08-072940

IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[redacted], a minor, by and through his parents and next friends, [redacted] and [redacted]; [redacted],

Plaintiffs,

v.

ATLANTA PUBLIC SCHOOLS,

Defendant.

Administrative Action Number:
OSAH-DOE-SE-0816663-60-JBG

FINAL ORDER

COUNSEL: Jonathan A. Zimring, for Plaintiff.

Elizabeth B. Baum, W. Warren Plowden, Jr., Sherry H. Culves, for Defendant.[1]

GATTO, Judge

I. INTRODUCTION

[redacted] and his parents [redacted] and [redacted] ("Plaintiffs"), brought this action against the Atlanta Public Schools ("Defendant") contending that the Defendant violated his rights under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et. seq.*, § 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794, the Americans with Disability Act of 1990 ("ADA"), 42 U.S.C. § 12101 *et. seq.*, and state law, seeking a "free appropriate public education" ("FAPE") and other rights. The due process complaint also sought the provision of all records, documents, and material relating to [redacted]. Defendant filed a response on January 10, 2008. That response was two (2) pages denying relief, but failed to comply with the content

[1] Prior to trial, Defendant's counsel, Marcia E. Fishman, was replaced.

requirements of 34 C.F.R. § 300.508 (2006).[2] For the reasons indicated below, the Court concludes that Plaintiffs are entitled to relief.

II. FACT FINDINGS

A. Findings by the Court, Order May 9, 2008.

1.

Plaintiff [redacted] lives with his parents within the jurisdiction of the Atlanta Public School System, and within the location of [redacted] Elementary School as his home school. (Fact Finding No. 1, Order May 9, 2008 (hereinafter "FF1," etc.)

2.

[redacted] is a child with a disability and has been found eligible for special education services by Defendant. (FF2, Order May 9, 2008)

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[2] Plaintiffs moved for partial summary judgment. The Court denied that motion, allowing Plaintiffs to re-file. Plaintiffs re-filed and then moved for the provision of their records. Certain records were tendered by Defendant, but Plaintiffs' claim for records continued with the case and was argued on the first day of trial. On April 10, 2008, Plaintiffs filed a motion to amend the complaint and then a motion and brief for partial summary judgment on the "ESY meeting issues." The Court entered an order granting the amendment as unopposed. On May 9, 2008, the Court entered an order on Plaintiffs' motion for partial summary judgment, making undisputed findings of fact, rejecting contested facts, and granting partial summary determination on several issues on the merits. Other claims were carried with the case. On May 19, 2008, the Court granted Plaintiffs' motion for summary judgment on the "ESY hearing issues." Plaintiffs and Defendant reached an agreement on a consent order on the ESY meeting issues including relief. Defendant failed to timely sign the consent order and Plaintiffs filed a motion for summary determination seeking the Court enter the agreement as its order. Defendant then tendered a signed consent order, which was filed. The Consent Order was entered, and the Court denied Plaintiffs' motion to enforce as moot. The parties failed to reach agreement on the relief on the May 9, 2008 Order, and the Court set the case for trial. Defendant sought a continuance for mediation, and the case was taken off the trial calendar. Defendant then failed to participate in mediation, and, after thirty (30) days upon Plaintiffs' request, the case was placed back on the trial calendar. Plaintiffs filed notices of expert witnesses pursuant to the

3.

[redacted]. was withdrawn from school by Defendant when he was removed to receive private education for the 2005-06 and 2006-07 school years. this withdrawal is dated 01/03/05 on Defendant' forms. (FF3, Order May 9, 2008)

4.

[redacted]. was provided services by his parents, including special education, instruction services, ABA or Applied Behavior analysis services, speech and language services, and related services, during the 2005-2006 and 2006-2007 school years. (FF4, Order May 9, 2008)

5.

Defendant required that [redacted]. register for public school with Defendant at [redacted] Elementary School to again receive public instruction. On April 10, 2007, Plaintiff completed this registration. (FF5, Order May 9, 2008)

6.

Defendant failed to provide ESY to [redacted]. for the Summer of 2007. (FF6, Order May 9, 2008)

7.

In August 2007 [redacted]. had been withdrawn from private school and could not re-enroll. (FF7, Order May 9, 2008)

8.

In August of 2007, when asked to consent by Defendant to an interim placement, [redacted].'s parents consented only to allow 50% of his time to be spent in special education and 50% of his

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Scheduling Order and these persons were entered as experts unopposed by Defendant.

time to be spent in regular education. Defendant accepted that consent at the time and Plaintiff understood at this meeting that this would be the placement that [redacted] would receive. (FF8, Order May 9, 2008)

9.

Defendant ignored the consent to the program provided and placed [redacted]. in special education services and classes for more than 50% of the time, without notice to the parents, without written notice as to the reasons, and unilaterally. (FF9, Order May 9, 2008)

10.

Defendant never objected in writing or provided written notice to Plaintiffs' counsel to only a 50%-50% regular education - special education placement. (FF10, Order May 9, 2008)

11.

On the first day of school for 2007-2008 the prior IEP from Defendant from 2005-2005 had expired and was inappropriate even if valid, the eligibility reports had expired, and the Defendant evaluations were more than three (3) years old. (FF11, Order May 9, 2008)

12.

In August and November 2007 meetings [redacted]'s eligibility was agreed upon to include Other Health Impaired or "OHI" eligibility. (FF12, Order May 9, 2008)

13.

Defendant did not complete OHI eligibility reports and the final IEP provided to [redacted] fails to identify or reflect OHI eligibility. (FF13, Order May 9, 2008)

14.

In response to Plaintiffs' Motion for Partial Summary Judgment, Defendant has admitted

that it had determined that [redacted]. was OHI eligible under IDEA and that the IEP fails to provide for this. (FF14, Order May 9, 2008)

15.

Defendant's interim goals and objectives were not agreed upon or consented to by Plaintiffs. (FF15, Order May 9, 2008)

16.

The agreement at the IEP meetings [redacted]. would have a paraprofessional to support his inclusion or non-special education services. (FF16, Order May 9, 2008)

17.

On October 10, 2007, the Defendant assigned paraprofessional improperly managed an instruction activity and then slapped and/or struck [redacted]. on the hand. (FF17, Order May 9, 2008)

18.

The paraprofessional was transferred by Defendant from direct services with [redacted]. (FF18, Order May 9, 2008)

19.

Defendant failed to provide a substitute or successor paraprofessional in calendar 2007. (FF19, Order May 9, 2008)

20.

The proposed final IEP requires the provision of a personal one-to-one paraprofessional for [redacted]. (FF20, Order May 9, 2008/Order May 9, 2008)

21.

Defendant had failed to provide a new paraprofessional in October, so at the Nov. 1, 2007

IEP meeting Plaintiff brought a private provider, SBG, Inc., which contracts with many school systems, to the IEP meeting and it offered its services to provide training and a paraprofessional, in the absence of any such direct Defendant services. (FF21, Order May 9, 2008)

22.

In the absence of any available paraprofessional to meet the interim and final IEP recommendations, [redacted]., mother of [redacted]., came to school daily to provide paraprofessional services to allow inclusion and implementation of that portion of the regular education placement Defendant would allow. (FF22, Order May 9, 2008)

23.

A "final" IEP was provided by Defendant after the November 1, 2007 IEP meeting. (FF23, Order May 9, 2008)

24.

Defendant's final IEP fails to have measurable goals. (FF24, Order May 9, 2008)

25.

ESY was not raised or discussed by Defendant at the August 9, 2007 IEP meeting. (FF25, Order May 9, 2008)

26.

[redacted] as a child with mental retardation is a class member of the *GARC v. McDaniel* permanent class and subject to the protections of that declaratory action and permanent injunction requiring the consideration of ESY at IEP meetings. (FF26, Order May 9, 2008)

27.

Defendant's IEP goals and objectives fail to have, identify, or establish baselines so that

progress can be tracked properly and so informed consent can be given to the program offered. (FF27, Order May 9, 2008)

28.

At the November 1, 2007 IEP meeting, Plaintiffs were told that Defendant utilized a Florida program (NOVA) as their ABA consultant. No plan, proposal, observation report or report has been provided by Defendant to Plaintiff concerning this service. (FF28, Order May 9, 2008)

29.

The Plaintiff wrote and sent an email on November 5, 2007 received by Defendant providing written notice as to the inappropriateness of the IEP and that it would seek private services. (FF29, Order May 9, 2008)

30.

The November 5, 2007 email from Plaintiff to Defendant also identified Plaintiffs' understanding that they may agree to some and object and withhold consent to other portions of the IEP and placement. Defendant never responded to this email or provided written notice to indicate that the Plaintiff did not have this right. (FF30, Order May 9, 2008)

31.

On November 12, 2007 Plaintiff sent an email to the Defendant and received by the Defendant which granted consent to implement portions of the proposed IEP and refused explicitly to allow the implementation of other portions. This email articulated the right to consent to portions of the program. Defendant never responded to this e-mail nor provided written notice to indicate Plaintiff did not have this right or to identify it would, nevertheless,

implement non-consensual services. (FF31, Order May 9, 2008)

32.

Defendant refused or has failed in the ensuing five (5) months to respond to the Plaintiff concerning the limited consent and the substance of the November 12, 2007 email consent sent to it. (FF32, Order May 9, 2008)

33.

The Defendant has implemented non-consented to portions of the IEP and program from the November 1, 2007 IEP. (FF33, Order May 9, 2008)

34.

Plaintiff in November, December and January 2007-2008 made requests of the Defendant as to what services it was implementing and Defendant refused and failed to respond to each and every one of these requests. (FF34, Order May 9, 2008)

35.

Defendant has not provided Plaintiff written notice meeting the requirements of 34 C.F.R. ¶ 300.503(b) (2006) as to the actions it took, the services it recommended, the requests it rejected, and as to the content of the November 1, 2007 IEP. (FF35, Order May 9, 2008)

36.

Defendant's progress report dated 1/11/08 and first provided on January 30, 2008 fail to show [redacted]. made any progress since August 13, 2007, the first day of school. (FF36, Order May 9, 2008)

37.

The Defendant's progress report is functionally meaningless, failing to provide the data

necessary to review and monitor the program and instead saying things like the activity or goal or objective was "in progress." (FF37, Order May 9, 2008)

38.

[redacted]. has been served appropriately by a private ABA therapist and has made progress in such services as provided privately since August 13, 2007, the first day of school. (FF38, Order May 9, 2008)

39.

[redacted]. has been served appropriately by a private speech and language therapist and has made progress in such services as provided privately since August 13, 2007, the first day of school. (FF39, Order May 9, 2008)

40.

[redacted]. has been served appropriately by a private occupational therapist and has made progress in such services as provided privately since August 13, 2007. (FF40, Order May 9, 2008)

41.

[redacted]. was properly and appropriately served privately in extended school year services in 2007. (FF41, Order May 9, 2008)

42.

[redacted] has mastered many of the special educational goals and objectives found in the Defendants' proposed IEP. (FF42, Order May 9, 2008).

43.

[redacted]. has regressed behaviorally since the beginning of the school year in Defendant's

classes. (FF43, Order May 9, 2008)

B. Findings by the Court, Order May 19, 2008.

44.

Defendant held an IEP Team meeting on March 28, 2008 to allegedly address extended school year services or ESY. (FF1, Order May 19, 2008)

45.

Defendant held the IEP meeting on March 28, 2008 without the parents in attendance as members of the IEP Team. (FF2, Order May 19, 2008)

46.

[redacted]. and [redacted]. as parents elected to have other persons in attendance at this IEP meeting with special knowledge of information concerning [redacted]. and to support their participation that were unavailable on March 28, 2008. (FF3, Order May 19, 2008)

47.

Plaintiffs communicated their unavailability and the inconvenience of March 28, 2008 to Defendant's prior to March 28, 2008. (FF4, Order May 19, 2008)

48.

Defendant's ESY IEP meeting failed to address or seek from Plaintiffs or their private professional current assessments or information concerning Plaintiff, his status, and needs. (FF5, Order May 19, 2008)

49.

Plaintiffs did not consent in writing to the intended change or amendment of the IEP, as reflected in the IEP documents concerning the ESY. (FF6, Order May 19, 2008)

50.

Mrs. C. Chernecky, the Physical Therapist for Defendant, was identified as an IEP Team Meeting participant by Defendant in the meeting notice provided to Plaintiff. She did not personally attend the meeting. Plaintiff was not asked to waive and did not waive her personal attendance at this meeting. (FF7, Order May 19, 2008)

51.

Mrs. J. Cummings for Defendant was identified as an IEP Team Meeting participant by the Defendant in the IEP Team Meeting notice provided to Plaintiff. She did not personally attend the meeting. Plaintiff was not asked to waive and did not waiver her personal attendance at this meeting. (FF8, Order May 19, 2008)

52.

Defendant did not provide Ms. Chernecky's written comments on ESY to the Plaintiffs prior to the ESY IEP Team meeting. (FF9, Order May 19, 2008)

53.

Defendant did not provide Ms. Cumming's written comments on ESY to the Plaintiffs prior to the ESY IEP Team meeting. (FF10, Order May 19, 2008)

54.

[redacted] and [redacted] did not agree or consent in writing that their attendance as parents and IEP Team members to this meeting could be waived. (FF11, Order May 19, 2008)

55.

The proposed ESY program identifies goals to be implemented in ESY which are not measurable. (FF12, Order May 19, 2008)

56.

The proposed ESY program provides for the continued implementation of goals through the ESY IEP amendment for which consent has not been given and as to which Plaintiffs expressly identified that they did not agree with the appropriateness of such goals or activities and refused consent. (FF13, Order May 19, 2008)

57.

Plaintiffs have not received written notice concerning the March 28, 2008 IEP Team meeting or why services they would seek were not included in the ESY or why the explicit services offered were appropriate though, they did receive a copy of the IEP meeting documents. (FF14, Order May 19, 2008)

58.

Defendant held the ESY IEP Team meeting on March 28, 2008 knowing that Plaintiffs had objected to this date, had offered other dates and had not agreed that this time and date was a convenient time. (FF15, Order May 19, 2008)

59.

Defendant held the ESY IEP Team meeting March 28, 2008 having failed to provide the Plaintiffs with progress reports and other records of [redacted]. from prior to December 1, 2007, and without providing other records including staff input into the meeting. (FF16, Order May 19, 2008)

60.

ESY IEP documents continue to ignore OHI eligibility. (FF17, Order May 19, 2008)

C. Additional Findings of Fact.[3]

61.

In making further findings, the Court weighs the credibility of the evidence. The failure to produce documents and the failure to respond to *subpoenas duces tecum* weighs against Defendant, Ms. Stokes, Ms. Wolfcale, Ms. Geist, and Mr. Marcello.[4] In addition, Stokes, Wolfcale, Geist and Marcello often gave conflicting testimony which tried to shift responsibility to others. The Court found Dr. Hughes, Defendant's expert witness, not to be helpful concerning [redacted] She had reviewed only a small portion of the information, observed for just an hour, and, as she was only provided sparse records by Defendant's attorney, her testimony addressed [redacted]'s alleged eligibility and was not based on sufficient knowledge of his individual needs. The Court did find Defendant's specialists Griffith (AT), Cummings (OT), and Chernecky (PT) more

[3] The parties agreed to the pos-trial submission of pleadings and written closing argument. After a review of the evidentiary record, the documents submitted into evidence, the arguments and pleadings of the parties, the Court makes the following additional findings of fact. The Court does not disturb the findings made previously.

[4] Plaintiffs filed two (2) requests to produce documents. S*ubpoenas* and *subpoenas duces tecum* were also served on certain witness employees of Defendant through Defendant. Defendant failed to provide substantial documents and material required. The Court ordered Defendant to gather such documents. Plaintiffs called Ms. Stokes, adversely, as the first witness. She was the identified Defendant representative and subject to a *subpoena duces tecum*, but Ms. Stokes failed to comply with the *subpoena*. The Court ordered the provision of the documents and compliance with the additional *subpoenas* as to Mr. Marcello, Ms. Geist, and Ms. Wolfcale. Plaintiffs elected to proceed with their examinations while the records were gathered by Defendant. During trial the failure to respond adequately to the requests to produce continued with several other APS witnesses. Ms. Wolfcale, Ms. Griffith, and Ms. Shea were never asked for information after February, 2008 by APS. Ms. Wolfcale appeared in Court without documents she contended exist. Ms. Griffith and Ms. Cummings appeared without being asked for documents. The Court admitted Def. Ex. 98, a cumulative file of documents not produced timely by Defendant from Ms. Wolfcale. Specific progress reports and data were introduced as P-103, A-E. Ms. Wolfcale testified that there was behavior data or her "FBA" in records kept by her. These educational records were never produced during the trial and are not in D-98.

credible.

In contrast, the Court finds Mr. and Mrs. [redacted] to be knowledgeable and involved parents and credits their testimony where it conflicts with Defendant. Plaintiffs' experts Dr. Berger, Ms. Mitchell, Ms. Hetzel, and Ms. Stagner were also familiar with [redacted]. and their opinions concerning his needs were clear and credible.

D. IDEA Rights and Defendant's Procedures.

62.

Plaintiffs gave notice timely of their intent to seek private services. They were cooperative and knowledgeable in their child's IEP process. The parents provided evaluations, proposed IEPs, assessments, and progress reports from a variety of private providers. (Stokes, Vol. 1, Marcello, Cummings, Griffith, Wolfcale, R.B.; Nelms).

63.

APS contended the parents had consented to [redacted]'s placement and IEP. Plaintiffs called Ms. Stokes adversely, APS' coordinator who attended meetings last year and is now an acting special education director. D-62 was brought to Ms. Stokes' attention, and she agreed that there was no written consent for services, and no other consent from the November 1, 2007 IEP. The Court finds this contention of APS factually erroneous.

64.

Ms. Stokes was questioned concerning placement. (Stokes, Vol. 1). With the child trying to move from interim to regular services, the IEP must be complete, including completion of the placement decision, and this means a discussion of the location of the services. Ms. Stokes agreed that as to the November 1, 2007 meeting, they did not get to placement. (Stokes,

Vol. 1; P-44).

65.

Carol Geist, an APS coordinator who supervised programs and was responsible for due process, was called adversely. She was not called for direct examination by Defendant. Ms. Geist testified that it was not her job to see that [redacted].'s evaluations were conducted timely after consent was given on 8/16/07. She said this was Mr. Marcello's responsibility. (Geist, Vol. 2). Ms. Geist testified concerning APS' response to [redacted].'s vision evaluation. Mr. Muchow, an APS' staff member designated to conduct the vision evaluation, was not asked to attend the IEP meeting. There is no report from him. According to Ms. Geist, Mr. Muchow said he decided [redacted] was not eligible for vision services and therefore he would not attend the IEP meeting or conduct an evaluation. (*Id.*)

66.

Ms. Geist was shown P-74, p. 3, the September 25, 2007 e-mail directing Ms. Wolfcale to implement the draft IEP. She testified that the standard operating procedure at APS was that one "would not implement IEP goals and objectives that were not agreed upon." (Geist, Vol. 2). After being shown P-55, p. 9, she also agreed that the IEP could not be implemented unilaterally and without consent. She further agreed that a FBA is an IEP Team decision and identified her notes from the IEP meeting in which the Team agreed a FBA was necessary so they could look for triggers that may be antecedents to [redacted].'s behavior and then design appropriate interventions. (*Id.*)

67.

Ms. Geist was also questioned concerning APS' failure to respond to the parents'

questions and limited consents. P-48 was sent to APS' legal counsel and the director of special education, Dr. Johnson. It was Marcello's job to inform the Team of the e-mail. Nothing was done by her, nor was anything done by Marcello, as, according to Ms. Geist, they were waiting for Dr. Johnson and Ms. Fishman. (Geist, Vol. 2).[5]

68.

Ms. Geist testified that in APS it is not the practice to discuss the location of programs. The Court finds that this explains only part of the placement failure at the November IEP and that this practice is inconsistent with the testimony of APS representative Stokes and contrary to IDEA and such a practice would result in the denial of FAPE and parent participation in making decisions.

69.

Mr. Marcello, the Coordinator, was called adversely, and agreed that the IEP Team must address all services and related services and that consideration of services in the home and in the classroom should occur. (Marcello, Vol. 1).

70.

Mr. Marcello was unable to explain the failure to conduct the vision evaluation, the orientation and mobility evaluation, or the FBA. (*Id.*).

E. Specific FAPE Issues

1. Untimeliness, Missing Services, Failure to Evaluate

71.

The Court has ruled on the untimeliness of the IEP meetings and program. Defendant at

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[5] *See*, FF # 32.

the August IEP meetings brought out IEP documents, evaluations, and eligibility reports from the 2003-2004 school year, and the IEP written in that school year for the 2004-05 school year. The evaluation was of [redacted]. as a preschool child for a Pre-K placement and had expired prior to the August IEP meetings since it was more than three (3) years old. (P-29; Dr. Stokes, Vol. 5). The eligibility reports from 2004 had also expired. (D-52; Dr. Stokes, Vol. 5). The 2004 IEP had expired and was a program from more than three (3+) years earlier and one from which [redacted] had been removed by his parents because of a concern with its appropriateness.

72.

Defendant placed goals and objectives from 2004-05 into its interim IEP for 2007-08. (Def. Ex. D-83; Wolfcale, Marcello).

73.

P-83 is the 8-16-07 evaluation consent form. It endorses an agreement for orientation and mobility evaluations and for visual efficiency or vision evaluations. This was provided to Mrs. [redacted] for her signature and she understood that these evaluations would take place. ([redacted].) Evaluations agreed upon by the Team must occur. (Stokes, Vol. 1).

74.

Orientation or mobility is a related services and a need for [redacted]. The failure to conduct the evaluation and address it at a timely IEP was a material failure of the IEP process and of the IEP.

75.

A number of witnesses testified concerning [redacted].'s vision limitation and vision needs. These included his teacher, occupational therapists, and assistive technology consultant. Other APS staff testified [redacted] has difficulty tracking across fields, and would have difficultly using his

Vanguard device depending on where it was placed. Mrs. [redacted] sought a vision evaluation to address these issues. APS was provided an assessment by Dr. [redacted], Ph.D., an optometrist who was admitted by the Court as an expert in vision and vision therapy. Dr. [redacted] testified about the educational needs of vision therapy for [redacted] and its provision generally for students.

76.

Mr. Marcello and Ms. Geist testified that there was no vision evaluation and that any vision support would be provided only for acuity, which was contrary to Ms. Stokes admission that vision therapy was a related service.

77.

Ms. Griffith was the assistive technology specialist for the School District. (Griffith, Vol. IV). She agreed that there was no sight evaluation from APS and that the use of [redacted]'s device could be compromised if he had problems with scanning and tracking or staying on a straight line. (Griffith, Vol. V) Ms. Griffith acknowledged that visual tracking could be a correctable and improvable skill. (*Id.*).

78.

After the IEP meeting, Mrs. [redacted] asked about the vision evaluation and vision therapy services. Conducting the evaluation was rejected by Defendant without notice to Plaintiffs and services were denied without discussion at the IEP Team meeting. (P-100; e-mails from November, 2007).

79.

The assistive technology evaluation was from 2004 and more than three (3+) years old.

(*See*, P-95, P-66, and D-27. Testimony of Griffith (August 13, 2008)).

80.

Defendant contended at the end of the trial that the parents had objected to an APS psychological evaluation. However, P-30 and 33, the minutes from the August meetings, do not identify any objection. P-83, the consent to evaluate form, makes no reference to any request by APS to conduct a psychological evaluation or to any rejection of this by the parents. Mrs. [redacted] testified that she had not been asked, nor did she object to an APS evaluation. (Mrs. [redacted], Vol. 5). APS was unable to present credible evidence that the parents were asked to allow APS to conduct additional psychological evaluations. The Court therefore finds APS' contention is without merit.

2. Failure to Consider ESY

81.

ESY is part of FAPE concerning any potential break in programming, including winter or spring breaks. (Stokes, Vol. 1). The "IEP team has to address, consider it and discuss it." (Stokes, Vol. 1). Even with three (3) year old children first coming into the program in the summer, the IEP team must address ESY on admission to the program. (*Id.*) If children transfer into Atlanta on April 1st, they would have a right to ESY for the upcoming summer and to be considered and provided it. (*Id.*)

82.

ESY requires consideration from multiple sources of data. The provision of services in prior school years is one type of data. (Stokes, Vol. 1). The opinions of competent professions is one additional way to address the need for ESY. (Stokes, Vol. 1). The opinion of both private

and APS professionals who have worked with a child is "actually very strong data that a child needs extended school year services, especially if the child "got them in the past . . . from APS." (Stokes, Vol. 1). There does not need to be evidence of regression to support ESY.

83.

The minutes from the August 16, 2007 IEP meeting do not identify that ESY was discussed. Mr. Marcello generally testified, as he did concerning August 9, 2007, that the policy and practice of APS is to defer consideration of ESY until the spring. The Court finds that this policy and practice means that [redacted] and other children are excluded from consideration for ESY concerning breaks in services.

84.

[redacted] received ESY in the 2004-05 APS IEP. He received it privately from his parents in 2007 and pursuant to the Court's Order after the ESY Team meeting in the Summer of 2008.[6] Defendant's presented no evidence to contest that [redacted] was not eligible for or required ESY in the Summer of 2007. This is reinforced by the decision it made in the contested ESY Team meeting in 2008 of his need, and by the Consent Order which requires the IEP to be changed to reflect this need. The Court finds that the severity of [redacted]'s disability and the importance of the services, the related services, and instructional objectives, required ESY in the 2007 summer and would have been required in the IEP if had been properly considered at the November IEP.

85.

Mr. Nelms testified that ESY was not raised or considered at any of the August IEP meetings or during the time he was at the November IEP. Mr. and Mrs. [redacted] each testified there

[6] [redacted] received ESY through the continuation of related services and ABA instruction in the

was no discussion about ESY, nor were they asked to agree to defer that consideration. The November IEP Team minutes kept by APS also fail to address any such consideration.

86.

Mr. Marcello testified that in keeping with his process of always deferring ESY consideration that he would not have taken minutes to chronicle that the issue was raised. In balance, his testimony was ambivalent or not credible about whether he had an actual recollection of raising the issue in August or November. The Court credits Plaintiffs' testimony and finds that the issue was not raised, supported further by the likely fact that Mr. and Mrs. [redacted] would not likely have agreed to defer that consideration at the November meeting. The Court also finds that it is an affirmative duty of the School District to raise and consider the ESY issue and to establish the duration of the program.

3. November IEP Meeting Procedures

87.

The IEP documents from November, 2007, P-44 and D-57, 59, 61 and 65, were not provided at the IEP meetings, as the IEP was kept open for a week for the submission of goals and objectives by APS staff, and then printed and sent to the family. (Marcello, Vol. 1; R.B.; *see also*, P-46 and 48.). At the end of that long meeting, Mr. and Mrs. [redacted]. asked if it was over and were told it was. They then gave notice of private services. Defendant, through Ms. Geist and Ms. Stokes, objected to that notice, saying it was insulting to APS staff.

88.

Plaintiffs identified that they would review the IEP when provided to identify services and goals and objectives to which they consented.

Winter break of 2007. This was necessary instructional time for him.

89.

IEP documents stated the IEP was for an initial placement. (P-44; D-65, at 1 ("Developing Initial IEP"). Defendant never informed Plaintiffs that it would implement the November IEP without consent.

90.

P-46 is the post-IEP meeting e-mail notice sent by Plaintiffs. It indicates Plaintiffs' understanding that they could agree in part, and disagree in part, with the IEP, that there was a proposal from SBG to be considered for ABA services, that NOVA would be called, and that there was some inaccuracy with the minutes, while the parents sought the notice with the IEP they were waiting to receive. P-48 is the notice which limits parental consent by the parents after the receipt of the written IEP. It reflects disagreement with the content of the IEP and with the development of goals and objectives which Plaintiffs identified had been written after the IEP meeting.

4. Failure to Consider Placement

91.

The IEP, but not P-33, APS' typed minutes, appears to reflect a discussion about placement. A discussion of the placement or of the class, school, and location of the class for [redacted] and a discussion concerning the least restrictive environment did not occur at the November 1, 2007 IEP Team meeting. There was no actual discussion of placement criteria under 34 C.F.R. § 300.116 (2006). The final IEP, FF. 23, was without a placement. The parents were asked in November, 2007 to consent or agree to the IEP in the absence of placement.

92.

APS staff admitted that placement was an essential and necessary IEP Team consideration. (Stokes, Vol. 1; Marcello, Vol. 2 and 3). The Court finds that this is a significant and material violation of the IEP process restricting parent participation, delaying and denying FAPE significantly and limiting the parents' rights to information and informed consent.

5. Unilateral Change of the IEP, P-44 and D-65

93.

Defendant identified D-65 as the IEP it provided which it was defending. (Vol. 1). This has a print date of 1/03/2008. APS' IEPs have a service page setting the amounts of actual services the child will receive. (*See*, D-65, p. 6). When Plaintiffs compared this to the service page on the November 8th IEP sent to the parents, P-44 at 9 was different as the amounts of special education were altered. Mr. Marcello testified that this was done when the computer realized the program offered did not meet the time requirements. He testified this January IEP change had been agreed upon with the Team and the parents. No other witness from APS, or Plaintiffs, supported his testimony. Every APS witness asked denied participating in a post-November 8, 2007 IEP discussion altering the services, and there were no minutes, e-mails or documents reflective of any alleged discussion.

94.

The Court finds there was no discussion, notice, or process leading to the alteration of the IEP resulting in D-65. As identified and described by Defendant, D-65 is the IEP it puts in defense of the issue, and that document unilaterally altered the P-44 IEP, after the IEP Team meeting and without notice. The alteration is material and significantly interferes with parent

participation and the provision of FAPE. It was implemented without notice and contrary to the IEP in Plaintiffs' possession.

6. Parent Participation and the Failure to Provide Records

95.

Plaintiffs made many requests for records and information concerning [redacted]. The Court ordered the provision of all information. After that Order, Plaintiffs filed additional requests and raised the issue by motion and at trial. Records were produced at trial by Court direction which had not been provided to the Family.

96.

P-34, Ms. Shea's observation report, was not provided to the Family as part of the program, but only as a document in litigation. Ms. Shea could not testify why it was not made available to the family, nor did anyone from APS take responsibility for providing it.

97.

D-65, the alleged APS IEP, was never provided to the parents, accept as a document in litigation.

98.

Ms. Wolfcale produced records at the trial that had not been previously provided to the parents. These included the data requested in the progress reports. The data reflected that the progress report's notations "IP" from May masked the lack of progress and, in some cases, identified regression in [redacted]'s actual performance.

99.

P-74, at 3, the e-mails concerning the implementation of the draft IEP, were not sent to

the family, nor was notice provided to the family when this was done. Consent to that draft IEP was not provided or signed.

100.

There is no credible evidence that the interim IEP was provided the family. Progress reports were only provided after Court direction in January, and none were provided as to the Fall of 2007.

101.

The Court finds that APS on multiple occasions failed to provide documents and information relating to [redacted] concerning his program, including his educational records. Such information was necessary for IEP meetings, generally to support parent participation, and were requested properly in the case. The failure to provide information timely interfered significantly with informed parent participation.

4. Interim Placement and Services, Pre-November Events

102.

Ms. Wolfcale testified concerning the initial IEP meetings and her observations at D-18 and 90. She described [redacted] as unable to attend, wouldn't or couldn't communicate his need to toilet, and required physical assistance with every task. Later, she testified that the observation by Ms. Shea about the non-functional use of the Vanguard and the lack of attendance was on a typical and consistent day.

103.

At the August IEP meeting, Mrs. [redacted] agreed to a two-thirds (2/3) day program, maintaining private services. She and Mr. Nelms testified this decision was made because there

was no final IEP and none which Mrs. [redacted] found appropriate. This decision is within her discretion and, in light of the failure to have a timely IEP, the Court finds this to be an appropriate determination.

104.

Plaintiffs maintained the 2/3 day program throughout the school year.

105.

The parents provided the ABLLs assessment and other goals and objectives. ABLLs can be used to provide a functional curriculum in appropriate developmental sequences. (Mitchell; Wolfcale, Vol. 4). Ms. Wolfcale testified that the ABLLs was not used, stating that she was not required to use that document. She admitted that none of the ABLLs objectives, or the SBG objectives which identified [redacted]'s skills and home programs, were in the interim IEP. (*Id.*)

106.

Ms. Wolfcale in P-74, at 3, identified a 9/25/07 e-mail and response to Marcello in which she was directed to implement the interim goals and objectives. She was not aware of any other document with those goals. (Wolfcale, Vol. 2). In reviewing her records on August 5, 2008, she could not locate any 8/16 documents or consents that were signed by the Family.

107.

D-83 is a draft of the IEP interim program, printed 9/26/2007. P-95 is a 9/25/07 e-mail between APS staff in which Ms. Wolfcale is told to implement the interim IEP. D-84 is an APS document which identifies its printing on 8/20/07 (a date on which there is no evidence there was a meeting), which asserts that IEP goals and objectives still needed to be written and that there would be meetings after 8/16/07 to write such goals. There is no written consent to the interim

IEP, or, other than P-97, a tender of any request by APS for Plaintiffs to consent to the interim goals and objectives. D-86 8/19/07 is only a consent to the interim MOID/SI 50-50% services.

108.

APS contended that the interim IEP, D-83, was written at the 8/16/2007 IEP meeting. P-33, the minutes from that meeting, do not reflect the writing of these goals and objectives, and D-84, as well as testimony of Mrs. [redacted], Mr. Nelms, and of APS staff, including Ms. Cummings, conflict with this contention. APS was unable to provide a copy of the goals and objectives it contends were agreed upon at the August 16, 2007 IEP meeting.

109.

D-83 contains goals and objectives from the 2004-05 school year, and 2004 progress reports. Ms. Wolfcale identified that the handwriting on D-83 was her writing in preparation for the November IEP meeting, not edits on the interim program, raising a question concerning the source of D-83. Wolfcale's handwriting raises further questions concerning whether the goals and objectives in D-83 can be measured and it seeks to delete some of the goals and objectives. By example, D-83, at 11, has the pulling pants up objective with a notation that it should be "deleted," as [redacted] is "not ready," though this objective was placed in the November IEP, P-44, at 3, and is one of the objectives the parents refused to consent to (P-48), which was, nevertheless, implemented by APS. (Wolfcale)

110.

D-83 does not contain modifications or accommodations, nor was any progress report provided or produced in October, 2007 addressing its goals.

111.

APS also contended it wrote goals with objectives on an interim basis on the Heart of Hands IEP provided by the parents. However, a comparison of the Heart of Hands IEP at P-25 with D-83 shows that it was not the basis for the goals and objectives in D-83.

112.

D-83 fails to have measurable goals and objectives, as goals identify "improvement" rather than measurable criteria, and others identify that [redacted] will "increase" skills within the school, also without criteria. This, like the November IEP, D-83, fails to establish baselines and has objectives such as behavior in the "office" which seem meaningless to [redacted] The interim IEP also checks support for many goals and objectives for OT or PT, though Ms. Chernecky, the PT, testified she was not implementing these goals or objectives, or any goals prior to the November IEP. The interim IEP was implemented according to APS through the first week of November, 2007 in excess of the limitations for an interim program of "30-60" days. (Wolfcale).

113.

The Court finds that the interim IEP, based on an expired APS program and expired goals, objectives, evaluation and eligibility, failed to provide FAPE to [redacted] and was implemented without written consent and without notice or a specific offer of services which would provide the parents the information necessary to exercise consent. This interim IEP failed to provide FAPE.

7. The Failure in Implementation of the IEP and Evaluations

114.

Ms. Chernecky, the PT, testified that her evaluation was not discussed until the

November 1, 2007 IEP Team meeting and the PT related services or PT assisted IEP goals and objective were not implemented until after that day. That was more than 60 days after the school year began. (Chernecky, Vol. 5). It is more than sixty (60+) days from the date of the consent to evaluation on August 16, 2007. (P-83). Ms. Chernecky did not get the evaluation consent from APS staff right away, (*Id.*), and therefore, the Court finds that APS did not complete the PT evaluation process timely.

115.

Ms. Chernecky assessed [redacted] until the November 1, 2007 IEP meeting, drawing what she called a distinction between direct services and treatment and her assessment. When D-83, p. 6-7, interim objectives from the 09/26/07 IEP which have PT support on them were brought to her attention, she agreed that these had not been implemented prior to the November IEP.

116.

Ms. Chernecky was questioned on the lack of data on the PT goals for the end of the year. These reflect only occasional application of the objectives. D-98 also shows regression in the school-based physical movement data. She was unable to explain the limited data.

117.

Ms. Chernecky testified she was never shown P-48, Plaintiffs' limited consent to the specific objectives she was implementing. (Chernecky, Vol. 5). If she had been aware of P-48, she would not have implemented the PT objectives because it would be contrary to the ethics of her profession, which requires parental consent and parental decision making for a minor child.

118.

Ms. Griffith, the APS AT specialist, testified that for most of the 2007-08 school year,

she was the only AT for APS. (Griffith, Vol. 5). The mouse required for [redacted]'s technology was not available for several months. The touch screen was on order and not installed until January 27, 2008. (D-22, Griffith, Vol. 5).

119.

The use of the Vanguard requires that it be programmed in advance for instruction and placement. Ms. Griffith has not had training on programming of the device, nor was the device being programmed by Ms. Wolfcale so that [redacted] could take his machine to regular education. (Griffith, Vol. 5).

120.

The private evaluation by Dr. [redacted] was done for Medicaid eligibility purposes, not for educational purposes. APS was aware of this. (*E.g.*, Dr. Stokes, Vol. 5).

121.

As Dr. Stokes testified, APS cannot waive the obligation to use two (2) I.Q. measures. (Dr. Stokes, Vol. 5)

122.

APS could have conducted other evaluations and administered supplemental instruments. (Dr. Stokes, Vol. 5)

8. FBA and Functional Behavioral Plan.

123.

Georgia law defines the functional behavioral assessment at GaDOE R. & Reg. § 160-4-7-.21(20). It's a "systematic process for defining a child's specific behaviors and determining the reason why (functional purpose) the behavior is occurring," is an examination "of the

contextual variables . . . of the behavior, environmental components, and other information related to the behavior." Its purpose "is to determine whether a Behavior Intervention Plan should be developed."

124.

A functional behavioral assessment is a way of addressing an understanding a child's behavior. (Stokes, Vol. 1). It is a scientific approach and the taking of ABC data for children with autism. Id.

125.

Mr. Marcello testified that the behavior specialist was responsible for seeing that the FBA occurs. (Marcello, Vol. 1).

126.

For an FBA in APS, staff come in and spend two to three (2-3) weeks, depending on the child. What the functional behavior assessment is, and how it will be used, is a decision of the IEP Team. (Stokes, Vol. 1).

127.

[redacted]'s IEP required a functional behavior assessment. (P-44, at 8-9). Ms. Stokes could not testify why it did not occur. She said she was not a behavior specialist, nor had she read the IEP. Mr. Marcello agreed that the functional behavior assessment was an IEP FBA issue. It was the direct responsibility of the behavior specialist, but that either he, Ms. Geist, or the behavioral specialist would have had the duty to see it occur. (Marcello, Vol. 1). He "wanted to say" that nothing was done until January, but could not answer whether there were e-mails which addressed this, and then testified it would have been either Ms. Stokes, but most likely Ms. Geist,

who would have been responsible for seeing this occur. (*Id.*) Ms. Geist testified that it was not her responsibility, nor did she know what happened, nor did she know the reason for the delay. (Geist, Vol. 2). There appears to be a consensus that P-34, the observation report from Ms. Shea, was not a FBA. Mr. Marcello agreed there was no FBA (Marcello, Vol. 1), as did Ms. Geist, as did Ms. Shea. Ms. Shea's position, despite Stokes, Marcello and Geist identifying that this was an IEP Team issue, was that she conducted an observation not for the IEP Team but to consult with Ms. Wolfcale. She unilaterally decided an FBA was unnecessary and did not do one. (Shea, Vol. 5).

128.

Ms. [redacted] testified that she requested a FBA because of her concerns with [redacted]'s behavior in class and with the significant difference between the behaviors observed there and in other environments. She was concerned with the reports of [redacted]'s behavior at school by Ms. Wolfcale. Plaintiffs wanted this data to assess what was occurring and to make judgments about the appropriateness of the placement. Her expectation was that it would occur as an IEP Team decision. (R.B., Vol. 3).

129.

The Court finds that there was an agreement by the IEP Team to conduct a full functional behavior assessment, that it was never done, and that the behavior observations represented in P-34 from March, 2008 were inadequate, untimely and contained questionable information which was not provided promptly to the Family. This was a significant and material IEP obligation which was not completed by APS during the 2007-08 school year. A FBA completed timely would have assessed prior to the spike in [redacted]'s behavior endorsed by Ms. Wolfcale and would

have addressed [redacted]'s behavioral regression at school.

9. Other Aspects of Inappropriate Services and IEP

130.

Goals and objectives must be measurable in part so the parent and team can gauge if the child is progressing. (Griffith, Vol. VI).

131.

The review of data provided at trial by Ms. Wolfcale shows a lack of progress. [redacted]'s degree of independence does not increase, nor do the objectives show movement toward mastery in 98-A. (Griffith, Vol. VI). The data fails to show that [redacted] was regularly using his device. *Id.* D-98B deals with his device and shows that typically it is not being used, and, where used, not being used with success or appropriately. (Griffith, Vol. VI).

132.

Students can become frustrated with their difficulty in communication, including [redacted]. (Griffith, Vol. V). Ms. Griffith testified that multiple means of communication could have been helpful, but the IEP Team had not agreed on that approach. (Griffith, Vol. VI).

133.

Ms. Shea, the behavioralist, when she finally conducted observations, did not discuss or address [redacted]'s behavior in any environment other than Ms. Wolfcale's class. Ms. Wolfcale did not share information about other environments. Ms. Wolfcale testified that she never observed, nor could she explain the difference between, [redacted]'s functional abilities in home, for Ms. [redacted], or for a private therapist and that he exhibited in her class.

134.

Ms. Shea explained that she was not asked to conduct an evaluation or assessment. The first contact with her was in February, 2008, some four (4) months after the IEP meeting.

135.

Ms. Julie Cummings, like Ms. Chernecky, was never told that there was no consent to certain services.

136.

When questioned concerning D-98-C data sheets which end in April, Ms. Cummings said she could not explain the absence of classroom OT data. She assumed the data would have continued and the IEP would have been implemented throughout that time. The D-98 data sheets A-E generally reflect the absence of data the last weeks of schools.

137.

Ms. Cummings was questioned concerning [redacted]'s progress on the fine-motor goals and objectives at D-98, C and E. The data shows no progress. The D-8 progress report from the teacher lumps the activities together without percentages of performance and without showing progress.

138.

Ms. Cummings and the Family agreed on [redacted]'s significant sensory impairment, which adversely impacts instruction for [redacted]. One approach to limit its adverse impact was by joint compressions and rushing. (Cummings, Vol. 5). Ms. Cummings had to train the teacher to follow the sensory diet, and at several points during the school year, had to re-instruct Ms. Wolfcale that it was necessary to do the compression and brushing together, as it could be

detrimental to [redacted] if not done together. The sensory diet was suspended to allow for this re-instruction in late-January or early February and was not started back up again. (*Id.*) Thus, the behaviors reflected in the March report from Shea, P-34, would have been occurring in the absence of the sensory diet.

139.

The P-34 Shea report states that [redacted]. never crossed mid-line or used his device with purpose, which was in conflict with Ms. Cummings' evaluation. This could, according to Ms. Cummings, be a serious indicator of regression or show an inappropriate positioning and use of the device.

140.

Ms. Cummings was questioned by APS concerning several goals and objectives, and her opinion was that certain of the objectives were not appropriate for [redacted] (Cummings, Vol. 5).

141.

Dr. Hughes, Ph.D., was called by Defendant. She had been given partial records by APS' counsel and had not spoken with many therapists or evaluators, or with the Family. She had little direct information about [redacted]. and she testified generally concerning SID children, not [redacted].'s individual needs. She did testify that such children should receive functional instruction, that her opinion was that Ms. Wolfcale was capable of this, and that what she saw in the hour observation was generally appropriate for an SID class. She testified that children like [redacted] are generally given functional math goals using money or time rather than the counting objectives found in his APS IEP. She admitted these types of objectives were not in the APS IEP for [redacted]. Her testimony fails to explain [redacted].'s lack of progress.

F. Private Services Provided.

142.

Plaintiffs presented several expert witnesses who had evaluated [redacted] and /or provided direct services to Plaintiffs and for whom reimbursement or an order of services were sought. The Court finds Dr. [redacted], Ms. Mitchell, Ms. Stogner, and Ms. Hetzel to be credible and personally knowledgeable about [redacted] and whose testimony supports the Court's prior findings of [redacted]'s progress, the appropriateness of services for reimbursement and placement, and further supports that the APS program was not appropriate.

1. Private Services - Summit Learning and Ms. Mitchell

143.

Ms. Jennifer Pine-Mitchell was admitted as an expert in autism and educational services. She is a Director of the Summit Learning Center, has been a public school teacher and is currently an autism consultant to the Marietta City School System. She has evaluated [redacted] using the ABLLs assessment and provided direct services to him and extensively observed his instruction.

144.

Applied Behavior Analysis or ABA is the proper methodology for instructing [redacted]. [redacted] has made progress using its errorless teaching method. This method is not reflected in the APS IEP, P-44, or in P-34 or P-23, p. 5, 8 and 9, observation and progress reports of APS concerning [redacted] by APS staff. [redacted] functions at higher skill levels than identified in APS documents, and has, in the Summit Learning Center program, continued to make progress throughout the spring and summer.

145.

Ms. Mitchell testified concerning [redacted]'s functional abilities and use of his augmentative device, the Vanguard. In her program, he is able to cross mid-line and he is improving in his use and consistency with the device. This is consistent with Ms. Griffith and Ms. Cummings of APS, but is inconsistent with Ms. Wolfcale, his teacher, observation reports by her, and Ms. Shea the behavior specialist. The differences in learning and performance are significant and support both the appropriateness of the private setting as compared to the inadequacy of the APS setting.

146.

The Court finds that the direct instruction provided by the Summit Learning Center and the ABA direct instruction provided earlier by SBG in which he progressed, are appropriate for [redacted] and are a reimbursable instruction for [redacted].

2. Private Services - FeldenKrais and Ms. Stogner

147.

Ms. Teresa Stogner is a FeldenKrais Movement instructor. She is a master's level physical therapist and was certified as a physical therapist in Georgia before allowing her certificate to expire. She was admitted as an expert in movements, physical therapy, and the limitations experienced by [redacted]'s physically in his environment.

148.

[redacted] has cerebral palsy. (*See* testimony of [redacted]). He has received FeldenKrais instruction for increasing his movements for several years. These are provided by Ms. Stogner and by another FeldenKrais therapist. They work differently than PTs and provide several consecutive days of movement instruction followed by a gap in time. By observing, positioning and

encouraging positive movements, a FeldenKrais therapist helps the individual learn to physically manage his environment more effectively and efficiently. The increased functional movement is not a question of repetition or strengthening as in more traditional PT, but in experiencing and then learning movements.

149.

[redacted]. has made significant progress in his physical abilities. He is able to better travel and manage his environment, sit and attend for instructional purposes, and use his device and other methods of communication due to these physical movement improvements. (Stogner, Vol. 2).

150.

Ms. Catherine Chernecky is the APS physical therapist. She concurred with the appropriateness of the FeldenKrais method, explaining how movement can train the brain to create ways to functionally move. (Chernecky, Vol. V). She agreed that the flexibility, stability, and walking goals were appropriate. (*Id.*) She characterized his progress in movement as "wonderful gains." (*Id.*)

151.

The Court finds that the FeldenKrais services were appropriate for [redacted] and resulted in his continual gain and progress in necessary areas impacted adversely by his disability, including physical limitations. Such services are subject to reimbursement and are appropriate to him in a private program.

3. Vision Therapy - Dr. [redacted]

152.

Dr. [redacted], a Ph.D. optometrist, testified concerning her evaluations of [redacted]. and

her recommendations concerning services. She is a Fellow in the College of Optometrist and Vision Development or COVD. She conducts comprehensive evaluations and works with children with special needs and children with autism. She often works with head injury children and with Shepherd and their Pathway Rehabilitation Center.

153.

Vision therapy is a sister to occupational therapy, speech therapy and physical therapy, with the goal to enhance visual performance and functional vision skills. ([redacted], Vol. 2). This allows the child to participate in and attend to instruction. She works with children to improve their visual processing, that is, the accuracy of their eye movements and the effectiveness of their eyes working together to gather information. ([redacted], Vol. 2).

154.

Dr. [redacted]'s evaluation of [redacted] from 2007 is P-53. She conducted a yearly re-evaluation in July, 2008 prior to her testimony. [redacted] has intermittent alternating exotropia so that he will look with his right eye and his left eye will turn out. He will switch these. These shifts can occur rapidly and over 40%-50% of the time. This fatigues children who then have trouble tracking and trouble with handwriting and other fine-motor tasks. In use of a computer screen or visual fields, this impairment will reduce the retention of information. (*Id.*)

155.

[redacted]. also has ocular motor dysfunction which addresses how he moves his eye, that is, his pursuit in eye movement. He also has saccadici eye movement which are jumps in eye movement and focus from point to point. These will also adversely impact his use of his device and his instruction. These can all occur at the same time.

156.

[redacted]'s visual acuity "is very good." ([redacted], Vol. 2). He can read 20/30 acuity, though his reading and visual processing is adversely impacted.

157.

Dr. [redacted] recommends vision therapy for one hour per week, with direct therapy by her and with her consulting with other service providers or the parent in an at-home program in order to address [redacted]'s conditions and improve his vision, visual processing, and the use of his vision to access his device and receive educational instruction. (*Id.*)

158.

Dr. [redacted] on cross-examination initially stated that her services were "medical services" and then explained her services were optometric medical services. On re-direct, she identified that she is not a medical doctor, that her services are not those requiring a medical doctor, and when answering these questions, she was thinking in the terms of a model, not whether she was practicing medicine.

159.

The Court finds that vision therapy, as admitted by Ms. Stokes, is an available related service and is not a service which requires a medical doctor. [redacted] has a need for such therapy to learn and support his education, and the evaluation/assessments of Dr. [redacted] should have been conducted by APS and are subject to reimbursement, each, at $300 per evaluation. ([redacted], Vol. 2). Vision therapy at a session a week at $135 per hour is an appropriate IEP service. ([redacted], Vol. 2).

4. Private Services - Aurora Strategies and Ms. Hetzel

160.

Ms. Kelly Hetzel, Executive Director of Aurora Strategies, a licensed speech and language pathologist with 21 years experience, was admitted as an expert witness in communication and communication disorders. She has personally evaluated [redacted]., observed his programs, and provided direct services to him. (Hetzel, Vol. 2).

161.

In working with [redacted]. over the past year, Ms. Hetzel identifies his difficulties in visual tracking, his work on his Vanguard device, and his work on structured oral motor programs and communication skills. P-56 and P-68 are her assessments which accurately reflect his abilities and progress.

162.

[redacted]. worked on OM exercises, increasing his air flow for speech and language, improved on his augmentative communication device, on the use of his computer device and touch screen, and worked on strengthening oral motor programs. He has continued to make progress in all areas in the Spring and Summer of 2008.

163.

Ms. Hetzel reviewed P-34, the observation report of Ms. Shea, and did not agree that it reflected [redacted]. accurately, or his use of his device or his abilities. He makes functional and intentional use of the Vanguard and has continued to improve in communicating with it.

164.

The Court finds services provided privately for [redacted]. by Aurora Strategies for part of the day were appropriate and reimbursements sought were proper.

165.

Ms. Hetzel identified that [redacted]. had confirmed to make progress in the areas she was focusing on. These are different than the APS areas, but not attributable to them. His progress is consistent with their year of data concerning the new growth rates of the children they serve.

166.

Ms. Hetzel had concerns with the inappropriateness of certain APS communication goals and objectives. She did not find that the IEP was based upon structured planning, or an adequate assessment of [redacted].'s oral motor, augmentative communication, or language systems. The goals and objectives did not pinpoint the areas he needs to learn or the preliminary skills he needed to obtain to foster this communication. (Hetzel, Vol. 2).

167.

The Court finds that the communication and oral motor services as planned for [redacted]. by Ms. Hetzel are appropriate and will provide [redacted]. with a continued ability to progress.

168.

Ms. Hetzel, Ms. Mitchell, and Mrs. [redacted]. met in July to design a program for [redacted]. for 2008-09. They agreed on a half-day program at the Summit Learning Center with a one-to-one, and then small group ABA instruction. [redacted]. would then go for the afternoon at Aurora Strategies, also receiving one-to-one and continued instruction in his oral motor needs, communication, and communication planning. This plan has the advantage of instruction which is tailored to his needs across different environments. Ms. Hetzel and the parents agree with the need for vision evaluations and vision therapy.

169.

P-21 is a summary of the costs expended by the parents and sought in reimbursement. Page 1 identifies the actual 2007-08 expenditures as the exhibit was used as a working document. (R.B). These accurately reflect the expenditures made and sought in reimbursement in the case. (*Id.*) [redacted] was provided ABA services first through SBG and then through the Summit Learning Center at hourly rates. The Court finds that these ABA services were appropriate. He received communication services from Aurora Strategies from which reimbursement is sought. He received FeldenKrais Movement instruction from the two (2) alternating therapists, and occupational therapy. The family seeks reimbursement in the amount of $25,602 for the school year, and $3,400 for ESY, and transportation and travel in the amount of $1,500.

Mr. and Mrs. [redacted] testified concerning the costs and prospective plans for [redacted]. The Court finds that the costs for private services and hourly reimbursements at standard state rates appropriate and reasonable.

170.

Plaintiffs sought reimbursement for Mrs. [redacted]'s work as [redacted]'s aide at an hourly rate. The Court finds that Mrs. [redacted]. provides this service voluntarily and is not entitled to reimbursement for such services.

171.

Plaintiffs understood from APS and APS documents that [redacted]'s admission was an initial placement. APS sought Plaintiffs' consent to evaluate and consent to services. At the August meeting Plaintiffs consented to evaluations and to placement. They understood they could consent to the interim goals. After the November IEP meeting, the Plaintiffs consented to

portions of the IEP and objected to other portions. The Court finds that Plaintiffs properly agreed to some services and restricted or withheld consent to other portions of the APS November IEP at P-44.

172.

Plaintiffs are active and involved parents. The procedural breaches as to the provision of records, and the absence of notice, and the failure to respond or allow consent caused "harm" in that these limited or interfered in their active participation, limited their role as an equal member of the IEP Team, and limited or delayed FAPE.

173.

Plaintiffs initially sought appropriate private and public services in their complaint. By trial, and after the ESY IEP Team issues they sought a full-day private placement. The Court finds that Plaintiffs request for a full-day private placement for the 2008-09 school year is appropriate.

III. CONCLUSIONS OF LAW

This Court has equitable-like authority to award all appropriate relief. 20 U.S.C. § 1415(i)(2)(C)(2004); *Burlington Sch. Com. v. Commonwealth of Mass.*, 471 U.S. 359, 105 S.Ct. 1996 (1985). Parents may contest the placement and/or FAPE offered by providing a private placement and seeking public reimbursement if the LEA "had not made FAPE available to the child in a timely manner." 34 C.F.R. § 300.148 (2006).

> "[A] court or an administrative law judge (ALJ) may require the LEA to reimburse the parents for the costs of that enrollment (in private school) if the . . . ALJ finds that the LEA had not made a FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate."

GaDOE R. & Reg. § 160-4-7-.13(2)(a)(2) explains:

> In a case where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for placement in a public school was inappropriate, it seems clear beyond cavil that "appropriate" relief would include a prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school.

471 U.S. at 370.

Here, Defendant's IEP was neither timely nor appropriate. A placement does not exist, there were inadequate progress reports, and the evaluation and eligibility are wanting. Plaintiffs are entitled to a remedy on the previous issues and on all remaining claims. Furthermore, the Court concludes that the procedural violations rose to the level of impeding W.B.'s right to FAPE, significantly impeding his parents' participation, and contributing to and causing educational deprivation. These permit substantive relief. *E.g.*, 34 C.F.R. § 300.513(a)(2). Specifically, the Court has found that the actions of APS demonstrate and provide that:

(1) IEP meetings were delayed and then denied full parent participation, as found on the ESY Team meeting;

(2) the previously determined right to timeliness of the IEP, delaying FAPE and educational services;

(3) the admitted egregious failure to consider or make a placement, failing to make an offer of services. In effect sixteen (16) months after registration and thirteen (13) months after services were to begin, there is still no IEP and nothing for APS to defend as it never offered placement;

(4) the failure to conduct the agreed upon evaluations, and the failure to conduct an FBA. These were admitted to have been necessary and available for the IEP

meeting, rendering that IEP also improper and facially defective;

(5) the alteration of the November 1, 2007 IEP in the document - D-65 - presented to the Court in opening and throughout trial as the IEP, until Defendant was caught with its unilateral alteration and the statements by Marcello that this was a product of meeting, notice and consent;

(6) the improper maintenance of an interim placement beyond the thirty to sixty (30-60) days APS admits is the maximum limitation for such a placement;

(7) the failure to create, distribute, and seek consent to the goals and objectives of the interim IEP, also encompassed within the finding of delay. The suggest that these were agreed to at the August 16, 2007 meeting cannot be correct in light of the emails and meetings after that day to write the goals. In addition, the email of 9/25 and the printing of the 9/26 version and then the failure of any evidence that the 9/26 IEP was sent to the parents counters this bare contention. That email could have said "send it to the Plaintiffs" and make sure they agree, but it did not. Finally, the version Defendants produced (as Plaintiffs were never given on in the documents which were supposed to be all [redacted].'s records) was the one written on by Ms. Wolfcale for the November IEP meeting. If there was an earlier version of the interim IEP and it was presented to the Plaintiffs, then where is it?;

(8) the unmeasurable goals and objectives in the final IEP,

found previously by the Court in an absence of FAPE;

(9) the failure to ever provide data or progress reports on the interim IEP services and the previously found failure to provide progress reports that allow information

and baselines for parent participation. This is a breach of parent participation;

(10) the findings of abuse and slapping and inappropriate services by Ms. Lake, still denied by APS at trial;

(11) the failure to allow inclusion and follow the 50-50% placement, as previously found by the Court. APS was still trying to decide whether to allow this throughout the fall months;

(12) the failure to have an adequate evaluation to support a legal determination of eligibility. Once this came out APS shifted to say the parent refused to allow evaluations by them. Prior to this and other than this mid-stream tactic, there is no evidence this objection occurred and Mrs. [redacted]'s testimony is in keeping with the APS documents. It has no minutes or record it sought to conduct its own or supplemental psychological evaluation, nor that the request to evaluate form was altered in any way. In fact, the consent was signed on August 16, 2007, which was weeks before the private Medicaid psychological was available. APS still had the duty to review it, which it did at the November IEP, and to seek supplemental testing if it was not adequate. There is no evidence this was even raised by Defendant at the meeting;

(13) the delays and failures in the implementation of assistive technology services, inexplicably not providing the touch screen until the end of January;

(14) the failure of any demonstrative or known educational progress on IEP goals and objectives. None of the progress reports show any meaningful progress or mastery of objectives. The data taken from Ms. Wolfcale at trial, D-98 A-E generally

shows that goals and objectives were inexplicably abandoned, that many showed regression and others demonstrated a lack of progress;

(15) the admitted failure to implement the IEP through the failure to provide an aide, denying FAPE. This is even more egregious in the face of rejecting the Plaintiffs suggested alternative of an aide and training from SBG. Thus this was an intentional deprivation by APS while it allowed the IEP to remain in breach by the failure to provide services;

(16) the failure of the IEP to have appropriate goals and objectives as it was addressing services [redacted] had achieved, wasting his educational opportunities;

(17) the complete failure of the Defendant to inform the staff concerning the limitations on consent, including as to the physical therapy services the admission by a competent therapist that the therapist would not have provided the services as such would have been unethical if APS had told her about the scope of the consent;

(18) the failure of the IEP to address appropriate functional skills, even as suggested by Defendant's own expert to address money instead of rote counting;

(19) the failure to implement the sensory diet. Ms. Wolfcale was doing this improperly and Ms. Cummings had to suspend it and was never able to re-train Wolfcale so she could re-implement the diet. This covered the entire second semester;

(20) the failure of reasonable progress if measured by the failure to obtain goals and objectives on the data kept by the classroom teacher, Ms. Wolfcale. In concert with this is the failure of learning;

(21) the demonstrative conflict in how the District views [redacted], in the observations of the behavioral therapist in the spring, contrasting with higher levels of functioning observed earlier in the year in supporting the conclusion of regression or inappropriate placement;

(23) the delays in addressing and implementing occupation therapy, as Ms. Cummings testified as to weeks and weeks of "assessment" waiting for the IEP;

(24) the withholding of records throughout the school year;

(25) the failure to provide data after February, and the failure to produce records. This combines with the failure to ever respond to the Plaintiffs as to what services and goals were in play;

(26) the onset of adverse behaviors at school and the finding of behavioral regression;

(27) the entire process in August through November on ESY, denying actual participation. This deferral process, at a minimum, denies consideration of services in winter and spring breaks illegally. It is also not credible that Marcello asked the parents if the consideration could be deferred, but it is clear that he filled in the form, and that the IEP was not presented in printed form to the parents until a week after the November meeting. It was only then they saw he had waived this consideration, as he does for APS in all similar meetings as a matter of policy and practice. This means the IEP presented cannot be seen as adequate or appropriate under *GARC v. McDaniels*, nor under state and federal ESY regulations. APS was asking for consent to an IEP which denied these services even though it ran from November to November. This approach has been

subject to permanent federal court class action injunction for 25 years;

(28) the OHI problem, which goes to eligibility, FAPE and shows that the IEP was written after the fact, ignoring the actual discussions at the meeting;

(29) the absence of a final offer of services, on several grounds, but overshadowed by the absence of a placement; and

(30) the offensive and incompetent failure of administration, with witnesses pointing fingers at each other while responsibilities went unfulfilled and while parental requests, and then additional requests, and then questions and requests for information and records, and for the basic response of what is occurring at school goes unexplained, unabated and unremediated. At the end, APS seemed to settle on blaming the special education director who has retired and their in-house counsel for many of these failures, which may be true, but also represent two persons unavailable for testimony.

These failures were also illustrated with the conduct of the defense by APS. It failed to respond to requests to produce, failed to seek data after February, though requests were made and there was an outstanding order of the Court for it to provide all the information. It failed to make basic inquiries to produce documents consistent with served subpoenas, and, in court, as at Morris Brandon, ignored Plaintiffs' rights.

There was virtually no evidence presented by APS to counter the appropriateness of the requested reimbursement and alternative services. The Court has already made findings of progress in all these material private therapy areas. APS presented no evidence concerning any of the private programs. It presented no affirmative evidence concerning the cost reimbursement.

APS presented virtually no evidence or cross-examination limiting the remedies sought. APS presented no evidence concerning ESY for 2007, except as support from the prior and subsequent ESY programs for the Plaintiff and by its decision in 2008, albeit done in violation of IDEIA, of ESY needs. Its witnesses endorsed the FeldenKrais training and its success. It did not contest ABA services, which have already been found appropriate and successful by the Court. It did not contest or present evidence about the inappropriateness of the Aurora Strategies language services, which are also supported by a finding of appropriateness and of the progress made. It did not contest private OT services which are also supported by a finding of progress and appropriateness. It did not contest the evidence on the need for vision therapy, and Ms. Stokes admitted that is an appropriate related service.[7]

Plaintiffs/Family seek, and the Court approves as appropriate the following relief:

(1) reimbursement for the Summer of 2007-08;

(2) reimbursement for the 2007-08 school year;

(3) placement in the programs sought for 2008-09, as the appropriate program under *Burlington/Carter*, with transportation, FeldenKrais Services, vision therapy, ABA direct instruction at Summit Learning Center, communication and AT/computer-based instruction at Aurora Strategies, occupational therapy for home and in the community, and associated with the private placement, and the

[7] APS also by policy or practice restricts the right of access to vision therapy. Ms. Stokes testified as the first witness that it is an available related service. APS staff testified later that they restricted vision therapy to those found eligible as blind or vision impaired, and that they only provide vision therapy for impairments of acuity, not for [redacted]'s handicapping conditions. The basic tenant existing for thirty (30) years under EHA/IDEIA is that once a child is eligible you provide services to meet the scope, nature, and extent of the child's disabilities, but this is ignored by APS. It erects arbitrary restrictions on how it defines its services. This is a related service and appropriate to provide.

maintenance of assistive technology, including, support for the assistive technology devices, consulting on a monthly basis in assistive technology, at school district provision or expense;

(4) to complete at School District expense the evaluations through independent professionals which APS ignored or disregarded;

(5) a year of compensatory educational services for the year lost in APS' program;

(6) a valid and complete eligibility report on OHI; and

(7) procedures to use should W ever reapply to APS.

SO ORDERED THIS 3rd day of October, 2008.

John B. Gatto

JOHN B. GATTO, Judge