difficulties working when other students or an unfamiliar adult was present in his workspace and his need for verbal

Casablanca's statements were not offered for their truth. In fact, Petitioners contend that the exact opposite is, in fact, true. That is, Petitioners contend that [REDACTED] is capable of learning despite his disabilities, contrary to Ms. Casablanca's statements. Instead, they offer Ms. Casablanca's statement to describe the attitude of the District and explain why the District failed to craft appropriate goals for [REDACTED] in light of his disabilities. Finally, Ms. Barnett was present at the hearing as the District's representative throughout Ms. Dement's testimony, and the District did not call her as a witness to rebut the statements attributed to herself and Ms. Casablanca. (Tr. 508-509, 513.)

prompting and physical direction to comply with class rules or tasks. Finally, the team added a few additional supports to the IEP, including preferential seating and testing in a small group with a familiar teacher, and it amended some of his goals, including rewording one of his communication goals and replacing another, removing the reading objective relating to identifying personal information, and re-categorizing another goal.¹¹ (Exs. P-1, P-4; Tr. 54-57, 75-88, 107, 113.)

20.

On Wednesday, March 11, 2020, ██████ went to Westside School for a parent-teacher conference. While there, she observed a small sensory room, which she described as a closet, and a child who was crying for over an hour. At the hearing, she described Westside School, which she refers to by its GNETS name, Burwell, as feeling like a “jail,” and she did not want ██████ to be in that type of institutional environment. ██████ testified that during the conference the District representatives were defensive and angry, and that they continued to insist that they knew what was best for ██████ because of their long relationship with him. (Tr. 448-49, 462, 544, 736.)

D. Pandemic Shutdown and Virtual School

21.

The day after the conference, Thursday, March 12, 2020, the District made the decision to close schools because of COVID. For over two weeks, schools remained closed while District officials, like school officials around the country, tried to determine how to safely educate students during a pandemic. Following a third week of closure due to Spring Break, the District began offering instruction to students virtually on April 13, 2022. Virtual learning continued through the

¹¹ In amending the IEP, the District mistakenly forgot to check the box indicating that ██████ needed AT. Ms. Dement testified that this was an error and pointed out that the use of AT devices was discussed in numerous places in the IEP. (Ex. P-4; Tr. 37-42.)

end of the semester in May 2020, as well as during the summer and for the first fifteen days of the new school year in August 2020. Nevertheless, despite the abrupt shuttering of schools, [REDACTED]'s teacher, Sharon Walker, contacted [REDACTED] almost daily during the first few weeks of the shutdown, offering materials, support, and general resources for working with [REDACTED] at home. In addition, on March 16, 2020, Westside's principal tried to deliver a laptop to [REDACTED]'s house for him to use, but [REDACTED] and [REDACTED] declined because they were fearful of COVID exposure and because neither [REDACTED] nor his grandmother, who was supervising him at that time, knew how to use a laptop. (Ex. R-6; Tr. 421, 557-561.)

22.

In order to devise a plan for providing services to students with disabilities during the pandemic, the District turned to multiple guidance documents from the U.S. Department of Education ("U.S. DOE") and the Georgia Department of Education ("GA. DOE") issued in March 2020. As an initial matter, IDEA does not specifically address extended closures due to a public health emergency, and U.S. DOE concluded that if districts closed school for all students, they were not required to provide services to students with disabilities during the same time period. When school resumed, however, districts were required to provide special education to students with disabilities, although how they provided services during the pandemic might be affected. The U.S. DOE repeatedly stated that IEP teams must make individual determinations as to whether and to what extent compensatory services are needed due to changes to services as a result of the pandemic, including "delays in providing services or even making decisions about how to provide services." The U.S. DOE encouraged districts to be creative and collaborate with parents, particularly to address technological barriers to providing services to disabled students. It provided that, "[a]lthough federal law requires distance instruction to be accessible to students with

disabilities, it does not mandate specific methodologies.” (Ex. R-5; Tr. 94-96, 273.)

23.

On March 31, 2020, the GA. DOE published a waiver document related to education during the pandemic. While acknowledging the unprecedented problems that all students and staff were facing due to COVID, the GA. DOE urged school districts to prioritize certain student populations, including students with disabilities. GA. DOE also identified three possible approaches to delivering instruction remotely: 1) Limited Instruction, 2) Supplemental Instruction, and 3) Wholesale Instruction. The District chose to offer all students “Supplemental Instruction,” which involved educators giving targeted direct instruction and periodic virtual check-ins with students.¹² GA. DOE recommended that Supplemental Instruction focus on key skills and that students be given the opportunity to make up missed or unfinished work.¹³ (Ex. R-5; Tr. 97, 554-56.)

¹² This option was a middle ground of sorts; between limited or no direct instruction by teachers, where parents or the students themselves directed their studies, and regular direct instruction to students by teachers through an online learning platform. Ms. Dement repeatedly referred to supplemental instruction as “optional” instruction, although she acknowledged that GA. DOE did not use the word “optional.” The District also referred to this instruction as “optional” in its Prior Written Notice denying compensatory education on August 21, 2020. (Exs. R-5, at p. 57, P-9; Tr. 97, 101, 556, 730-731, 733.)

¹³ Later, on July 30, 2020, after the semester ended and school districts were contemplating reopening for the 2021-2022 school year, the GA. DOE issued a Guidance on Restart and Implementation for IDEA. In the Restart Guidance, the GA. DOE recognized that students with disabilities might receive special education services in a different way during virtual learning but stated that a virtual setting did not “automatically” mean the student will not receive FAPE. Rather, the IEP teams must make individual determinations about whether the change in “instructional delivery models” caused delays in or denied services or whether services were not accessible to a student with disabilities. If so, the IEP team must consider compensatory services. On February 17, 2021, the GA. DOE expanded on the Restart Guidance, reminding school districts that IEP teams must consider any harmful effect on the student or the quality of services due to a change in location of services, and in the event that in-person services are required for a student to receive FAPE, the team must consider “how those services will be provided now (e.g., use of private contractors or outside agencies) or in the future (e.g., provision of compensatory services).” On February 19, 2021, Ga. DOE also issued a document entitled “Compensatory Services Determination Process,” with guidance on how an IEP team should consider whether and to what extent a student with disabilities should receive compensatory education services. (Exs. P-39, P-40, P-41; 274-278.)

24.

From April 13, 2020, through the end of the spring semester on May 27, 2020, [REDACTED] received supplemental virtual instruction from the District in his bedroom while being supervised and assisted by his grandmother, [REDACTED] or [REDACTED]. This arrangement did not work well for [REDACTED] who was easily distracted by his swing, the chair, his bed, and other objects in the room. He was frequently non-compliant with attempts to do school tasks and would slap the computer screen, slam the closet door, turn the lights on and off, and jump on the bed. Outside his bedroom, he would not engage in schoolwork at all. In addition, when [REDACTED]'s grandmother or [REDACTED] were overseeing [REDACTED]'s virtual school, they had great difficulty keeping [REDACTED] in his seat, and his grandmother was not adept at using the computer. [REDACTED] who had the most success at getting [REDACTED] to pay attention, described [REDACTED]'s virtual school day as follows: An adult would turn on the computer, log in, and navigate between various classroom screens. In the morning, after watching a video of singing and the news, [REDACTED] had a session with his teacher. An adult would have to retrieve his index cards from a binder, and the teacher would ask [REDACTED] to touch a particular letter or number on the card. [REDACTED] would not do so, despite repeated verbal prompts from the teacher and [REDACTED] so [REDACTED] had to physically move [REDACTED]'s hand to point to the named card. [REDACTED] then worked virtually with the speech therapist, who tried to get [REDACTED] to touch different signs, such as stop or go, on the computer screen. After a break for lunch, [REDACTED] would watch another video and then return to touching index cards. (Tr. 406-414.)

25.

Although [REDACTED]'s teacher continued to have frequent contact with [REDACTED] it was not until June 1, 2020, that the District held an IEP amendment meeting to review [REDACTED]'s progress, consider the results of the informal speech evaluation done before the pandemic, and discuss

extended school year (“ESY”) services. The team reviewed a progress report dated May 19, 2020, which included only data collected from February 3, 2020 to March 13, 2020, when schools shut down. Although the District had changed ██████’s level of mastery from 2 to 3 on some of his goals during that time period, the Court has compared the progress reports from November 2019, February 2020, and May 2020, and finds that ██████’s progress was, for the most part, modest,¹⁴ and ██████ had not mastered any of his goals or objectives by the end of the 2019-2020 school year.¹⁵ (Exs. P-3, P-5, P-6, R-9; Tr. 121-123, 563.)

26.

The team also reviewed the results of an informal speech evaluation conducted in January and February 2020 and psychological assessments conducted on March 4, 2020. The team amended some of his IEP goals and decided to focus on communication goals during ESY services during the summer, specifically using a picture board or signs to communicate his wants and needs and to participate in communication exchanges with familiar adults. However, ██████’s problems with distance learning continued through the summer, and ██████ was unable to supervise the ESY sessions after the first week. By August 2020, as the IEP team gathered to begin

¹⁴ For example, ██████’s progress on his social/emotional/behavioral goal of complying with class rules with no aggression was changed from level 2 to level 3 on the May 2020 Progress Report. However, the data reported showed that ██████ complied without aggression 35% of the time on the November 2019 report, 30% on the February 2020 report, and 32% on the May 2020 report, for a net decrease in performance on this objective. Similarly, the District changed ██████’s level on the objective of staying in his area from 2 to 3, although the data in the reports reflected that he stayed in his area 60% of the time on the November 2019 report, 65% on the February 2020 report, and 67% on the May 2020 report, reflecting only a small move toward mastery. On his Daily Living Goals, the District also changed the level of mastery from 2 to 3 in the May 2020 Progress Report, but the notes indicate that ██████’s performance on these goals improved from 60% to 62% (keeping clothes on) and from 10% to 12% (brushing his teeth) from February to May. Similar small gains were reported on the math and reading goals, and his progress on his communication and cognitive goals was mixed. (Exs. P-3, P-6.)

¹⁵ Ms. Dement testified that the IEP team would not have expected mastery at the end of May, even though that was the end of the school year, because the IEP did not expire until August, and ██████ was offered ESY services. In addition, Ms. Dement opined that “for a student like ██████ anything is progress for him. Obviously, we look at the progress reports to see how he’s progressing toward those goals. Those are very important.” (Tr. 123, 158, 655.)

developing ██████'s IEP for the next year, ██████ had not mastered any of his IEP goals for the past year, although he had made some additional progress, short of mastery, on some of his ESY communication goals.¹⁶ (Exs. P-8, R-9; Tr. 280-84, 413-414, 564-571.)

E. August 2020 IEP

27.

In August 2020, ██████'s IEP team met three times, each time for almost three hours, to develop his IEP for the 2020-2021 school year. The first meeting was on August 3, 2020 and was held mostly in person. Approximately ten educators and specialists participated from the District, including autism and behavioral specialists, speech pathologists, the Director of Special Education, and others. In addition to ██████ and ██████ ██████ had a special education advocate, Marianne Young, and a private Board-Certified Behavior Analyst (“BCBA”), Jamie Enns, participate on his behalf. At the first meeting, the team reviewed all the goals and objectives from the past IEP and the data collected on ██████'s performance and evaluations and agreed that the number of goals needed to be reduced and more specific focus paid to attending and communication. The team reconvened virtually on August 19, 2020, and August 26, 2020. (Ex. P-8; Tr. 171, 183, 306, 580-581.)

28.

During the meetings, ██████ ██████ and their advocate expressed that they did not think ██████ had made progress or been provided a free appropriate public education (“FAPE”), particularly during virtual instruction, and that he had become too dependent on prompting. They

¹⁶ For example, ██████'s performance on answering yes/no questions by selecting a picture symbol increased to 67% of the time by the end of the summer, although he still required significant prompting, including hand-over-hand assistance. On another ESY communication objective relating to using 2- to 3-word signs or pictures during meals and recreation, ██████ went from 52% on the May 2020 progress report, to 22% spontaneously and 50% of the time with modeling and a lot of verbal prompts by either B.M. or the speech therapist. This would appear to indicate a slight regression on this objective. (Exs. P-8, P-30; Tr. 157-159, 162, 167, 282.)

stated that ■ needed intensive full-time Applied Behavioral Analysis (“ABA”) therapy at a private clinic for approximately nine weeks.¹⁷ They also requested compensatory education for the time ■ received virtual instruction, and notified the District that they were reserving their right to seek reimbursement for a private placement for ■. The District disagreed with these requests, but continued to work with the family, Ms. Young, and Ms. Enns to develop appropriate goals and objectives for ■’s IEP, as well as to identify supports and services for the coming school year. The team agreed that the District would conduct numerous evaluations – including in the areas of occupational therapy, physical therapy, assistive technology, and functional behavioral analysis – and would incorporate the family’s request for music therapy into his instruction and explore opportunities for ■ to interact with non-disabled peers and participate in various recreational opportunities, including equine therapy, as COVID restrictions allowed. (Exs. P-8, P-30; Tr. 108, 359, 469, 580-582.)

29.

■ acknowledged at the administrative hearing that the District acted professionally and collaboratively with them during the August 2020 meetings, particularly with Ms. Enns, and that the District was very accepting of their suggestions, as long as they were easy and not too expensive. Nevertheless, ■’s perception was that the District was only “putting on a show” during those meetings, and that their “Southern hospitality” masked an

¹⁷ Petitioners presented the District with two letters from Dr. Helen Panarites, M.D., of the Marcus Autism Center, from August 2020, which stated that because of his severe autism spectrum disorder, ■ required “intensive intervention in order to safely navigate his environment,” and that ABA “is one of few interventions that have shown efficacy in working with children with autism in published research studies.” She expressed her opinion that it was “medically necessary” for ■’s IEP to include behavioral health treatment that used ABA principles, in addition to other therapies. However, Dr. Panarites did not testify, nor did Ms. Enns, who began providing ABA treatment to ■ at the end of 2020. During the hearing, Ms. Dement acknowledged that the ABA services offered through the school were different than private therapy ABA. As she explained, the school uses ABA principles, such as Discrete Trial Training, to deliver instruction in alternate content curriculum, such as math and reading, while private ABA therapy uses direct therapy to teach behavior and communication skills. (Ex. P-8; Tr. 374, 697-704.)

arrogant and complacent attitude. [REDACTED] believes that in response to [REDACTED]'s biological mother's disinterest in [REDACTED]'s education, the District allowed him to fall through the cracks in dereliction of their obligations under IDEA, and they were now "scrambling" to try and rehabilitate their image. Conversely, Ms. Dement testified that the District tried to partner with [REDACTED] and [REDACTED] and gain their trust. In fact, according to Ms. Dement, during the August 2020 meetings, the parties exchanged multiple drafts of the IEP, and the District responded to the family's revisions and suggestions until they reached complete agreement on the final version of the IEP.¹⁸ (Ex. P-30, P-32; Tr. 310, 452, 469, 509, 512-515, 581-586.)

30.

One of the changes to [REDACTED]'s IEP was a focus on a picture exchange communication system ("PECS"), which [REDACTED]'s family and providers requested. PECS uses a book or a digital device that has pictures that can be exchanged with a partner to communicate a want or need. For example, one of the three communication goals adopted by the team in the August 2020 IEP was for [REDACTED] to independently pick up a picture of an item from the PECS book, travel up to 10 feet to a communication partner, and release the picture into the partner's hand to request the item. The goal was for [REDACTED] to show "communicative intent" by completing these steps.¹⁹ A second

¹⁸ The Court has listened to portions of the audio recording from the final IEP meeting on August 26, 2020, which corroborates Ms. Dement's testimony that the District gave Petitioners and their advocates ample opportunity to discuss all the goals, and the IEP team reached consensus on each adopted goal and objective with the express agreement of Petitioners' representatives. In particular, the team discussed prompt levels and the reasonableness of establishing independence as the target for certain goals and decided to postpone setting prompt level with respect to some goals until after they observed his performance when in-person instruction resumed. (Ex. P-32.)

¹⁹ Ms. Dement admitted that she is not an expert in communication or PECS, but she does understand the basic principles. (Tr. 117, 119.) Moreover, the parties did not dispute that PECS is an accepted, research-based approach to building communication skills in children with autism. See generally *L.M.P. v. Sch. Bd.*, 879 F.3d 1274 (11th Cir. 2018) (case involved a twelve-year IDEA battle involving claim that a Florida district had a blanket policy not to include ABA-based therapies in IEPs; court held that parents lacked standing to bring the claim because their children's IEP's contained PECS, which is an ABA-based therapy, just not the one the parents wanted). In *L.M.P.*, the Eleventh Circuit held that

ABA is an applied science whose purpose is to produce socially significant changes in behavior.

communication goal was for [REDACTED] to select the correct picture of a preferred item when his PECS book had a picture of the preferred item and a distractor. The District agreed to train their staff on using PECS with [REDACTED] and began to use the system when [REDACTED] returned to in-person instruction on September 3, 2020. Another change was the addition of a series of objectives on emotions, which involved selecting a real-life picture card that depicted a specific emotion from a field of at least 3 cards. [REDACTED]'s daily living goal was reduced to just one goal – to independently dress himself before leaving the restroom using a visual step-by-step task sheet. Similarly, the team adopted just one reading goal – to correctly identify his first and last name from a field of at least 3 cards. Finally, the team added three vocational goals, involving identifying safety signs through PECS, responding to vocal safety instructions, and presenting a contact card when asked his name. The team agreed to establish new baselines on his goals and objectives once the PECS program was implemented. (Exs. P-8, P-32; Tr. 120, 207-209, 347, 584.)

31.

Following the August 2020 meetings, the District issued Prior Written Notices (“PWNs”) to explain why they did not agree with some of the family’s requests, including 1) [REDACTED]’s family’s

ABA is not a method of instruction or method of teaching. Rather, it is a broad umbrella under which numerous intervention strategies fall. There is no singular technique that must be used in all circumstances. There are hundreds of ABA intervention strategies that can be provided.

One strategy is called discrete trial training (“DTT”). DTT is a highly structured form of implementing the principles of reinforcement and stimulus control. Although DTT is often done one-on-one, it can be done in group setting when appropriate. Just as DTT is a method under the umbrella of ABA there are multiple intervention strategies that have been developed under the umbrella of DTT. Different methods include the Lovaas method, the pivotal response method, and the Picture Exchange Communication Systems (“PECS”) method. PECS is a scientifically-validated ABA-based intervention strategy for teaching communication skills to children with autism.

Id. at 1277 [citations to district court decision omitted]; see also A.M. v. Bridges Pub. Charter Sch., 2019 U.S. Dist. LEXIS 55677, *5, n.5 (D.D.C. Jan. 30, 2019) (quoting M.H. v. New York City Dep’t of Educ., 712 F. Supp. 2d 125, 131 n.2 (S.D.N.Y. 2010) (defining discrete trial instruction or DTT as an ABA methodology in which “complex goals are broken down into simple elements which can be taught in repeated trials”). Although there is not similar background evidence regarding ABA, DTT, or PECS in the record in this case, both [REDACTED]’s IEP team and his private BCBA have employed PECS as an ABA intervention targeting [REDACTED]’s communication and behavior deficits.

request that ■■■ receive in-person instruction, rather than virtual instruction, when school began on August 13, 2020; 2) their request for ABA therapy for approximately nine weeks through a private clinic if the District was unable or unwilling to provide such services; 3) a clarification that ■■■s guardians were not intending to enroll ■■■ in a private placement, but were only reserving their right to do so; 4) the family’s request for an Independent Educational Evaluation (“IEE”),²⁰ and 5) the family’s request for compensatory education for the period of virtual instruction from March 13, 2020, through May 22, 2020. With respect to virtual instruction, the PWNs reiterated the position articulated by Ms. Casablanca and others during the three August IEP meetings, that the District was “within its right” to offer instruction virtually to all students, including ■■■ under guidance from the U.S. DOE and the GA. DOE. In addition, Ms. Casablanca asserted that the District would have to wait until they could observe ■■■ “in the building,” once schools re-opened in September, before the District could determine what further supports he might need. Similarly, in the August 21, 2020 PWN, the District contended that “there wasn’t an obligation to provide compensatory education for the period March 13 – May 22, 2020 due to the structure the District implemented and based on the guidance provided from the GADOE.”²¹ Finally, the District asserted that ■■■ already received ABA services through trained staff throughout his school day, and denied the request to pay for intensive ABA therapy through a clinic. (Exs. P-8, P-9, P-30, P-31; Tr. 239-248, 395.)

²⁰ The IEP team agreed to conduct a comprehensive re-evaluation of ■■■ in multiple areas, and Petitioners did not include an evaluation claim in the due process complaint.

²¹ According to District representatives during the August 3, 2020 meeting, parents across the District were confronting issues overseeing virtual instruction for their students, but ■■■s family, in a slightly heated exchange, pointed out that ■■■ had unique needs, different than the majority of District students, that made accessing instruction through a virtual platform to be impossible on his own, and extraordinarily challenging even with direct adult oversight. (Ex. P-30.)

F. First Semester 2020-2021 School Year

32.

As stated above, the District began the 2020-2021 school year with virtual instruction for fifteen days, and on September 3, 2020, [REDACTED] and other students with disabilities returned to school for full-time in-person instruction. During the next several months, the District conducted a number of evaluations as ordered by the IEP team, and [REDACTED] worked on his new IEP goals in his small classroom at Westside. [REDACTED] and [REDACTED] continued to be dissatisfied with his progress, however, and testified that he continued to lack basic daily living skills related to toileting and holding his toothbrush. They began pursuing outside services for [REDACTED] through private providers, including engaging Jamie Enns, the BCBA, and a behavior technician, to begin work with [REDACTED] in his home late in October 2020. (Exs. P-11 through P-14, P-23; Tr. 406, 414-415.)

33.

According to a report prepared by Ms. Enns in April 2022, she began her work with [REDACTED] by creating a plan for direct ABA services, which appear to have been paid for by Medicaid or a private insurer beginning in December 2020, and included intensive instruction designed to “promote the acquisition of new skills and the reduction of problem behaviors.” Her report identified a number of treatment areas, such as 1) deficits in social communication and interaction, which were to be addressed through the use of PECS; 2) remediation of restricted or repetitive patterns of behavior and movement, which included daily living tasks, like showering, toileting, and teeth brushing, working at a table, tolerating changes in routine and exposure to stressors, like wearing a mask or glasses, and learning to wait for preferred items or activities; and 3) reduction in problem behaviors, such as aggression, disrobing, property destruction, and self-injury. Within the treatment areas, Ms. Enns identified over 400 discrete targets, a number of which were met

almost immediately. (Ex. P-23; Tr. 406, 414-416, 601.)

34.

During the winter break, ██████████ and ██████████ decided to pull ██████████ out of Westside and begin educating him at home through private services, led by Ms. Enns and supplemented by private therapies in the community, beginning in January 2021. At the time they removed him from school, ██████████'s progress reports reflected he was making progress on most of his IEP goals, including a few objectives that had been fully mastered.²² ██████████ testified that they had not seen much improvement at home, and by December 2020, ██████████ still could not tolerate waiting, would throw or push away items when he was done, and frequently would chew on things, like his shirt, for stimulation. He could not open a water bottle. According to ██████████ ██████████'s bathroom hygiene at school was poor, and he often came home from school with dirty underwear that they would throw away. (Ex. P-10; Tr. 414, 491-492, 649-650.)

G. Services and Progress at Home

35.

From January 2021 through the present, ██████████ has received therapies at home and in his community and has not returned to Westside or any other District school. For at least six months, Ms. Enns and the behavior technician provided ██████████ with 20 to 24 hours of in-home ABA therapies, overlapped with private speech and occupational therapy. In addition, ██████████ has received some

²² The Court has reviewed the progress reports dated December 3, 2020, and February 22, 2021, which reflect ██████████'s progress toward his IEP goals through his last day at Westside on December 18, 2020. According to the progress reports, ██████████ was making more progress toward his IEP goals this school year, with most of his goals at level 3 – progressing – including his communication goals using the PECS books and his use of functional communication. The February 22, 2021 progress report made a specific note regarding an important PECS breakthrough: ██████████ brought the wrong picture to an adult, and when he was given that item, he put it down and ran back to his PECS book to retrieve and bring back the correct picture, demonstrating an understanding and intent to communicate using the cards. He was also reported to have made significant progress in not grabbing, pulling or snatching a desired item, but using appropriate forms of communication, either his picture exchange or physical proximity and gesturing, 90% of the time. (Ex. P-10.)

music therapy, at a cost of \$85.00 per hour, and [REDACTED] has explored private physical therapy, at a cost of \$123 per hour (without insurance), and equine therapy, at a cost of \$70 per session. In addition, Ms. Enns's services, which appear to have been paid for by Medicaid or private insurance, are billed at a rate of \$36.68 for every 15 minutes, and the behavior technician's services are billed at \$18.15 per 15-minute session. Finally, [REDACTED] has explored private education for [REDACTED] at the Joseph Sams School, a special needs school in Fayetteville, Georgia, where tuition for the Upper Collaborative program is \$23,885 per year.²³ (Exs. P-24 through P-29; Tr. 471-479, 533, 588.)

36.

According to [REDACTED] and [REDACTED] [REDACTED]'s progress in his home program has been "exponentially better." [REDACTED] testified that [REDACTED] can now independently get a water bottle, remove the cap, pour it into a cup, and pour in the correct amount of MiO drink mix. He can make a sandwich, open and spread mayonnaise, scoop food onto his plate, scrape food into the garbage, and put dishes in the sink or dishwasher. He is also now washing his body and brushing his teeth independently and is progressing with bathroom hygiene. He is using a high-tech communication device, and can point to signs or pictures for drink, take a ride, and other items and activities. [REDACTED] testified that [REDACTED] will point to things he wants, and is making progress on shaking his head yes and no. In addition, [REDACTED] is hopeful that he will be independent with his speech-generating device in the next year. In his home environment, [REDACTED] has grown calmer, can tolerate waiting, no longer throws items or chews on them, attends to television, and interacts some with his siblings. [REDACTED] testified to her belief that early intensive ABA therapy would have changed the course of [REDACTED]'s life. (Tr. 415-419, 471, 492-94.)

²³ There is no information in the record about the Joseph Sams School, other than the name, address, and tuition rates, and Petitioners did not identify private school as a requested remedy in the due process complaint.

According to Ms. Enns's report, which she prepared in April 2022, ■■■'s gains at home were more modest than his guardians described and have not come without challenges. For example, because of the demanding nature of the ABA therapy, ■■■ has become frustrated at times, and his aggression and other problem behaviors have cropped up. As Ms. Dement testified, Ms. Enns's report notes some instances of property destruction and self-injury during this time, which the school rarely saw.²⁴ Moreover, based on an assessment in March 2022, Ms. Enns reports that ■■■ "slightly improved in the area of self-management but regressed in 4 areas related to tolerating changes without problem behavior." Ms. Enns also characterized his progress in basic communication as "slight," and his gains in dressing, toileting, grooming, bathing, and health as "modest." According to Ms. Enns, ■■■ continues to need many "prerequisite skills" before he can make significant gains in functional living skills. In addition, as Ms. Dement observed, Ms. Enns's report also describes ■■■'s continued reliance on prompting in some situations. For example, Ms. Enns reported that ■■■ had switched from PECS "to a speech generating device ("SGD") and is able to request for continuation or cessation with prompts and occasionally independently." Ms. Enns also reported that ■■■'s "lack of imitative skills has resulted in slower progress with acquiring daily living and communication skills as his staff and family must use some type of physical, gestural, and positional prompting to increase skill acquisition. This has also resulted in significant prompt dependence." (Exs. P-23, P-34; Tr. 359, 670, 684-686, 751.)

²⁴ In fact, the speech therapist who worked with ■■■ told the IEP team that she did not see aggressive behaviors with ■■■ and she rated his problem behaviors as mild. (Ex. P-34.)

H. IEP Meetings in 2021

1. April and May 2021 IEP Meetings and Requests for Hospital Homebound or Home-Based Services

38.

Although [REDACTED] did not return to school in January 2021, he remained an enrolled student through the end of the school year and into the summer. In addition, the District had completed numerous evaluations in the fall of 2020, and his IEP team reconvened in April and May 2021 to review the results of these evaluations and discuss the plan for [REDACTED] going forward. Ms. Enns and [REDACTED]'s guardians met with the team to review his goals from the August 2020 IEP and consider updates regarding his at-home therapy and the evaluations. The team discussed streamlining some of [REDACTED]'s IEP goals, should he return to school, and agreed to remove the goal relating to identifying emotions to focus more on attention and communication.²⁵ In addition, the team heard from the evaluators, including the evaluator who assessed [REDACTED]'s needs and abilities to use AT. The AT evaluator told the team that he assessed [REDACTED]'s use of PECS in October 2020 and determined that [REDACTED] understood that he was expected to take a card and deliver it to a communication partner, but he observed [REDACTED] pick the card indiscriminately, without even looking at it. [REDACTED] demonstrated the same indiscriminate selection on a digital tablet, not looking at the screen and making a random selection. The evaluator concluded that [REDACTED] at that time, lacked an understanding of the purpose of PECS and his use of the system lacked “communicative intent.” Accordingly, the evaluator concluded that [REDACTED] had not mastered PECS Level 1 despite having goals built around PECS Levels 2 and 3, and he recommended that [REDACTED]'s goals include developing mastery of Level 1, so that he

²⁵ The District mistakenly removed a different goal, however, and the goal relating to emotions remained in [REDACTED]'s draft IEP following the April and May meetings. Although Petitioners made much of this error, the evidence proved that it was just a clerical mistake and did not have an impact on [REDACTED] or his guardians since he never returned to school and the IEP was not implemented. (Tr. 316-318.)

can select and deliver the correct picture to communicate his specific preference.²⁶ (Exs. P-12, P-16, P-35; Tr. 308-314, 344.)

39.

During the April and May 2021 meetings, [REDACTED] and [REDACTED] stated that they wanted [REDACTED] to continue to receive his medically-necessary therapy at home and did not want to send him back to school at that time. The District proposed providing IEP services to [REDACTED] on a half-day schedule, so that Ms. Enns could continue ABA therapy in the home, either in the morning or the afternoon, and [REDACTED] could come to school to work on his IEP goals for the other half of the day. [REDACTED] asked instead about Hospital-Homebound (“HHB”) instruction, and the District provided her with an HHB medical referral form. However, when [REDACTED] returned the form on or about April 30, 2021, [REDACTED]’s physician had indicated that [REDACTED] was not confined to his home and could attend school with accommodations and receive HHB services on an intermittent basis. The District advised [REDACTED] that Ga. DOE rules require that a student be confined to his home for HHB services, and [REDACTED] submitted a second medical referral form from the same physician on May 7, 2021. This time, the physician indicate that [REDACTED] was confined to his home and could not attend school or receive HHB services on an intermittent basis. Understandably, the District was uncertain about these two conflicting forms from the same physician just one week apart, and they asked to consult with the physician before making a determination on the HHB

²⁶ Ms. Dement testified that notwithstanding the AT evaluation, [REDACTED]’s performance with PECS in the classroom and with familiar adults demonstrated a greater understanding of the purpose of the picture exchanges than was observed during the October 2020 AT evaluation. The speech pathologist, Donna Alaimo, for example, who worked regularly with [REDACTED] reported to the IEP team some of the successes discussed in the progress reports from the end of December 2020, in which [REDACTED] was discriminating between a field of five pictures and even self-correcting when he picked the wrong picture. Ms. Alaimo was very pleased with this development, and noted in her evaluation summary on December 12, 2020, that in addition to this progress on discriminating between pictures, [REDACTED] was improving on using other functional communication tools, such as eye gazing and physical proximity, as opposed to inappropriate behaviors, like grabbing. Ms. Alaimo also told the team that [REDACTED] was demonstrating some ability to take turns during games, which she also found to be an exciting development. (Exs. P-11, P-34.)

request. On May 13, 2021, ██████ responded to the District, stating that she no longer wished to pursue HHB instruction, but wanted to request that ██████ receive home-based instruction for his IEP services. (Exs. P-16, P-17, P-34, R-43; Tr. 368-372, 377.)

40.

On May 14, 2021, the District provided Prior Written Notice relating to ██████'s family's request for either HHB instruction or a placement at home for IEP services. In the PWN, the District offered to collaborate with the family and Ms. Enns to accommodate the home-based ABA therapy, which they had done for other families, and the District was willing to provide IEP services at school three hours per day on a flexible schedule. However, because the District did not have any evidence that ██████ was confined to his home and could not participate in and benefit from instruction in the school setting, the District declined the request for a home placement. At the hearing, Ms. Dement acknowledged that an IEP team could consider home-based instruction, independent of HHB criteria, based on a student's unique circumstances. However, she noted that a home placement was the most restrictive placement, where the student would not have access to peers, teachers, and other activities and supports available in the school setting. Thus, the District wanted additional information about why such a restrictive placement was appropriate. Until such time, the District was standing by the IEP developed in the April and May 2021 IEP meetings. (Exs. P-16, P-17; Tr. 278-297, 377, 379-383, 592, 742-743.)

2. June Extended School Year Amendment

41.

█████ stayed at home through the summer of 2021. Nevertheless, because ██████ was technically still enrolled as a student in the District, his team considered whether his IEP should be amended to include ESY services. ██████ responded by email to the District, indicating

that the IEP was improved with the addition of ESY services so she consented to the amendment, but because the IEP as a whole did not offer ■■■ FAPE, he would not be attending school that summer. When he did not appear for the beginning of the 2021-2022 school year in August, he was disenrolled from District schools. (Exs. P-18, R-46; Tr. 617-623.)

3. November and December 2021 IEP Meetings

42.

In October 2021, Petitioners' counsel contacted the District and said that Petitioners were considering reenrolling ■■■. The District assembled ■■■'s IEP team, which met virtually on November 15, 2021, for two hours and again on December 7, 2021, for two hours. Both the District's lawyer and Petitioner's lawyer attended, as did eight District educators, ■■■■■ and ■■■■■.²⁷ At the November 15, 2021 meeting, Petitioners notified the District that they might seek reimbursement for private therapies in the home because private funding for Ms. Enns's services was not unlimited, and the District had failed to offer FAPE, both in the past and in the current proposed IEP. The District issued a Prior Written Notice on November 19, 2021, asserting that it had offered FAPE to ■■■ while he was enrolled, and that the IEP team had not completed the development of a new IEP in the event he re-enrolled in the District. At the December 7, 2021 IEP meeting, Petitioners renewed their request for reimbursement for private therapies or private school. In addition, they requested the District consider a home placement. The District issued a Prior Written Notice on December 7, 2021, indicating that ■■■'s IEP team considered home services, but that the District contends that a school-based placement offered ■■■ FAPE in the least restrictive environment. The District noted that at Westside ■■■ had access to alternate content

²⁷ The District did not receive any written data from Ms. Enns related to her work with ■■■ prior to the first meeting on November 15, 2021. At 10:00 p.m. on the night before the second meeting, December 7, 2021, the District received a progress report from Ms. Enns, with data from April 2021 to October 2021. (Tr. 631-634.)

standards, a certified teacher and para-professionals, and peers, as well as oversight by a BCBA, two Autism Behavior Specialists, and a behavior technician. The District further noted that ABA principles were incorporated into ■■■'s programming, and ■■■ had been making appropriate progress when he was last enrolled at Westside. (Exs. P-19, P-20, P-21; Tr. 628-631, 642-43.)

43.

■■■ remained at home for the remainder of the 2021-2022 school year and did not reenroll in District schools. On February 7, 2022, Petitioners filed their due process complaint, and a hearing was scheduled for April 11-14, 2022. At the request of the District and with the consent of Petitioners, the hearing was reset for May 11 and 13, 2022, at OSAH in Atlanta, and on May 16, 2022, in the Coweta County Juvenile Court in Newnan. The parties filed post-hearing briefs on July 1, 2022, after the receipt of the transcript, and the record closed.

III. CONCLUSIONS OF LAW

A. General Law

1.

The pertinent laws and regulations governing this matter include IDEA, 20 U.S.C. § 1400 *et seq.*; federal regulations promulgated pursuant to IDEA, 34 C.F.R. § 300 *et seq.*; and Georgia Department of Education Rules, Ga. Comp. R. & Regs. (“Ga. DOE Rules”), Ch. 160-4-7.

2.

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

3.

The goals of IDEA are “to ensure that all children with disabilities have available to them a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs” and “to ensure that the rights of children with disabilities and parents of such children are protected.” 20 U.S.C. § 1400(d)(1)(A) – (B); J.N. v. Jefferson Cnty. Bd. of Educ., 12 F.4th 1355, 1362 (11th Cir. 2021). In addition, IDEA includes a “specific directive” that disabled children be placed in the “least restrictive environment” or “LRE.” Greer v. Rome City Sch. Dist., 950 F.2d 688, 695 (11th Cir. 1991), withdrawn, 956 F.2d 1025 (11th Cir. 1992), reinstated in part, 967 F.2d 470 (11th Cir. 1992). Specifically, IDEA provides that

(2) Each public agency must ensure that –

(i) To the maximum extent appropriate, children with disabilities . . . are educated with children who are nondisabled; and

(ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the uses of supplementary aids and services cannot be achieved satisfactorily.

34 C.F.R. § 300.114(a)(2); 20 U.S.C. § 1412(a)(5)(A).

4.

The scope of an IDEA due process hearing is limited to those issues raised in the due process complaint, which cannot be amended without the consent of the opposing party. See 20 U.S.C. § 1415(f)(3)(B) (preventing the party who requests the due process hearing from raising “issues at the due process hearing that were not raised in the [due process complaint] unless the other party agrees otherwise”). In addition, a due process complaint must include a description of the nature of the problems and “a proposed resolution of the problem to the extent know and available to the party at the time.” 20 U.S.C. § 1415(b)(7)(A)(ii)(III) and (IV). Petitioners did not

amend their due process complaint, and the Court will address only those issues raised in the February 7, 2022 complaint, as identified below.

5.

IDEA requires that a due process complaint “allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process complaint.” 34 C.F.R. § 300.507(a)(2). The only exceptions to this two-year statute of limitations are if a parent was prevented from filing a due process complaint due to specific misrepresentations by the school district or if the district withheld information from the parent that was required to be provided by IDEA. *Id.* Petitioners have not asserted that either exception applies in this case, and there was no evidence in the record to support tolling the statute of limitations. Consequently, the Court will consider events occurring prior to February 7, 2020, the beginning of the limitations period in this case, only to the extent appropriate to understand the alleged violations of IDEA occurring within the limitations period and raised in the complaint, but not as an independent basis for relief under IDEA. *See Draper v. Atlanta Indep. Sch. Sys.*, 480 F. Supp. 2d 1331, 1341 (N.D. Ga. 2007), *aff’d* 518 F.3d 1275 (11th Cir. 2008) (historical facts used as background and to provide context for claims, not to support a violation of the IDEA).

6.

The Individualized Education Program or IEP is the “centerpiece” of IDEA’s extensive procedural framework. *J.N.*, 12 F.4th at 1362 (citing *Honig v. Doe*, 484 U.S. 305, 311 (1988); 20 U.S.C. § 1401(9)(D)); *see also Endrew F. ex rel. Joseph F. v. Douglas Cty. School Dist. RE-1*, 137 S. Ct. 988, 994 (2017). An IEP is a “written statement that describes the child’s academic performance and how the child’s disability affects her education, states measurable educational

goals and special needs of the child, establishes how the child’s progress will be measured and reported, and states the services available, based on peer-reviewed research, to enable the child to attain the goals, advance educationally, and participate with disabled and nondisabled children.” A.L. v. Jackson Cnty. Sch. Bd., 635 Fed. App’x. 774, 777 (11th Cir. 2015) (quoting K.A. ex re. F.A. v. Fulton Cnty. Sch. Dist., 741 F.3d 1195, 1201 (11th Cir. 2013)). For an IEP to meet the standards for FAPE under IDEA, it must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” Endrew F., 137 S. Ct. at 1001; see also L.J. v. Sch. Bd., 927 F.3d 1203, 1211 (11th Cir. 2019). “The ‘reasonably calculated’ qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials.” Endrew F., 137 S. Ct. at 999 (citation omitted). Thus, “a court cannot evaluate whether an IEP is reasonably calculated to provide a FAPE solely in terms of what a student actually achieves.” S.S. v. Cobb Cnty. Sch. Dist., 1:18-DV-00313-JPB, 2021 U.S. Dist. LEXIS 37154, at *5 (N.D. Ga. Mar. 1, 2021). Rather, the Eleventh Circuit has recognized that the development of an IEP is a “fact-intensive exercise”²⁸ and the resulting “IEP is a snapshot, not a retrospective.” Mandy S. ex rel. Sandy F. v. Fulton County Sch. Dist., 205 F. Supp. 2d 1358, 1367 (N.D. Ga. 2000) (quoting Roland M. v. Concord Sch. Comm., 910 F.2d 983, 992 (1st Cir. 1990) (“actions of school system cannot . . . be judged exclusively in hindsight”)).

B. Due Process Claims

7.

In their due process complaint, Petitioners identified the following six claims:

1. The District failed to provide ■■■ appropriate education by failing to address his deficits in functional communication skills.

²⁸ L.J., 927 F.3d at 1207 (quoting Endrew F., 137 S. Ct. at 999).

2. The District failed to provide an individualized plan to ■ because (a) the District did not have baseline data for goals included in the August 2020 IEP, (b) his IEP included goals without any particularized data about whether the goals addressed his skill deficits, and (c) the District predetermined that his placement would not be at home.
3. The District denied ■ and ■ equal opportunity to participate in the IEP process by confusingly redrafting the IEP in February 2020 and by changing his placement to virtual without holding an IEP meeting.
4. The District did not provide appropriate education during virtual schooling because they failed to address the unique needs of a non-verbal student with cognitive impairment attempting to learn in a virtual classroom.
5. The District discriminated against ■ by retaliating against his doctor for providing medical opinion on his education needs.
6. The District discriminated against ■ by failing to provide him access to education on account of his disability.

The Court will address each claim in turn below.

1. ■'s IEP was not reasonably calculated to enable ■ to make appropriate progress toward his communication goals from February 2020 to August 2020.

8.

As of February 7, 2020, ■'s annual IEP had been in place, as amended, for half of the school year. When it was first adopted, ■'s biological mother had expressed her belief that ■'s problems stemmed from his communication deficits, and the September 2019 IEP noted that despite the District's efforts to introduce different types of AT in the past to help him communicate,

including low-tech picture boards and high-tech speech-generating devices, ■■■ was reluctant to use any of the AT or to accept physical prompting to do so. His two communication goals from September 2019 to February 2020 were both focused on his learning to use this AT, yet the IEP did not add any new supports or instructional methodologies to help ■■■ succeed in using it, did not order a new AT evaluation,²⁹ and did not include individual speech-language therapy. Unsurprisingly, the preponderance of the evidence proved that ■■■ did not make meaningful progress on his communication goals between September 2019 and February 2020. In fact, at the February 3, 2020 meeting, the IEP team noted that ■■■'s progress on the communication goals was slow and inconsistent because of ■■■'s lack of attention and compliance, and even after the team discussed his lack of progress and tweaked his communication goals after the meeting, ■■■'s performance on his communication goals did not improve, and in some cases, regressed.

9.

Although the original drafting of the IEP in August and September 2019 is outside the two-year limitations period, the IEP team had an obligation to review and revise the IEP to address any lack of expected progress toward annual goals. 34 C.F.R. § 300.324(b)(1)(ii)(A) & (D); 20 U.S.C. § 1414(d)(4). When the team met to consider ■■■'s lack of progress in February 2020, the District admitted that ■■■ was still relying on physical proximity, gestures, and vocalizations to communicate, just like he was in September 2019 and the previous school year, and that he had not been successful in using the AT identified in his IEP goals, including a speech-generating device or the picture cards. Under the circumstances, in light of ■■■'s past struggles to understand

²⁹ “Assistive technology service” includes an evaluation of the needs of a child with a disability for an assistive technology device, coordination of other therapies or interventions needed to use the device, and training the child, the child’s family, if appropriate, and professionals involved with the child in using the device. 34 C.F.R. § 300.6. An “assistive technology device” is any item, piece of equipment, or product system used to improve the functional capabilities of a child with a disability. 34 C.F.R. § 300.5.

and use AT, coupled with his continued lack of progress toward his communications goals in February 2020, the Court concludes that the District was obligated to make meaningful revisions to ■■■'s IEP following the February 3, 2020 IEP meeting. However, instead of acknowledging this obligation in February 2020 when ■■■'s new guardians inquired about ■■■'s lack of basic communication skills, the District's representatives questioned ■■■'s capacity to learn to use such devices and made minimal and ineffective changes to ■■■'s IEP to address his communication deficits. The Court concludes that the IEP in effect on February 7, 2020, even after it was amended, was not reasonably calculated to allow ■■■ to advance appropriately toward attaining his annual communication goals in light of his unique circumstances.

10.

Moreover, the Court concludes that what meaningful instruction ■■■ was receiving on his communication goals was drastically curtailed upon the cessation of in-person learning due to the COVID pandemic in mid-March 2020. As discussed below, ■■■'s access to special education and services during virtual instruction was extraordinarily limited given the difficulties ■■■ and his grandmother had getting him to attend and ■■■'s inability to participate in online learning without direct adult supervision and hand-over-hand prompting. Like many children, the pandemic disrupted ■■■'s education in a profound way; however, unlike most other children, ■■■ had no independent ability to self-direct or perform schoolwork or activities without constant adult oversight and active guidance. The preponderance of the evidence proved that, for ■■■ virtual supplemental instruction on his IEP goals through the end of May 2020 and into the summer was not reasonably calculated to allow him to advance appropriately toward his communication goals given his unique disabilities.

11.

The evidence proved, however, that once the IEP team met in August 2020 and in-person instruction resumed in September 2020, ■■■'s IEP, with the new annual communication goals and the inclusion of PECS, was reasonably calculated to allow him to begin to advance appropriately. After nine hours of meetings and following the exchange of multiple drafts, the IEP team reached consensus over the appropriate goals for ■■■'s 2020-2021 school year, the measure of mastery for these goals, and the services and supports needed to help him make reasonable progress toward their attainment.³⁰ Specifically, as to his communication goals, which the evidence proved are the linchpins to ■■■'s advancement in all areas, the team agreed that the District should use PECS to teach ■■■ communication skills and the IEP called for his teachers to be trained in using this system. There is no evidence that Ms. Enns or ■■■'s guardians objected to this approach; rather, Ms. Young and Ms. Enns suggested PECS and Ms. Enns used it in her own plan for ■■■'s in-home ABA therapy. Accordingly, as of September 2020, when ■■■ returned to in-person instruction at Westside School and the District began implementing his IEP, using PECS, the Court concludes that the IEP was reasonably calculated to allow ■■■ to advance as required under IDEA.

12.

In addition, ■■■ was making progress toward his communication goals through the fall of 2020, including using the PECS book and demonstrating an understanding of its role in communicating his wants and needs. That is, notwithstanding the observations of the AT evaluator that ■■■ was indiscriminately selecting picture cards in October 2020, the evidence in the record

³⁰ Although ■■■'s guardians and Ms. Enns did not withdraw their request for more intensive at-home ABA therapies, nor did they renounce their claim that the District had denied ■■■ FAPE in the past, the evidence in the record proved that the team, with considerable input and direction from ■■■'s guardians, Ms. Young, and Ms. Enns, reached an agreement as to the goals and objectives in the August 2020 IEP through a collaborative process with District employees.

proved that by December 2020, ■■■ had demonstrated some ability in the classroom setting to recognize an incorrect selection in the PECS book and retrieve the correct picture to attain a desired item. ■■■'s functional communication skills in the classroom were also improving around this time, and he was using appropriate non-verbal communication. Finally, the IEP team had ordered numerous evaluations, including the AT evaluation, which were being completed in the fall of 2020 and would soon be available to help guide the team in further refining ■■■'s goals and services going forward.

13.

Thus, although the IEP must be evaluated in light of the information available at the time it was created, and not exclusively in hindsight, the Court finds it relevant that the supports and services put into place by the August 2020 IEP were yielding some positive results. Mandy S., 205 F. Supp. at 1367; see also B.L. v. New Britain Bd. of Educ., 394 F. Supp. 2d 522, 537 (D. Conn. 2005) (adequacy of IEP must be evaluated in light of information available at time IEP created). Admittedly, ■■■'s progress was not swift, but he was moving closer to mastery and showing glimmers of communicative intent, and the Court is persuaded by Ms. Dement's testimony that it was reasonable to expect slow but steady gains, given ■■■'s significant communication deficits. Cf. R.S. v. Highland Park Indep. Sch. Dist., No. 3:16-CV-2916-S, 2019 U.S. Dist. LEXIS 37775, * 73 (N.D. Tex. 2019).³¹ In fact, Ms. Enns made similar observations in her report, when she found that ■■■'s lack of imitative skills had led to slower progress and significant prompt dependence in acquiring communication skills after six months of intensive in-

³¹ The court in R.S. commended the parents "for acting as fierce advocates for their child and consistently pushing for challenging and meaningful goals to be included in his IEP" when he moved to a new district. Id. However, the court found that the parents' rosy perception of their child's skill and progress at his former school was not completely accurate. Id. Rather, the court concluded that "[a]s a result of R.S.'s multiple disabilities, his accomplishments happen more slowly and incrementally, with the 'big gains' occurring over a number of years or long periods of time." Id.

home services.³² Thus, as of December 2020, when [REDACTED] was removed from District schools, the Court finds that the IEP designed by the team in August was reasonably calculated to provide, and was, in fact, providing [REDACTED] with meaningful access to education as required by IDEA. See A.R. v. Katonah Lewisboro Union Free Sch. Dist., No. 18-CV-9938, 2019 U.S. Dist. LEXIS 203446 (S.D.N.Y. Nov. 21, 2019) (quoting Waczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 133 (2d Cir. 1998) (IDEA requires states to provide . . . “meaningful access to an education, but it cannot guarantee totally successful results.”)).

2. Petitioners did not meet their burden to prove that the District failed to provide an individualized plan for [REDACTED] because of a lack of data or pre-determination of his placement.

14.

Claim 2 is actually made up of three separate claims – two relating to an absence of data in [REDACTED]’s IEP and one relating to the District’s denial of a home-based placement. The first data-related claim alleged that the August 2020 IEP was deficient because it lacked “baseline data.” First, the IEP contained a detailed description of [REDACTED]’s present levels of performance. Second, the team agreed that because they were instituting a new instructional method – PECS – it was appropriate to establish new baselines once the program was implemented. Finally, IDEA does not mandate measurable baselines, only “a statement of measurable annual goals” and a description of how “the child’s progress toward meeting the annual goals” will be measured, which were included in the August 2020 IEP. See 34 C.F.R. § 300.320(a)(2)-(3); Damarcus S. v. District of Columbia, 190 F. Supp. 3d 35, 52 (D.D.C. 2016); see also T.M. v. Gwinnett County Sch. Dist.,

³² Even if the Court were to give more weight to [REDACTED] and [REDACTED]’s anecdotal assessments of [REDACTED]’s progress since he left Westside than to the more measured assessment of his progress by Ms. Enns, “the inquiry as to the appropriateness of [an LEA’s] program is not comparative.” Kerkam ex re. Kerkam v. Superintendent, D.C. Pub. Sch., 931 F.2d 84, 88 (D.C. Cir. 1991) (benefit from private placement “has no bearing” on whether district’s IEP conferred education benefit); M.M. ex rel. [REDACTED] v. Foose, 165 F. Supp. 3d 365, 380 (D. Md. 2015) (no authority holding that courts should “consider student’s after-occurring progress in a private-school environment in determining whether the public-school system formerly offered the student a FAPE.”).

No. 1:10-CV-370, 2010 U.S. Dist. LEXIS 157989, *51-52 (N.D. Ga. Dec. 20, 2010) (student’s baseline made clear in present levels of performance section, and IEP included goals with measurable standards), aff’d 447 Fed. App’x. 128 (11th Cir. 2011); T.T. v Jefferson Cty. Bd. of Educ., No. 2:19-cv-1965, 2020 U.S. Dist. LEXIS 219052, *16 (N.D. Ala. Nov. 23, 2020) (“IDEA does not explicitly mandate [baseline] data” and student’s IEP had all the required information, including present levels and statement of measurable annual goals) (quoting Lathrop R-II Sch. Dist. v. Gray, 611 F.3d 419, 429 (8th Cir. 2010)). Based on the evidence in the record, the Court concludes that Petitioners did not prove that a lack of specific baseline data in the August 2020 IEP denied ■■■ an appropriate education.

15.

The second data-related part of claim 2 was somewhat vague and alleged that ■■■s IEP (presumably the August 2020 IEP, although the complaint does not specify) “included goals without particularized data about whether the goals addressed his skill deficits.” The Court has reviewed the evidence in the record with some care and has not found probative evidence to support this claim or to even illuminate the exact nature of the alleged problem. Petitioners only addressed the lack of baseline data in its post-hearing brief, and to the extent this part of claim 2 has not been abandoned, the Court concludes that Petitioners failed to meet their burden of proof to show that ■■■ was denied FAPE due to the lack of particularized data in his IEP goals.

16.

The third prong of claim 2 alleged that the District predetermined that ■■■s placement would not be in his home. Specifically, Petitioners assert that during the April and May 2021 IEP meetings, the District only considered ■■■s eligibility for placement at home under the narrow standards for hospital-homebound services and did not make an individualized determination that

█ should not receive his IEP services at home. See 34 C.F.R. § 300.115 (district must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities, including regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions). With respect to the November and December 2021 IEP meetings, Petitioners alleged that although the District considered home instruction, they failed to consider “additional educational benefits” of a more restrictive setting and, once again, only applied the narrow standard for hospital-homebound services. As an initial matter, a pre-determination claim is a procedural claim under IDEA, and Petitioners must prove that the alleged pre-determination denied them the right to meaningfully participate in the development of █’s IEP. J.N., 12 F.4th at 1366; Greer, 950 F.2d at 696 ; S.M., 646 Fed. App’x. at 765; see also 34 C.F.R. § 300.513(a)(2) (a procedural violation results in a denial of FAPE only if it impeded the child’s right to a FAPE or significantly impeded parent’s opportunity to participate in the decision-making process). “Predetermination occurs when the state makes educational decisions too early in the planning process, in a way that deprive the parents of a meaningful opportunity to fully participate as equal members of the IEP team.” S.M. v. Gwinnett Cty. Sch. Dist., 2015 U.S. Dist. LEXIS 194582, * 19-20 (N.D. Ga. May 29, 2015) (quoting R.L. v. Miami-Dade Cnty. Sch. Bd., 757 F.3d 1173, 1188 (11th Cir. 2014)).

17.

From a review of the record, the Court concludes that █ and █ were active members in all the IEP meetings in 2021, and their right to participate in the decision-making process was not impeded by the District’s position on home instruction. With respect to the April and May 2021 IEP meeting, the team discussed accommodating █’s home-based therapy with Ms. Enns, which was occurring 20 to 24 hours per week, by having █ attend school

on a part-time basis. The District explained that, consistent with IDEA’s mandate to educate children in the least restrictive environment, they believed that █████ would gain meaningful benefit from receiving his IEP services in a school setting, including exposure to peers, teachers, specialists, and other non-academic activities. 34 C.F.R. § 300.114 - 116. Moreover, there is no probative evidence in the record that the District had a blanket policy against home instruction or that the IEP team refused to consider and weigh anticipated benefits from a home placement against the IDEA’s preference for placement in the LRE. See Doe v. Alabama Dep’t of Educ., 915 F.2d 651, 664 (11th Cir. 1990) (an “inflexible policy” against placing students in residential programs would violate procedural safeguards, but “generalized policy” against doing so, coupled with a determination that district schools could better provide services to meet student’s particular needs, did not). Rather, the Court is unaware of any evidence in the record that Petitioners, in fact, presented the team with any evidence of either particular benefit to home instruction or particular harm from in-school instruction.³³

18.

Rather, in April and May 2021, Petitioners raised the possibility of HHB Services, which are governed by rules adopted by the Ga. DOE. See Ga. Comp. R. & Regs. 160-4-2-.31. HHB Services are defined by Ga. DOE as “academic instruction and other services provided to eligible students who are confined at home or in a health care facility for periods of time that would prevent

³³ The Court notes that Petitioners only raised a procedural claim relating to the District’s alleged pre-determined refusal to consider home instruction. They did not make a substantive challenge to the team’s decision that █████ should receive IEP services at Westside, and not at home. In fact, it is not clear why the parents rejected the offer of half-days at Westside, other than █████’s characterization of it feeling like a “prison” and her negative opinion of District officials in general. Finally, Petitioners did not prove their claim that they offered evidence to the team of “other educational benefits” that would arise out of a more restrictive home placement, and the Court is not aware of any probative evidence in the record to support a conclusion that a home placement was necessary to provide FAPE. (If there was a discussion of this topic on the audio recordings from these meetings, Petitioners did not direct it to the Court’s attention.) In fact, assuming *arguendo* that the extended one-on-one ABA therapy being provided by Ms. Enns was necessary to provide FAPE to █████ a fact that Petitioners did not specifically allege or prove, there is no evidence that it could not have been provided in the school setting by either school personnel or outside providers.

normal school attendance based upon certification of need by the licensed physician or licensed psychiatrist who is treating the student for the presenting diagnosis.” Ga. Comp. R. & Regs. 160-4-2-.31(1)(d). The Ga. DOE rule provides that HHB services shall be provided to students, “including students with disabilities,” who meet certain eligibility requirements, including being enrolled in a public school prior to the referral for HHB services, being absent at least ten consecutive days due to a documented medical condition, and being able to participate in and benefit from an instructional program. Id. The Court concludes, and Petitioners do not appear to contest, that ■■■ did not qualify for HHB Services as set forth in the Ga. DOE rules because he was not confined to his home.

19.

Of course, as Ms. Dement acknowledged at the hearing, an IEP team has the authority under IDEA to make an individualized decision about alternative placements, including home instruction, for students with disabilities based on their unique needs and consistent with the LRE mandate, independent of the HHB rules. See 34 C.F.R. § 300.116 (in selecting the LRE, the team must consider “any potential harmful effect on the child or on the quality of services that he or she needs”). However, Petitioners did not prove that ■■■s IEP team decided in advance to reject a home placement or that the District members came to the May and June 2021 meetings with “closed minds.” Rather, the preponderance of the evidence proved that the team considered Petitioners’ request for HHB Services, sought medical documentation, and requested additional information from ■■■s physician before Petitioners withdrew their HHB request. There is insufficient evidence in the record that Petitioners presented any support for their request for home instruction outside of the HHB framework, and no evidence that the IEP team preemptively rejected such evidence or refused to consider it. Similarly, with respect to the November and

December 2021 IEP meetings and Petitioners' renewed request that the IEP team consider home instruction, the preponderance of the evidence proved that the IEP team, in fact, considered the request for home instruction during the two meetings, including reviewing some of Ms. Enns' data, but the team determined that placement at Westside was the LRE for [REDACTED] and would provide him FAPE. Simply because the team did not accede to Petitioners' request for a more restrictive placement at home does not mean that the outcome was pre-determined, or that it was the result of an inflexible policy that impeded the family's right to participate in the decision-making process. Accordingly, the Court concludes that Petitioners failed to meet their burden of proof on Claim 2.

3. Petitioners failed to prove procedural violations regarding the February 2020 IEP meeting or the District's decision to move to supplemental virtual instruction without holding an IEP meeting.

20.

Similar to claim 2, Petitioner's claim 3 consists of two separate claims, alleging procedural violations. The first part of claim 3 alleged that the District denied [REDACTED]'s guardians an equal opportunity to participate in the IEP process "by confusingly redrafting the IEP in February 2020." As an initial matter, the February 2020 IEP meeting occurred a few days outside the start of the two-year limitation period and his biological mother was still [REDACTED]'s legal guardian for purposes of the IEP meeting. More importantly, Petitioners did not elaborate on this claim during the hearing or address it in their post-hearing brief, and although the Court could speculate regarding what Petitioners meant by this allegation, it declines to do so. Rather, the Court concludes, having considered the evidence in the record, that Petitioners failed to prove an actionable procedural violation based on the IEP team's amendments to the February 2020 IEP.

As to the second part of claim 3, the Court concludes that the District did not unreasonably delay in scheduling an IEP team meeting to address the District's move to virtual instruction for all students due to the pandemic. Although conceivably the team could have assembled sooner than June 1, 2020 to discuss ■■■■■'s anticipated needs during the prolonged public health emergency, it is not the timing of the eventual meeting, but the District's entrenched position on the availability of compensatory education, that resulted in a significant impediment to ■■■■■'s right to a FAPE. See, e.g., K.C. v. Nazareth Area Sch. Dist., 806 F. Supp. 2d 806, 830 (E.D. Pa. 2011) (citations omitted) (“[d]elays are procedural violations of the IDEA” and only rise to the level of a denial of FAPE if they result in substantive harm to the child or his parent). That is, as set forth in more detail in the conclusions relating to claim 4 below, although the District was “within its rights” to make decisions to protect the health and safety of its students and teachers during a global pandemic, including moving instruction to a virtual platform for all students, there is simply no legal authority to support the District's position that the pandemic relieved the District of its obligation under IDEA to either provide specially-designed instruction, at no cost to the parents, to meet the unique needs of students with disabilities, or to provide compensatory education when it was unable to meet that obligation. See 34 C.F.R. § 300.39 (definition of special education); J.N., 12 F.4th at 1362, (citing 20 U.S.C. § 1401(26), (29)). Accordingly, even assuming that the District's delay in holding an IEP meeting constituted a procedural violation of IDEA, it is the substantive denial of an appropriate education during this time, and the District's subsequent refusal to consider compensatory education, that led to the denial of FAPE. See generally Glass v. D.C., No. 19-2148, 2020 U.S. Dist. LEXIS 217950, at *31-34 (D.D.C. Nov. 19, 2020).

4. Petitioners proved that the District failed to provide special education services to [REDACTED] during virtual schooling.

22.

During the beginning of the COVID pandemic in March 2020, the District confronted a public health emergency that led to the shuttering of schools across the nation. After three weeks when schools were completely closed, the District resumed instructions for all students virtually in mid-April through the end of the semester. The evidence in the record proved that [REDACTED]'s teacher made frequent contact with [REDACTED] during this time, offering assistance and resources to help [REDACTED] access his IEP services and instruction virtually. However, the preponderance of the evidence proved that [REDACTED] was unable to do so, despite the efforts of his guardians, grandmother, and teachers. He simply did not have the skills or abilities to benefit from instruction delivered in his bedroom through a computer. His lack of meaningful progress is evident from the fact that the District did not collect or report any data on [REDACTED]'s IEP goals after March 13, 2020 on his May 2020 progress report.

23.

The Court does not fault the District's decision-making during this extraordinary time or find that it was inappropriate for the District to choose supplemental instruction as the method for teaching students while school buildings were closed. But it is undeniable that supplemental instruction through periodic virtual check-ins and targeted direct instruction was not specially-designed instruction adapted to [REDACTED]'s unique needs and was not reasonably calculated to provide him FAPE. See 34 C.F.R. 300.39(b)(3) ("specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction . . . to address the unique needs of the child that result from the child's disability") (emphasis added). Although supplemental virtual instruction may have been an appropriate

delivery method for the District in light of the pandemic and may have provided adequate educational opportunities for most of its students, it did not provide any educational benefit to [REDACTED]. Under IDEA, the failure to provide specially designed instruction to a student with a disability so that he can access instruction constitutes a violation of a district's obligation to provide FAPE and gives rise to an award of compensatory education. See J.N., 12 F.4th at 1366 (compensatory education is an equitable remedy designed to provide a student with educational benefits that would have been received had the school provided appropriate special education services).

24.

The District's defense of its supplemental instruction approach to [REDACTED]'s education during the early days of the pandemic was that it was following guidance from the U.S. DOE and the GA. DOE. However, all the guidance documents admitted into the record expressly and repeatedly stated that IEP teams must make individual determinations as to whether and to what extent compensatory services are needed due to changes to services as a result of the pandemic. The evidence in the record proved, however, that the District stalwartly insisted that it did not have an obligation to provide compensatory education, and the IEP team did not undertake to consider compensatory education for [REDACTED]. The Court concludes that the District violated its obligation under IDEA to provide specially designed instruction for [REDACTED] from April 13, 2020, when instruction resumed for District students, through the first fifteen days of school in August 2020, and ignored the clear directives of the guidance upon which it purported to rely to consider compensatory services to address [REDACTED]'s individual needs.

25.

Finally, the Court concludes that it does not have the authority to waive the District's obligations to provide FAPE during the pandemic or to excuse its refusal to consider and provide

appropriate compensatory education. First, as the guidance documents acknowledged, IDEA does not contain an exception to a district's obligation to provide FAPE in the event of a public health crisis, and the District was required to provide special education to students with disabilities during the pandemic if it chose to provide instruction to regular education students. Second, although the IEP does provide limited exceptions to a district's "fundamental obligation" to provide FAPE, there are no equitable defenses recognized under IDEA. McDowell v. D.C., No. 18-1382, 2019 U.S. Dist. LEXIS 189605, at *11 (D.D.C. Nov. 1, 2019) (IDEA has limited exceptions to district's fundamental obligation to provide FAPE, but there are no "contractual" or "equitable" defenses). See also Matter of Elmira City Sch. Dist. v. New York State Educ. Dept., 204 A.D.3d 1134, 1142 (N.Y. 2022) (district denied FAPE to student who required a one-on-one registered nurse to attend school, after nurse resigned and school could not secure a replacement for several months; court held that "impossibility of performance defense is generally at odds with the purpose of the IDEA," and did not relieve the District of its obligation to provide FAPE) (citing Brown v. D.C., No. 17-cv-348, 2019 U.S. Dist. LEXIS 130692, at *6 (D.D.C. July 8, 2019)). In Brown, the school district argued that because IDEA is a federal funding statute, the contractual doctrine that performance is excused when it becomes impossible or impracticable applied in the case of a student with a disability incarcerated in a federal prison, thus absolving the district from providing him FAPE. Id. at * 43. The federal district court rejected this argument, noting no court has held that "impossibility of performance relieves a state, state educational agency, or local educational agency of its duties under the IDEA." Id.

5. Petitioners failed to prove that the District discriminated against [REDACTED] by retaliating against his doctor.

26.

Petitioners did not present any probative evidence to support their claim that the District retaliated against [REDACTED]'s doctor for suggesting that [REDACTED] could not be educated in District schools and needed intensive ABA therapy. Accordingly, Petitioners failed to meet its burden of proof on Claim 5.

6. Petitioners' discrimination claim is outside the scope of the due process hearing under IDEA.

27.

Claim 6 of the due process complaint asserts a discrimination claim under Section 504 of the Rehabilitation Act of 1973 ("Section 504"). Petitioners stated in the due process hearing that this Court had jurisdiction over the Section 504 claim under GA. DOE rule 160-1-3-.07. However, that rule permits a local board of education to request that an IDEA due process hearing be consolidated with a Section 504 hearing. As there has been no such request in this matter, the Court concludes that the Section 504 discrimination claim is outside the scope of this IDEA hearing. See Atlanta Indep. Sch. Sys. v. S.F., 2010 U.S. Dist. LEXIS 141552, at * 21-22 n.4 (N.D. Ga. Feb. 22, 2010); see also 34 C.F.R. § 300.507, 300.503(a)(1) and (2); Ga. DOE Rule 160-4-7-.12(3) ("The impartial due process hearing is designed to provide a parent or LEA an avenue for resolving differences with regard to the identification, evaluation, placement or provision of a FAPE to a child with a disability.").

C. Remedies

28.

“Once a court holds that the public placement violated IDEA, it is authorized to ‘grant such relief as the court determines is appropriate.’” Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 15-16 (1993) (quoting 20 U.S.C. § 1415(e)(2)). The Eleventh Circuit has held that compensatory education is considered “‘appropriate relief where responsible authorities have failed to provide a handicapped student with an appropriate education as required by [the Act].’” Draper, 518 F.3d at 1280 (quoting Todd D. ex rel. Robert D. v. Andrews, 933 F.2d 1576, 1584 (11th Cir 1991)). The Draper court found that “‘equitable considerations are relevant in fashioning relief’” under IDEA and that courts enjoy “‘broad discretion’” in doing so. Id. (quoting Sch. Comm. of the Town of Burlington, Mass. v. Dep’t of Educ. of Mass., 471 U.S. 359, 374 (1985)).

29.

In addition to compensatory education involving “‘discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency’s failure over a given period of time to provide a FAPE to a student,’” reimbursement of expenditures for private special education services paid by parents pending review is also available under IDEA if such services are deemed appropriate. Draper, 480 F. Supp 2d at 1352-53, *quoting* G. v. Fort Bragg Dependent Schs., 343 F.3d 295, 309 (4th Cir. 2003), Burlington, 471 U.S. at 369. The amount of reimbursement and prospective relief to be awarded are to be “‘determined by balancing the equities. Factors that should be taken into account include the parties’ compliance or noncompliance with state and federal regulations pending review, the reasonableness of the parties’ positions, and like matters.’” Burlington v. Dep’t of Educ., 736 F.2d 773, 801-801 (1st Cir. 1984), *aff’d sub nom.* Burlington, 471 U.S. at 359.

30.

The Court is mindful of the admonition by some courts not to rely on a strictly quantitative, “cookie-cutter” approach to fashioning equitable remedies in IDEA cases. *See Reid v. Dist. of Columbia*, 401 F.3d 516 (D.C. Cir. 2005) (Where child was “neglected by the school system charged with affording him free appropriate education,” he was entitled to compensatory instruction in an amount not “predetermined by a cookie-cutter formula, but rather [by] an informed and reasonable exercise of discretion regarding what services he needs to elevate him to the position he would have occupied absent the school district’s failure”). As the Eleventh Circuit held in *J.N.*, “[c]ompensatory educational services are designed to counteract whatever educational setbacks a child encounters because of IDEA violations – to bring her back where she would have been but for those violations. The decision maker must analyze whether compensatory services are necessary, and if so, what they should be. That exercise will always be fact-intensive, and the evidence needed will vary in nature and quantity from case to case.” 12 F.4th at 1362.

31.

Finally, the Court notes the dearth of reliable expert testimony or other probative evidence in the record of this case to explain the complex needs and capabilities of a child with ■■■■■s significant disabilities. As discussed above, the only witnesses at the hearing were ■■■■■s two guardians, who are not educators, and Ms. Dement, who was never tendered as an expert by either side and who admitted that she was not an expert on PECS or teaching communication skills to children with ■■■■■s unique deficits. None of the experts who worked with or evaluated ■■■■■ testified at the hearing, and the evidence in the record does not provide a clear picture of what skills ■■■■■ can reasonably be expected to learn and how long it will take him to learn them. Of course, neither party disputes that ■■■■■ will continue to need assistance throughout his life and that

his acquisition of communication and independent living skills will be challenging. However, the evidence in the record proved that [REDACTED] can make progress toward communicating his needs and preferences and toward learning functional skills that will allow him to achieve some measure of independence in his daily life. Congress, in reauthorizing IDEA, found that “[d]isability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society.” 20 U.S.C. § 1400(c)(1). [REDACTED] was entitled, under IDEA, to specially-designed instruction to meet his unique needs and to prepare him, “to the maximum extent possible,” to lead a productive and independent adult life. 20 U.S.C. § 1400(c)(5)(A)(ii). He did not receive such instruction from February 2020 through the end of August 2020.

32.

Having carefully considered the foregoing Findings of Fact and Conclusions of Law, the Court awards the following relief to compensate for the violations of IDEA set forth above:

1. The District shall pay for an Independent Educational Evaluation (“IEE”), with a focus on [REDACTED]’s cognitive, social/behavioral, and communication deficits and skill level. Petitioners may choose the evaluator, or if necessary, evaluators, who, to the extent possible, should be experienced in assessing and recommending services to older children with autism and significant developmental delays. The evaluator(s) shall provide a written report to [REDACTED]’s IEP team, which shall meet promptly after receipt of the report to create an IEP based on the recommendations of the evaluators.
2. Until the IEP team receives the IEE report and creates a new IEP for [REDACTED] or until the end of the fall semester in December 2022, whichever occurs first, Petitioners may elect to keep [REDACTED] in his home setting to receive ABA therapy and speech therapy from private providers at the District’s expense. Petitioners may also choose to send [REDACTED] back to

District schools for in-person instruction pending the IEE report, either part-time or full-time, in which case the IEP team shall meet promptly to adopt an interim IEP for ■■■ that will be in effect until the IEP team meets to consider the IEE and amend ■■■'s interim IEP to incorporate the IEE report's recommendations.

33.

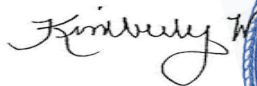
As to Petitioners' request for reimbursement, the Court concludes that Petitioners failed to present sufficient probative evidence to support their reimbursement claim. First, there is insufficient evidence in the record to prove that Petitioners actually incurred any reimbursable expenses. There are no speech therapy invoices in the record or any probative evidence regarding who may have provided such services, when they were provided, and at what cost to Petitioners. Similarly, although Petitioners provided some evidence regarding the rate Ms. Enns charges for her ABA therapy services, there are no invoices or other evidence to prove that Petitioners incurred any expenses associated with these services. In addition, there is insufficient evidence in the record to prove that occupational therapy, physical therapy, equine therapy, or music therapy are appropriate services for ■■■ or that such therapies were, in fact, provided and paid for by Petitioners, with the exception of a music therapy invoice for \$85.00. Petitioners also failed to present any probative evidence, or cite to any legal authority, to support their claim that they are entitled to an unspecified amount of reimbursement for their role in assisting ■■■ during virtual schooling. Finally, there is insufficient evidence that ■■■ has enrolled in a private school or that the private school identified as a potential placement, the Joseph Sams School, would be an appropriate placement for ■■■

Having considered the evidence in the record, including the testimony of the three witnesses, the IEP documents, and audio recordings from the meetings, the Court concludes that the District has not “forfeited” the right to continue to educate ■■■ in its schools, as the court held in Draper. 518 F.3d at 1290. Rather, the Court credits the testimony of Ms. Dement that ■■■ will benefit from exposure to peers, teachers, and activities in the school setting, consistent with IDEA’s preference for students to be educated in the least restrictive environment. In addition, the Court does not find, as Petitioners allege, that the District has acted without compassion or concern for ■■■ or that he was unsafe or unhappy while at Westside. Rather, as of September 2020, when ■■■ returned to in-person instruction under his new IEP, the Court concludes that the District offered ■■■ FAPE and acted collaboratively and reasonably when it offered to design a half-day school program around Ms. Enns’ schedule. Accordingly, when the IEP team convenes to consider the results of the IEE and draft a new IEP for ■■■ the team shall design an educational program that can be offered to ■■■ in a District school and that is reasonably calculated to allow him to advance appropriately toward his goals in the school setting.

IV. DECISION

For the reasons stated above, the Court finds that the Coweta County School District did not provide ■■■ with a free appropriate public education under IDEA from February 2020 through August 2020. Petitioners are entitled to compensatory relief as set forth above.

SO ORDERED, this 8th day of August, 2022.



Kimberly W. Schroer
Administrative Law Judge

