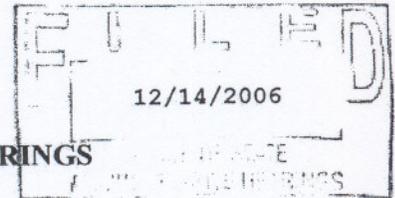


06-006640



IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

██████████ by and through his parents ██████████
and ██████████,

Petitioner,

v.

FULTON COUNTY SCHOOL
DISTRICT.,

Respondent.

Administrative Action No:
OSAH-DOE-SE-0629961-60-Gatto

FINAL ORDER

COUNSEL: Chris E. Vance, for Petitioner.

Rachel Platt, for Respondent.

GATTO, Judge

I. INTRODUCTION

██████████ brought this action, through his parents ██████████ and ██████████, against the Fulton County School District contending that it had failed to comply with the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1400 *et seq.* (main ed. and Supp. 2005), and its implementing regulations, 34 C.F.R. Part 300.¹ ██████████ contends that the Individualized Education Program (IEP) prepared by the District for him failed to provide a free appropriate public education (FAPE) to him in the in the least restrictive environment (LRE) free from discrimination based upon disability. The record closed on November 29, 2006 after the filing of the District's Response to ██████████'s proposed findings and conclusions. For the reasons indicated below, the Court finds that the District offered FAPE in conformity with IDEA to ██████████ in the

¹ Citations to the federal regulations are to the 2006 federal regulations implementing IDEA, which became effective on October 13, 2006.

LRE free from discrimination based upon disability and therefore, ██████ requested relief is **DENIED.**

II. FINDINGS OF FACT

1.

█████ is a █████ year old disabled student residing within the District receiving special education services pursuant to the IDEA. ██████ was diagnosed with Autism by the Emory Autism Center on July 8, █████. (Petr.'s Ex. 1-5.)² ██████ is also severely language impaired. (Tr., p. 666, 668.)

2.

█████ was a resident of Dawson County until he moved to the District on April 1, 2005.³ (Tr., p. 558, 819.) He had previously attended Challenged Child from December 2002 until January 2004. He then attended the ██████ Academy from January 2004 until it closed in October 2004. (Petr.'s Ex. 170, Tr., p. 562.)

3.

In October 2004, after the ██████ Academy closed, ██████'s parent initiated a full time home program, which was in place until they enrolled him at the District in April 2004. (Petr.'s Ex. 170, Tr., p. 563-564.)

4.

█████, █████, initially contacted the District in March 2005 and spoke with Salitha Westbrook, who was the administrative assistant to Susan Bates, at that time the Special

² All citations to evidence or testimony entered into the record will be cited as follows: Respondent's trial exhibits are designated as "Respt.'s Ex. " in accordance with their exhibit number. Petitioner's trial exhibits are designated as "Petr.'s Ex. " in accordance with the Bates number on each page, as Petitioner's exhibits were not separately identified. For instance, Petitioner's Bates stamped page 200 would be designated as "Petr.'s Ex. 200." Citations to the trial transcript are designated as "Tr." (Transcript), "p." (page number) for the first seven days of trial and "Tr2." (Transcript), "p." (page number) for the eighth and ninth days of trial.

³ ██████ was never enrolled in the Dawson County School System, and he never received any educational services from Dawson County. (Tr., p. 558, 1187.)

Education Coordinator for Pre-School. (Tr., p. 818, 1183, 1260.) [REDACTED] then spoke with Susan Bates and explained that [REDACTED] had never had an IEP.⁴ (Tr., p. 1147, 1166, 1183.) When [REDACTED] initially spoke with Ms. Bates and Ms. Westbrook in March 2005, [REDACTED] was not yet a resident of Fulton County. (Tr., p. 558, 819.) However, Ms. Bates arranged for a referral packet to be sent to [REDACTED], which she filled out and sent back to the District on or about March 16, 2005. (Petr.'s Ex. 60 through 62, Tr., p. 1183-1184.)

5.

After receiving the referral packet, Ms. Bates contacted [REDACTED] to discuss the evaluation process. (Tr., p. 1185.) At that time, [REDACTED] indicated that she wanted to enroll [REDACTED] in a school setting, so Ms. Bates sent two staff members to his home to observe him in order to get [REDACTED] started in school and honor the parents' request for a Diagnostic IEP.⁵ (Tr., p. 1185-1186.) [REDACTED] subsequently provided [REDACTED]'s private evaluations to the District. (Tr., p. 1185, 1187-1188.)

6.

Bridgette Cleary, the diagnostician with the District's special education preschool program, and Halee Anderson, an Autism Itinerant Teacher, went to [REDACTED]'s home to observe him. (Tr., p. 903-904, Tr2., p. 38.) They observed a one-on-one Discrete Trial Training (DTT) session with Christine Palkovic, one of [REDACTED]'s private therapists from MaySouth.⁶ (Tr., p. 903-

⁴ Ms. Bates was recognized by this Court as an expert in developing educational programs for disabled students and has a Masters Degree in Speech and Language Pathology, which she received in 1974 from the University of South Florida in Tampa, and an Endorsement in Director of Special Education from Georgia State University, which she received in 1986. She has been the Special Education Coordinator for Early Childhood Special Education since approximately 1984, although the position at that time was called Special Education Program Consultant. However, she started doing only preschool in approximately 1991. This position entailed developing and coordinating the special education services for the 3, 4, and 5 year olds. She has also attended several seminars, conferences and IEP meetings during her tenure with the District. (See Tr., p. 1125-1165 for a complete description of Ms. Bates' qualifications.)

⁵ A Diagnostic IEP is an interim IEP that is implemented while initial evaluations are being completed. (Tr., p. 1192.)

⁶ MaySouth is a nonprofit behavioral health care corporation based in Atlanta serving people of all ages with autism, pervasive developmental disorder, and other developmental disabilities, as well as those with brain injury, mental retardation, and behavioral health needs. (Tr2., p. 414.)

904, Tr2., p. 38.) Since the family had just moved into their new home, the therapy room was unorganized, and "the therapist did not have her materials readily available." (Respt.'s Ex. 11, Tr., p. 903.) During the therapy session, "[REDACTED] was easily distracted when he was working on specific tasks with his therapist." (Respt.'s Ex. 11, Tr., p. 903, Tr2., p. 38.) However, he did not seem to be distracted by Ms. Cleary and Ms. Anderson being there. (Tr., p. 903, Tr2., p. 38.) [REDACTED] exhibited self-stimulatory behavior and needed frequent breaks. (Tr2., p. 38-39.) Ms. Cleary and Ms. Anderson also observed that [REDACTED] became upset when his therapist was unable to draw a bunny the specific way he wanted, and he had a temper tantrum that lasted over five minutes. (Tr., p. 906.)

7.

After receiving the information from [REDACTED] and after [REDACTED] had officially moved into Fulton County, the District scheduled an IEP meeting to develop a Diagnostic IEP for [REDACTED]. (Petr.'s Ex. 104, Tr., p. 1185-1186.)

8.

The IEP team convened on April 14, 2005. (Petr.'s Ex. 86-100.) [REDACTED]'s parents were both present and Brad Bezilla, the director of school and home-based behavioral services with MaySouth, Michelle Winkles-Atwood, an independent consultant working with [REDACTED], and Christine Palkovic, one of [REDACTED]'s private therapists, were also present at the request of [REDACTED]'s parents. [REDACTED]'s parents presented the District with a two-page memorandum outlining their input for the April 14, 2005 meeting. (Petr.'s Ex. 82, 83.)

9.

At the IEP meeting, [REDACTED]'s current levels of educational performance were discussed, and it was noted that [REDACTED] demonstrated strength with visual performance, that he enjoyed

puzzles, and that his receptive language skills were stronger than his expressive language skills. (Petr.'s Ex. 88.) It was also noted that ██████'s developmental delays negatively impacted his school performance. The IEP team also discussed that ██████ preferred to be alone and that he would not initiate any contact with his peers. There were further discussions ██████ did not play appropriately with toys; rather he held onto the toys and did not pretend or imitate. (Petr.'s Ex. 98.) This information came from ██████'s parents as well as the private individuals they had brought to the meeting. (Tr., p. 1192, Tr2., p. 41.) At this time, ██████ was also engaging in self-stimulatory behaviors and was tantruming. (Tr2., p. 514.)

10.

At the IEP meeting, the IEP team developed interim goals and objectives based on what ██████'s parents and his therapists reported were his strengths and weaknesses and based on the information reported by Ms. Cleary and Ms. Anderson from their observations at ██████'s home. (Petr.'s Ex. 86-100, Tr., p. 1193, Tr2., p. 42-43.) The representatives from MaySouth gave input and submitted some of the goals that they had been working on with ██████. (Tr., p. 921-922, 1193.) The IEP team also considered the goals and objectives the parents had suggested. (Tr., p. 925.) The IEP team developed goals and objectives for pre-readiness skills, fine motor skills, work-study skills, social skills, and communication skills, which were all things that the IEP team felt ██████ needed to work on. (Tr., p. 924.) The team felt that these goals and objectives were a good starting point considering that the District had no knowledge of ██████ other than what the therapist and the parents provided them. (Tr2., p. 43.)

11.

After the IEP team developed goals and objectives, the team discussed placement options for ██████. (Petr.'s Ex. 86-100, Tr., p. 922, 1193-1194, Tr2., p. 41.) Several placement options

were considered including the general education setting only with no special education services, special needs preschool-facility based, and special needs preschool-community based. (Tr., p. 922-923, 1193, Tr2., p. 41.)

12.

The IEP team also discussed that [REDACTED] was speech impaired and would need the related service of speech therapy. (Petr.'s Ex. 86-100, Tr., p. 922, 1193.) [REDACTED] indicated that she wanted [REDACTED] to participate in an all day program. (Petr.'s Ex. 100.) The IEP team determined that the special-needs facility-based preschool program implemented at [REDACTED] Elementary School, [REDACTED]'s home school, would provide [REDACTED] FAPE in the LRE.⁷ (Tr., p. 922, 1195, Tr2., p. 42.) Specifically, the IEP team recommended 32.5 hours in the special needs facility-based preschool class and 1 hour of speech services per week for the remainder of the 2004-2005 school year. (Petr.'s Ex. 86-100, Tr., p. 922, Tr2., p. 42.) [REDACTED] also would have received integrated speech services, where the speech therapist comes into the classroom approximately six hours per week to work with the children in the classroom. (Tr., p. 922-923.)

13.

Neither [REDACTED] or [REDACTED] nor any individual they invited to attend the meeting voiced any concerns with this placement, and [REDACTED] signed the IEP indicating that she agreed with the placement and services described in the IEP. (Petr.'s Ex. 96, Tr., p. 1195, 1269.) Although Mr. Bezilla testified that he had some concerns with the Diagnostic IEP, he also admitted that he never voiced those concerns at the meeting, and he actually left the meeting before the IEP was completed. (Tr., p. 1195, Tr2., p. 470, 471, 525.)

⁷ The classroom had typically-developing children participating in the program as well as some disabled children. (Petr.'s Ex. 168, Tr., p. 168, 922, Tr2., p. 41.) A special education teacher taught the class, and there was also an assistant in the classroom. (Tr., p. 922.)

14.

The Diagnostic IEP was developed based on the private evaluations and input provided by [REDACTED] and [REDACTED] and the individuals they brought to the IEP meeting. (Tr., p. 922, 1194-1195.)

15.

The IEP developed for [REDACTED] for the remainder of the 2004-2005 school year was appropriate. (Tr., p. 924, 1195, Tr2., p. 42-43.) It was a program that would meet [REDACTED]'s needs and allow him to work on his goals and objectives to make progress. (Tr., p. 924.) It would also have allowed the District to get to know [REDACTED] and to see how he would have interacted with general education peers as well as students who had special needs. (Tr2., p. 42.)

16.

[REDACTED] began attending school on April 18, 2005. He attended school for one week, and was then absent for one week, due to a pre-scheduled family vacation to Disney World in Orlando, Florida. (Tr., p. 587, 819-820, 1196.) Ms. Bates expressed her concern at the IEP meeting with enrolling [REDACTED] in school for only one week and then leaving for a one week vacation since [REDACTED] had difficulty with transitioning. (Tr., p. 1196, 1383-1384.) However, since [REDACTED]'s parents seemed anxious to enroll him in school and since enrolling him in school would give the District staff an opportunity to get to know [REDACTED], despite Ms. Bates' concerns, he began school prior to his vacation. (Tr., p. 1196-1997, 1385-1386.) After the vacation, [REDACTED] returned to school and completed the remaining three weeks of the 2004-2005 school year in the special needs preschool class. (Tr., p. 819.) Although [REDACTED] had observed the special needs classroom before he started school, she never observed him while he was in the special needs pre-kindergarten classroom. (Tr., p. 167-68, 819.)

17.

Once █████ returned from his vacation, the District began conducting its own evaluations. While █████'s parents had provided the District with their private evaluations, the District appropriately felt that it was important to conduct its own evaluations in order to gain full information regarding █████. (Tr., p. 1474-1475.)

18.

As a precursor to a child being evaluated by the District, he must pass both vision and hearing screening so that any vision and hearing issues are ruled out. These are cursory screenings to determine generally if a student can see and hear. (Tr., p. 1189, 1287.) █████'s parents provided documentation that █████ had passed both a vision and a hearing screening on March 8, 2005. (Petr.'s Ex. 64, Tr., p. 1186.)

19.

The Speech and Language Evaluation was completed on May 4, 6, and 17, 2005 by Dana Henning, a speech pathologist with the special needs preschool program in Fulton County.⁸ (Petr.'s Ex. 160-164, Tr., p. 1032, 1038, 1042.)

20.

Ms. Henning completed the receptive language subtests from the Preschool Language Scale-4 ("PLS-4") and the Battelle Developmental Inventory ("Battelle") in order to evaluate

⁸ Ms. Henning was recognized by this Court as an expert in evaluating children in speech and language and in providing educational services and developing goals and objectives for disabled students in the area of speech and language. Ms. Henning received an undergraduate degree in audiology and speech pathology in 1978 and received a Masters degree in Communications disorders in 1980. She has been working for the special needs preschool program exclusively since 1991. She was doing both diagnostics and speech therapy at that time. Since receiving her master's degree, Ms. Henning has attended several conferences and has taken several continuing education classes. She has also attended approximately 2000 IEPs over the 24 years she has been employed with the School District. (See Tr., p. 1032-1040 for a complete description of Ms. Henning's qualifications.)

█████'s auditory comprehension or his ability to understand what is being said to him.⁹ (Petr.'s Ex. 161, Tr., p. 1042.) █████ received a standard score of 50 on the PLS-4 and a standard score of 65 on the Battelle.¹⁰ (Petr.'s Ex. 161.) Those standard scores are both in the first percentiles with an age equivalency of approximately 19-21 months. (*Id.*) The results of these tests show that █████ had a significant impairment of his auditory comprehension or receptive language skills. (*Id.*) █████ could not identify common objects easily without multiple repetitions, he did not point to actions in pictures, identify pictured objects by their function, or understand descriptive or special concepts. (Tr., p. 1043.) A typically developing child would be able to do these things at █████'s age. (*Id.*)

21.

Ms. Henning also completed the expressive language subtests from the PLS-4 and the Battelle in order to assess █████'s verbal language development or his ability to use verbal language. (Petr.'s Ex. 161-162, Tr., p. 1043.) █████ received a standard score of 50 on the PLS-4 and a standard score of 65 on the Battelle. (Petr.'s Ex. 161, Tr., p. 1044.) Those standard scores are both in the first percentiles with an age equivalency of approximately 20-23 months. (Petr.'s Ex. 161.) These results indicated that █████ had a significant impairment in his expressive language development. (Petr.'s Ex. 162, Tr., p. 1044.)

22.

Ms. Henning also assessed █████'s pragmatic language skills or his social use of language and found them to be significantly delayed. (Petr.'s Ex. 162-163, Tr., p. 1044.) █████'s significant impairment of pragmatic language skills was also evidenced by his lack of

⁹ Two measures are used to ensure that the measures being taken coincide. (Tr., p. 1042.)

¹⁰ Standard scores between 85 and 115 are considered within normal limits for all language measures used with █████. (Tr., p. 1043.)

interaction and his lack of using words spontaneously to make choices to greet and to imitate. (Petr.'s Ex. 162-163, Tr., p. 1044-1045.)

23.

Ms. Henning also informally assessed [REDACTED]'s articulation -- which is his speech-sound production -- and noted that a majority of the word and phrase level productions produced during the evaluation sessions were intelligible. (Petr.'s Ex. 163, Tr., p. 1045.) A formal assessment was not done since it was important that he acquire functional speech first before worrying about the way he is speaking it. (Tr., p. 1045.)

24.

Finally, Ms. Henning did an informal assessment of [REDACTED]'s voice and fluency, which is vocal quality, rate, and rhythm, and she found that his vocal quality was within normal limits for his age and gender, although his vocal intensity was somewhat low. (Petr.'s Ex. 164.)

25.

The overall results of Ms. Henning's evaluation suggested a "significant impairment of receptive language development with skills measuring in the 19 to 21 month range, significant impairment of expressive language development with skills measuring in the 20 to 23 month range, and a significant impairment of pragmatic language development." (Petr.'s Ex. 160-164, Tr., p. 1046.)

26.

During the evaluation, [REDACTED] would not interact with Ms. Henning, and it was difficult for him to engage him in structured test items. (Tr., p. 1048.) However, he never expressed any discomfort during the session. (*Id.*)

27.

Prior to completing her evaluation, Ms. Henning reviewed the private speech and language evaluation done by Children's Healthcare of Atlanta provided to the District by ██████'s parents. (Petr.'s Ex. 48-55, Tr., p. 1049.) This private evaluation was completed in February 2005, just three months prior to Ms. Henning's evaluation. (*Id.*) Ms. Henning noted that her evaluation and the Children's Healthcare evaluations were "very similar." (*Id.*, 160-164, Tr., p. 1049.) For example, on the Preschool Language Scale for Auditory Comprehension given to ██████ by Children's Healthcare, he received a standard score of 50, and an expressive communication score of 55, which were almost identical to the raw scores he received on Ms. Henning's evaluation. In addition, although Children's Healthcare did not do a formal assessment of pragmatics, they did indicate that ██████ had impaired communicative intent, including commenting, giving information, seeing information, social, persona, and gaze. (Petr.'s Ex. 48-55, Tr., p. 1050.)

28.

Lisa Helton, an occupational therapist employed by the District, completed an occupational therapy evaluation on May 11, 2005. (Petr.'s Ex. 165-168.) Ms. Helton completed the Peabody Developmental Motor Scales to evaluate ██████'s fine motor skills. ██████ received a raw score of 42 for grasping, which placed him in the first percentile, with an age equivalent of 20 months. (*Id.*) His raw score for visual-motor integration was 100, which placed him in the second percentile, with an age equivalent of 27 months. (*Id.*) His fine motor quotient was 61, which placed him in the very poor range for his age, and he displayed scattered skills up to the 30 months age level. (*Id.*) (Petr.'s Ex. 167.) In addition to the formal evaluation, Ms. Helton also observed ██████ in the classroom and during her evaluation, and reviewed his records. (Petr.'s Ex. 166.) Ms. Helton also assessed ██████'s muscle tone, flexibility/range of

motion/functional strength/movement patterns, his fine motor skills, his gross motor skills, his sensory motor skills, and his self-help skills. (Petr.'s Ex. 165-168.)

29.

Ms. Helton noted that ██████ showed a delay in the area of fine-motor and visual-motor integrations. (Petr.'s Ex. 168.) She indicated that his fine motor skills scatter between 20 months and 30 months. (*Id.*) She also noted that his self-care activities were delayed and that he required extra time to transition between activities within the classroom. (*Id.*) Ms. Helton also noted that ██████ did not make eye contact with her during her testing and that he displayed a delayed response time when following verbal directions. (Petr.'s Ex. 166.)

30.

Bridgette Cleary, a special education teacher and diagnostician with the District's special education preschool program, completed the Developmental Evaluation Report of ██████ on May 4, 9, 10, 12, and 17, 2005.¹¹ (Petr.'s Ex. 169-178, Tr., p. 852-853, 902, 930.) Ms. Cleary observed ██████ in his classroom on two separate occasions and worked directly with him on three occasions. (Tr., p. 904, 930.) It usually did not take Ms. Cleary that much time to evaluate a child, but ██████ was having "difficulty conditioning to the standardized assessment instruments," and she wanted "to try to get a clear picture of what he was able to do, so [she] kept going back to try to get him to do something if he wasn't able to do it the first time around." (Tr., p. 931.)

¹¹ This Court recognized Ms. Cleary as an expert teacher in the area of mild Learning Disabilities, mild Emotional Behavioral Disorder and mild Mental Retardation, areas in which Ms. Cleary is a certified teacher in the State of Georgia. Ms. Cleary has been a special education teacher for ten years and has been a diagnostician for six years. (Tr., p. 852-853.) She has an undergraduate degree in special education from Bowling Green State University in Ohio and a Masters in Education in Special Education from Kennesaw University. (Tr., p. 854.) She has taught autistic children and has evaluated many children with autism. (Tr., p. 854.) She has also taken several classes in educating children with autism. (Tr., p. 854-855.) Furthermore, she has attended over two hundred IEP meetings. (Tr., p. 857.) There is currently no certification for Autism in the state of Georgia. (Tr., p. 196, 1224, Tr2., p. 19.)

Ms. Cleary observed ██████ in the classroom and noted that he required “verbal, gestural, and physical prompting to follow directions given by the teacher to transition from one activity to another. He did not initiate tasks without adult assistance or participate in activities without adult assistance.” (Petr.’s Ex. 171-173, Tr., p. 904.) She also noticed “he demonstrated many self-stimulatory behaviors ... including hand flapping [and] high-pitched vocalizations. He did repetitive jumping, patted his belly, and clapped over his ears.” (Tr., p. 904-905.) Ms. Cleary also observed that ██████’s “significant behaviors were consistent with a diagnosis of autism, including [his] lack of social interaction with adults and peers, [his] lack of functional play with toys, [his] delayed echolalia, [his] stereotypical behaviors, [his] hand flapping, [his] patting his tummy repetitively, and [his] decreased eye contact.” (Tr., p. 920.) Ms. Cleary noted that ██████ “required a lot of assistance in order to participate in the classroom, so when he was able to do something, he had adult assistance.” (Tr., p. 931.) He also had “difficulty following directions given by the teacher, and during play [time], he didn’t functionally play with toys, and ... when the teacher would try to engage with him, he didn’t want her to do that.” (Tr., p. 932.) She also noted that ██████ enjoyed participating when the adaptive music therapist came into the room. (Id.)

Ms. Cleary completed the Personal-Social Domain of the Battelle and of the Developmental Profile II to assess abilities and characteristics that enable children to engage in meaningful social interactions.¹² (Petr.’s Ex. 173-174.) Information regarding ██████’s personal-social skills was obtained through an interview with R.G., his ABA therapist, Christine Palkovic, and with his classroom teacher, Patti Schaaf. (Petr.’s Ex. 173-174.) ██████ received a z score of

¹² This Domain also looks at adult interaction and self-concept. (Tr., p. 933.)

-2.33 on the Battelle, which is an age equivalent of 21 months and is in the first percentile. (Petr.'s Ex. 173-174.) [REDACTED] received a z score of -2.0 on the Developmental Profile II. (Petr.'s Ex. 173.) These scores indicate that [REDACTED] "did very poorly on the test." (Tr., p. 933.)

33.

Ms. Cleary also completed the Adaptive Domain of the Battelle and of the Developmental Profile II to assess [REDACTED]'s self-help skills, such as toileting, feeding, dressing, and task related skills.¹³ (Petr.'s Ex. 175, Tr., p. 934.) [REDACTED] received a z score of -2.33 on the Battelle, which is an age equivalent of 26 months and is in the first percentile. (Petr.'s Ex. 175, Tr., p. 934.) [REDACTED] received a z score of -2.0 on the Developmental Profile, which is an age equivalent of 30 months. (Petr.'s Ex. 175.) These scores indicated that [REDACTED] was in the Significant Range, which means he scored "very poorly on the test." (Tr., p. 934.)

34.

Ms. Cleary completed the Motor Domain to assess [REDACTED]'s abilities to use and control large and small muscles of his body. (Petr.'s Ex. 176-177.) [REDACTED] received a total z score of -2.33 on the Battelle, which is an age equivalent of 30 months and is in the first percentile.¹⁴ (Petr.'s Ex. 176.) [REDACTED] received a z score of -2.0 on the Developmental Profile, which is an age equivalent of 30 months. (Petr.'s Ex. 176-177.) These scores are also in the Significant Range, which again means "he did poorly on the test." (Tr., p. 935.)

35.

Finally, Ms. Cleary completed the Cognitive Domain to assess sensory-motor interactions and abilities to retrieve information and to think critically.¹⁵ (Petr.'s Ex. 177-178, Tr., p. 935.)

¹³ This Domain also looked at attention span. (Tr., p. 934.)

¹⁴ The Battelle looks at gross motor skills and fine motor skills separately and then gives a composite score. (Tr., p. 935.)

¹⁵ This domain also assesses pre-readiness and conceptual development skills. (Petr.'s Ex. 177-178, Tr., p. 935.)

█████ received a z score of -2.33 on the Battelle, which is an age equivalent of 28 months and is in the first percentile. (Petr.'s Ex. 177-178.) █████ received a z score of -2.0 on the Developmental Profile, which is an age equivalent of 32 months. (Petr.'s Ex. 177-178.) Again, █████ scored in the significant range. (Tr., p. 935.)

36.

All of these scores indicate delays in █████'s personal-social, adaptive, motor and cognitive domains on the two assessment instruments. (Petr.'s Ex. 169-179.)

37.

Halee Anderson, an autism itinerant teacher with the District, completed the Childhood Autism Rating Scale (CARS) on May 18, 2005, which is an evaluation tool that was developed in order to identify children with autism and distinguish them from children that are developmentally delayed but who do not have autism.¹⁶ (Petr.'s Ex. 179-181, Tr2., p. 48.)

38.

Information for the CARS was gathered through classroom observations, teacher interviews, and information previously provided by █████'s parents through interviews and private reports. This is an appropriate way to conduct this assessment and is only one of the tools used in determining eligibility for autistic students. (Tr2., p. 49.) Ms. Anderson observed

¹⁶ Ms. Anderson was recognized by this Court as an expert in providing educational services to autistic children and in developing educational programming for special education children including autistic children (Tr2., p. 20, 37.) She was also recognized as an expert in analyzing and interpreting data. Ms. Anderson's job is to observe, assess and support the children in the district that are either diagnosed with autism or that may exhibit the characteristics of children that have been diagnosed with autism spectrum disorders and develop programs and curriculum for those children in order to meet their educational needs. She has an undergraduate degree from Auburn University in human development and family studies, which she received in 1999 and a masters of education from Georgia State University in early childhood special education, which she received in 2003. She also has taken specialist of education level courses from the University of Georgia, which would be considered postgraduate level courses. She has taken several courses in autism, such as methods of teaching classes, characteristics of autism disorder class, a seminar in autism spectrum disorders, and instructional design for children with autism spectrum disorders. In addition, she has taken behavior analysis courses in order to satisfy the requisites for the board certified behavior analyst credential. She has been the autism itinerant teacher for three years and was a teacher for several years prior to that. She has attended several workshops and trainings in autism and has read numerous articles on autism. (See Tr., p. 5-37 for a complete description of Ms. Anderson's qualifications.)

█████ in different classroom activities throughout his day and noticed that he was not very engaged in the group activities and would not initiate peer interaction. (Tr2., p. 39.) █████ needed several prompts in order to follow through with different activities. (Tr2., p. 39.)

39.

█████ received a total score of 46.5, which falls in the Severely Autistic Range on a scale of 15-60, with 15-29 being Non-Autistic, 30-36 being Mildly-Moderately Autistic, and 37-60 being Severely Autistic.¹⁷ (Petr.'s Ex. 179-181, Tr2., p. 49.) Ms. Anderson felt that this was an accurate assessment of █████'s behavior at that time because she observed him on several different occasions in his classroom and felt that he presented as a child with severe autism. (Tr2., p. 49.)

40.

Although Mr. Bezilla testified that he did not believe that the CARS results were valid since Ms. Anderson did not interview █████'s parents, he acknowledged that it was not the only evaluation used on the Autism Eligibility Report. (Tr2., p. 510.) In addition, although █████ testified that she did not agree with the results of the CARS, she never asked for an independent evaluation. (Tr2., p. 355-357.)

41.

Moreover, the results of the District's evaluations were consistent with the private evaluations provided to the District by █████'s parents, as well as with what his private therapists and his parents were reporting. For example, the evaluation completed by the Emory Autism Center on July 8, 2003, provided to the District by █████'s parents, noted that █████ actively avoided eye contact with the evaluators by turning his head away. (Petr.'s Ex. 1-5.)

¹⁷ There are fifteen domains that are scored with a score ranging from 1-Age appropriate; 2-Mildly abnormal; 3-Moderately abnormal; 4-Severely abnormal. Scores can also be given between two descriptions by using ratings of 1.5, 2.5, and 3.5. (Petr.'s Ex. 179 through 181, Tr2., P. 48.)

The evaluation further noted that █████ did not attempt to communicate through gestures, that he displayed a lack of interest in the other children in the room, and that he seemed unaware of the presence of other children. █████ did not initiate interactions with the evaluators, and he usually ignored the approaches of the evaluators and continued in isolated play. (Petr.'s Ex. 1-5.)

42.

In the evaluation completed by Dr. Barbara Dunbar on December 10, 2004, which was also provided to the District by █████'s parents, she also noted that █████ was exhibiting many of the same characteristics, and noted that █████ spent the majority of the session on his own and that there were very few communicative or social initiatives on his part. (Petr.'s Ex. 36-46.) She also noted that █████ "clearly does display the qualitative impairment in reciprocal social interaction and communication that is consistent with a diagnosis of an autistic spectrum disorder." (Petr.'s Ex. 36-46.)

43.

The evaluations were also consistent with a private evaluation performed by the Marcus Institute on █████ in July and August 2005, just a few short months after the District's evaluations were completed. (Petr.'s Ex. 281-292, Tr., p. 1445-1446.) For example, the private evaluator noted that █████ had difficulty with eye contact, which is something the District evaluators also noted. (Tr., p. 1445.) The private evaluation also indicated that █████ needed prompting to use language communication, which is also consistent with what the District found. (Tr., p. 1446.) The report also indicated that █████ had difficulty in domains of social, self-help, motor, expressive language skills, and receptive language skills. (Tr., p. 1448.)

44.

█████ also testified that █████ needed instruction to play simple games. (Tr2., p. 384.) Additionally, Ms. Sandra Black, one of A█████'s private ABA therapists, testified that at this time, █████ was not interacting with other peers and was "still working up to it." (Tr., p. 422.) Furthermore, at the Diagnostic IEP meeting, it was reported that █████ did not initiate contact with his peers and that he did not play appropriately with toys. (Tr., p. 1192, Tr2., p. 41.)

45.

All of the District's evaluations reflected similar characteristics of █████ and indicated that he had Autism and that he was disabled and in need of special education services from the District. Furthermore, almost all of the District's evaluators noted that █████ had difficulty with transitions, that he did not make eye contact, that he did not initiate contact with either peers or adults, and that he was not engaged in activities in the classroom.

46.

On May 11, 2005, the IEP team reconvened to discuss Extended School Year Services (ESY) for A█████ (Petr.'s Ex. 152-158.) Both of █████'s parents were present at the meeting, as was Christine Palkovic and █████'s attorney. (Tr., p. 927-928, 1202-1203.) At the time of the meeting █████ had only been in school for two and a half weeks. (Petr.'s Ex. 154, Tr., p. 929, Tr2., p. 44.)

47.

The meeting began with a discussion of the interim goals and objectives that had been developed for █████ at the Diagnostic IEP meeting. (Tr., p. 1200, Tr2., p. 44.) It was noted during the meeting that █████ did not receptively identify colors or shapes, that he could not verbally label colors, and that he did not independently copy pre-writing designs. (Petr.'s Ex.

152-158, Tr., p. 927.) It was also noted that he had a tendency to go under the table and cover his ears when he became sensory overloaded, which is something that he was also doing at home during this time. (Petr.'s Ex. 152-158.)

48.

Nonetheless, ██████ was making some progress, was able to remain in a teacher-directed area for at least five minutes, and was following directions for classroom routine if he was able to gain access to a preferred activity. (Petr.'s Ex. 152-158, Tr., p. 926.) The District staff provided intervention to help ██████ acclimate and transition. (Tr., p. 1201.)

49.

The IEP team determined that ██████ qualified for ESY services due the nature of his disability because he needed some continuity in his educational program. (Petr.'s Ex. 152-158, Tr., p. 928, 1201, Tr2., p. 46.) The IEP team recommended that ██████ attend a summer program at ██████ Elementary School from 8:00 a.m. until 12:15 p.m. three days per week. (Petr.'s Ex. 152-158, Tr2., p. 46.) The program began on June 3, 2005 and ended on June 30, 2005. (Petr.'s Ex. 152-158, Tr., p. 1202.) Ms. Bates thoroughly explained the program at ██████ Elementary School to ██████'s parents at the IEP meeting. (Petr.'s Ex. 152-158.) The program at Alpharetta Elementary School was a self-contained pre-kindergarten setting and was taught by a special education teacher with two assistants in the classroom. (Tr., p. 928, Tr2., p. 45.) There was also integrated speech therapy, which ██████ would have received for one hour per week. (Tr., p. 928, 1202.) It was explained that the speech therapy would have been done in a group in order to promote generalization, social interactions, and to make progress on the goals on objectives. (Tr., p. 928, 1202.) The IEP team also recommended that ██████ receive ABA

services for ten hours per week in his home from June 6, 2005 until July 29, 2005. (P 152-158, Tr., p. 928, 1202, Tr2., p. 45.)

50.

The IEP team felt that the ESY program was appropriate for [REDACTED] because it was an intensive program where he would be able to maintain the progress he had made. (Tr., p. 929, Tr2., p. 46.) It was a mixture of his home-program, which is what his parents were advocating for, and a school program, so [REDACTED] could stay in the habit and routine of being in school. (Tr., p. 1204-1205, Tr2., p. 46.) The total ESY services that [REDACTED] would have received if he had attended the program at [REDACTED] Elementary School and received the ABA would have been 22 hours of services. (Tr2., p. 46.) However, [REDACTED]'s parents rejected the program at Alpharetta Elementary School and never enrolled [REDACTED] in the program. (Tr., p. 168, 593, 1203.)

51.

During the meeting on May 11, the District also asked for a tape of a MaySouth therapy session since Ms. Palkovic reported different abilities than the District personnel observed in the classroom. (Petr.'s Ex. 155, Tr., p. 929, 1205.) [REDACTED]'s parents agreed to provide the videotape. (Tr., p. 929.) However, the tape was never provided because [REDACTED] indicated that [REDACTED] was distracted by the video camera.¹⁸ (Petr.'s Ex. 225, Tr., p. 929, 1205.)

52.

The IEP team reconvened on May 23, 2005 to develop an IEP for [REDACTED] for the 2005-2006 school year and to determine eligibility for special education services. (Petr.'s Ex. 198-223.) [REDACTED]'s parents both attended this meeting along with their attorney and Christine

¹⁸ However, when Ms. Anderson and Ms. Cleary went to observe [REDACTED] in his home in early April 2005, they noticed that there was video cameras set up in [REDACTED]'s playroom. (Tr., p. 904.) [REDACTED]'s mother also testified that there was a camera in the room, which was eventually mounted on a wall. (Tr., p. 155-156.)

Palkovic.¹⁹ (Petr.'s Ex. 198-223, Tr., p. 941, 1211.) ██████'s parents brought a Memo to the IEP team and an "Addendum to IEP Meeting Minutes" that outlined what services and goals and objectives they felt ██████ needed. (Petr.'s Ex. 192-195.)

53.

At the IEP meeting, Ms. Cleary, Ms. Henning, Ms. Helton, and Ms. Anderson reviewed the results of their evaluations. (Petr.'s Ex. 219, Tr., p. 1207.) The IEP team then completed the Autism Eligibility Report. (Petr.'s Ex. Ex. 197-198, 220, Respt.'s Ex. 34.) The Eligibility Report incorporated both the private evaluations provided by ██████'s parents as well as the evaluations completed by the District.²⁰ (Respt.'s Ex. 34, Tr., p. 938-939, Tr2., p. 52.)

54.

In addition, the Eligibility Report referred to the report completed by Dr. Dunbar. (Respt.'s Ex. 34.) Finally, at the bottom of the Report, it was noted that "private evaluations should be included in the eligibility and are in the confidential file." (Respt.'s Ex. 34.) However, the Assessment of Basic Language and Learning Skills (ABLLS), completed in November 2004, was not considered because ██████ had received an intensive amount of services since it was completed, and it was, therefore, out of date. (Tr2., p. 50.) The IEP team determined that ██████ met the eligibility criteria for Autism. (Respt.'s Ex. 34, Tr., p. 939, 1208.) The entire IEP team signed the Report, including both of ██████'s parents. (Respt.'s Ex. 34, Tr2., p. 552.) The IEP team also found ██████ eligible for Speech-Language Impaired services since

¹⁹ In addition to the members of the IEP team who had attended the two previous IEP meetings, Nancy Erickson, an instructional support teacher at ██████ Elementary School, Mary Welch, the special needs kindergarten teacher at ██████ Elementary School, and Betsy Cloud, a general education pre-kindergarten teacher, also attended this meeting to help develop the IEP. (Tr., p. 1471.)

²⁰ Specifically, the results of the Battelle and the Developmental Profile completed by Ms. Cleary, Ms. Henning's Speech and Language Evaluation, the results of Ms. Anderson's CARS, and the results of Ms. Helton's Occupational Therapy Evaluation were listed on the report. (Respt.'s Ex. 34, Tr., p. 939.)

his speech-language disorder impacts his academic, social or emotional performance. (Respt.'s Ex. 22.)

55.

The IEP team also discussed the limited progress that ██████ had made in school during the 2004-2005 school year. During the brief time that ██████ was enrolled in school, data was taken on his goals and objectives. (Petr.'s Ex. 139-150.) Although he was successful on some of his goals, he did not make much progress, which was not unexpected given the short period of time he attended class and the transitions he had recently been through, especially the move to his new home.²¹ (Tr., p. 1209, Tr2., p. 44.)

56.

It would have been especially difficult for ██████ to become adjusted when he was only in school for one week, and then was gone on vacation for one week, and then returned for only a few weeks. Furthermore, he was in a "wide range of therapies, going to a wide range of places and people during the course of his day...he had a lot of different transitions that he was going through." (Tr., p. 1380.)

57.

The IEP team drafted the goals and objectives for ██████. (Petr.'s Ex. 198-223, Tr., p. 941, 1209.) The goals and objectives proposed by the District were merged with the goals and objectives that ██████'s parents had provided to develop what the team believed to be reasonable goals and objectives for ██████.²² (Petr.'s Ex. 198-223, Petr.'s Ex. 192-195, Tr., p. 941, 1210,

²¹ Moving is a big transition, and it is very difficult for children, especially children with autism. In fact, moving "can be devastating" for an autistic child "because they crave that sameness and the consistency, it can be devastating," and can be compared to a death. (Tr., p. 238.) The move "was actually a very difficult transition for [██████]...he had a really hard time transitioning." (Tr., p. 727.)

²² Susan Bates testified that "The District had input, the parents had input. It was a very long process because ██████'s parents] had a lot of things they wanted [the team] to look at and to include, and so [the team] went back and forth a lot with trying to come to terms of agreement with the goals and objectives. And the staff looked very

1408, Tr2., p. 53.) Specifically, the team wrote goals and objectives for language arts, math, work-study habits, adaptive skills, motor skills, fine arts, personal-social skills and language. (Tr., p. 941.)

58.

██████ was functioning at a 2 to 3 year old level and was a child with significant autism, so the IEP team tried to look at what he would be able to accomplish and incorporated that into the goals and objectives. (Tr., p. 1415.) The IEP team tried to incorporate as many of the objectives that the parents wanted to include as possible. (Tr., p. 941-942.) However, the District did not believe that several of the goals that ██████'s parents had proposed were developmentally appropriate since a typical ██████ year old child would not have been expected to know some of the tasks his parents wanted included as goals. (Tr., p. 942, Tr2., p. 54.) In addition, some of the goals and objectives proposed by ██████'s parents would be part of the kindergarten curriculum, and were therefore not appropriate for ██████ since was not functioning at the level of a typically-developing kindergarten student. (Tr., p. 947.) Based on the District's evaluation and its staff's observations, ██████'s parents wanted some goals and objectives that were far above what the District believed ██████ required at that time.²³ (Tr., p. 1406.)

59.

Ms. Henning helped draft the speech and language goals. (Tr., p. 1051.) Since it is important to gain attention, goals were written that would assist ██████ in responding to his name and in establishing eye contact. (Petr.'s Ex. 213, Tr., p. 1051.) She also drafted goals so that he

copiously at what the parents wanted to include to be sure that that was in sync with where they thought ██████ was and where he could go. ... We worked diligently toward getting changes in the goals and objectives and getting agreement." (Tr., p. 1210, 1211.)

²³ Again, the Court notes that because of the discrepancies between what ██████'s parent's were reporting he was capable of and what the District was observing, the District asked for a copy of the video tape of a MaySouth therapy session, which was never provided.

would be able to point to named vocabulary associated with common preschool themes, action words, object functions, and answering questions. (Petr.'s Ex. 213-215, Tr., p. 1051-1052.) Finally, goals were written to assist ██████ to engage in the cycles of communication so he could begin working on turn-taking, verbal turn-taking for conversation, and matching pitch and loudness for vocal quality. (Petr.'s Ex. 213-215, Tr., p. 1052.) A goal was also included to assist ██████ using please/thank you, which was an objective that ██████'s parents wanted included. (Petr.'s Ex. 214, Tr., p. 1052.)

60.

The meeting was then adjourned with an agreement to re-write the goals and objectives as agreed upon and to reconvene at a later date to finish the IEP. (Petr.'s Ex. 198-223.)

61.

The IEP team reconvened on June 10, 2005. (Petr.'s Ex. 238-242.) Again, both of ██████'s parents were present, as was their attorney. (Petr.'s Ex. 238-242.) The District had also invited Elizabeth Novak, the Program Coordinator of the ██████ Program at ██████ Elementary School, to participate in this meeting because her program was to be considered along the continuum of services available to ██████. (Petr.'s Ex. 238-242, Tr., p. 1206-1207.) Since Ms. Novak was not listed on the parental notification that was given to ██████'s parents, the District gave his parents the option of postponing the meeting, which they declined. (Tr., p. 1207; Petr.'s Ex. 238.)

62.

The meeting began with a discussion of the goals and objectives that were prepared at the previous meeting. ██████'s parents and their attorney stated that the goals were not accepted. (Petr.'s Ex. 238.)

63.

Given the District's evaluations and observation, the Court finds that the goals and objectives were appropriate for what ██████ was capable of at that time, especially since they were consistent with what ██████'s private therapist had reported were his weaknesses.²⁴ (Tr., p. 1054, Tr2., p. 53.)

64.

The IEP team then discussed the placement options available to ██████. (Petr.'s Ex. 238-242, Tr., p. 942-943, 1211-1212, Tr2., p. 54.) Specifically, the options considered were: general education setting only, general education setting with supplemental aids and services, general education setting with consultative services, general education setting with direct special education half day or less, general education setting with direct special education more than half day, the North Metro program which is a self-contained special education setting with participation in general education for activities to be determined by the school team with parents input after the school year begins and schedules are determined, self-contained special education setting, continuation of home-based program, and continuation of home-based program and participating in school based programs for select activities. (Petr.'s Ex. 198-223, 238-242, Tr., p. 943, 1211, Tr2., p. 54.)

65.

The special needs kindergarten was described as a cross-categorical kindergarten program that is located at select schools. (Tr., p. 1211-1212.) The program follows the general education curriculum with modifications according to the children's needs and their current levels so that they can participate in the general education curriculum, but with modifications

²⁴ Although ██████ testified extensively about ██████'s current abilities in relation to the goals and objectives written a year before the trial, she did not testify that he could do them at the time the IEP was drafted. (Tr., p. 697-700.)

directed toward the goals and objectives on their IEP. (Tr., p. 1212.) There are typically between 10 and 12 children in the classroom, and an early childhood special education teacher teaches the class with one or two assistants, depending on the amount of children in the class. (Tr., p. 1212.) The teacher works closely with the general education kindergarten team members to ensure that all of the students are all on the same level. (Tr., p. 1212.)

66.

Ms. Novak described the ~~North Metro~~ Program in detail.²⁵ (Petr.'s Ex. 238-242, Tr., p. 1539.) The ~~North Metro~~ Program serves children with autism, other health impairments, and emotional behavior disorder. (Tr., p. 1511.) There are approximately 32 or 33 autistic children in the program at ~~North Metro~~ Elementary School. (Tr., p. 1511.) The autistic students are not in the same classes as the students with emotional behavior disorders. (Tr., p. 1513.)

67.

The staff was trained to work with children with autism. (Tr., p. 1511.) The teachers were "mind-set" trained to know how to work with students if they become upset and how to calm them down. (Tr., p. 1520.) The staff also participated in a continuous improvement plan on assistive technology and was trained on the different devices for assistive technology. (*Id.*) The staff was also encouraged to participate in any other training offered by the District, such as

²⁵ Ms. Novak was recognized by this Court as an expert in developing IEPs or educational programs for children with disabilities, especially autism. (Tr., p. 1506.) Ms. Novak has an undergraduate degree from the University of Iowa in Elementary Education and a Masters Degree in Special Education, also from the University of Iowa. She also received a degree in the Supervision of Special Education from West Georgia in 1998. She has worked for the North Metro Program in several different capacities, including teaching grades 3, 4, and 5, teaching middle school students and teaching higher functioning students with emotional behavior disorder and autism. She was also the lead teacher for one year, which entailed assisting teachers in the classroom, assisting the teachers in behavioral support and overseeing the program. She then became the assistant coordinator for two years and then became the coordinator of the Program. She has also attended several conferences, seminars and trainings since graduating from college. In addition, she has attended several IEP meetings both as a coordinator and as a teacher. (See Tr., p. 1483-1506 for a complete description of Ms. Novak's qualifications.)

visually-acute instruction, Picture Exchange Communication System (PECS) training, and sensory integration training. (*Id.*)

68.

There are classrooms that follow different models, based on the children's needs. (Tr., p. 1511.) At the time that ██████ would have been in the ██████ Metro Program, there were three classrooms that would have had children in his age group. (Tr., p. 1529-1530.) Two of these classes were predominantly focused on applied behavior analysis (ABA) throughout the day, and one was modeled after the TEACCH methodology.²⁶ (Tr., p. 1511-1512.) The students in the ABA classrooms participated in DTT, their respective DTT programs were developed according to each individual child's needs, and the students rotated from station to station where they participated in twenty-minute intervals with different therapists to work on their respective goals and objectives. (Tr., p. 1512.) The students were all working on their own programs, which were developed based on the assessment of the ABLLS and the goals and objectives of the IEP. (Tr., p. 1512.)

69.

The classrooms typically had five to six students with a teacher and two assistants in the room at all times. (Tr., p. 1519-1520.) Since the additional therapies the students received were done in the classroom, there might also have been a speech therapist or an occupational therapist in the room. (Tr., p. 1520.) In other words, the instructor/student ratio was never more than two instructors to one student, and it was often one instructor to one student. Finally, a student from

²⁶ ABA works on the functions of behaviors and looking at behaviors throughout the day. (Tr., p. 1793, Tr2., p. 221-222.) It is a methodology for teaching appropriate behaviors and removing unwanted inappropriate behaviors based on reinforcement. (Tr2., p. 472.) DTT is a methodology used as part of ABA as an instructional tool to instruct students on different skills. (Tr., p. 1793.) The child will have a program sheet with their goals on it, and the instructor will sit with the child and do the trials. (Tr., p. 1793.) DTT is one method that is based in ABA technology. It is one of the many methods that are used to teach children with autism and related disabilities. (Tr2., p. 222.) TEACCH is a program that is used to educate children with autism and related disabilities that uses a lot visual strategies for instruction for those children. (Tr2., p. 225.)

Roswell High School was sometimes in the classroom working with a student on a leisure skill activity as part of a class the student was taking at the high school.²⁷ (Tr., p. 1517, 1521, 1651.)

70.

The program also had specials in all areas, including adaptive physical education (PE), adaptive art, and adaptive music. The adapted programs were an extension of the general education program but were more specialized, where the teachers worked with the students with disabilities by making things more hands-on and accessible for them in smaller groups. (Tr., p. 1513-1514.) There was also an adaptive playground with swings and other items that were designed to help give the students sensory input. (Tr., p. 1514.)

71.

There was also a sensory room where the students with autism could go to work with an occupational therapist and work on their sensory needs. (Tr., p. 1514.) The sensory room was located in a portable unit behind the school. (Tr., p. 1514.) The sensory room had a squeeze machine, which students could go through and get deep pressure. (Tr., p. 1518.) There was also a ball pit where students could get in with the balls and can play with them. (Tr., p. 1518.) The room also had a mini trampoline and mats and big therapy balls the children could roll on. (Tr., p. 1518-1519.)

72.

The students also took community-based instruction trips, where they went out into the community. (Tr., p. 1515.) These trips were prearranged, and before going on the trip, they made a book of the actual trip they were going to go on, so the students were prepared for the trip. (Tr., p. 1515.)

²⁷ The high school student meets with a social worker to go over the confidentiality of the students. (Tr., p. 1521.) The high school students will then learn about working with the autistic students and will also observe for several weeks and keep a journal and will then be slowly introduced to working with a student. (Tr., p. 1521.)

73.

There was also a reverse inclusion or "Peer Mentorship" program where the general education students came to the program and interacted with the students and facilitated social interaction, such as learning to play a game, reading a story, or playing blocks. (Tr., p. 1516, 1591.) When a child was ready for inclusion into a general education classroom, he was then transitioned to that classroom, where he already had a peer buddy in the school that he knew and could interact with in the general education classroom. (Tr., p. 1516.) All of the autistic students participated daily in the reverse inclusion program. (Tr., p. 1517.) The reverse inclusion typically started after the first few weeks of school, once everyone had been acclimated to the beginning of school. (Tr., p. 1517.) Additionally, since the program was in an elementary school, the children ate with the general education students during lunchtime whenever possible. (Tr., p. 1516.) In addition, the students participated in all grade-level activities as well as all school activities and PTA-sponsored events (Tr., p. 1525-1526.)

74.

The ██████████ Program also has consulting Ph.D. behavior analysts and psychiatrists, which ██████'s parents were originally seeking. (Tr., p. 597, 1215, 1510.) The behavior analysts come to the program on a weekly basis and help develop strategies and discuss the students and what is working and what is not working since the ultimate goal of the program is to get the children into general education setting. (Tr., p. 1215-1216, 1510.)

75.

Parent training was also offered. (Tr., p. 1528.) This was typically done in the evening, and the social workers worked with the families on any problems they might have had. (Tr., p.

1528.) They also discussed with the parents how to work on the behaviors at home. (Tr., p. 1528.) The social worker also worked with the siblings of the students. (Tr., p. 1529.)

76.

At the time that [REDACTED] would have attended the program, there were two classes that spanned his age group that were modeled in the ABA and DTT format. (Tr., p. 1529-1530.) A typical day for the children would have started with having them hang up their backpack and then going to the group table and having breakfast. (Tr., p. 1530-1531.) The teacher sat with the students to help facilitate communication during this time and to help work on table manners. (Tr., p. 1531.) They then moved to circle/calendar time, where they worked on skills in a group setting. (Tr., p. 1531-1532.) The class then moved into DTT for approximately two hours with a break in the middle for snack. (Tr., p. 1532.) However, if a student needed a break more frequently, then he would have been given a break or sensory input to meet his needs. (Tr., p. 1535.) During the DTT, different therapists, such as the speech and occupational therapists, came in and worked with the different students on their goals and objectives outlined in their IEPs. (Tr., p. 1532.) Since not every child participated in DTT, they also taught the students to participate in an independent activity, such as using the listening center or reading a book. (Tr., p. 1533-1534.) There was also education software on the computers that the students used independently. (Tr., p. 1534.)

77.

After the two hours of DTT, the students may have gone onto the playground. (Tr., p.1535.) They tried to go outside with same age peers so that they could interact with the general education students, which was also part of the reverse inclusion program. (Tr., p. 1535-1536.)

The students then went to the cafeteria to eat lunch. (Tr., p. 1536, 1590-1591.) After lunch, they participated in their specials and then prepared to go home. (Tr., p. 1536.)

78.

If a student comes to the program and does not do well, then the District would attempt to see why the student is not being successful. (Tr., p. 1523.) They may call in Dr. Gail Maddox, the consulting psychiatrist, or Dr. Coby or Dr. Janet Lund, the board certified behavior analysts who oversee the program, or the Fulton County Behavior Specialist, Sharon Butler, who may come and do assessment to see what is not working. (Tr., p. 1523-1524.)

79.

If a child came to the program and did well, then student would be able to transition to larger groups within the general education setting. (Tr., p. 1524.) In addition, if a student was doing well, the student's home school might have come and observed to learn techniques that work with the student that could be implemented when the child returned to the home school. (Tr., p. 1524-1525.)

80.

At the IEP meeting, ██████'s parents stated their concerns with the ██████ program indicating that they had heard "conflicting things" about the program. (Petr.'s Ex. 240, Tr., 690.) They were invited to visit the program. (Petr.'s Ex. 240.) Ms. Novak also invited ██████'s parents to contact her so they could obtain the names and numbers of other parents who had enrolled their children in the ██████ program, but ██████'s parents never contacted her. (Tr., p. 1540.)

81.

The IEP team determined that the programs that were not appropriate for [REDACTED] were: continuation of the home program, continuation of the home program and a school-based program, the general education setting, and the special needs kindergarten setting. (Petr.'s Ex. 198-223, 238-242, Tr., p. 1212-1213.) Ms. Henning and Ms. Cleary both agreed with [REDACTED] that general education setting would be too overwhelming for [REDACTED], even if he had a Para-professional assigned to him. (Petr.'s Ex. 238-242.)

82.

A student who has a one to one Para-professional assigned to him at all times may become too attached to that Para-pro, and it will be become difficult for that student to generalize his skills. (Tr., p. 1558.) It is typically a more restrictive placement to have a child in a general education classroom with an assistant who helps the student do everything because it limits the social interactions and the ability for the student to interact in a natural environment with his peers. (Tr., p. 1559.)

83.

The District concluded that the [REDACTED] program would offer [REDACTED] the best of both worlds in that he would be allowed the specialized education and intervention with specifically trained personnel in autism and he would also be allowed the opportunity to participate in things like reverse inclusion where children from typical education would be brought into his classroom and involve [REDACTED] in specific activities to promote social skills, appropriate generalization of activities. (Tr2., p. 56.)

wanted the continuation of the home-based program considered in the continuum of placements, as well as a partial home program and a partial school program because she stated that was “not ready for a large group setting of 20 other children – it is over stimulating.” (Petr.’s Ex. 239, Tr., p. 945, 1122, 1212, 1214, Tr2., p. 55.) The Court agrees with the District that the home-based program that the parents wanted was not appropriate for and would have been too restrictive. (Tr., p. 945-946, 1213.) Language development for children is often more appropriate in a natural setting, and a home-based ABA program is not a natural setting and would hinder generalization. (Tr., p. 1122.) Furthermore, it is important for a child of ’s age to be in a school setting so he can gain school-related skills. (Tr., p. 1213.) Additionally, needed the structure and continuity that the District program could provide since the services that he was receiving at home were from different people in different places from different organizations, thus making it too fragmented. (Tr., p. 1213, 1424.)

The IEP team recommended that attend the North Metro Program at Sweet Apple Elementary School because of the opportunities it would provide to . (Petr.’s Ex. 198-223, 238-242, Tr2., p. 55.) The amount of time in the general education setting would have been determined once the school year had begun and once the schedules had been determined. (Tr., p. 1560.) Once everyone was settled into their routines, then the IEP team would have met to determine which general education setting should go to and for how long. (Tr., p. 1560.) In May and June 2005, it would have been hard to determine how much time in the general education setting would have received because the IEP team would have needed to sit down and figure out what was ready for and what classes he could go into. (Tr., p. 1561.)

The IEP team also recommended that [REDACTED] receive speech services daily in a one to one setting. (Petr.'s Ex. 198-223, 238-242, Tr., p. 1216.) Occupational Therapy was also recommended for two, thirty-minute sessions per week in a one to one setting to help [REDACTED] modulate his arousal levels. (Petr.'s Ex. 198-223, 238-242, Tr., p. 1216.) In addition, the occupational therapist would help train the staff to work with [REDACTED] throughout the course of his day to do the types of skills or interventions he needs throughout the day, not just during the time designated for occupational therapy. (Tr., p. 1217.) Ms. Henning, Ms. Cleary, and Ms. Anderson all expressed their agreement with placement in the ~~North Metro~~ program. (Petr.'s Ex. 241, Tr., p. 946-947, 1058, Tr2., p. 56.)

86.

The Court also agrees with the District that the ~~North Metro~~ Program was appropriate for [REDACTED] because it was a program that was reasonably calculated to meet his needs and enable him to make progress. (Tr., p. 946.) It would have allowed him to have the specialized education and intervention with specifically trained personnel in autism, and it would also have allowed him to interact with the general education students so he could have learned to generalize his skills and learned to interact socially. (Tr2., p. 56.) Sandra Black and Linda Loff both testified that it was important to have contact with neuro-typical peers, which [REDACTED] would have received at North Metro. (Tr., p. 376, 343.)

87.

The ~~North Metro~~ Program is designed for children with a diagnosis of autism, and it has specific programs designed for those children. (Tr., p. 1060.) Furthermore, there is research that indicates that there is a certain amount of skill that a child needs before they are ready for inclusion. (Tr., p. 1066.) "Sometimes children need to go through other placements in a process

to get to the point where they can be within the least restrictive educational setting.” (Tr., p. 1366.) In fact, even Mr. Bezilla testified that [REDACTED] needed to be taught certain necessary skills before he could appropriately enter a neurotypical classroom. (Tr2., p. 454-455.)

88.

The ~~North Metro~~ Program would have allowed [REDACTED] “to benefit and make gains.” (Tr., p. 1213-1214.) The program was appropriate because the personnel had the “skills and expertise for children with autism and were able to build on his skill base and then integrate him through their reverse inclusion or main streaming into the general setting with support.” (Tr., p. 1214.) The North Metro Program would also have allowed [REDACTED] to continue with his ABA program within the context of a school setting. (Tr., p. 1215.) Mr. Bezilla opined that the North Metro Placement would not have been appropriate for [REDACTED], yet he also testified that he was not familiar with the specific classroom in which [REDACTED] would have been placed. (Tr2., p. 432.)

89.

A home-based program would have been more restrictive than the ~~North Metro~~ Program because it would have removed [REDACTED] from the school environment. (Tr., p. 1327, Tr2., p. 56.)

90.

At the end of the meeting held on June 10, 2005, [REDACTED]’s parents stated they were rejecting the IEP because they had “heard through other families about the program,” although they had not yet observed the program or spoken to any of the parents of other students at the school. (Petr.’s Ex. 242, Tr., p. 1214.) Since the parents rejected the IEP, no further meetings were held, and [REDACTED] was never enrolled in the ~~North Metro~~ program. However, if [REDACTED]’s parents had accepted the IEP, Ms. Novak would have met with them to begin the intake process with a social worker to ascertain [REDACTED]’s social history and background information. (Tr., p.

1742, 1796.) In addition, the psychologist would have gone and observed ██████ in the setting he was in, whether it was at his home or another setting. (Tr., p. 1796.) ██████ would also have had the opportunity to come to the school prior to school the start of the school year to meet his teachers and get acquainted with them and with the school. (Tr., p. 1797.)

91.

The purpose of an IEP is to come together as a team of parents, educators, related service staff, if necessary, and develop a plan and a program for a child, which is what the District did at each IEP meeting held for ██████. (Tr., p. 1507.) An IEP is a fluid document that is ever changing to meet the needs of a child. (Tr., p. 1507.) If a student makes progress on an IEP, then the team would re-convene to look at goals and objectives and see what needs to be changed. (Tr., p. 1510.) Similarly, if a student is not making progress, the team will re-convene to determine what is not working and what other services may be implemented to help the children be successful. (Tr., p. 1510.)

92.

If a student is having inappropriate behavior, a behavior intervention plan is developed to help the child re-learn another behavior that would replace the inappropriate behavior. (Tr., p. 1508.) Not all children need a behavior plan, and the children in the ██████ ██████ Program typically do not need these plans because the structure and support that is given to the students, especially the students with autism, help minimize the behaviors once the children are in a setting they feel comfortable in. (Tr., p. 1508-1509.)

93.

On June 6, 2006, the District began administering the ABA services to ██████ at his home two hours per day for a total of ten days per week. (Tr., p. 1222.) ██████'s parents rejected all

other ESY services offered by the District. Due to a pre-scheduled vacation, the District's ABA therapist who usually administered the therapy was unavailable the week of July 4, 2005.²⁸ Ms. Anderson administered the therapy during this week since she knew the therapist would be on vacation that week. (Tr2., p. 59-60.) The therapy was conducted in a room that had been set up for ██████ to do therapy in. (Tr2., p. 60.) It also had cameras in it. (Tr2., p. 60.) Ms. Anderson noted that ██████'s willingness to participate in sustained work declined as the week went on and that he was engaging in self-stimulatory behaviors and required frequent breaks. (Tr2., p. 60.)

94.

On July 5, 2005, ██████ told Ms. Anderson that ██████ had started the Sensory Learning Program, which is a private, twelve-day intensive program. (Tr2., p. 61-62.) The therapist had advised ██████ to discontinue all other therapies ██████ received during those twelve days. ██████ indicated that ██████ had ceased all other therapies, but she was going to continue with the ABA therapy being administered by the District. (Respt.'s Ex. 38.) At no time during the five days that Ms. Anderson was administering therapy to ██████ did either of ██████'s parents express any discontent with the therapy he was receiving. (Tr2., p. 66-67.)

95.

However, on July 15, 2005, ██████ sent an email to Ms. Bates indicating that she was "rejecting the remaining ESY ABA therapy as provided by Staci Cordery and Halee Anderson." (Respt.'s Ex. 41, Tr., p. 612, 1224.) ██████ alleged that the ABA therapy was inconsistent and inappropriate, yet she had never expressed to anyone that she was unhappy with the services ██████ was receiving. (Tr2., p. 66-67.) ██████ also reiterated in that email that she was "rejecting the proposed kindergarten IEP and placement in the ██████ Program," even though at that time, she had not visited the ██████ Program. (Respt.'s Ex. 41.)

²⁸ No therapy was provided on July 4, 2005 due to the fact that it was a National Holiday.

96.

After the District received the email from [REDACTED], Ms. Bates sent her a letter dated July 25, 2005 indicating that the District would be happy to make up any missed ABA therapy due to unforeseen absences by the therapist. However, [REDACTED] did not want the District to provide any additional therapy. (Respt.'s Ex. 42 and Respt.'s Ex. 44.) At all relevant times, the District was ready, willing and able to complete the services during the summer of 2005.

97.

The witnesses who testified on behalf of [REDACTED], other than his parents, did not have the opportunity to observe him in any of the District settings nor did they ever attend an IEP meeting, yet they testified that the District's programs were inappropriate for A [REDACTED]. Although Ms. Loff testified that she did not think the ESY program at [REDACTED] Elementary School was appropriate for [REDACTED], she was not familiar with the program. (Tr., p. 363.) Ms. Palkovic indicated that she did not think the [REDACTED] Program would have been appropriate for [REDACTED], yet she had never observed the Program. (Tr., p. 736, 738.) Mr. Bezilla never observed [REDACTED] in any Fulton County District setting. (Tr2., p. 511.) In fact, the only place Mr. Bezilla observed [REDACTED] was the [REDACTED] Academy, which is not a District facility and which is now closed. (Tr2., p. 512.)

98.

[REDACTED]'s parents have complained about the lack of specifics in the IEP developed for the 2005-2006 school year. However, on the ABLLS data, MaySouth was recommending 20 to 25 hours of "ABA therapy" for [REDACTED] without giving any explanation what this "ABA therapy" would consist of. Additionally, the report did not indicate how much DTT [REDACTED] would have or should have gotten. (Petr.'s Ex. 12-16, Tr2., p. 507-508.) In addition, on the report for January

2006 to January 2007, MaySouth was still recommending 25 hours of ABA therapy, even after ██████ had allegedly improved, but again, the recommendation did not indicate that it would be DTT. (Petr.'s Ex. 558-565, Tr2., p. 408-509.)

III. CONCLUSIONS OF LAW

The purpose of the IDEA generally is "to ensure that all children with disabilities have available to them [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. . . ." 20 U.S.C. § 1400(d)(1)(A). The IDEA also mandates that schools and parents together develop an IEP, a written statement for each disabled child that includes, *inter alia*, "a statement of the child's present levels of academic achievement and functional performance . . . ; a statement of measurable annual goals . . . ; [and] a statement of the special education and related services . . . to be provided to the child" § 1414(d)(1)(A)(i)-(iii). "The IEP is more than a mere exercise in public relations. It forms the basis for the [disabled] child's entitlement to an individualized and appropriate education." *Doe v. Ala. State Dep't of Educ.*, 915 F.2d 651, 654 (11th Cir. 1990).

If parents believe their child's proposed IEP is inappropriate, they may file a due process complaint. § 1415(f). However, as the party filing the complaint and seeking relief, ██████ bears the burden of proof as to all issues for resolution. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 537 (2005); GDOE Rule 160-4-7-.18(1)(g)(8) (May 1, 2006).²⁹ Accordingly, ██████ bears the burden of proving that the IEP proposed by the District was inappropriate under IDEA.

²⁹ ██████ argues that when a parent files a due process complaint, the local school system "shall bear the burden of coming forward with the evidence and burden of proof at any administrative hearing to establish that the proposed IEP is appropriate and provides FAPE." ██████ further argues that the Supreme Court decision in *Schaffer* does not address the situation where the state has its own rules, as in Georgia, for applying the burden of proof. However, ██████ erroneously relies on a version of the Georgia rules no longer in effect. Prior to the filing of the instant case, the Georgia Department of Education amended its rule to conform to the *Schaffer* case, which now specifically states "the party seeking relief shall bear the burden of coming forward with the evidence and the burden of proof..." GDOE Rule 160-4-7-.18(1)(g)(8) (May 1, 2006).

Furthermore, claims brought under IDEA are generally subject to a two-year statute of limitations. *See* § 1415(f)(3)(C). Thus, the cause of action accrues within 2 years of the date the parent knew or should have known about the alleged action that forms the basis of the complaint. *Id.*

The Supreme Court has held that in order to satisfy its duty to provide FAPE, the District must provide "personalized instruction with sufficient support services to permit [REDACTED] to benefit educationally from that instruction." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 203, 102 S. Ct. 3034, 3049, 73 L. Ed. 2d 690 (1982). This standard, that the District must provide the child "some educational benefit," *Id.* at 198, has become known as the *Rowley* "basic floor of opportunity" standard. *J.S.K v. Hendry County Sch. Bd.*, 941 F.2d 1563, 1572-73 (11th Cir. 1991).

The Supreme Court has formulated a two-part test in analyzing whether a FAPE was provided in cases arising under the IDEA: (1) whether the District has complied with the procedures set forth in the IDEA, and (2) whether the IEP developed pursuant to the IDEA is reasonably calculated to enable [REDACTED] to receive educational benefit. *See Rowley* at 206-07. However, in matters alleging a procedural violation, this Court may find that [REDACTED] did not receive FAPE only if the procedural inadequacies—

- (I) impeded his right to FAPE;
- (II) significantly impeded his parents' opportunity to participate in the decision-making process regarding the provision of FAPE to [REDACTED]; or
- (III) caused a deprivation of educational benefits.

See § 1415 (f)(3)(E)(ii).

With regard to the first prong of the *Rowley* test, the Court concludes that any procedural inadequacies that may have existed did not impede [REDACTED]'s right to FAPE, did not significantly impeded his parents' opportunity to participate in the decision-making process regarding the

provision of FAPE to him; and did not cause a deprivation of educational benefits. Therefore, ██████ has not met the burden of showing a procedural violation that prevented him from receiving FAPE. See § 1415 (f)(3)(E)(ii).

In addressing the level of educational benefit required under IDEA, the Eleventh Circuit held in *J.S.K.*:

[W]hen measuring whether a handicapped child has received educational benefits from an IEP and related instructions and services, courts must only determine whether the child has received the basic floor of opportunity. *Todd D. v. Andrews*, 933 F.2d 1576, 1580 (11th Cir. 1991). This opportunity provides significant value to the handicapped child who, before EAHCA might otherwise have been excluded from any educational opportunity. The IEP and the IEP's educational outcome need not maximize the child's education. *Id.*; *Doe v. Alabama State Dep't of Educ.*, 915 F.2d at 665. If the educational benefits are adequate based on surrounding and supporting facts, EAHCA requirements have been satisfied. While a trifle might not represent "adequate" benefits, *see, e.g., Doe v. Alabama State Dep't of Educ.*, 915 F.2d at 655, *maximum improvement is never required*. Adequacy must be determined on a case-by-case basis in the light of the child's individual needs.

Id. at 1572-73 (emphasis added).

The Eleventh Circuit also noted that in determining whether an IEP provided adequate educational benefit, courts must pay great deference to the educators who develop the IEP. *Id.* at 1573. The *J.S.K.* decision continues to be the standard in the Eleventh Circuit for determining the educational benefit required under IDEA. *See, e.g., Devine v. Indian River County Sch. Bd.*, 249 F.3d 1289 (11th Cir. 2001); *Todd D. v. Andrews*, 933 F.2d 1576, 1581 (11th Cir. 1991) ("it seems highly unlikely that Congress intended courts to overturn a state's choice of appropriate educational theories in a proceeding conducted pursuant to Section 1415 (e)(2)").

IDEA, as reauthorized in 2004, does not change this basic principle and instead leaves the choice of educational methodologies in the discretion of the educators who develop the IEP. In keeping with this "great deference" owed to the educators who develop a child's IEP, IDEA

provides that questions of methodology used to address a disabled student's educational needs are squarely within the discretion of the educators who develop the IEP. *See, e.g., M.M. v. Sch. Bd. of Miami-Dade County*, 437, F.3d 1085, 1102 (11th Cir. 2006) ("Rowley and its progeny leave no doubt that parents, no matter how well-motivated, do not have a right under the [statute] to compel a school district to provide a specific program or employ a specific methodology in providing for the education of their handicapped child") (citing *Lachman v. Illinois Bd. of Educ.*, 852 F.2d 290, 297 (7th Cir. 1988)); *K.C. v. Fulton County Sch. Dist.*, 2006 U.S. Dist. LEXIS 47652, *39 (N.D. Ga. 2006) ("the use of a particular methodology to address a disabled student's educational needs is within the discretion of the educators who developed the IEP"). IDEA's implementing regulations and accompanying commentary likewise make clear that choices of methodology remain within the discretion of the educators who develop the IEP:

There is nothing in the [IDEA] that requires an IEP to include specific instructional methodologies. Therefore, consistent with section 614(d)(1)(A)(ii)(I) of the [IDEA], we cannot interpret section 614 of the [IDEA] to require that all elements of a program provided to a child be included in an IEP. The Department's longstanding position on including instructional methodologies in a child's IEP is that it is an IEP Team's decision. Therefore, if an IEP Team determines that specific instructional methods are necessary for the child to receive FAPE, the instructional methods may be addressed in the IEP.

71 Fed. Reg. 46665 (August 14, 2006).

In addition to according great deference to the educators who develop a child's IEP, IDEA likewise expresses a very strong preference for mainstreaming and requires that children be educated in the LRE, with nondisabled peers to the maximum extent possible. § 1412(a)(5); 34 C.F.R. § 300.114(a); *see also, e.g., Rowley*, 458 U.S. at 194; *Greer v. Rome City Sch. Dist.*, 950 F.2d 688 (11th Cir. 1991). Indeed, extremely restrictive placements, such as homebound placements, are generally disfavored and are to be used only as a last resort when other, less

restrictive settings have failed. While residential placements are undoubtedly restrictive, homebound placements are considered to be even more restrictive:

Home instruction is, for school-aged children, the most restrictive type of placement because it does not permit education to take place with other children. For that reason, home instruction should be relied on as the means of providing FAPE to a school-aged child with a disability only in those limited circumstances when they cannot be educated with other children even with the use of appropriate related services and supplementary aids and services, such as when a child is recovering from surgery.

64 Fed. Reg. 12638 (March 12, 1999); *see also Dept. of Educ. v. Katherine D.*, 727 F.2d 809, 818 (9th Cir. 1983) (“Hospitalized and homebound care should be considered to be among the least advantageous educational arrangements [and are] to be utilized only when a more normalized process of education is unsuitable for a student who has severe health restrictions”). Given IDEA’s very strong emphasis on educating disabled students in the least restrictive environment, requests for home instruction should be viewed even more skeptically. Additionally, there is a “presumption” in favor of placement in the public schools. *T.F. v. Special Sch. Dist. of St. Louis County*, 449 F.3d 816, 820 (8th Cir. 2006). Further, IDEA “does not require a school district to provide a child with the specific educational placement that [his] parents prefer.” *Id.* at 821 (quoting *Blackmon v. Springfield Respt. 's Ex. XII Sch. Dist.*, 193 F.3d 648, 658 (8th Cir. 1999)).

In the instant case, [REDACTED] has requested that the District reimburse him for this home-based program developed by his parents and provide him with compensatory education for the time that he was enrolled in school. However, [REDACTED] has failed to meet his burden on all of these issues. In all instances the District has acted diligently with regards to its obligations regarding [REDACTED] and has developed appropriate IEPs that take into account his needs as the IEP teams knew them at the time they were developed. In April 2005, the District convened an IEP

meeting. The District considered the information provided to the IEP team by ██████'s parents and by his private therapists who were in attendance. The District then developed an appropriate IEP for ██████ and recommended a placement in the special needs pre-kindergarten class, and ██████ enrolled in school.

While ██████ attempted to argue that this placement was not appropriate for him, he was going through a significant amount of transitions during this time and was having difficulty adjusting. ██████'s own witnesses testified that the move was difficult for him. Additionally, he was only enrolled in this setting for a short period of time. During such a short amount of time, it is unlikely that any child, let alone an autistic child, could made adequate progress on his goals and objectives. However, as noted above, mastery of goals and objectives is not required to provide a FAPE. Rather, the IEP must be "reasonably calculated" to enable a child to make adequate educational progress, and in fact, ██████ was making some progress. For instance, he was able to remain in a teacher-directed area for at least five minutes, and he was beginning to follow directions and follow the classroom routine.

The majority of ██████'s witnesses who testified that this placement was not appropriate for him did not attend the IEP meeting, did not observe him in the setting, or speak with any District personnel regarding this placement. Mr. Bezilla, the only witness who actually attended the IEP meeting, testified, more than a year after the fact, that he had some concerns with this placement, yet he did not voice those concerns to the IEP team at the time the team was considering placement options.

The results of the evaluations were consistent with the private evaluations provided to the District by ██████'s parents, they were also consistent with each other.³⁰ For example, almost of

³⁰ It also appears that ██████ is attempting to argue that the District's evaluations were not completed in a timely manner and that they were not done appropriately. However, since neither of these accusations were raised in his

all the District's evaluators noted that [REDACTED] had difficulty with transitions, that he did not make eye contact, that he did not initiate contact with either peers or adults, and that he was not engaged in activities in the classroom. All of these traits were also noted either by [REDACTED]'s parents, his private therapists or his private evaluators.³¹

On May 11, 2005, the IEP team reconvened to discuss Extended School Year (ESY) services for [REDACTED], which he is now arguing was inappropriate. The Georgia Department of Education states that when an IEP team considers if ESY services are needed as part of a student's FAPE

it shall consider the individual needs of the student, and a multiplicity of variables, including such factors as: (i) the age of the student; (ii) the severity of the student's disability; (iii) progress on skills as identified in the IEP goals and objectives which address, as appropriate, the student's needs in the areas of academics, communication, social, behavior, motor, vocational, and mobility; (iv) the contents of any applicable transition plan; (v) the rate of progress for the student or the rate of regression which may limit the student's ability to achieve IEP goals and objectives; (vi) the relative importance of the IEP goals at issue; (vii) whether related services are needed to enable the student to progress toward IEP goals; (viii) whether there were any delays or interruptions in services during the school year; and (ix) other pertinent information such as emerging skills.

GDOE Rule 160-4-7-.09(3)(i)(2). Additionally, a number of circuit courts have articulated standards for determining when ESY services must be provided.

The Fourth Circuit has established that "ESY services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly

complaint, he is now barred from raising them and for seeking any relief related to the alleged untimeliness or inappropriateness of these evaluations. § 1415 (f)(3)(B).

³¹ [REDACTED] also attempted to argue that since the District could not produce the CARS protocol completed by Ms. Anderson that he was entitled to relief under the doctrine of spoliation of evidence. [REDACTED]'s argument is without merit. Spoliation of evidence is "the destruction or failure to preserve evidence that is necessary to contemplated or pending litigation." *Bridgestone/Firestone N. Am. Tire, L. L. C. v. Campbell Nissan N. Am., Inc.*, 258 Ga. App. 767,768 (2002). When spoliation of evidence occurs, "a presumption arises that the charge or claim against [the spoliator] is well founded." O.C.G.A. § 24-4-22 (2006). When such critical evidence is destroyed, courts may exclude evidence or dismiss a case. *Id.* at 768. Here, however, there is no evidence that the District destroyed the CARS protocol in this case. The document is simply missing. As such, there is no basis to conclude that there has been any spoliation of evidence. Further, there is no evidence that his CARS protocol is "necessary" to the litigation.

jeopardized if he is not provided with an educational program during the summer months.” *MM v. Sch. Dist. of Greenville County*, 303 F.3d 523, 537-38 (4th Cir. 2002); see also *Alamo Heights Independent Sch. Dist. v. State Bd. of Educ.*, 790 F.2d 1153, 1158 (5th Cir. 1986) (stating that “[t]he issue is whether the benefits accrued to the child during the regular school year will be significantly jeopardized if he is not provided an educational program during the summer months”); *Johnson v. Independent Sch. Dist. No. 4*, 921 F.2d 1022, 1028 (10th Cir. 1990) (adopting the Fifth Circuit’s premise that courts must look at whether students’ educational benefits will be ‘significantly jeopardized’ if a summer program is not provided).

Similarly, the Sixth Circuit in *Cordrey v. Euckert*, 917 F.2d 1460 (6th Cir. 1990), stated that “an ESY ‘would be appropriate if it would prevent significant regression of skills or knowledge retained by [the child] so as to seriously affect his progress toward self-sufficiency.’” *Id.* at 1470 (citation omitted). As with any claim challenging the adequacy of an IEP, [REDACTED] bears the burden of establishing that ESY services are necessary for the District to provide a FAPE. See *Schaffer v. Weast*, 126 S. Ct. 528 (2005). Meeting this burden with respect to ESY services requires evidence of regression and recoupment problems. There are varying opinions on how concrete the evidence of regression must be. See *Cordrey v. Euckert*, 917 F.2d 1460, 1471-72 (6th Cir. 1990). Nevertheless, “the mere fact of likely regression is not a sufficient basis, because all students, disabled or not, may regress to some extent during lengthy breaks from school.” *MM v. Sch. Dist. of Greenville County*, 303 F.3d 523, 537-38 (4th Cir. 2002). Thus,

it is incumbent upon those proposing an ESY for inclusion in the child’s IEP to demonstrate, in a particularized manner relating to the individual child, that an ESY is necessary to avoid something more than adequately recoupable regression. More specifically, it must be shown that an ESY is ‘necessary to permit [the child] to benefit from his instruction.

Cordrey, 917 F.2d at 1473 (citation omitted).

The ESY program offered to [REDACTED] was a mixture of his home-program, which is what his parents were advocating for, and a school program, so [REDACTED] could stay in the habit and routine of being in school since routine is important for an autistic student. The total ESY that [REDACTED] would have received if he had attended the program at [REDACTED] Elementary School and received the ABA would have been 22 hours of services per week. Since [REDACTED] had only been in school for a limited amount of time, the Court concludes that the IEP team developed a program that was appropriate for [REDACTED] based on its knowledge of [REDACTED] and that would have allowed him to retain any knowledge he had learned while enrolled in the District. The Court further concludes that ESY services were appropriate based on the limited time in which the District had to educate [REDACTED] during the 2004-2005 school year.

[REDACTED] also argues that the [REDACTED] program was not an appropriate placement for him for the 2005-2006 school year. However, as noted above, in order to receive reimbursement for the private services [REDACTED] unilaterally obtained, he must first prove that the District did not offer him a FAPE, and he must then prove that the services he received were appropriate. He has not met either burden of proof in this case.

Once evaluations of [REDACTED] were completed, the IEP team reconvened to develop an IEP for the 2005-2006 school year and to determine [REDACTED]'s eligibility for special education services. The IEP team drafted goals and objectives for [REDACTED] based on his parents' input, his private therapist's input, and based on the evaluations and observations of [REDACTED] completed by the District. The goals and objectives proposed by the District were cross-referenced with the goals and objectives [REDACTED]'s parents had provided to the IEP team and significant changes and

alterations were made to the goals and objectives. The District considered what goals and objectives ██████'s parents wanted included and included the ones that were appropriate for him.

The IEP team reconvened on June 10, 2005 to determine an appropriate placement for ██████. The IEP team determined that the North Metro Program was appropriate for ██████ because it was a program that would meet his needs, and he would be able to make progress. It would have allowed him to have the specialized education and intervention with specifically trained personnel in autism, and it would also allow him to interact with the general education students so he could learn to generalize his skills and learn to interact socially. However, the District was never given the opportunity to implement this IEP because ██████ unilaterally withdrew from the District and rejected the District's proposed placement in the North Metro Program.

Although ██████ testified repeatedly that she did not receive critical information about the North Metro Program, the reality is that since ██████'s parents rejected the program at such an early point in the process, they missed out on a great deal of the orientation inherent in any placement in the program.

██████ also appears to argue that since his IEP did not contain a BIP, it was defective. However, this Court has held that there is no requirement under IDEA for any IEP to include a BIP, even for a child that displays extreme behavioral difficulties. *B.F. v. Fulton County Sch. Dist.*, 181 OSAH 28, 66; LRP 20640 (SEA Ga. 2004). *See also., Sch. Bd. of Indep. Sch. Dist. No. 11 v. Renollett*, 440 F.3d 1007 (8th Cir. 2006) (IDEA does not require a written BIP to be part of any IEP); *CJN*, 323 F.3d at 639-640 (IEP was appropriate for child who displayed severe behavioral difficulties, such as kicking others, hitting staff with pencils, and banging his head against a wall, even though IEP did not include a BIP); *J.K. v. Metropolitan Sch. Dist. Southwest*

Allen County, 2005 U.S. Dist. LEXIS 42439 (N.D. Ind. 2005) (IDEA requires only that a school district consider the use of positive behavioral strategies, as appropriate, but does not require that any such considerations be formalized in a BIP).

It is clear in the instant matter that the District considered all appropriate information and planned for ██████'s individual needs. It recommended placement in a self-contained classroom for students with autism, with the structure that such a setting would provide. Accordingly, the District completed all necessary steps in planning for ██████'s education and behavioral concerns. ██████ has failed to show that the District's proposed placement for the 2005-2006 school year is inappropriate or that the IEP was procedurally defective. The North Metro program is specially designed for students like ██████, who have an autism spectrum disorder. Furthermore, it would have provided ██████ the opportunity to learn the basic skills necessary in order to eventually transition back to a less restrictive setting. In addition, ██████ would have had the opportunity to interact with neurotypical peers in a variety of settings.

As indicated above, the court in *Devine* discounted the parent's experts because "both witnesses based their determination on limited observation of [child] and on the word of [child's] parents. The district court noted that neither witness consulted [child's] teachers nor requested documentation underlying the IEP." *Devine*, 249, F.3d at 1292-1293. The instant case is analogous to *Devine* in that ██████'s experts who testified the ██████ Program was inappropriate had not observed ██████ in a District setting, had not attended an IEP meeting nor had they spoken with any District personnel regarding ██████, and thus their testimony is discounted.

██████ also attempted to use his current progress to show that the IEP developed by the IEP team was inappropriate. However, in determining the appropriateness of an IEP, the courts

have maintained consistently that the analysis must be prospective rather than retrospective. *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1040 (3d Cir. 1993); *see also Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999); *O'Toole v. Olathe Dist. Schools*, 144 F.3d 692, 701-02 (10th Cir. 1998). In *Fuhrmann*, the Court stated,

The measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date. Neither the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement.

Id. An IEP "is a snapshot, not a retrospective. In striving for 'appropriateness,' an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated." *Mandy S. v. Fulton County Sch. Dist.*, 205 F. Supp. 2d 1358 (N.D. Ga. 2000), *aff'd without opinion*, 273 F.3d 1114 (11th Cir. 2001); *Roland M. v. Concord School Comm.*, 910 F.2d 983, 992 (1st Cir. 1990.) Therefore, the appropriateness of an IEP is determined only based on the information available to the IEP team at the time it was developed.

Additionally, the courts specifically recognize that evidence of a child's performance or alleged progress in a subsequent placement or through the delivery of private services is irrelevant to the determination of the appropriateness of an IEP proposed by a school district. *Adams v. State of Oregon*, 195 F.3d 1141 (9th Cir. 1999); *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 133 (2d Cir. 1999) (inadequacy of IEP is not established simply because parents show that child made greater progress in a single area in program desired by them); *O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233*, 144 F.3d 692, 708 (10th Cir. 1998) (the fact that student made more progress or was happier in private placement does not indicate either that private placement was appropriate or that district's IEP was inappropriate); *Delaware County Intermediate Unit No. 25 v. Martin K.*, 831 F. Supp. 1206, 1216 (E.D. Pa. 1993)

(evaluation of child's progress in alternative placement is not relevant to determination of appropriateness of proposed IEP).

Considering subsequent information not only undermines the role of the IEP team and the Congressional deference to educators recognized in *Rowley*, but also creates the danger that the analysis will turn from the appropriate consideration of the challenged IEP's adequacy into the impermissible comparison of possible programs. *Fort Zumwalt School Dist. v. Clynes*, 119 F.3d 607, 613 (8th Cir. 1997)(school district's IEP was appropriate notwithstanding that student may have benefited more from parent's choice of placement). "An IEP may not be the only appropriate choice, or the choice of certain selected experts, or the parents' first choice, or even the best choice, yet still provide a free appropriate public education." *Amann v. Stow School Sys.*, 982 F.2d 644, 651 (1st Cir. 1992)(quoting *G.D. v. Westmoreland Sch. Dist.*, 930 F.2d 942, 948 (1st Cir. 1991)(internal citations and punctuation omitted)); see also *Heather S. v. State of Wisconsin*, 125 F.3d 1045, 1057 (7th Cir. 1997)(the issue is whether school's IEP is appropriate, "not whether another placement would also be appropriate, or even better for that matter"); *Adam J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 810 (5th Cir. 2003); *A.B. v. Lawson*, 354 F.3d 315 (4th Cir. 2004)(issue was not whether parent's choice of placement was better, but whether school's IEP offered FAPE).

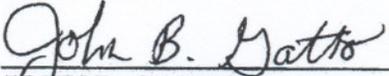
For ██████, the question presented is whether the IEP for the 2005-2006 school year was reasonably calculated to allow him to make adequate progress based on the information known to the IEP team at the time of the meeting. As ██████'s subsequent participation in a program at home and at a private school were not available to the IEP team May and June 2005—the time that the IEP team proposed the challenged IEP, any evidence of ██████'s participation or alleged progress following his removal from the District is irrelevant to the issue presented for resolution

here. The law is clear that [REDACTED] is not entitled to what is best for him but is instead entitled to what is reasonably calculated to enable him to receive educational benefit. Accordingly,

IV. DECISION

IT IS HEREBY ORDERED THAT the District offered FAPE to [REDACTED] in the LRE free from discrimination and therefore, his requested relief is **DENIED**.

SO ORDERED THIS 14th day of December, 2006.



JOHN B. GATTO, Judge