07-007738

IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[redacted], by and through his Parents, [redacted] and [redacted],[1]	)	
Petitioner,	)	Administrative Action No: OSAH-DOE-SE-0704550-15 -Gatto
v.	)	
BRYAN COUNTY SCHOOL DISTRICT	)	
Respondent.	)	

FINAL ORDER

COUNSEL: R. Bates Lovett, for Petitioner.

Susan W. Cox, for Respondent.

JOHN B. GATTO, Judge.

I. INTRODUCTION

This action came before the Court pursuant to a complaint filed by Petitioner [redacted], by and through his parents, [redacted] and [redacted], against Respondent Bryan County School District alleging that the District failed to offer him a free appropriate public education ("FAPE") in violation of 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.[2] Specifically, [redacted] seeks implementation of the services most recently offered to him by the Chatham County School District and reimbursement for any and all costs of his private education since August 1, 2006. In response to the complaint, the District argues that it did offer [redacted] FAPE in the least restrictive environment ("LRE"). For the reasons indicated below, the Court finds that the

[1] The action was originally styled erroneously without inclusion of [redacted] parents.
[2] Citations to the federal regulations are to the 2006 federal regulations implementing IDEA, which became effective on October 13, 2006.

District offered FAPE to [redacted] in conformity with IDEA and therefore, his requested relief is **DENIED**.

II. FINDINGS OF FACT

[redacted] is a child of [redacted] years of age who received the diagnosis of autism around the age of 22 months. (Trial Tr. 25, 27, October 18-19, 2006). There is no dispute that [redacted] is eligible for special education services pursuant to the IDEA. He has been diagnosed as meeting the eligibility requirements for autism and speech/language impaired as established on 1/27/05. *See* Parties' Pretrial Order – Stipulated Facts. Beginning at age 3, [redacted] was served in the Chatham County, Georgia school system, initially in the Preschool Intervention Program. (Tr. 26, 32). He also received speech and occupational therapy (OT) services. (Tr. 30-31). He continued to be served by the Chatham County school system until the start of the 2006-2007 school year, when the family moved to Bryan County.

The records indicate that [redacted] was served in Chatham County pursuant to an Individual Education Plan ("IEP"). The IEP meeting was held on October 27, 2005 and the IEP was expected to remain in place until October 26, 2006. (Tr. 250; p. 247). Under this IEP, [redacted]. was served in a transition class for children with autism, taught by Lynette Turns. (Tr. 247). [redacted]'s mother, Mrs. [redacted], consented to the goals and objectives and plan for services. (Tr. 250-251; Joint Ex., p.288). The IEP was amended in March to change the goals and objectives to be consistent with the Assessment of Basic Language and Learning Skills ("ABLLS") curriculum. Although the goals and objectives changed, the effective date for the IEP remained through October 26, 2006. (Tr. 254; Joint Ex., p. 182 *et seq.*). Mrs. [redacted]. consented to the change in the goals and objectives and the services in the autism classroom. (Tr. 94).

The IEP team met again before the end of the school year to discuss Extended Year Services ("ESY") for [redacted] (Tr. 255; Joint Ex., p. 155). Again, although the team decided that ESY services were appropriate for [redacted], the existing, amended IEP continued until October 26, 2006. (Tr. 256; Joint Ex., p. 155). The ESY plan provided that [redacted] would receive individualized instruction for four hours per day, beginning June 5, 2006. The plan envisioned that [redacted] would gradually transition into the inclusion class offered during summer school, so that [redacted] could work on his socialization and interpersonal skills. (Tr. 286; Joint Ex., p. 149). Mrs. [redacted]. consented to this plan. (Tr. 95, 99; Joint Ex., p. 149). It was never intended that the ESY plan would be limited to direct instructional services; rather, the intention was to transition [redacted] into the inclusion classroom so as to assist him with the generalization of skills. (Id.) The ESY plan had a specific ending date of August 4, 2006. When [redacted] returned to school in the fall, it was anticipated that he would return to the classroom setting, under the existing IEP, not the ESY plan. (Tr. 288-289). The Chatham County school board contracted with Michele Hittner to provide the direct instructional services to [redacted] for the ESY plan. (Tr. 287). Ms. Hittner was a behavior therapist, but she was not board certified and did not have a Georgia teaching certificate. She had never set up an ABA program herself and the program was actually developed by an Autism specialist employed with the Chatham County schools. (Tr. 289-290).

Rather than returning to school in Chatham County, the family moved to Bryan County in July of 2006.[3] (Tr. 61). However, Mrs. [redacted] did not contact the District about services for [redacted] until the day before school started for the 2006-2007 school year (Tr. 62; 100; 162), which was also the day before the ESY services were to end from Chatham County (Tr. 289).

[3] A letter from a realtor indicates that the family moved as of July 14, 2006. (*See* Joint Ex., p. 90).

Although the parties are in substantial agreement as to the events that transpired once Mrs. [redacted] contacted the District, it is clear that, for whatever reason, they were never on the same page concerning the services to be offered to [redacted]. The District expected to serve [redacted] on an interim basis pursuant to his current and valid IEP from Chatham County. (Tr. 169). However, Mrs. [redacted] expected the District to continue providing the "current" services [redacted] was receiving. (Tr. 103). Essentially, Mrs. [redacted] wanted the District to continue and pay for the one-on-one services provided by Ms. Hittner under the ESY plan. (Tr. 163-164; 172). However, the "current" services that Mrs. [redacted] requested that the District provide [redacted] were services that had never been agreed to by the Chatham County school district and would not have been provided to him had he returned to their system in the fall. (Tr. 294-295).

Michele Newsome, the program manager for the Chatham County Department of Exceptional Children, testified that the ESY services for [redacted] were not compensatory, as contended by Mrs. [redacted], since [redacted] did not qualify for ESY services on the basis of regression/recoupment, but rather, because he qualified because of his emerging skills in speech and progression toward goals. (Tr. 284). It was also never intended that the ESY services consist solely of one-on-one instruction from Ms. Hittner since she was expected to transition [redacted] into the inclusion classroom and assist him in the transition with the generalization of skills. (Tr. 287-288). Significantly, [redacted] was never fully transitioned into the inclusion classroom but was instead served one-on-one by Ms. Hittner. (Tr. 292; 307-308) Ms. Newsome testified that initially there were some difficulties with the schedule for the inclusion class, but she spoke with the classroom teachers and those issues were rectified. (Tr. 290-291).

Dr. Lori Spencer is a board-certified behavior analyst with Armstrong Atlantic University who assisted Chatham County with the summer program. She agreed that there were initial

problems with the scheduling but stated that the classroom became a well-run classroom. While [redacted] would have required transitioning to fully participate in the classroom, the IEP required that Ms. Hittner work toward moving him toward that end. (Tr. 308-309). However, [redacted] never transitioned to having consistent attendance in the classroom. (Tr. 102; 292).

Mrs. [redacted] initiated her contact with the District by speaking with Frank Williams, the District's Director of Special Education Services. As previously noted, she initially called the District the day before students were to arrive to begin the new school year. (Tr. 162). Mrs. [redacted] expressed her desire that the District continue to pay for the services she was receiving through Chatham County from Ms. Hittner. (Tr. 164; 172). Mrs. [redacted] wanted the opportunity to sit down with Mr. Williams and discuss the strategies that she felt had allowed her son to make progress and those aspects of the Chatham County program that had been less successful. The parties agreed to meet the following week. Mr. Williams asked that Mrs. [redacted] bring with her the current IEP and related documents and that she enroll her son in the District. (Tr. 173).

Mr. Williams did not feel he had enough information about [redacted] to have a successful IEP meeting and needed the information that Mrs. [redacted] indicated she would bring to the conference. (Tr. 174-175). Mr. Williams viewed this meeting as an informational meeting and an opportunity to exchange data concerning [redacted] It was not planned as an IEP meeting. In order to hold an IEP meeting, the members of the team have to be notified and given the opportunity to attend. Since the meeting was not a formal IEP meeting, the District could not commit to any services for [redacted] since that decision had to be made as a team decision by the entire IEP team and could not be made unilaterally by the parent and/or the special education director. (Tr.175-176).

Mrs. [redacted] did meet with Frank Williams and the Assistant Director, Laura Murphy, on August 8, 2006. Mrs. F. brought Michele Hittner with her to the meeting and stated that she wanted the services provided by Ms. Hittner in place from the summer to continue. (Tr. 70; 177-178). Mrs. [redacted] left the meeting thinking that the District was going to hire Michelle Hittner to provide services to her son and others in the school system. (Tr. 70-71). Mr. Williams recalls telling her that District is always looking for talented people (Tr. 183). The issue of whether the District was going to hire Michele Hittner further confused the issues between the parties. Nonetheless, it is of no real significance to the outcome of this case since Ms. Hittner did not have either a current Georgia teaching certificate or board certification as an ABA therapist.

After the meeting on Tuesday, August 8, 2006, between Mr. Williams, Mrs. Murphy, Mrs. [redacted], and Michele Hittner, the parties planned to meet again on Friday, August 11, 2006, for the IEP meeting. In the interim, Mr. Williams' staff began organizing the information left by Mrs. [redacted] They realized they did not have a complete IEP, eligibility reports, or psychological records, and contacted [redacted]'s former school to try to obtain a complete set of records. Mr. Williams was unable to review those records until Thursday evening, August 10, 2006. (Tr. 184-185). Once he looked at the documents, he realized that he would be the only person on the IEP team who would have any knowledge of [redacted]'s background and services. He felt it would be better to postpone the meeting until the following week, to give the other members of the team the opportunity to review [redacted]'s educational file. (Tr. 186). Mr. Williams called Mrs. [redacted] at home and suggested that the meeting be postponed. (Tr. 186; a summary of his conversation is found at Joint Ex, p. 145). Mrs. [redacted] did not want to postpone the meeting. She stated that her son's ESY services had ended the previous Friday and she really needed to have him in school on Monday. Mr. Williams replied that he would suggest an interim IEP until the District could

get to know [redacted] and he and Mrs. [redacted] agreed to proceed with the meeting as scheduled for 2:30 that next afternoon. (Joint Ex., p. 145).

Again, it appears that Mrs. [redacted] and Mr. Williams were not on the same page. Mr. Williams intended to adopt the Chatham County IEP, not the ESY plan, as the interim IEP. (Tr. 195; *see also* Minutes from the 8/11/06 IEP meeting, Joint Ex., p. 2). Mrs. [redacted] wanted the services from the summer and thought that the District would agree because she assumed that the District was hiring Ms. Hittner. (Tr. 75; Joint Ex., p. 2). Mr. Williams told Mrs. [redacted] that he and Laura Murphy would be at the meeting. (Tr. 188-189). Mr. Williams told her this to let her know that she had already met at least two of the people who would be there; he never meant to imply that they would be the only two District personnel in attendance. (*Id.*). Although Mrs. [redacted] is a parent advocate (Tr. 23-24) and has attended prior IEP meetings for her own child as well as many other children, she nonetheless assumed that only Mr. Williams and Mrs. Murphy would be present. She was very upset when she arrived at the school, by herself, and realized there was an IEP team assembled. (Tr. 76; Joint Ex., p.1, 2). When Mr. Williams realized how upset Mrs. [redacted] was that the entire team was there, he released the speech pathologist and told Mrs. [redacted] that although he had to include all of these individuals to have a properly constituted IEP team, she could release any of the teachers from attending, or she could ask them questions and then excuse them. (Tr. 189-190).

At the IEP meeting, Mrs. [redacted] maintained the position she had held since she first contacted the District – that she wanted the District to continue the ESY services from Chatham County, with those services to take place both at school and in her home. (Tr. 75; 195; Joint Ex., p. 2). The remaining IEP team members felt that the appropriate placement for [redacted] was to continue on an interim basis the current Chatham County IEP, as amended in March of 2006. (Tr. 195,

Joint Ex., p. 3-4). Mrs. [redacted] indicated that if the District would not agree to continue to provide the individualized services, then she would have to go to mediation. (Joint Ex., p. 4). Mrs. [redacted] left the meeting and the team members completed the IEP after she left. (Tr. 197). Mr. Williams subsequently was served with a copy of [redacted]'s due process complaint on the following Tuesday.[4] (Tr. 198; Joint Ex., pp. 10-11; Joint Ex., pp. 51-52).

Although Mrs. [redacted] raised several issues in the Complaint, her main contention at trial was that her son had made remarkable progress over the summer. According to Mrs. [redacted], her son had called her "mommy" only once in his life, when he was eighteen months old, until Ms. Hittner began working with him over the summer. (Tr. 56-57). As a result of Ms. Hittner's services, he was able to make eye contact. He was able to point and wave. (Tr. 58). He now plays appropriately with toys. (Tr. 59-60). Mrs. [redacted] contends that because her son made so much progress this summer, as a result of the individual therapy he received, the decision by the District to implement the Chatham County IEP as an interim IEP denied her child FAPE. [5] She therefore seeks reimbursement for the expenses she has incurred in providing private placement services for her son, including the costs for Ms. Hittner and the amount she is contractually obligated to pay Ms. Jackson. (Tr. 86-89).

According to Mrs. [redacted], she decided to replace Ms. Hittner in September with Rebecca Jackson, an ABA therapist. The total cost for Ms. Hittner, including school supplies was $10,753.00, although Mrs. [redacted] did not offer any documentary proof other than to say that Ms. Hittner charged $30 per hour for her services and the amount included school supplies. (Tr. 86-

[4] Mr. Williams sent Mrs. [redacted] the parental rights packet (Joint Ex., p. 55, Tr. 206) and Mrs. F. returned her formal Due Process complaint to the District and requested an Early Resolution Meeting. (Joint Ex., p. 6). Mr. Williams contacted the state department to request this meeting (Joint Ex., p. 28) and the District filed its response to her complaint. (Joint Ex., p. 42-44). The Resolution Session was held on August 30, 2006 (Joint Ex., p. 8; p. 12). Despite a good faith effort by both parties, they were not able to reach an agreement at that time. (Joint Ex., p. 9).

[5] Although Mrs. [redacted] wanted the District to pay for Ms. Hittner's services instead of returning him to a classroom (Tr. 171-172), she would not have been entitled to have these services continue had she remained in Chatham County. (Tr. 288-289).

87). Mr. and Mrs. [redacted] have signed a contract with Ms. Jackson for $24,000. Again, Mrs. [redacted] did not offer the contract into evidence, but testified that the amount was around $24,000. (Tr. 89).

ESY and IEP services are not synonymous since ESY extends objectives that might be lost over a break in services, but they do not take the place of the IEP services. IEPs are based on the present levels of performance, which in turn help determine the goals and objectives for the child. The IEP is a comprehensive plan that addresses how to best meet those goals and objectives. It is expected to last for twelve months, unless it is sooner changed, and is global in nature. (Tr. 165). ESY services are provided when there is evidence of regression or when the child is on the verge of developing a critical skill. It is more narrowly focused on those critical or emerging skills and is more of a laser beam. (Tr. 167-168). ESY services have a beginning and ending date and are typically not the full range of services a student receives under the IEP. (Tr. 312-313). When the student returns to school, he or she begins again with the IEP services, not the ESY services. (Tr. 168, 313). A student who transfers into a new school system with a valid IEP will be served under that IEP or comparable services until the IEP team can meet and determine if they will continue the existing IEP or develop a new one. (Tr. 168, 314).

The record from Chatham County indicates that [redacted] made progress under the current IEP, prior to the implementation of the ESY services. Many of the accomplishments noted by Mrs. [redacted] as proof of her son's remarkable progress over the summer were also documented during the school year. According to Mrs. Turns, the Chatham County autism teacher, [redacted] made tremendous progress during the time she was his teacher under the October 26 2005 IEP. Initially, [redacted] pinched, bit, and kicked. However, as the year went on, those behaviors decreased. (Tr. 257). He went from drinking out of a sippy cup to drinking from a juice box

with a straw. (*Id.*). Initially, he would not interact with other children in the general education kindergarten class. Towards the end of the year, he was able to initiate social contact. (Tr. 258).

Mrs. [redacted] contended that [redacted] only developed the ability to communicate and ask for items verbally as a result of Ms. Hittner's work with her son. However, Mrs. Turns related an incident where [redacted] was able, on his own and without prompting, to ask the general education teacher for a cookie. (Tr. 258). By the end of the year, he could say: "I want juice, I want horse horse," (Id.). He could respond to his name being called. He was able to maintain eye contact. (Tr. 261). He was able to play with toys appropriately. (Tr. 262). He was able to increase his time in the general education classroom and on the playground. (Tr. 264). He also referred to his mother as "mommy" while he was in the classroom. (Tr. 273). All of these behaviors, cited by Mrs. [redacted], were noted by Mrs. Turns before the end of the school year and the implementation of the summer ESY plan. (Tr. 261).

Mrs. Turns knew that she would be leaving the classroom to go to the psychoeducational center for the 2006-2007 school year. (Tr. 260). Therefore, as part of one of the IEP meetings, she prepared a report to assist [redacted]'s teacher for the next school year. (Joint Ex., p. 357). At the top of the page, Mrs. Turns stated: "I have worked with [redacted] since ESY 2005. He has made a TREMENDOUS amount of progress since then. Listed below are things he can do and will need: . . . " Mrs. Turns went on to list a number of accomplishments, many of which were claimed by Mrs. [redacted] to have developed only after the school year was over. (*Id.*) This report was prepared long before anyone knew that [redacted] would not be returning to the Chatham County schools for the 2006-2007 school year. Therefore, [redacted] made progress during the school year, pursuant to his IEP, and not solely as a result of the ESY services provided by Ms. Hittner. Therefore, [redacted]'s parents have not met their burden of showing that the services offered by the

District would deny [redacted] FAPE. The parents have never allowed the District to begin serving their son. Their case is based on the assumption that [redacted] did not make progress in a classroom setting at Chatham County. However, the record reflects that [redacted] did make progress under his Chatham County IEP and in the classroom taught by Mrs. Turns. Thus, many of the "firsts" that Mrs. [redacted] contend only occurred after Ms. Hittner's services began were observed by Mrs. Turns during the school year. (Joint Ex., p. 357).

Mr. [redacted] admitted that he had no real knowledge of the services offered by the District, that his concerns about his son returning to a classroom setting were based on his experience in Chatham County. (Tr. 151). However, Dr. Spencer pointed out that some of the progress noted from the ESY data had started during the school year and that he had also made progress during the school year. (Tr. 323, 324). Dr. Christine Reeve testified that it is difficult to say how much progress [redacted] made over the summer because the ABLLS was administered in February and then again in August, so there is no evidence as to his abilities at the end of the school year.[6] (Tr. 353). Some of the goals that seem to indicate significant progress were already at the sixty percent mastery level before the ESY services began. (*Id.*) Despite the concerns expressed by Mrs. [redacted] about the services offered by the District (Joint Ex., p. 5-6), the evidence does not support her contention that [redacted] could only make progress in a one-to-one setting. Because the parents' case is premised on this assumption, they have failed to meet their burden of proving that the services offered by the District would deny their son FAPE.

In contrast, the District has established their ability to provide [redacted] with FAPE. (Tr. 321-322). The [redacted] Primary School is one of the top fifteen schools in the state for making Annual Yearly Progress under No Child Left Behind. Special Education students' test

[6] Dr. Christine Reeve is the Director of the Autism Consortium for the university's Mailman Segal Institute, which offers programming and consultative services for Districts in the area of autism. Dr. Reeve is a BCBA with a doctorate in clinical psychology

scores are included in the figures for AYP. (Tr. 210). The District has a disproportionate number of children with autism in its system, partly due to its proximity to Ft. Stewart. The military base is designated as the base for soldiers who have children with disabilities, so both Bryan and Liberty counties have a significant number of disabled students in their program. (Tr. 156-157). The District's special education program has received consultative services from Nova Southeastern University in Ft. Lauderdale, Florida since 1999. (Tr. 157-158; 342). Dr. Christine Reeve is the Director of the Autism Consortium for the university's Mailman Segal Institute. Dr. Reeve and her colleagues have provided training, classroom consultation, and set up demonstration classrooms in the District. The methodologies and approaches used in Bryan County are scientific and research-based. (Tr. 158-159; 343). Two years ago, the District began providing ABA training so that one of its staff members, Erica Birchall, could become board certified. (Tr. 351). Mrs. Birchall is currently the teacher in the autism classroom that [redacted] would have been placed in while the regular teacher, Mrs. Braddock, is on maternity leave. (Tr. 211).

Training for teachers and staff is on going and continuous. (Tr. 352). The District provides for consultants to come to the school and provide hands-on training for teachers and staff. (Tr. 214). The related service providers, the OT and speech instructors, have also received training to assist them in working with students with autism. (Tr. 215-216). Since the beginning of this school year, the District has had the services of Dr. Spencer to provide training and work with teachers and staff on ABA and related areas. (Tr. 305). Dr. Spencer has trained all the District personnel who would have served [redacted] since the beginning of the school year. (Tr. 305-306). She is in the school every week to assist teachers, give them feedback, help them determine

when to move targets along, just as she would with a home program. (Tr. 306). She implements research-based strategies, based on each student's individual needs. (Tr. 333).

The assigned teacher in that classroom, Mrs. Braddock, appears to be well qualified to serve the children in the autism class at the Richmond Hill Primary School (Tr. 200-201; 315; 348), and the parents have offered no real evidence to the contrary. Mrs. [redacted] stated that she was alarmed because Mrs. Braddock did not understand the term "BCBA." (Tr. 77). Mr. Williams explained that Mrs. Braddock does understand the meaning of the designation, but that she would have used the term "board certified," not "BCBA," to describe someone who held that certification. (Tr. 202). Mrs. Braddock also understands ABA principles. (Tr. 350).

Mrs. [redacted] was also concerned both with Mrs. Braddock's pregnancy and her upcoming maternity leave. (Tr. 77-78). The District offered evidence that the children in the autism class have not suffered as a result of Mrs. Braddock's maternity leave. In her absence, Erica Birchall has taught the class. Mrs. Birchall is in the board-certified behavior analyst program through Nova Southeastern University and has completed her course work toward obtaining her BCBA certification. She has experience in providing one-on-one discrete trial instruction through the District's summer camp for autistic students. She will remain in the classroom after Mrs. Braddock returns, to ensure a smooth transition back to Mrs. Braddock. (Tr. 211-213). Dr. Spencer will also assist ensuring there is a smooth transition when Mrs. Braddock returns. (Tr. 317). Mrs. Birchall has provided the continuity of programming so that the children in Mrs. Braddock's class have continued to make progress in her absence. (Tr. 351).

Mrs. [redacted] expressed concern that the students in the autism class did not have consistent schedules. Mr. Williams explained that this was the first week of school and schedules were changing as students developed the ability to transition into less restricted environments, such as

physical education, art, music, or general education classes. (Tr. 198- 199). In fact, since school started, three of the six children originally in the autism class have transitioned into general education and resource services and out of the autism class. (Tr. 199). As Dr. Spencer noted, schedules change all of the time for a variety of reasons and teachers have to be flexible in implementing class schedules. (Tr. 319-320). Dr. Reeve pointed out that although the class schedule was changing during that first week of school, because some of the students were already being transitioned out of that class, it did not mean that the class was not organized. (Tr. 348).

Dr. Reeve testified that it is not unusual for classrooms to change as the school year progresses. As she pointed out, as the school year progresses, as children progress, as the instructors learn more about the children, the class changes to meet the individual needs of the students. (Tr. 345). Because of the need to meet each student's individual needs, it is very difficult for a parent to judge a class based on a "snapshot" of the class at any particular time. Parents may look at a class and say that it doesn't meet the needs of their child, and it won't, because their child isn't there yet. (Tr. 346-347). The issue is not what the classroom is doing at any particular time, but whether the teacher is able to provide the programming for the child coming into the class. (Tr. 347).

Mrs. ■ was also not happy with the relative inexperience of the paraprofessionals assigned to the autism classroom. As Mr. Williams explained, the IEP meeting took place the first full week of school and he was still moving staff around to meet the needs of all of the classrooms. The paraprofessionals now serving the autism classroom are both highly skilled, highly trained, and have extensive experience in working with autistic children. (Tr. 203). One of the paraprofessionals, Mrs. Jackson, was the camp administrator for the summer autism

program and assists and trains other paraprofessionals in working with students with autism. (Tr. 213). Dr. Spencer testified that Mrs. Jackson is an excellent paraprofessionals, as is the other paraprofessionals in the classroom. (Tr. 317). Mr. Williams had already contacted Atlantic Armstrong University to obtain the consulting services of Dr. Spencer before he even knew that Mrs. [redacted] was moving to Bryan County. (Tr. 204). These changes were all part of the process of settling into a new school year and were not the result of Mrs. [redacted]'s due process complaint. (*Id.*).

Dr. Spencer also addressed another of Mrs. [redacted]'s concerns: That the autism classroom was not set up as an ABA classroom. According to Dr. Spencer, the classroom does implement the components of an ABA classroom and is set up to provide those services. (Tr. 318-319). Even before Dr. Spencer began her work in that class, Nova sent one of its consultants in to help set up and organize that classroom. Despite Mrs. [redacted].'s contentions, the classroom was set up in accordance with ABA principles. (Tr. 349). Mrs. F. has insisted that her son can only make progress as the result of direct ABA services. If the IEP team had concluded that [redacted] needed direct ABA services, the District could provide those services. (Tr. 217). In fact, the three students presently in the autism classroom are receiving one-to-one instruction now. (Tr. 320). The District was also capable of serving [redacted] under his current Chatham County IEP, implementing the ABLLS goals and objectives. (Tr. 193-194; 325; 352). In short, the parents have offered no evidence that the District personnel are not capable of providing appropriate programming for their son.

The parents contended that to place [redacted] back in the classroom would have been a step back from the progress he made over the summer. However, Dr. Reeve testified that a self-contained classroom such as Mrs. Braddock's offers the opportunity to provide one-to-one instruction but also the opportunity to move the student into small group settings, then larger

group settings, then eventually into the general education classroom. (Tr. 354). Although it might appear to a parent that the child is making more progress in an individualized one-on-one program, Dr. Reeve said that often the individually instructed students don't generalize those skills to other people, in other settings, and in other directions. Skills that are taught in a classroom may take longer to acquire, but when the skill is mastered, it typically can be used in more environments, with more people, and therefore can be used more effectively. But, because it takes longer to acquire a skill in that setting, it may appear to the parent that the child is making more progress in the home program. (Tr. 354-355). In addition to the ability to generalize skills acquired in a one-to-one setting, public schools offer socialization opportunities with typically-developing peers. Research shows that these skills are important for students with autism. (Tr. 356). Dr. Reeve concluded that she has seen the District successfully instruct students like [redacted], and based on her work with the District, she is of the opinion that the District could have provided [redacted] with FAPE, if his parents had given them the opportunity to serve [redacted] (Tr. 357). Even though the data indicated [redacted] had made progress over the summer, Dr. Reeve noted that skills involving group interaction were not addressed in the summer program, and the individual focus missed the big picture for [redacted] (*Id.*).

Further, [redacted]'s parents have not met their burden of establishing their entitlement to be reimbursed for their private services. As a threshold matter, since the District has established it can provide FAPE in its program, the parents are not entitled to reimbursement for their private services. But the parents' claim must also fail as a matter of proof. No documentary evidence was offered in support of their claim for reimbursement. Mrs. [redacted] testified to a lump sum that she said represented their expenses for Ms. Hittner, $10,753.00. Mrs. [redacted] did not offer any documentary proof or break down the figure, other than to say that Ms. Hittner charged $30 per

hour for her services and that this amount also included school supplies. (Tr. 86-87). Mr. and Mrs. [redacted] have evidently signed a contract with Ms. Jackson for her services. Again, Mrs. [redacted] did not offer the contract into evidence, but testified that the amount was around $24,000. (Tr. 89).

It appears that prior to trial, Mrs. [redacted] expressed the desire to go ahead and have [redacted] receive speech and OT services through the District. The District arranged to provide those services but due to illness or other issues, the parents have never started those services. (Tr. 207-208). However, the parents' failure to provide itemized statements make it impossible for the Court to determine if any of the costs for which the parent seeks reimbursement would include OT and speech services. Since the parents have apparently agreed that the District can adequately provide those services, they would not be entitled to reimbursement for private OT and speech services, even under their theory of the case. The lack of supporting documentary evidence for their claims make it impossible for the Court to determine which costs are for direct ABA services and which costs might be for related services such as OT and speech. Therefore, the parents have simply not met their burden of proving either entitlement to reimbursement or the actual cost of those services.

III. APPLICABLE 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 mandates that schools and parents together develop an individualized education program ("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 files a due process complaint. § 1415(f). As the party filing the complaint and seeking relief, [redacted] bears the burden of proof as to all issues for resolution. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 537 (2005). Accordingly, [redacted] bears the burden of proving that the IEP proposed by the school district was inappropriate under IDEA. § 1412(a)(10)(C); *Sch. Comm . of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 370, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985). The recent Eleventh Circuit decision in *M.M. v. School Board of Miami-Dade County, Florida,* 437 F.3d 1085, 1095-1096 (11th Cir. 2006) sets forth the framework for developing the IEP:

> . . . To provide a child with a FAPE, the School Board formulates an IEP "during a meeting between the student's parents and school officials." *Loren F.*, 349 F.3d at 1312 (citing 20 U.S.C. § 1414(d)(1)(A)-(B) and *N.L. v. Knox County Sch.*, 315 F.3d 688, 689 (6th Cir. 2003)). More specifically, a parent is required to notify a school board or other public agency that it wishes to place a child in special education services. (Footnote 7, omitted). The parent then consents to have the child evaluated to determine whether the child is "a child with a disability" under the IDEA. See 34 C.F.R. §§ 300.320, 300.343. Once a child is evaluated and determined to be "a child with a disability" under the IDEA, an "IEP team" is formed. *See* 34 C.F.R. § 300.344(a). The IEP team normally includes the parents, a regular education teacher, at least one special education teacher, a School Board representative, other individuals with relevant expertise, and the child (if appropriate). Id. at §§ 300.344(a)(1) - (7). Once the IEP team is formed, meetings are held and an IEP is developed. See 20 U.S.C. § 1414(d)(1)(A)(I) (describing the necessary contents of an IEP). During the IEP-development process, parental involvement is critical; indeed, full parental involvement is the purpose of many of the IDEA's procedural requirements. *See Doe v. Alabama State Dep't of Educ.*, 915 F.2d 651, 661 (11th Cir. 1990); *see also Weber v. Cranston Sch. Comm.*, 212 F.3d 41, 51 (1st Cir. 2000); 34 C.F.R. § 300.345 (outlining parental involvement in the IEP process). Once an IEP is developed, the School Board must determine whether it will provide the special education needs of the child. *See Sch. Comm. of Town of Burlington v. Dep't of Educ.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 2002

(1985) ("The Act contemplates that such education will be provided where possible in regular public schools, with the child participating as much as possible in the same activities as nonhandicapped children, but the Act also provides for placement in private schools at public expense where this is not possible.") (citations omitted); *Loren F.*, 349 F.3d at 1312 ("Although the IDEA reflects a structural preference in favor of providing special education in public schools, it recognizes that certain public schools are unable or unwilling to provide appropriate special education services."). If the School Board elects not to provide the programs outlined in the IEP, it refers the child to a private school or program at no cost to the parents. See 20 U.S.C. § 1412(a)(10)(B)(I); 34 C.F.R. § 300.401. If, however, the School Board elects to provide the services outlined in the IEP, one of three things will happen. First, the parents can enroll their child in public school and the school is required to provide for the services outlined in the IEP. See 34 C.F.R. § 300.342 (outlining when IEPs must be in effect). Second, the parents can acknowledge that the IEP is sufficiently adequate to provide a FAPE but decide that their child's educational needs are better met by voluntarily enrolling their child in a private school or program. If the parents elect this option, the School Board is not required to reimburse the parents for any cost associated with the child's voluntary enrollment in private school. See 20 U.S.C. § 1412(a)(10)(C)(I); 34 C.F.R. § 300.454(a)(1). Third, the parents can notify the school that they are rejecting the IEP and then challenge the IEP via a due process hearing. See 20 U.S.C. §§ 1412(a)(6)(A) & 1415(a)-(o); 34 C.F.R. § 300.403(b). Should the parents successfully challenge the IEP and if it is determined that the placement in private school was proper, "a court or a hearing officer may require [the School Board] to reimburse the parents for the cost of that enrollment . . . ." 20 U.S.C. § 1412(a)(10)(C)(ii); see 34 C.F.R. 300.403(c) ("[A] court or a hearing officer may require the agency to reimburse the parents for the cost of that [private school] enrollment if . . . the agency had not made FAPE available to the child in a timely manner prior to that enrollment and . . . the private placement is appropriate.").

437 F.3d at 1095-1096.[7]

Therefore, if the District has offered [redacted] FAPE, the parents are not entitled to be reimbursed under the IDEA for private tuition or related services. *Rowley,* 458 U.S. at 207, 102 S.Ct. at 3051. Similarly, if the District has offers [redacted] FAPE, the parents' decision to provide private therapy services is voluntary and the District is not required under the IDEA to reimburse the parents for their private services. *M.M., supra,* 437 F.3d at 1101, *citing* § 1412(a)(10)(C)(I) and 34 C.F.R. § 300.137(a). The Supreme Court has held that in order to satisfy its duty to

[7] Citations to the federal regulations in this quotation are to the pre-2006 federal regulations implementing IDEA.

provide FAPE, a state or local educational agency must provide "personalized instruction with sufficient support services to permit the child 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 local school system must provide the child "some educational benefit," *Id.* at 198, has become known as the *Rowley* "basic floor of opportunity" standard. *JSK v. Sch. Bd.*, 941 F.2d 1563, 1572-73 (11th Cir. 1991) ("The . . . educational outcome need not maximize the child's education. If the educational benefits are adequate based on surrounding and supporting facts, [IDEA] requirements have been satisfied.") (internal citations omitted).[8] 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).

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. The purpose of the IDEA generally is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). See also *CP v. Leon County School Board Florida*, --- F.3d ---, 2006 WL 2940745 (11th Cir. October 16, 2006).

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[8] The Supreme Court has developed a test for determining whether a school board has provided FAPE in cases arising under the IDEA: "(1) whether the state actor 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 the child to receive educational benefit." *Sch. Bd. v. K.C.*, 285 F.3d 977, 982 (2002) *citing Rowley*, 458 U.S. at 206-07, 102 S. Ct. at 3051.

In the present case, the Court concludes that there is no issue as to the District's compliance with IDEA's procedural requirements. The only issue is whether the District's plan to implement the Chatham County IEP on an interim basis would have allowed [redacted] to receive educational benefits. Therefore, this case is essentially about methodology. The parents contend that [redacted] can only benefit from one-on-one direct instruction. The District contends that it can provide both direct instruction and inclusion in group and other settings.

This case is controlled by the Eleventh Circuit's recent decision in *M.M., supra.* In that case, the child was born with a profound hearing loss. After doing considerable research, the parents concluded that auditory-verbal therapy (AVT) was the best methodology for their child and began providing these services privately. 437 F.3d at 1089. When the child was three, the parents began meeting with the Miami-Dade School Board. The parents stated that they were happy with their private AVT services, but they wanted the District to pay for them. The school board's response was that it did not provide AVT, but it did have other programs it could recommend. Specifically, the school board used the verbotonal (VT) approach instead of the AVT approach. VT is also a recognized and well-established methodology for teaching hearing-impaired children to speak. 437 F.3d at 1090-1091. Despite mediation and other attempts to resolve their differences, the parents remained committed to AVT therapy for their child and the school system continued to be willing to offer VT but not AVTr. 437 F.3d at 1092-1093. The conclusion reached by the District Court sums up the issues and that case and controls the issues in the case at hand:

> . . . In this case, the parents' only complaint about either the first or second IEP was that each one did not provide C.M. with AVTr. (footnote 13, omitted). Thus, there is no issue as to whether the School Board complied with the IDEA's procedural requirements. The sole issue is whether the two proposed IEPs, which provided for VT instead of AVT, were "reasonably calculated to enable the child to receive educational

> benefits," and, thus, were sufficient to provide C.M. with a FAPE. *Rowley*, 458 U.S. at 207, 102 S. Ct. at 3051.
> ... The dispute in this case boils down to the parents' belief that AVT is the program best suited to provide C.M. with a quality education. However, under the IDEA there is no entitlement to the "best" program. *See Rowley*, 458 U.S. at 204, 102 S. Ct. at 3049 (The IEP "should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."); *Lachman v. Illinois Bd. of Educ.*, 852 F.2d 290, 297 (7th Cir. 1988) ("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 District to provide a specific program or employ a specific methodology in providing for the education of their handicapped child.") (citations omitted) ....

437 F.3d at 1101-1003. Similarly, in present case, [redacted]'s parents contend that their program of home services allows [redacted] to make maximum progress, but they provided no evidence that [redacted] would not make progress under the existing Chatham County IEP. Indeed, the testimony of Lynette Turns and Michele Newsome established that [redacted] had made significant progress under his IEP and that many of the accomplishments attributed to the work of Ms. Hittner had actually occurred during the school year.

Even assuming *arguendo* that [redacted]'s private placement was "better", the question is not whether the proposed private services are "better" or "worse." The Court agrees with the District that the issue is whether the services offered by the District are adequate; that is, that the services are reasonably calculated to allow [redacted] to make or receive educational benefits pursuant to *Rowley, supra.* The District does not have to offer the "best" possible plan for [redacted], and the parents' contention to the contrary fails to state a claim under the IDEA. *MM,* supra. The Court concludes that the District's proposed services meet this standard and would have provided [redacted] with FAPE. *See Roy and Anne A. v. Valparaiso Community Schools,* 951 F. Supp. 1370, 1380 (N.D. Ind. 1997); *see also O'Toole v. Olathe District Schools Unified School District No. 233,*

144 F.3d 692, 709 (10th Cir. 1998); *J.P. v. West Clark Community Schools,* 230 F. Supp.2d 910 (S.D. Ind. 2002).

The Court further concludes that the District's plan to implement the existing Chatham County IEP as an interim plan was reasonable. The IDEA required the District to continue to provide [redacted] with the same level of service that he was receiving under his current IEP, until such time as the IEP team could decide if other services were consistent with state and federal requirements. § 1414(d)(2)(C)(i)(I). Furthermore, the Court does not agree with [redacted]'s parents that "current services" were the services [redacted] was receiving from Michelle Hittner. The evidence from all of the educational professionals who testified is that ESY services, such as those provided by Ms. Hittner, are not the same as IEP services and would not be the services the District would implement until a new IEP was developed. ESY services meet a specific need, over a break in services, and are not a substitute for the more comprehensive services offered under the IEP. Thus, the District's decision to implement the existing IEP as an interim IEP was both reasonable and in accordance with the IDEA.

Finally, the District has the prerogative to assign staff to provide educational services without parental consent. *See, Moubry, By and Through Moubry v. Indep. Sch. Dist. 696, Ely, Minn.*, 951 F.Supp. 867, 885 (D.Minn.1996)("*Moubry I*"); *Slama ex rel. Slama v. Independent School Dist. No. 2580*, 259 F.Supp.2d 880, 177 Ed. Law Rep. 308, (D.Minn. 2003). Although the school personnel assigned to [redacted]'s proposed class were competent and capable of providing adequate programming for [redacted] Mrs. [redacted]'s concerns over the qualifications of the teacher, the paraprofessionals, and the pending maternity leave for the primary teacher do not state a cause of action under the IDEA.

Since [redacted]'s parents have not established that the District's proposed services would have denied FAPE to [redacted], it follows that they are not entitled to reimbursement for their private services. *M.M. v. School Board of Miami-Dade County, Florida,* 437 F.3d 1085 (11th Cir. 2006). *See also Doe by and through Doe v. Defendant I,*989 F.2d 1186, 1191 (6th Cir. 1990) (District not responsible for parent's private tutoring and private school tuition expense where the IEP was appropriate and parents rejected school's offer to provide these services satisfied its duty to provide services). Accordingly,

IV. ORDER

IT IS HEREBY ORDERED THAT the District offered FAPE to [redacted] in conformity with IDEA and therefore, his requested relief is **DENIED**.

SO ORDERED THIS 21st day of **November, 2006**.

John B. Gatto

JOHN B. GATTO, Judge

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