08-083658

IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[redacted],

Plaintiff,

v.

COBB COUNTY SCHOOL DISTRICT,
Defendant.

Docket No.:
OSAH-DOE-SE-0824583-33-Schroer

FINAL DECISION

I. INTRODUCTION

On March 27, 2008, Plaintiff [redacted] filed a due process complaint pursuant to the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA"). The due process hearing was held at the Office of State Administrative Hearings ("OSAH"), on May 19 - 22, 2008, June 16, 2008, and July 11, 2008. Chris E. Vance represented Plaintiff. Christy A. Calbos and Aric M. Kline represented Cobb County School District. The record remained open until Monday, July 28, 2008, in order for the parties to review the transcript and file post-hearing briefs. The deadline for the issuance of this decision was extended to August 16, 2008, pursuant to 34 C.F.R. § 300.515(c).

II. FINDINGS OF FACT

1.

[redacted] was born in [redacted] and is [redacted] years old. During the 2007-08 school year, he resided with his mother in Marietta, Georgia and attended fourth grade at [redacted] Elementary School ("[redacted]") in the Cobb County School District ("School District").

2.

[redacted]. was first evaluated for special education services when he was four years old. He was initially identified as having significant developmental delays and a speech-language disorder, but by age seven the School District had changed his primary disability to autism. The School District provided special education services to [redacted]. until March 2008 when his mother withdrew him from the School District and began a home study program.

A. Educational Background

Although the period relevant to the claims raised in the due process complaint is the 2006-08 school years, the Court reviewed [redacted]'s educational background to provide context for evaluating the services he received during the relevant period. *See* K.C. v. Fulton Co. Sch. Dist., 2006 U.S. Dist. LEXIS 46752, *5 (N.D. Ga. 2006); Draper v. Atlanta Independent Sch. Sys., 480 F. Supp. 2d 1331 (N.D. Ga. 2007); *aff'd* 518 F.3d 1275 (2008).

1. Preschool

3.

[redacted]'s mother, [redacted]., owns and operates a day care center. When [redacted]. was three years old, [redacted] became concerned with his slow speech development and his decreased interaction with other children in the day care. In September 2000, [redacted]. had a speech evaluation, which found language deficits and recommended speech-language therapy. In November 2000, [redacted] took [redacted] to the [redacted] for a developmental evaluation. The [redacted] found signs of developmental delays and autistic characteristics and concluded that [redacted] "probably falls within the mild pervasive

developmental disorder spectrum." (Exhibits D-7, D-22A; [redacted]. Testimony, Tr. 89)

4.

Shortly thereafter, [redacted]. was evaluated by the School District and found eligible for special education services for significant development delay and a speech-language disorder. [redacted].'s parents and the School District developed an Individualized Education Program ("IEP") for [redacted]. that called for him to attend a special needs preschool at [redacted] Elementary and receive speech therapy services. (Exhibit D-16; [redacted] Testimony, Tr. 157)

5.

In the Spring of 2002, the IEP Team met to consider [redacted].'s transition to kindergarten. [redacted]. was to be placed in a small group special education kindergarten class at [redacted] Elementary for most of the day, but was to attend specials (art, music and physical education) and "centers" with general education students.[1] During kindergarten, [redacted]. was also to receive speech therapy once per week and occupational therapy ("OT") consultative services once per month. (Exhibits D-32, D-36)

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[1] The IEP called for a "sensory diet to be implemented prior to centers in regular classroom." A sensory diet is composed of different activities scheduled throughout a child's day that provide the sensory input the child needs to stay focused or "modulated." A child who is "hyper-reactive" to sensory stimuli will need activities in their sensory diet that help calm or relax the child. There are a variety of activities that could serve to calm a child who experiences sensory overload, such as lifting heavy blocks, jumping on a trampoline, or going for a walk. Determining the right mix and amount of sensory activities is the hardest part of devising an effective sensory diet. (Grisham Testimony, Tr. 1093-94, 1098-99, 1123; Kagan Testimony, Tr. 336, 350) *See infra* ¶ 8; Section D.

2. **Kindergarten**

6.

[redacted]. did not attend kindergarten at [redacted] Elementary at the start of the 2002-03 school year. Rather, [redacted]. enrolled [redacted]. in [redacted], a private school that serves children with autism.[2] (Exhibit D-39, at 0153)

7.

For the 2003-04 school year, [redacted]. enrolled [redacted]. at [redacted] Elementary and he was placed in a small group special needs kindergarten class taught by Hanna Pak. [redacted].'s initial IEP for this year called for 60 minutes per week of speech and language services in a small group setting. In October 2003, speech services were increased to 90 minutes per week. (Exhibits D-39, D-43)

8.

Upon [redacted].'s return to the School District, he was evaluated in a number of different areas, including OT, psycho-educational, and speech and language. The OT Evaluation found that [redacted]. was easily over-stimulated by visual and auditory stimulation. The evaluator recommended that a sensory diet be integrated into [redacted].'s classroom routine, including soft music and lighting, a mini-trampoline, and periodic walks. OT services were recommended on a consultative basis for 30 minutes per month. (Exhibit

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[2] Plaintiff did not present any specific evidence on [redacted], other than [redacted].'s testimony that [redacted]. had attended the "autism program" at [redacted] for one year, that [redacted] focused on four critical areas (cognitive, social/emotional, physical, and neurological) in educating children with autism, and that [redacted]. believed that the school had been effective in educating [redacted]. [redacted]. admitted that the staff at [redacted] is largely uncertified and Plaintiff presented no other evidence on the student body, staff, programs, cost, or methodology used at [redacted]. ([redacted]. Testimony, Tr. 1840, 1850-53)

D-45)

9.

A speech and language reevaluation found that [redacted]. exhibited a language disorder that was characterized by deficits in his receptive and expressive language and that impacted his academic performance and functional communication abilities. (Exhibit D-52)

10.

The School District also conducted a psycho-educational evaluation of [redacted]. The evaluation concluded that [redacted]. functioned in the "deficient" range of intelligence, although some scores indicated "borderline" or "average" intelligence. [redacted]. continued to have significant speech and language delays and difficulties with social interactions. Based on all the assessments, the evaluator recommended that [redacted].'s disability be identified as autism. (Exhibit D-47)

11.

In January 2004, [redacted].'s IEP Team met to consider these evaluations and his eligibility for special education services. The Team agreed that [redacted]. met the eligibility requirements for autism and that [redacted]. was also eligible as "speech impaired" because of his language disorder. The Team considered a nursing evaluation relating to [redacted].'s asthma and allergies and discussed [redacted].'s parents' request that [redacted]. be given more opportunities for social interactions with typically-developing children. (Exhibits D-52, D-53, D-54)

3. First Grade (2004-05)

12.

In first grade year, [redacted]. was moved to [redacted] Elementary School within the School District and was placed in a special education classroom for part of the day.[3] [redacted]. attended language arts, reading, and math in the small group special education class, but attended social studies, science and specials in an inclusion class.[4] A para-professional assisted [redacted]. during his school day. Speech and language services continued at 90 minutes per week and OT continued at 30 minutes per month on a consultative basis. (Exhibit D-55)

13.

At the beginning of the school year, [redacted]'s IEP review indicated that his "behaviors were not impeding his learning or the learning of others." However, in October 2004, the IEP Team reconvened to review [redacted]'s progress. The IEP Team noted that [redacted]'s behavior could be "extreme" because of his "sensory issues" and described kicking and hitting, among other behaviors. The IEP Team also discussed concerns that [redacted]'s school day had too many transitions, which were difficult for him. In December 2004, the IEP Team determined that [redacted]'s current placement was not working and that he needed a lower teacher-to-student ratio and fewer transitions. In January 2005, the IEP Team agreed to transfer [redacted]. to [redacted] Elementary, where he would be placed in a

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[3] The record does not indicate the reason why [redacted]. moved to [redacted] from [redacted], except that it appears that [redacted] was his neighborhood school. [redacted]. did not list [redacted] as one of the schools [redacted]. attended. ([redacted] Testimony, Tr. 157-58; Svetlay Testimony, Tr. 1539)

[4] An inclusion class is a class composed of both regular education students and students with disabilities.

smaller group setting with para-professional support, a "sensory program," and minimal transitions. (Exhibits D-56, D-57, D-60A & B)

14.

In May 2005, at the end of first grade, [redacted].'s IEP described his strengths as "math calculation and penmanship" and described his weaknesses as "expressive communication, following directions and responding to correction, tolerance for frustration, physically strikes out when angry or upset."[5] For the first time, [redacted].'s IEP indicated that [redacted]'s "behavior impedes his learning and the learning of others" and found that [redacted] needed a Behavior Intervention Plan ("BIP"). The first BIP, dated March 2005, identified positive behavior interventions (such as pennies for positive reinforcement), environmental modifications (low lighting, separate study carrel, picture schedule), use of sensory integration equipment (swing, therapy ball), as well as consequences for problem behaviors, including loss of privileges, removal from group, and physical restraint when he was a danger to himself or others. (Exhibit D-63)

15.

The May 2005 IEP Progress Report showed that [redacted] had mastered or made significant progress toward most of his academic goals in his first grade year. In addition, the Progress Report indicated that "movement activities," such as swinging,

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[5] Under Social/Behavioral functioning, the IEP stated that [redacted] "has difficulty with response to correction, impulse control and concentration. He becomes very frustrated which leads to verbal and physical outbursts. He strikes out at teachers, throws items or knocks them off of tables and attempts to run from situation. [redacted] does not respond to verbal redirection but calms down when removed to a more isolated area. He has a study carrel in the classroom and also a 'break room' across the hall. Taking [redacted] for a walk does not help as he wants to go into other classrooms and becomes very loud in the hallway when he is not allowed to do this." (Exhibit D-63, at 0331)

were incorporated into [redacted].'s sensory diet, as well as continued use of a pressure vest and other deep pressure activities. With respect to his behavior goals, the IEP Progress Report noted inconsistent responses and only 10% mastery of these goals. Similarly, [redacted].'s language and communication goals were only inconsistently or minimally mastered during first grade. (Exhibits D-74, D-76)

4. Second Grade (2005-06)

16.

In the 2005-06 school year, [redacted]. entered second grade at a new school, [redacted] Elementary, also within the School District.[6] The IEP for [redacted]'s second grade year placed [redacted] in Ms. Pak's Mildly Intellectually Delayed ("MID") classroom[7] for all his academic classes, with a para-professional for support. [redacted] attended specials in the general education setting.[8] At the conclusion of his second grade year, the IEP indicated that [redacted]'s disability continued to impact his ability to benefit from a large group and small group instructional setting; rather, [redacted] worked best with "one-to-one" support. "He is not independent at this time and requires constant prompts and redirection to

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[6] Apparently, [redacted] followed his former teacher, Hanna Pak, from [redacted] Elementary to [redacted]. ([redacted] Testimony, Tr. 158; Boggan Testimony, Tr. 477) Also, the May 2006 IEP noted that [redacted].'s placement in a "LD" (learning disabled) classroom at [redacted] was not successful. (Exhibit D-81)

[7] An MID classroom serves students who have mildly-impaired cognitive abilities. The students are exposed to grade-level curriculum, but their education goals are individualized. (Green Testimony, Tr. 823)

[8] At the beginning of the 2005-06 school year, the IEP Team discussed a placement in the [redacted] program, which is a program for students with severe behaviors, but agreed on a placement in the MID program instead. Id. A [redacted] placement was considered again at the end of the 2005-06 school year, but not selected as the most appropriate placement for [redacted] at that time. (Exhibit D-81, at 0538; Bailey Testimony, Tr. 1202) *See infra* at ¶ 20. *See generally infra* Section II.F.

complete tasks and manage behavior." (Exhibit D-76, at 0442; Exhibit D-81, at 0521-22)

17.

With respect to his behavior, the May 2006 IEP noted the following:

Social/Behavior 05/16/06-

[redacted]'s behaviors are challenging in the areas of adult interaction, attention to task, tolerance for frustration, compliance with rules and response to correction. He shows strengths in his social interactions with his peers when he is in control of the situation....

[redacted] has difficulty with response to correction, impulse control and concentration. He does not respond well to traditional corrective approaches for inappropriate behavior. For example, planned ignoring and time-out for positive reinforcement for behavioral purposes only escalates the screaming behavior. Data shows that he has 100-150 screaming behaviors in a school day.[9] He becomes very frustrated which leads to verbal and physical outbursts. He strikes out at teachers, throws items or knocks them off of tables, pushes down his desk and occasionally attempts to run from the situation. He screams profanity words and other inappropriate words (i.e. "shut up you, idiot!" & "stupid"). During fall and winter marking periods, the aggressive behaviors were more frequent. During the spring marking period, the physical aggressive behaviors have decreased, however, the inappropriate screaming has increased. Screaming has been reported to be loud enough for classes in the same hallway and front hallways to be heard with doors closed. Inappropriate screaming is impeding the learning of others as well as himself.

[redacted] requires 1:1 support when academic demands are requested of him and also when completing academic tasks. His inappropriate screaming behaviors increase in intensity and in frequency when academic demands are placed....

Id. at 0522-23.

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[9] This data was collected by TASB, a department in the School District that provides Technical Assistance for Severe Behavior. (Whitmarsh Testimony, Tr. 1679) TASB does not become involved until all the resources in the student's home school have been exhausted. TASB conducts functional behavioral assessments ("FBA") of students, with the ultimate goal of developing interventions that will extinguish inappropriate behavior. (Whitmarsh Testimony, Tr. 1680-81) TASB received a referral relating to [redacted] in 2005 and collected data on his behavior for an FBA through the fall of 2005 and the spring of 2006. (Whitmarsh Testimony, Tr. 1684-87)

18.

For the first time, in the "Health" section of the IEP, the special education nurse reported that [redacted] exhibited "motor tics" (such as eye blinking, grimacing, lip pouting, tooth clicking/grinding, etc.) and phonic tics (such as screeching, echolalia and outbursts). In addition, Ms. Waggon reported that [redacted] had frequent asthma flare-ups and required nebulizer treatment for wheezing on 42 days during the school year.[10] (Exhibit D-81, at 0523)

19.

With respect to OT services, the May 2006 IEP reported that the School District had implemented a number of strategies to help [redacted] remain clam and decrease sensory over-stimulation, including soft music, a slow and soft voice, picture or visual schedules, and movement activities such as periodic walks. A classroom tent and a swing were used on a trial basis, but proved to be disruptive because [redacted] did not follow the rules for their use. (Exhibit D-81, at 0526)

20.

At the May 16, 2006 IEP meeting, the Team considered the reports of [redacted]'s difficulties through his second grade year and discussed placement options. Although there were a number of [redacted] representatives at the meeting, the Team ultimately

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[10] The Health section of the 2007 and 2008 IEPs described similar motor tics. (Exhibit D-83, at 0856; Exhibit D-95A) The Court finds that the laundry list of "tics" described in the Health section of the IEP over the years presented a somewhat misleading picture to the extent that it implied that these tics were observed on a routine or frequent basis. Rather, Ms. Green, his teacher for third and fourth grade said that [redacted]'s tics were "rare." Also, [redacted] did not observe the "level" of tic behavior described in the IEP and Ms. Weber, the speech therapist, only observed some of the tics listed "from time to time." (Weber Testimony, Tr. 705, 707; [redacted] Testimony, Tr. 106, 109; Green Testimony, Tr. 942-43)

decided that [redacted] was most appropriately placed in a small group setting in the MID classroom with additional adult support. OT was to continue at the same level as the past and speech and language services were set at one hour per week. (Exhibit D-81, at 0536-39)

B. **Third Grade (2006-07)**

1. Ms. Green's Classroom

21.

In August 2006, [redacted] began his third grade year as a student in the MID classroom of Margaret Green, a special education teacher at [redacted] Elementary. [redacted] remained in Ms. Green's MID class through all of third grade and most of fourth grade. (Green Testimony, Tr. 821)

22.

Ms. Green is an experienced teacher with considerable experience and training in teaching students with disabilities, including students with autism. She has had specific training on issues relating to behavior management and crisis prevention and has worked with over 30 students with autism. (Green Testimony, Tr. 800-06)

23.

In 2006-07, Ms. Green's MID class had between 8 to 11 students in grades 3 through 5. In addition to Ms. Green, there were two other adults in the classroom – a para-professional ("para-pro") who assisted Ms. Green with all the students and a para-pro who provided one-on-one assistance to [redacted] (Green Testimony, Tr. 824-25, 887)

24.

Ms. Green's classroom was very structured, both in terms of the students'

schedules and the physical lay-out of the classroom.[11] A highly structured environment is beneficial for children with autism, allowing them to anticipate transitions and communicate more effectively through non-verbal means. [redacted] had a clearly defined space within the classroom to work one-on-one with a teacher and an independent work station. Ms. Green also used a Picture Exchange Communication System ("PECS") in her class, which depicted [redacted]'s daily activities and schedule in a visual format. According to Dr. Ernie Whitmarsh, the School District's behavior analyst with TASB, "for children with autism you can't structure a transition too much." (Green Testimony, Tr. 838-40, 844, 847; Boggan Testimony, Tr. 478-79, 486, 512; Berger Testimony, Tr. 1025-26; Whitmarsh Testimony, Tr. 1783; Svetlay Testimony, Tr. 1592-93)

25.

This type of structure was built into [redacted]'s BIP for the 2006-07 school year. For example, the BIP called for the use of PECS, as well as requiring [redacted] to complete a task before moving to the next activity in his PECS work schedule. Thus, if [redacted] had an outburst while working on a task, he was required to go back to the same task, once his behavior subsided, before moving on in his schedule. (Green Testimony, Tr. 841-45; Exhibit D-93, at 0839; Whitmarsh Testimony, Tr. 1702-03; Berger Testimony, Tr. 1027)

26.

During the 2006-07 school year, [redacted] yelled often and loudly and had trouble staying in one area. He would hit with an open hand, kick, and spit at the ground. He

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[11] Many of the methods used by Ms. Green were based on the "TEACH" model (Treatment of Autistic and Communication Handicapped Children), which uses a very structured, visual environment to help children with autism communicate more effectively. Shannon Svetlay, a supervisor at [redacted], described the TEACH model as the "best research practices for students with autism." (Green Testimony, Tr. 803-04, 838, 847; Svetlay Testimony, Tr. 1491)

occasionally would bite or scratch. He would sometimes tantrum, push a desk over, or throw things or himself on the ground. According to Ms. Green, [redacted].'s verbal outbursts were more frequent than the physical aggression. Often, Ms. Green found [redacted]'s behavior unpredictable; that is, she could not discern a "trigger" or antecedent to these behaviors.[12] (Green Testimony, Tr. 831-35)

27.

Approximately three times per month, Ms. Green found it necessary to physically restrain [redacted]. in response to a physically aggressive outburst. Ms. Green was trained in proper restraint techniques as part of her Crisis Prevention Intervention ("CPI") training and she only used restraint as a last resort, when [redacted]. was a danger to himself or others. At some point during the 2006-07 school year, [redacted]. asked Ms. Green to stop restraining [redacted], but after Ms. Green explained the reason for restraint and demonstrated how it was done, [redacted] did not object. (Green Testimony, Tr. 817-20, 835-38; [redacted]. Testimony, Tr. 115, 149)

28.

Ms. Green implemented the BIP strategies during the 2006-07 school year and although they did not extinguish [redacted].'s behaviors, they helped diminish them. Dr. Whitmarsh opined and the Court finds that the strategies identified in [redacted].'s BIP were appropriate for [redacted]. and Ms. Green properly implementing the BIP in her classroom. (Green Testimony, Tr. 841-45; Exhibit D-93, at 0839; Whitmarsh Testimony, Tr. 1693-

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[12] Ellen Weber, [redacted].'s speech therapist, also found that it was "hard to predict what would set him off. I mean there were certain things that you know would, but there was also lots of times when something out of the blue would set him off that never set him off before." (Weber Testimony, Tr. 670)

95, 1702-03; Berger Testimony, Tr. 1027-28; Weber Testimony, Tr. 689)

2. Tension Between Ms. Green and Para-Professional Boggan

29.

At the beginning of the 2006-07 school year, Vermel Boggan was [redacted].'s one-on-one para-pro in Ms. Green's class. Ms. Boggan had moved with [redacted].'s former teacher Ms. Pak from [redacted] to [redacted] and had known [redacted]. since kindergarten. (Boggan Testimony, Tr. 477)

30.

Ms. Boggan did not agree with the methods used by Ms. Green, either as a general matter or as they related to [redacted]. in particular. Ms. Boggan viewed Ms. Green's emphasis on structure as inappropriate and rigid. She testified that Ms. Green's personality and her own "didn't mix" and that she could not "stand the structure." (Boggan Testimony, Tr. 499-501)

31.

Ms. Boggan noted that, unlike Ms. Pak's classroom, Ms. Green's classroom did not have sensory equipment that [redacted]. could use to calm down when he was agitated, such as a tent, a swing or a trampoline.[13] In addition, [redacted]. was not permitted to take breaks if they deviated from his schedule and Ms. Boggan observed Ms. Green "hovering" over [redacted]. and invading his personal space. Ms. Boggan believed that Ms. Green's methods actually caused [redacted]'s behavior to escalate and that her techniques did not result in

[13] Ms. Green testified that she tried a number of sensory strategies with [redacted]. in 2006-07, including a pressure vest, the trampoline, soft lights, soft music, and taking walks. However, [redacted].'s response to them was inconsistent or actually caused his behavior to escalate. (Green Testimony, Tr. 872)

positive behavioral change.[14] (Boggan Testimony, Tr. 481, 484, 490, 503, 515; Green Testimony, Tr. 930-31)

32.

Ms. Boggan testified that Ms. Green used restraint as a "consequence" for behavior.[15] Ms. Green denied this. The Court finds that the evidence is insufficient to prove that Ms. Green used restraint inappropriately during the short time Ms. Boggan was in her classroom, or for that matter, at any other time. Acts of physical aggression by [redacted]., whether they were directed at himself, other people, or school property, could present a danger to himself or others depending on the unique circumstances surrounding the conduct, including the proximity of other students, whether the aggressive conduct is being repeated or is escalating, the physical environment in which the conduct occurred, and other factors. The Court credits Ms. Green's testimony that she limited the use of restraint to those instances of physically aggressive behavior that she judged to present a danger to [redacted] or others.

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[14] [redacted]. testified that "none" of [redacted]'s concerning behavior had occurred when [redacted]. was with Ms. Pak and Ms. Boggan during 2005-06. ([redacted]. Testimony, Tr. 119-20) However, the Court does not find this testimony to be accurate. The IEP from May 2006, before [redacted] entered Ms. Green's class, indicated significant behavioral concerns, including many instances of physical and verbal aggression. In fact, TASB had been called in to assess [redacted].'s behaviors and a placement at [redacted] was considered as early as 2005. Also, Ms. Weber, the speech therapist who has worked with [redacted]. for three years, described significant behavior problems during the 2005-06 school, including constant screaming and tearing up materials. According to Ms. Weber, [redacted].'s behaviors diminished in Ms. Green's class and Ms. Green worked extremely well in calming [redacted]. (Weber Testimony, Tr. 669-72)

[15] Another para-pro, Mollett McCloud, who worked with [redacted] in 2007-08 also testified that Ms. Green routinely used restraint for "correction" for behavior that did not present a danger to [redacted]. or others. For example, Ms. McCloud testified that Ms. Green told her to restrain [redacted] to stop him from damaging school property or turning over desks. (McCloud Testimony, Tr. 195, 224, 255-56)

33.

According to Ms. Boggan, after an incident that required a restraint, [redacted]. would often have to receive a breathing treatment for his asthma. Ms. Green denied that the restraints ever led to [redacted]. having breathing difficulties or escalated his behavior. The Court finds that is not possible to determine, based on the evidence in the record, whether the frequency of asthma attacks following restraint were related to the restraint itself, the initial behavior that led to the restraint, or some combination of the two. In fact, [redacted].'s asthma could be triggered by any physical activity, such as recess or P.E, as well as emotional distress. (Green Testimony, Tr. 927, 952; Boggan Testimony, Tr. 480-84, 517-18; McCloud Testimony, Tr. 228)

34.

After working with Ms. Green for four months, Ms. Boggan asked to be removed from her classroom because of their difference in teaching styles and approach to dealing with [redacted].'s behaviors. (Boggan Testimony, Tr. 496)

3. May 2007 BIP and IEP

35.

On May 15, 2007, the IEP Team modified the BIP to include "pre-teaching each transition with verbal cues" and "maintain[ing] eye contact." The modified BIP also identified new target behaviors under the heading of "Aggression": biting, grabbing, forcefully "pushing, hitting, kicking, head-butting," or throwing objects at others. (Whitmarsh Testimony, Tr. 1696-97; Exhibit 93, at 0840)

36.

On the same date the BIP was modified, the IEP Team met to review [redacted].'s

progress during third grade and plan for fourth grade. [redacted]. was told at this meeting that [redacted] "was doing wonderful, that his behavior had improved and he would continue the token rewards that were in place and that he made great strides, that everything was good." ([redacted]. Testimony, Tr. 95)

37.

The IEP Team meeting notes also highlighted [redacted].'s progress in the areas of speech and language, OT, academics, and behavior. [redacted]. had mastered some of his goals and objectives and made progress on all of them. Dr. Whitmarsh from TASB attended the IEP Meeting and was very positive about [redacted].'s progress, both academically and behaviorally. (Green Testimony, TR. 826-28; Whitmarsh Testimony, Tr. 1798; Exhibit D-83A, at 0668-69)

38.

The current functioning section of the IEP was slightly more circumspect and indicated that [redacted].'s behaviors, although improving, had not been eliminated.

> **Social/Behavioral**: [redacted]. is friendly and outgoing. He often seeks attention and interaction with others yet can at times become anxious, over-excited or frustrated and respond impulsively with verbal or physical aggression. [redacted].'s aggressive behaviors occur most frequently when he does not understand something. His ability to understand or cope with events in his school day often vary [sic] from day to day. [redacted]. is showing a greater awareness of his inappropriate behaviors and a willingness to maintain greater control.

(Exhibit D-83A at 063)

39.

The IEP Team agreed to a placement for fourth grade in the MID classroom with additional adult support for academics. [redacted] was to be placed in a regular education setting for specials. TASB was to provide consultative services one hour per week and

speech therapy and OT services remained unchanged. (Exhibit D-83A)

C. **Fourth Grade (2007-08)**

40.

[redacted]'s behaviors at the beginning of fourth grade were fairly stable. The behavioral data from August 2007 indicated a relatively low occurrence of physical aggression and Ms. Green's records indicated that she did not have to restrain him at all in August or September. Ms. Green observed [redacted] making progress during that time. (Exhibit D-93, at 0837; Whitmarsh Testimony, Tr. 1798; Green Testimony, Tr. 854)

41.

Beginning in October 2007, however, [redacted]'s behavior in Ms. Green's class began to decline. Although the frequency of his inappropriate behavior was decreasing, when it did occur the behavior was more severe. [redacted]'s verbal outbursts were louder, angrier, and "more tantrum-like" than in third grade. His physically aggressive behaviors were escalating as well, including throwing objects at people, spitting in people's faces, and knocking down large items, like a divider and a computer. He broke a white board and a window with his fist. He hit Ms. Green and gave her a black eye and a fat lip. He punched another teacher and other students and banged his own head against the wall. (Green Testimony, Tr. 856-57, 885-87, 861; Weber Testimony, Tr. 671)

42.

Ms. Green continued to find [redacted]'s behaviors unpredictable.[16] However, when

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[16] One factor that may have contributed to [redacted]'s behaviors was the degree of disruptions in the MID class. In October, [redacted] got a new para-pro and the other students in Ms. Green's class moved in and out of the room throughout the school day. His behavior could also be triggered when a teacher or student failed to respond to [redacted]'s questions, when he had an unanticipated change in his schedule, or when his personal

his behavior was under control, he made strides academically. (Green Testimony, Tr. 868, 884) Dr. Whitmarsh considered this development to be significant because of the rise in the intensity of the physical aggression, which were "reminiscent of behaviors I had seen when I first got the referral" in the 2005-06 school year. (Whitmarsh Testimony, Tr. 1798)

43.

Ms. Green notified [redacted]. of some, but not all, of these severe behaviors either through [redacted]'s daily communication log or by telephone. Specifically, Ms. Green notified [redacted]. of the use of physical restraint in October 2007, as well as other instances of screaming, pushing, hitting, and kicking. [redacted]. acknowledged that Ms. Green had noted these types of incidents in the communication log, but she did not appreciate the severity of the behaviors until shortly before the IEP meeting in March 2008.[17] ([redacted] Testimony, Tr. 111, 155; Green Testimony, Tr. 862-67, 947; Exhibit D-102)

44.

In November 2007, [redacted]. attended a conference with Ms. Green, Dr. Whitmarsh and others, where [redacted]'s behaviors were discussed. As a result of this meeting, [redacted]'s BIP was amended to include additional positive behavioral support strategies (maintaining a positive facial expression and not getting close to [redacted]'s face to gain eye contact). Based on the evidence in the record, the Court finds that that these additional strategies were appropriate for [redacted]. and that they were implemented by Ms. Green.

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space was invaded. (Green Testimony, Tr. 885-87, 876; McCloud Testimony, Tr. 225-26)

[17] Ms. Green called [redacted]. on March 7, 2008 and apologized for "sugar-coating" her reports of [redacted]'s behaviors. Ms. Green explained that she intended to apologize for not conveying the information in a way that would ensure that [redacted] grasped the severity of the behaviors. ([redacted] Testimony, Tr. 161; Green Testimony, Tr. 946-47)

(Green Testimony, Tr. 862-67; Exhibit D-102; Exhibit D-93, at 0841; Whitmarsh Testimony, Tr. 1698)

45.

From November 2007 to March 2008, [redacted]'s behaviors in Ms. Green's classroom continued to intensify, although not in a consistent manner. Ms. Green found it necessary to restrain [redacted] more frequently after October 2007. Ms. McCloud, [redacted]'s para-pro at the time, testified that the use of restraints by Ms. Green became very routine after they both attended a training on CPI techniques in October 2007; however, the Court finds that there is no evidence in the record to show that the training did not merely coincide with [redacted]'s intensifying behaviors. In addition, as the Court found above, there is not sufficient credible evidence in the record to support a finding that Ms. Green's use of restraint was improper or in violation of [redacted]'s IEP. (Green Testimony, Tr. 869; McCloud Testimony, Tr. 224)

46.

Ms. McCloud, like Ms. Boggan, disagreed with Ms. Green's approach to addressing [redacted]'s behaviors and found it too rigid. Ms. McCloud believed that [redacted] needed more sensory breaks throughout his day in order to calm him down and avert a full-blown outburst. Ms. Green did not always permit [redacted] to take a sensory break if it deviated from his schedule. When Ms. Green denied a request for a break, [redacted]'s behavior might escalate and "half the class could be torn apart." (McCloud Testimony, Tr. 178-79; Green Testimony, Tr. 906)

47.

Ms. Green acknowledged having disagreements with Ms. McCloud over whether [redacted] needed more personal space and flexibility to choose his activities and schedule. Ms. Green's position was that [redacted]'s educational program needed to focus on managing his behavior and preparing him to participate in society. The Court gives weight to Ms. Green's expert opinion, based on her background and training in autism, that Ms. McCloud's approach actually reinforced [redacted]'s negative behaviors by acceding to his demands to avoid a tantrum.[18] Ms. Green was working with Ms. McCloud on these issues and she had considered having Ms. McCloud replaced. (Green Testimony, Tr. 1003-07)

D. Occupational Therapy

48.

Occupational therapy is a related service for students with disabilities. Generally, OT assists individuals in developing skills they need to perform their "occupations," which for children are school and play. OT in a school setting focuses on skills in the following areas: neuromuscular development, fine motor, sensory motor processing, and self-care or "adaptive" skills. (Grisham Testimony, Tr. 1089-93)

49.

[redacted] does not have difficulties with his fine motor, neuromuscular, or adaptive skills. [redacted]'s deficits revolve around "sensory processing" skills. In 2003, [redacted] was

[18] Barbara Berger, a behavior autism support teacher for the School District, observed [redacted] in Ms. Green's classroom in March 2008, shortly before [redacted] was withdrawn from [redacted]. She observed Ms. McCloud give into [redacted] after he repeated his demand over and over again, more and more loudly. Ms. McCloud's response was inappropriate. (Berger Testimony, TR. 1042-44)

evaluated for OT services and was found to "have difficulty with sensory processing…"

> [T]hese difficulties have had an impact on his ability to sit and focus on tasks appropriately and may also contribute to emotional outbursts in the classroom. [redacted] can be easily over-stimulated by visual and auditory stimulation. He has a high threshold for movement and seeks vestibular[19] input;…. It is recommended that [redacted] receive occupational therapy services on a consult basis to institute a sensory diet into the classroom routine. A sensory diet is a planned program of activities designed to meet a child's specific sensory needs. This scheduled approach was developed to provide an optimal level of arousal and prevent sensory seeking behaviors from interfering with classroom routines.

(Exhibit D-45; Grisham Testimony, Tr. 1092)

50.

During third and fourth grade, [redacted] received 30 minutes per month of OT services on a consultative basis. Essentially, a "consultative basis" meant that the School District's occupational therapist met with Ms. Green for 30 minutes per month to discuss [redacted]'s progress and recommend different OT strategies. (Often, the therapist would also observe [redacted] in the classroom.) [redacted] did not receive any "direct" OT services through the School District, either in a small group or individually.[20] (Grisham Testimony, Tr. 1091, 1141, 1162; Exhibits D- 81; D-83A)

51.

In September 2006, Dr. [redacted], an experienced occupational therapist specializing in autism and sensory integration, began private OT therapy with [redacted] for one hour per week in an outpatient clinic. Dr. [redacted] opined that [redacted]'s behavior issues

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[19] Vestibular means swinging or rotating. ([redacted] Testimony, Tr. 331)

[20] According to Amanda Grisham, an occupational therapist for the School District who works with disabled students, the School District uses a "consultative model" to support classroom teachers when students have sensory processing deficits. The School District does not provide one-on-one sensory integration therapy as a related service. (Grisham Testimony, Tr. 1160, 1163; Bailey Testimony, Tr. 1264)

stem from his "sensory processing issues."[21] In the clinic, Dr. [redacted] tries to teach [redacted] to recognize when he is in an over-excited (or "hyper-sensitive") state and to bring himself down to a calm state, which Dr. [redacted] refers to as "modulating." In a modulated state, [redacted] can respond to sensory inputs, such as noises or movement, in an appropriate, organized way. ([redacted] Testimony, Tr. 332-34)

52.

Dr. [redacted] opined that [redacted] needs individual occupational therapy two hours per week. According to Dr. [redacted], thirty minutes per month on a consultative basis is not adequate to address [redacted]'s sensory processing deficits. "[T]hese are very challenging kids. And you have to know the child and you have to know what sensory input, how it affects that child. You have to know how they relate interpersonally with a teacher, with the other children." Moreover, Dr. [redacted] opined that if [redacted] does not learn sufficient "self-modulation" skills over time, it will "affect his whole functioning in society," including future job performance and inter-personal relationships. ([redacted] Testimony, Tr. 334-36, 349, 360, 392-93)

53.

[redacted] also needs a sensory diet that is tailored to him individually, based on his neurological responses to stimuli. Since a child's response to sensory stimuli can change over time, the creation of a sensory diet is an "interactive" process that must be done by

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[21] As the School District pointed out in its post-hearing filing, Dr. [redacted] did not testify that she, or any other OT professional, had diagnosed [redacted] with "sensory integration dysfunction," but opined that [redacted] had "sensory processing issues." The Court is uncertain of the significance of this distinction, although it may relate to the severity of the impairment. Dr. [redacted] did testify that children with autism generally have different neurological responses to sensory stimuli, which she treats through sensory integration therapy. ([redacted] Testimony, Tr. at 388; Grisham Testimony, Tr. 1094, 1096)

an occupational therapist who has ongoing contact with [redacted]. Although Dr. [redacted] expressed doubt that an occupational therapist who consults only thirty minutes per month could adequately create and monitor an effective sensory diet for [redacted], "it really does depend on their understanding of how [redacted] responds to the different parts of the diet." ([redacted] Testimony, Tr. 349-50, 364)

54.

Dr. [redacted] acknowledged that the clinical setting is different from the educational setting, both in terms of the amount and nature of the sensory stimuli and the appropriate sensory diet for the child. In addition, Dr. [redacted] admitted that her experience was limited to the clinical setting; she has little to no experience in creating sensory diets in schools. She also has not seen [redacted] in his school environment, has not spoken to the School District's occupational therapist, and is not familiar with his OT-related goals and objectives. Accordingly, the Court gives Dr. [redacted]'s opinion relating to the appropriate amount of OT necessary for [redacted] *in the school setting* less weight than the opinion of the school occupational therapist, as set forth below. ([redacted] Testimony, Tr. 346, 373, 395)

55.

Amanda Grisham was [redacted]'s school occupational therapist in fourth grade. Ms. Grisham identified [redacted]'s specific OT goals as remaining seated during instructional time and transitioning appropriately. (Grisham Testimony, Tr. 1107, 1142-43)

56.

In addition to her thirty-minute consultations with Ms. Green every month, Ms. Grisham reviewed historical records to determine what OT strategies had been

successful, or unsuccessful, for [redacted] in the past.[22] Based on these sources, Ms. Grisham recommended that [redacted]'s sensory diet include the following: a visual schedule, a study carrel to reduce visual distractions, low lighting, soft music, soft and calm voices, frequent movement breaks and walks throughout the day, and a bean bag chair as a calming area. Although Ms. Grisham did not disagree that [redacted] needed sensory integration therapy as a general matter,[23] in her expert opinion, [redacted] did not need direct OT services in the school setting to make progress toward his goals and objectives in the IEP.[24] (Grisham Testimony, Tr. 1103-05, 1121-22, 1163)

57.

During the 2007-08 school year, Ms. Grisham spent approximately one hour per week in Ms. Green's classroom providing direct services to other students in [redacted]'s class. During that time, she was able to informally observe [redacted]. Ms. Grisham never saw behaviors that she believed resulted solely from sensory processing difficulties; however, she admitted that she did not observe any of the severe behaviors reported by Ms. Green. (Grisham Testimony, Tr. 1109, 1138, 1142-43)

58.

Weighing the opinions of Dr. [redacted] and Ms. Grisham, giving due regard to their experience, background, training, and specific knowledge of the school environment and

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[22] For example, Ms. Grisham ruled out the use of the trampoline and weighted vest because of [redacted]'s past negative reactions to them. (Grisham Testimony, Tr. 1109-14)

[23] Ms. Grisham did not know that [redacted] was in private therapy with Dr. [redacted]. Ms. Grisham never spoke to [redacted] or attempted to consult her regarding [redacted]'s sensory deficits or successful strategies used at home to calm him down. (Grisham Testimony, Tr. 1125-27)

[24] Research on whether sensory integration strategies are effective for children with autism has not been conducted with large enough sample groups to prove positive outcomes. (Grisham Testimony, Tr. 1121-22)

[redacted]'s education goals, the Court finds that although the School District's consultative model for OT services was not the best method for addressing [redacted]'s sensory processing issues, it was sufficient to allow [redacted] to make progress toward his IEP goals and objectives and to receive adequate educational benefit.

E. Speech and Language Services

59.

[redacted] has a speech and language disorder and his difficulties understanding verbal communications and expressing himself have led to frustration and problem behaviors. [redacted] has received speech and language services through his IEP since being found eligible for special education in 2000. ([redacted] Testimony, Tr. 104, 139)

60.

Since the 2005-06 school year, [redacted] has received one hour of speech therapy services per week from Ellen Weber, an experienced speech pathologist with the School District. Ms. Weber has worked with other students with autism and has attended recent trainings relating to autism and communication skills. (Weber Testimony, Tr. 652-54, 657)

61.

Over the past three years, Ms. Weber has employed a variety of teaching techniques to improve [redacted]'s speech and language skills, including discrete trial training, PECS, social stories, and more recently, peer-mediated therapy. Small group therapy is crucial for [redacted] to develop social communication skills, however, it was not until fourth grade that [redacted] could tolerate small group speech therapy. Prior to that, his therapy sessions were one-on-one with Ms. Weber. The Court finds, as Ms. Weber opined, that it

is "very good" for [redacted] to interact with regular education students, who, ideally, will serve as role models of appropriate behavior and communication skills. (Weber Testimony, Tr. 662, 670, 689, 703)

62.

During her time working with [redacted], Ms. Weber had the opportunity to observe his behavior in the classroom. She observed very difficult behavior in second grade, which diminished when [redacted] entered third grade in Ms. Green's class. Ms. Green was one of the best special education teachers with whom Ms. Weber had ever worked and Ms. Green was even-tempered and calming in her approach to [redacted]. (Weber Testimony, Tr. 649, 669-72)

63.

[redacted] made steady progress on his speech and language goals during the years Ms. Weber worked with him. Ms. Weber opined that the level of speech therapy – two thirty-minute sessions per week in a small group – was appropriate for [redacted] to achieve his speech-language IEP goals. [redacted] did not need speech therapy on an individual or daily basis. In fact, Ms. Weber opined that therapy on that intense a level might be "overkill" and might inundate him. Plaintiff did not present any evidence to contradict Ms. Weber's expert opinion on the frequency or nature of his speech therapy services. The Court therefore finds, based on the evidence in the record, that the School District offered and provided appropriate speech-language services to address [redacted]'s speech impairment. (Weber Testimony, Tr. 672, 677, 693, 730-31, 737)

64.

In February 2008, Ms. Weber observed a deterioration in [redacted]'s behavior that impeded his progress in speech therapy. She observed more frequent and more intense behaviors. (Weber Testimony, Tr. 672, 677, 693, 731)

65.

Ms. Weber never spoke with [redacted]'s private speech therapist regarding his progress or treatment in that setting. The private speech therapist did not testify in the hearing and there is no evidence in the record relating to the services [redacted] received outside the school setting. [redacted] did not participate in Ms. Weber's sessions with [redacted] and it does not appear that either [redacted] or Ms. Weber initiated any communication with the other. (Weber Testimony, Tr. 696, 788)

66.

Apraxia is a neurological disorder that affects a person's ability to coordinate his "speech articulators," such as the lips, tongue or teeth. A "myofunctional" disorder is a reverse swallow pattern that can affect speech and feeding. Ms. Weber did not observe any signs of apraxia or myofunctional difficulties while working with [redacted]. Plaintiffs did not present any evidence to indicate that [redacted] suffered from either of these conditions or that the School District should have had [redacted] evaluated for them. (Weber Testimony, Tr. 665-67, 698)

F. [redacted]

67.

The [redacted][25] program is one of 24 regional psycho-educational programs in Georgia that make up the Georgia Network for Educational and Therapeutic Support ("GNETS"). Under Georgia Department of Education ("Ga. DOE") regulations, the GNETS program is part of the continuum of services offered to students with disabilities and provides comprehensive special education and therapeutic support as an alternative to residential or other more restrictive placements. (Bailey Testimony, Tr. 1183; Exhibit P-3) *See* Ga. DOE Rule 160-4-7-.15(a).

68.

The [redacted] program accepts referrals from within the School District[26] for students who are exhibiting severe behaviors and whose current placements have been unsuccessful in eliminating or managing those behaviors. The [redacted] methodology is based on the principles of applied behavior analysis ("ABA") and focuses on replacing severe behaviors, such as physical aggression, verbal aggression, destruction of property, self-injury, and elopement, with positive behaviors. (Bailey Testimony, Tr. 1184-85; Weidner Testimony, Tr. 1343)

69.

[redacted] is envisioned as a "short-term" placement for students, with a goal of returning the student back to a less restrictive environment once they have learned the

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[25] [redacted] stands for "Hope, Achievement, Victory, Enlightenment, and Nobility" and is the name of the GNETs program that serves students with severe behaviors from the School District. (Bailey Testimony, Tr. 1183-84)

[26] [redacted] also serves students with severe behaviors from Douglas County and Marietta City schools. (Bailey Testimony, Tr. 1230)

behavior skills that will allow them to access the academic curriculum. In order to determine when the student is ready to transition out of the program, [redacted] establishes exit criteria for each student in the program. (Bailey Testimony, Tr. 1188, 1208; Weidner Testimony, Tr. 1339, Svetlay Testimony, Tr. 1496)

70.

[redacted] serves two different populations of students. The first population is composed of students that carry an "EBD" or Emotional Behavior Disorder classification. The second population, within which [redacted] falls, is called the "dual diagnosis strand" and is composed primarily of students that have an autism eligibility[27] under IDEA and also exhibit extreme behaviors. (Bailey Testimony, Tr. 1188-89; Svetlay Testimony, Tr. 1616-17)

71.

[redacted] has designed a specific program to serve students with autism called the Model Autism Classroom ("MAC") program. The MAC program is geared toward the needs of the autistic child in the areas of socialization, communication and sensory processing issues, as well as the needs of the teacher for efficiency and organization when working with students with autism. For example, a MAC classroom is very structured and has many visual components, including PECS and visual schedules, as well as a "calm down" or sensory area and an area for group work. The MAC teachers, who are thoroughly trained and experienced in working with students with autism, can devise and provide a sensory diet in consultation with a [redacted] occupational therapist.

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[27] The dual diagnosis strand also contains students who are not autistic, but have severe behaviors and another disability, such as a learning disability. Of the 422 students served at [redacted] in 2007-08, 100 students had an autism eligibility designation. (Weidner Testimony, Tr. 1339, 1402)

The MAC teachers and para-pros also keep behavior data on each student in the classroom, which is used to help assess the student's progress and evaluate the treatment plan. In addition, the MAC staff are trained in "Mind Set," which is a technique to de-escalate dangerous behaviors and includes physical restraint techniques as a last resort. (Bailey Testimony, Tr. 1190-91, 1200-01, 1263, 196-97; Weidner Testimony, Tr. 1347-49; Svetlay Testimony, Tr. 1491-92, 1534-35, 1603-07)

72.

Many of the components of the MAC program, as described by Dr. Josette Bailey, the Assistant Director of the [redacted] program, were also present in Ms. Green's MID classroom to a large extent. However, an important additional feature of the [redacted] program is the coordination of the many different service providers into a unified and informed "treatment team." Each student at [redacted] has a treatment team composed of the classroom teacher, the para-pro, a therapeutic social worker, and other supportive personnel such as a psychologist, occupational therapist, or speech pathologist. Each treatment team has the opportunity to meet weekly to discuss the students' progress and any needed changes.[28] Parents may be invited to participate in the treatment team meetings. (Bailey Testimony, Tr. 1199-1200; Weidner Testimony, Tr. 1350-51, 1465; Svetlay Testimony, Tr. 1494-95, 1538, 1591-92)

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[28] Although Dr. Bailey testified that the treatment teams meet weekly, Ms. Weidner acknowledged that not all members of the team necessarily meet every week and not every student is discussed by the treatment team each time they meet. In addition, Ms. Svetlay testified that the treatment team may not meet formally more than monthly. (Bailey Testimony, Tr. 1294; Weidner Testimony, Tr. 1406-10; 1476; Svetlay Testimony, Tr. 1583-84)

73.

The therapeutic social worker, who provides direct therapeutic services to students in the classroom, is also charged with being a liaison between the [redacted] service providers, parents, and any outside service providers, such as private therapists. The therapeutic social worker will work with a student's family to help in transferring skills between school and home so that the student will be able to generalize these skills between settings. This role is particularly important because, as Dr. Bailey testified, the parent is the "expert on their child" and plays a critical role in the success of the student. (Bailey Testimony, Tr. 1178, 1192-94, 1205-06, 1226, 1281)

74.

[redacted] offers the MAC program in two different settings. One is within a [redacted] center for kindergarten through 12th grade students called [redacted] School. All of the students at [redacted] have severe behavior problems, although some may be in the dual diagnosis strand and others in the EBD strand. There are no general education students at [redacted] so there is no opportunity for the students placed at [redacted] to interact with students without disabilities. This is considered an "isolated facility" and is the most restrictive on the continuum of available school placements. (Bailey Testimony, Tr. 1189, 1211, 1229; Weidner Testimony, Tr. 1372-73)

75.

[redacted] also has MAC classrooms in 16 satellite settings, which are housed within "regular" schools throughout the School District. As the Director of the [redacted] program, Marianne Weidner, described, the satellite MAC classrooms "more closely represent their home schools...." At the satellite locations, students in the MAC

classrooms may, if their IEPs provide for it, attend classes such as PE, art, and music, and eat lunch, ride the bus, and go to the media center with general education students. In this important respect, the satellite classrooms are less restrictive than [redacted].[29] (Bailey Testimony, Tr. 1209; Weidner Testimony, Tr. 1340-41, 1356, 1373, 1414-16)

76.

Two of [redacted]'s satellite MAC classrooms are located at [redacted] Elementary School. A typical MAC classroom has a small number of students, four to five, and two to three adults, a lead teacher and one or two para-pros. The [redacted] program follows the same academic performance standards as the other schools in the School District; however, the grade levels of the students may vary within the classroom and the students may perform below their grade level.[30] (Bailey Testimony, Tr. 1203, 1318; Weidner Testimony, Tr. 1370, 1396; Svetlay Testimony, Tr. 1497, 151563-65)

77.

Ideally, before a student moves to a [redacted] satellite classroom, the School District tries to prepare the student for the transition by using social stories (a booklet that

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[29] According to Dr. Bailey, a student who is placed in a satellite MAC classroom may need to be moved to [redacted] School because of the additional supports available there and because the student is unable to navigate the regular education environment that surrounds the MAC classroom in the satellite locations, such as the cafeteria, the gymnasium, or the media center. In addition, Dr. Bailey noted that the students at [redacted] typically will have more severe behaviors than those in the satellite MAC classrooms. (Bailey Testimony, Tr. 1210-11, 1259-60; Weidner Testimony, Tr. 1356-57, 1416)

[30] Ms. Weidner acknowledged that providing differentiated instruction across multiple grade levels might be taxing on a classroom teacher, but that [redacted] provides their teachers with the skills, resources, and training to address these challenges. (Weidner Testimony, Tr. 1398-99) The Court also notes that the student-teacher ratio is so low at [redacted] that the academic instruction could, at times, be done on an almost individual basis.

depicts the future transition in pictures) and pre-teaching strategies. In addition, the [redacted] staff will plan for the introduction of the student to the MAC classroom, including, as in [redacted]'s case, training the teachers and staff on his asthma-related health needs. (Svetlay Testimony, Tr. 1502-03, 1605)

G. March 19, 2008 IEP Meeting

78.

The School District scheduled an IEP meeting regarding [redacted] for March 19, 2008. Prior to this meeting, [redacted] was contacted by Mary Rainwater, the Director of Special Education for the School District and asked to visit the [redacted] program because it would be considered a placement option for [redacted]. [redacted] visited the [redacted] Elementary School satellite classroom on four occasions.[31] Her visits ranged from 10 minutes to 30 minutes. She did not visit [redacted]. During her observations, [redacted] did not see many of the components of the MAC classroom described by the [redacted] representatives at the hearing, such as individual visuals or PECS cards, sensory equipment, or a calming area. [redacted] also believed that the students in the classroom at the time of her visits were academically below [redacted]'s level. ([redacted] Testimony, Tr. at 146, 1819-23, 1828, 1837, 1846, 1854-5; Svetlay Testimony, Tr. 1611-12)

79.

[redacted] attended the March 19, 2008 IEP meeting with her daughter and two family friends. There were a number of School District representatives also present, including Ms. Green, Ms. McCloud, Dr. Whitmarsh, Shannon Svetlay, a special education supervisor at [redacted], and others. The IEP Team reviewed [redacted]'s current functioning,

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[31] [redacted] asked permission of the School District to allow her to bring an outside expert with her to visit [redacted]. This request was denied. ([redacted] Testimony, Tr. 1836)

including his behaviors, his need for services, and his goals and objectives. [redacted]. had mastered many of his goals in reading, math, communication, writing, and spelling, and had made significant progress toward mastery of almost all others. (Exhibit D-95A; Svetlay Testimony, Tr. 1488)

80.

The Team also discussed placement options. Although the Team discussed the continuum of placement options from the least restrictive to the most restrictive, the focus of the discussion related to the appropriateness of changing [redacted]'s placement to the [redacted] program, particularly a satellite classroom at [redacted] Elementary. (Green Testimony, Tr. 992-94; [redacted]. Testimony, Tr. 96-97; Svetlay Testimony, Tr. 1488, 1490)

81.

At the IEP meeting, Ms. Svetlay described [redacted], the MAC classroom at [redacted] Elementary, and the [redacted] methodology. Ms. Svetlay told [redacted]. that if [redacted]. were placed at [redacted] Elementary, he could be moved to [redacted]'s in-center school, [redacted], at any time the School District thought it was necessary. According to School District practice, the move from a satellite classroom to [redacted] would occur without an IEP meeting (and presumably without prior written notice to the parent) because in the eyes of the School District the program is the same in both places and it takes time to get an IEP Team meeting scheduled.[32] Nevertheless, Ms. Svetlay testified that the School District would try to notify the parents before a child is moved in-center and that they would try to involve the parents in the decision. (Svetlay Testimony, Tr.

[32] Ms. Weidner testified that "theoretically" students could bounce back and forth between in-center and satellite classes, but in practice it does not happen frequently. In 2007-08, Ms. Weidner testified that five students "returned" to in-center placements from satellite schools. (Weidner Testimony, Tr. 1417-18)

1489, 1506-11, 1514; Weidner Testimony, Tr. 1416-17; [redacted] Testimony, Tr. 1841)

82.

At the meeting, Dr. Whitmarsh shared TASB's recent observations of [redacted] and his recommendation that a functional behavior analysis be done to determine what variables were contributing to [redacted]'s behaviors. The school personnel members of the IEP Team recommended that TASB remain involved with [redacted] to help in determining what the "root cause" of [redacted]'s behaviors are and how best to replace them. (Exhibit D-93; M.C. Testimony, Tr. 98-99; Svetlay Testimony, Tr. 1499)

83.

The IEP Team agreed that [redacted]'s needs could be met in the general education setting for specials, as long as he had additional adult support. Specifically, the Program Summary from the March 19, 2008 IEP required that [redacted] participate daily in specials in a regular education setting. (Svetlay Testimony, Tr. 1496, 1544) The rationale listed for this service was that [redacted]'s "needs can be met in General Education for this subject/service."[33] (Exhibit D-95A, pg. 15 of 22)

84.

The IEP Team, with the exception of [redacted] and her guests, agreed that the [redacted] Elementary classroom, with one-on-one adult support, was the most appropriate

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[33] The School District argued that because the IEP Team Meeting Notes, which were drafted by the School District without review or input from [redacted], stated that [redacted] will access the general education setting "as tolerated," that the services offered to [redacted] were somehow conditional and that the School District could unilaterally withdraw that service without prior notice and without IEP Team approval. (Svetlay Testimony, Tr. 1498, 1544, 1600; Exhibit D-95A, p. 22 of 22; [redacted] Testimony, Tr. 156) The Court finds that the minutes are not a binding part of the IEP and that the School District's interpretation of the minutes is self-serving and contrary to the IDEA. *See infra* Section E.3(c).

placement for [redacted]. The School District members of the Team discussed transferring [redacted] to [redacted] quickly, within a week of the meeting. (In fact, [redacted]. was told that if she did not file a due process hearing request within three days they would send [redacted]. straight to [redacted].) Ms. Svetlay testified that such haste was due to her personal opinion that [redacted]. was "in crisis." None of the witnesses that actually worked with [redacted]. testified that he was "in crisis" or that such a transition was immediately necessary. (Svetlay Testimony, Tr. 1494, 1519, 1589, 1593; Whitmarsh Testimony, Tr. 1800-01; [redacted] Testimony, Tr. 1841)

85.

Ms. Green agreed with the proposed placement at [redacted] Elementary because it was less restrictive than [redacted]. "I liked the idea of – [redacted] was least [sic] restrictive than [redacted]. And I think that he has a lot of potential with just a little bit more that he could – with those interventions, I could certainly see him moving into a least restrictive environment again." (Green Testimony, Tr. 994)

86.

As a general matter, the School District's witnesses agreed that it was preferable that [redacted]. be placed in a satellite classroom so that he could be "integrated as much as possible with children who don't have disabilities." Research on educating children with autism has shown that facilitated interactions between children with autism and their non-disabled peers are beneficial to autistic students. (Bailey Testimony, Tr. 1258; Svetlay Testimony, Tr. 1522-23)

87.

[redacted] opposed the placement at [redacted] Elementary, particularly under the terms

set by the School District regarding its right to transfer [redacted]. to [redacted] without notice and an IEP meeting. She asked for an outside behavioral analyst to evaluate [redacted] in the classroom and for Dr. [redacted] to be permitted to visit [redacted], but the Team declined these requests. [redacted] participated in the meeting until she began to believe that the outcome was inevitable, at which point she "sat idly" and no longer contributed to the discussion. ([redacted] Testimony, Tr. 145-46, 1836, 1843; Svetlay Testimony, Tr. 1623-29)

H. [redacted]'s Behaviors in Other Settings

88.

Plaintiff presented a number of witnesses, including [redacted]., [redacted]'s PE teacher, his tutor, family friends, and others, who testified that [redacted] did not exhibit severe behaviors in other settings. However, the Court finds that the other settings described by those witnesses were different than the classroom academic environment, where academic demands were placed on [redacted]. in a structured environment in the presence of peers and school staff. The Court credits the expert opinions of Dr. Whitmarsh, Dr. Bailey, and Ms. Weidner that the fact that [redacted]. did not have severe behaviors in other settings, such as home, PE, and individual tutoring, or when his mother was present in the classroom, was not significant in assessing the severity of his behavior in the academic classroom setting or determining the appropriateness of an alternative, more restrictive academic placement. (Whitmarsh Testimony, Tr. 1743, 1763, 1769, 1790; Bailey Testimony, Tr. 1287-88; Weidner Testimony, Tr. 1412, 1414)

I. [redacted]'s Withdrawal from the School District

89.

After [redacted] filed the due process complaint that initiated this hearing, [redacted] remained in Ms. Green's classroom as a "stay put" placement until March 28, 2008. On that date, [redacted] returned home from school with a long scratch on his face. The probative evidence presented at the hearing does not show what caused the scratch on [redacted]'s face that day. However, the undisputed evidence was that Ms. Green and Ms. Berger, an autism support teacher who was observing [redacted] in the classroom, physically restrained [redacted] that day after he aggressively hugged and licked Ms. Weber on the face during speech therapy and then began to hit and kick Ms. Berger and Ms. Green, knock over desks, attempt to run, and hit Ms. Weber's arm. (Weber Testimony, Tr. 685; Green Testimony, Tr. 986-87; M.C. Testimony, Tr. 122; Exhibit P-9)

90.

[redacted] was upset over the scratch and withdrew [redacted] from the School District after this incident. [redacted] began a home-study program with a private tutor for the remainder of the school year. He has done well with the tutor and not demonstrated severe behaviors or physical aggression toward her. ([redacted] Testimony, Tr. 100, 122; DeSilva Testimony, Tr. 580-82)

III. CONCLUSIONS OF LAW

A. General Law

1.

The pertinent laws and regulations governing this matter include IDEA, 20 U.S.C. § 1400 *et seq.*; federal regulations promulgated pursuant to IDEA, 34 C.F.R. § 300 *et*

seq.; and Georgia Department of Education Rules, Ga. Comp. R. & Regs. ("Ga. DOE Rules"), Ch. 16-4-7.

2.

Claims brought under IDEA are subject to a two-year statute of limitations. *See* 34 C.F.R. § 300.507(a)(2). Plaintiff filed his due process hearing request on March 25, 2008. Thus, only events occurring after March 25, 2006 are at issue in this proceeding. *See generally* W.C. v. Cobb County Sch. Dist., 407 F. Supp. 2d 1351, 1353 (N.D. Ga. 2005); Draper v. Atlanta Indep. Sch. Sys., 480 F. Supp. 2d 1331 (N.D. Ga. 2007), *aff'd*, 518 F.3d 1275 (11th Cir. 2008).

3.

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

B. **FAPE**

4.

Under both federal and state law, students with disabilities have the right to a free appropriate public education ("FAPE"). 20 U.S.C. § 1412(a)(1); 34 C.F.R. §§ 300.1, 300.100; Ga. DOE Rule 160-4-7-.01(1)(a). "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 . . . .'" C.P. v. Leon County Sch. Bd., 483 F.3d 1151 (11th Cir. 2007), *quoting* 20 U.S.C. § 1400(d)(1)(A).

5.

The United States Supreme Court has developed a two-part inquiry to determine whether a school district has provided FAPE: "First, has the State complied with the procedures set forth in the Act? And second, is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 (1982). "This standard, ... has become know as the *Rowley* 'basic floor of opportunity' standard." C.P., 483 F.3d at 1152, *citing* JSK v. Sch. Bd., 941 F.2d 1563, 1572-73 (11th Cir. 1991). *See also* Draper, 518 F.3d at 1280.

6.

Under the *Rowley* standard, a school district is not required to provide an education that will "maximize" a disabled student's potential; "rather, it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit him to benefit from instruction." Loren F. v. Atlanta Indep. Sch. Sys., 349 F.3d at 1312 n.1 (11th Cir. 2003)(citations omitted). In order for Plaintiff to show that the School District's IEPs were not reasonably calculated to allow [redacted] to receive educational benefit, Plaintiff must show that the IEPs did not permit him to make "measurable and adequate gains in the classroom." JSK, 941 F.2d at 1573 ("[a]dequacy must be determined on a case-by-case basis in the light of the child's individual needs"); KC v. Fulton County Sch. Dist., 2006 U.S. Dist. LEXIS 47652, n.4 (N.D. Ga. 2006).

7.

Moreover, the IDEA does not require a school district to "guarantee a particular outcome" and the adequacy of an IEP cannot be judged by whether the student

successfully mastered all of the IEP's goals and objectives. W.C., 407 F. Supp. 2d. at 1359, *citing* Rowley, 458 U.S. at 192. "In evaluating the appropriateness of an IEP, the Court must determine the measure and adequacy of the IEP at the time it was offered to the student and not at some later date." Draper, 480 F. Supp. 2d at 1345, *citing* Carlisle Area Sch. v. Scott P., 62 F.3d 520, 535 (3rd Cir. 1995). An "IEP is a snapshot, not a retrospective. In striving for appropriateness, an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, the time the IEP was promulgated." Mandy S. v. Fulton County Sch. Dist., 205 F. Supp. 2d 1358, 1367 (N.D. Ga. 2000).[34] Finally, "[i]n determining whether a student has received adequate education benefit, ... the Eleventh Circuit has noted that courts should pay 'great deference' to the educators who developed the IEP." W.C., 407 F. Supp. 2d at 1359, *citing* JSK, 941 F.2d at 1573.

C. **Least Restrictive Environment**

8.

In addition to the mandate that all children with disabilities be provided with a FAPE, IDEA also contains a "specific directive" regarding the placement of disabled children. *See* Greer v. Rome City Sch. Dist., 950 F.2d 688, 695 (11th Cir. 1992) (subsequent history omitted); L.G. v. Sch. Bd. of Palm Beach County, 255 Fed. Appx. 360 (11th Cir. 2007)(unpublished decision). The states are required to develop procedures that ensure that –

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[34] As the Eighth Circuit noted in CJN, *infra*, "when a disabled student has failed to achieve some major goals, it is difficult to look back at the many roads not taken and ascertain exactly how reasonable his IEPs were at the time of their adoption.... But this difficulty is precisely why we have recognized that 'as long as a student is benefiting from his education, it is up to the educators to determine the appropriate educational methodology.'" 323 F.3d at 638 (citations omitted).

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

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

34 C.F.R. § 300.114.

9.

The Eleventh Circuit refers to this directive as "mainstreaming" or placement in the "least restrictive environment," but recognizes the "tension" between the goal of mainstreaming and meeting each child's unique needs. Greer, 950 F.2d at 695. The Court in *Greer* adopted a two-part test to address mainstreaming issues: (1) "whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily," and (2) "if it cannot and the school intends to provide special education or remove the child from regular education, ... whether the school has mainstreamed the child to the maximum extent appropriate." Id. at 696. Each case must be analyzed individually to determine the nature and severity of the child's disability and the school's response to the child's needs. Id.

D. Placement and Services at Fair Oaks Elementary

1. The IEPs

10.

In applying the above standards to [redacted]'s education while at [redacted], the Court concludes that both the May 2006 IEP and the May 2007 IEP were reasonably calculated to provide [redacted] with educational benefit and that [redacted] did, in fact, make measurable and adequate gains during his third and fourth grade years. Both IEPs placed [redacted] in an MID

classroom with many supports and services specifically tailored to meet [redacted].'s unique needs and allow him to access the academic curriculum. He was provided an experienced teacher, a one-on-one para-pro, a highly-structured and visual environment, and appropriate related services such as speech therapy and occupational therapy. The School District also adopted and revised an appropriate BIP and enlisted the recommendations and services of TASB to address [redacted].'s behavioral concerns. Plaintiff failed to prove by a preponderance of the evidence that the services offered through the IEP were not sufficient to permit him to benefit from instruction.

11.

With respect to OT services in particular, the Court finds that the IEPs provided the "basic floor of opportunity" in terms of addressing [redacted].'s sensory processing issues. See M.M. v. Sch. Bd., 437 F.3d 1085, 1102-03 (11th Cir. 2006). In M.M., the Eleventh Circuit reiterated that the IDEA does not require that the "best" program or methodology be employed by the School District in order to provide FAPE. Id. Thus, although the Court does not discount Dr. [redacted]'s expert opinion about [redacted].'s need for sensory integration therapy and the School District does not dispute that such therapy might enhance [redacted].'s educational experience, Plaintiff failed to prove by a preponderance of the evidence that sensory integration therapy is a related service that [redacted] needs to receive educational benefit in a school setting.

12.

In fact, the evidence in the record shows that [redacted] did benefit from instruction while at [redacted], despite his intensifying behaviors. He made progress on all his IEP goals, including academic goals, speech and language goals, and even some of his school

behavior goals, such as following one-step directions, responding to redirection, and transitioning with verbal prompts. His academic progress, which included mastery of many of his goals and objectives in math, language arts, and reading, is particularly relevant to the educational benefit inquiry in light of [redacted].'s severe behaviors. "It demonstrates that his IEPs were not only reasonably calculated to provide educational benefit, but, at least in part, did so as well." CJN v. Minneapolis Pub. Schs., 323 F.3d 630, 638 (8th Cir. 2003), *cert denied*, 540 U.S. 984 (2003), *quoted in* W.C. v. Cobb County Sch. Dist., 407 F.Supp. 2d 1351 (N.D. Ga. 2005).

2. Least Restrictive Environment

13.

The Court further concludes that the placement in the MID classroom at [redacted] met IDEA's mandate that [redacted]. be educated in the least restrictive environment ("LRE"). 34 C.F.R. § 300.114. [redacted]. was able to interact with non-disabled students during his specials, lunch, recess, and other times throughout the day, while still receiving his academic instruction in a small group setting designed to support his behavioral, academic, and social needs. *See* 34 C.F.R. § 300.117. Notwithstanding Plaintiff's conclusory statements that [redacted]. should be educated in a regular education setting with supports, Plaintiff failed to meet its burden of proving that [redacted]. could satisfactorily receive academic instruction in a regular classroom, even with supplemental aids and services. Rather, the evidence in the record shows the opposite. It is precisely during academic instruction that [redacted]. is most likely to exhibit the extreme behaviors that necessitate special education instruction in a structured, small-group setting with one-on-one adult assistance.

3. Review and Implementation of IEP

14.

A School District is not permitted to rely on an IEP that, because of changing circumstances, is no longer adequate to meet a student's needs. An IEP Team must review a student's IEP "periodically, but not less than annually, to determine whether the annual goals for the child are being achieved," and must revise the IEP as appropriate to address the child's lack of progress, incorporate new information about the child, or to meet the child's anticipated needs. See 34 C.F.R. § 300.324(b). In this case, the IEP Team met in November 2007 to address concerns regarding [redacted]'s behavior and revise his BIP. In addition, the IEP Team convened two months early to review [redacted]'s IEP in March 2008 because of a perceived change in his behaviors and a need to consider revisions to his IEP. The Court finds that the School District acted in a timely manner to review and revise [redacted]'s IEP in the face of his intensifying behaviors.

15.

Plaintiff argues that even if the IEP was appropriate, [redacted] was denied FAPE because Ms. Green inappropriately, and "illegally," restrained [redacted]. *See generally* 42 U.S.C. § 15009(a)(3)(B)(iii) (*Developmentally Disabled Assistance and Bill of Rights Act* ("DDABRA")).[35] As an initial matter, neither the IEP nor [redacted]'s current BIP explicitly address the use of physical restraint. (The last specific mention of restraint was in the

[35] The Court notes that the DDABRA, which Plaintiff cites to support the proposition that [redacted] was subject to "illegal" restraint was "'intended to be hortatory, not mandatory'" and does not create an enforceable right or a corresponding obligation on behalf of the State. Olmstead v. L.C. by Zimring, 527 U.S. 581, 599 (1999), *quoting* Pennhurst State Sch. And Hosp. v. Halderman, 541 U.S. 1 (1981). Moreover, to the extent that the DDABRA provides that services for individuals with developmental disabilities "should be designed to maximize the potential of the individual," it is in conflict with *Rowley* and its progeny and does not apply to this case.

2005 BIP.) However, assuming *arguendo* there was an implicit provision in the IEP that prohibited the use of restraint "unless absolutely necessary to ensure the immediate physical safety of individual or others" or that the IEP Team was somehow obligated to include such a provision in the BIP,[36] the Court has found that Plaintiff failed to prove that restraints were used in violation of such a provision. Rather, the Court concludes, as did the court in CJN, that even though [redacted] may have been "subject to an increased amount of restraint in his [fourth]-grade year, ... that fact alone does not make his education inappropriate within the meaning of the IDEA." CJN, 323 F.3d at 640 ("Because the appropriate use of restraint may help prevent bad behavior from escalating ..., we refuse to create a rule prohibiting its use, even if its frequency is increasing").

4. Procedural Violations

16.

Plaintiff argues that the School District violated her procedural rights under IDEA by failing to fully inform [redacted] of the severity of his behaviors during fourth grade. This argument is without merit. First, [redacted] was informed by Ms. Green of many of the episodes of severe behaviors during the fall of 2007 and early 2008. Second, although Ms. Green may have focused on [redacted] positive accomplishments and tempered negative information with words of encouragement, the Court concludes that she did report to [redacted] the essential facts regarding his behaviors. Finally, [redacted] admits that she was

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[36] "In the case of a child whose behavior impedes the child's learning or that of others," the IEP Team must "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." 34 C.F.R. § 300.324(a)(2)(i). Although restraints could be encompassed under "other strategies," there is no explicit requirement that the IEP Team consider restraint. Accordingly, under 34 C.F.R. § 300.320(d), the Court concludes that the IEP Team was not required to include a provision relating to restraint in the BIP or the IEP.

informed of the severity of [redacted]'s behaviors in the weeks preceding the March 19, 2008 IEP meeting. Accordingly, because [redacted] was provided sufficient information in time to prepare for and participate in the IEP meeting, there is no harm from any alleged omission or misrepresentation.

17.

Under IDEA, in order to prove a denial of FAPE based on a procedural violation by the School District, Plaintiff must show that the procedural inadequacies "(i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit." *See* 34 C.F.R. § 300.513(2); 20 U.S.C. § 1415(f)(3)(E). *See also* Weiss v. Sch. Bd., 141 F.3d 990, 996 (11th Cir. 1998). Under *Weiss*, the Eleventh Circuit held that where a family has "full and effective participation in the IEP process . . . the purpose of the procedural requirements are not thwarted." 141 F.3d at 996.

18.

Moreover, although the IDEA's procedural safeguards are set up to "protect the informed involvement of parents in the development of an education for their child," a parent's right to full disclosure arises in relation to the decision-making process, when a parent's consent is to be sought. *See* Winkelman v. Parma City Sch. Dist., 127 S.Ct. 1994, 2000 (2007) *citing* 20 U.S.C. 1415(b)(1). *See also* 34 C.F.R. § 300.9(a) (If a parent's consent is sought for an activity, the parent must be "fully informed of all information relevant to the activity"); 20 U.S.C. § 1414(a)(1)(D) (IDEA requires the School District to obtain "informed consent from the parent of such child before

providing special education and related services to the child"). These provisions do not require that parents receive daily reports on their child's activities,[37] or that every report must be a stark and dispassionate rendering of their child's performance. Indeed, although a teacher may not deceive or purposely mislead a parent, this Court finds that a caring teacher's tendency to emphasize a student's accomplishments, rather than his setbacks, is not a procedural violation of the IDEA.

E. **May 2008 IEP**

1. Pre-Determination

19.

Plaintiff argues that the School District violated the procedures of IDEA by "pre-determining" the appropriate placement, thus denying [redacted] her right to meaningfully participate in the development of the IEP. Greer v. Rome City Sch. Dist., 950 F.2d at 696.

> We have underscored the importance of the development of the IEP. It is during this developmental process that school officials should consider the full range of supplemental aids and services that may be provided in conjunction with regular classroom education, and they should share these considerations with the child's parents at the IEP meeting. It is not sufficient that school officials determine what they believe to be the appropriate placement for a handicapped child and then attempt to justify this placement only after the proposed IEP is challenged by the child's parents.

Id.

20.

[redacted] came to the March 19, 2008 IEP meeting with misgivings about the [redacted] program. Many of the other IEP Team members, including Ms. Green and

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[37] "Although the IDEA envisions full parental participation in the development of the IEP, the Act does not mandate full parental participation in every aspect of the education process." Weiss, 141 F.3d at 997.

providing special education and related services to the child") (emphasis added). These provisions do not require that parents receive daily reports on their child's activities,[37] or that such reports must be a stark and dispassionate rendering of their child's performance. Indeed, although a teacher may not deceive or purposely mislead a parent, this Court finds that a caring teacher's tendency to emphasize a student's accomplishments, rather than his setbacks, is not a procedural violation of the IDEA.

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others, clearly entered the meeting with concerns that [redacted]'s current placement was not fully addressing his intensifying behaviors; however, it is unclear how much these members knew about [redacted] prior to the meeting or what their thoughts were about the available placement alternatives. At the meeting, Ms. Svetlay provided information about [redacted] to the members of the IEP Team and, in turn, listened to the reports of [redacted]'s teachers and service providers regarding his present level of functioning.

21.

The Court understands [redacted]'s feelings as she sat in the IEP meeting and sensed that the School District members were coalescing around a placement choice with which she adamantly disagreed. However, the Court does not find that the evidence in the record supports a conclusion that a [redacted] placement was pre-determined by the School District and that they have only justified their decision in anticipation of this hearing. The Court's conclusion is bolstered by evidence that the School District twice previously considered a placement at [redacted] for [redacted]. and decided that it was not appropriate for him at those times.

22.

The Court is persuaded by the Tenth Circuit's discussion in T.W. v. Unified Sch. Dist. No. 259, 136 Fed. Appx. 122 (10th Cir. 2005) (unpublished decision) that the prohibition against pre-determination does not mean that the School District members must enter an IEP meeting with completely blank minds.

> Certainly, it is improper for an IEP team to pre-determine a child's placement, and then develop an IEP to justify that decision. *See* Spielberg ex rel. Spielberg v. Henrico County Pub. Sch., 853 F.2d 256, 259 (4th Cir. 1988). This does not mean, however, that district personnel should arrive at the IEP meeting pretending to have no idea whatsoever of what an appropriate placement might be. "*Spielberg* makes clear that school

officials must come to the IEP table with an open mind. But this does not mean they should come to the IEP table with a blank mind." (citation omitted)

Id. Although the Court appreciates [redacted].'s feelings as the meeting progressed that the outcome was inevitable, causing her to sit "idly" by while the Team completed their discussion about placement, the Court concludes that [redacted].'s placement was not pre-determined by the School District prior to the meeting in violation of the IDEA.

2. Refusal to Allow Expert Observation

23.

Plaintiff argues that the School District denied [redacted].'s request to have Plaintiff's experts, namely Dr. [redacted], visit and observe the prospective [redacted] placement at [redacted] Elementary, thereby hindering [redacted].'s meaningful participation in the development of the IEP. Specifically, Plaintiff argues that by denying Dr. [redacted] access to the prospective placement, the School District limited [redacted].'s ability to gather evidence and level the playing field in a contested case. *See* John M. v. Bd. of Educ. Of Evanston Twp. High Sch. Dist. 202, 450 F. Supp. 2d 880 (N.D. Ill. 2006), *rev'd on other grounds*, 502 F.3d 708 (7th Cir. 2007).

24.

It is unclear from the evidence in the record who from the School District actually "declined" [redacted].'s request to have Dr. [redacted] visit [redacted]. Apparently, this request was made at the March 19, 2008 IEP meeting and the denial was made by some member(s) of the IEP Team. Based on the scant evidence in the record regarding how and to whom the request was made, who responded on behalf of the School District, and what exactly the response to the request was, the Court cannot find that there was a definitive refusal by

the School District to allow Dr. [redacted]'s visit to [redacted]. Moreover, the legal authority cited by Plaintiff does not establish a parent's absolute right to have an expert observe an educational placement and the Court is unaware of any provision of IDEA that confers such a right.

25.

Thus, although the Court is persuaded that Dr. [redacted]'s observation would have assisted [redacted] in her assessment of the prospective placement and is troubled by what may have be an unjustified response to [redacted].'s reasonable request, the Court is unable to find a violation of [redacted].'s procedural rights based on the record in this case.

3. Prospective Placement: MAC Classroom at [redacted]

a) Eligibility for Placement

26.

At the hearing, Plaintiff made a motion to exclude evidence regarding [redacted] because [redacted] was not eligible to be placed there. Specifically, Plaintiff argued that Ga. DOE Rule 160-4-7-.15, which was revised in 2007, provided that only children who have been classified as having an emotional behavior disorder ("EBD") were eligible to be placed in a GNETS psycho-educational center. The Court made a preliminary ruling at the hearing that Rule 160-4-7-.15 did not, as a matter of law, preclude the placement of children with other disabilities in a GNETS program. However, the Court found that because the GNETS program, of which [redacted] was a part, was specifically designed to serve EBD students, Plaintiff had made a prima facie case that [redacted] was not the appropriate placement for a student with autism. Thus, the burden of proving that [redacted] was appropriate shifted to the School District. (Court's Ruling, Tr. 312-15)

27.

The Court confirms its preliminary ruling here, but concludes that the School District met its burden of proving the appropriateness of the prospective placement at the MAC classroom at [redacted] Elementary. The MAC classroom is specifically designed with the needs of autistic students in mind. It incorporates research-based methods, practices, and models for teaching students with autism that are implemented by teachers and staff that have been trained in working with children with autism and severe behaviors. Appropriate related services, such as OT and speech pathology, would be available to [redacted]. at [redacted] and all [redacted].'s services would be coordinated and monitored on a regular basis by a treatment team.

28.

The Court views the treatment team component to be particularly important to the provision of special education services to [redacted] given the variety of services that are part of his IEP. It is evident from the record that although there has been some attempt to coordinate these services in the past, [redacted]. and [redacted] will benefit from a more systematic collaboration among his service providers, including his private providers, which is available through the treatment team at [redacted]'s satellite classroom.

29.

Finally, the Court concludes that based on the evidence of [redacted].'s intensifying behaviors, including self-injury and significant physical aggression toward his teacher and peers, [redacted]. needs the therapeutic environment offered by the [redacted] program and their trained staff to address his behavior issues and special needs associated with autism. Accordingly, the Court concludes that the prospective placement in the [redacted] MAC

classroom at [redacted] offered [redacted]. a free and appropriate public education.

b) Least Restrictive Environment

29.

The Court further concludes that the satellite MAC classroom at [redacted] Elementary meets the IDEA's directive that [redacted] be educated in the least restrictive environment. The IEP specifically provides that [redacted] will attend specials with a regular education class on a daily basis, while remaining in the small-group, structured, therapeutic environment that is needed to meet his academic and behavioral needs. By ensuring that [redacted]. continues to have interactions with his regular education peers within [redacted] Elementary, the prospective placement allows [redacted]. to be mainstreamed to the maximum extent appropriate in compliance with 34 C.F.R. § 300.114 & § 300.117.

c) School District's Assertion of Unilateral Right to Transfer [redacted]. to [redacted] without Prior Written Notice or an IEP.

30.

A large part of [redacted].'s objection to the prospective placement related to the School District's steadfast insistence that once [redacted]. was placed at the satellite class at [redacted] the School District could unilaterally move him to [redacted] School. The School District went to great lengths both at the March 19, 2008 IEP meeting and at the due process hearing to assert an absolute right to transfer [redacted]. between [redacted] and [redacted] without the inconvenience of providing prior notice to his parent or convening an IEP Team meeting. Based on the record in this case and the IDEA's requirement of prior written notice under 20 U.S.C. § 1415(c), the Court concludes that the imposition of this condition on [redacted].'s prospective placement was improper and significantly impeded [redacted].'s opportunity to participate in the decision-making process

regarding the provision of FAPE to [redacted]. See 34 C.F.R. § 300.503.

31.

Under IDEA, the School District may not change the "educational placement" of a child or "the provision of FAPE" to a child without first providing the parent written notice of the proposed change, an explanation of why the change is necessary, and a statement of the parent's right to employ the Act's procedural safeguards to contest the change.[38] 34 C.F.R. § 300.503(a) & (b). It is clear in this case that participation in regular education classes for specials on a daily basis is a significant part of the provision of FAPE to [redacted] by the School District. It is explicitly included in his IEP. Indeed, as the Court concluded above, it is what makes the proposed placement compliant with the IDEA's mainstreaming directive. Moreover, all of the School District's witnesses, without exception, agreed that it was important for [redacted] to maintain interaction with regular education peers.[39]

32.

The Court concludes that any change that would completely deny [redacted] access to

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[38] One of the important procedural safeguards available to parents under IDEA is the right to invoke the "stay put" provision pending an appeal. *See* 20 U.S.C. § 1415(j); CP v. Leon County Sch. Bd. Fla., 483 F.3d 1151 (2007), *cert. denied*, 128 S.Ct. 232 (2007) ("With the stay-put provision, Congress has provided procedural protection to disabled children and their parents by preventing unilateral action by school administrators in contravention of a child's or parent's objection, until the completion of review proceedings").

[39] Congress recognized the benefits of mainstreaming for disabled students generally in IDEA. *See* 20 U.S.C. § 1400(c)(5)("Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible..."). *See also* Greer, 950 F.2d at 697 (disabled children will receive "considerable non-academic benefit, such as language and role-modeling, from association" with non-disabled peers).

regular education as specified in his IEP would be a change in "the provision of FAPE" to him and require prior written notice under IDEA. Transferring [redacted] to [redacted] from the [redacted] satellite classroom would effect such a change. There are no regular education students at [redacted]. In fact, the students at [redacted] exhibit much more severe behaviors than even the students within a satellite MAC classroom. As the [redacted] witnesses acknowledged, [redacted] is the most restrictive placement for students within the School District, short of a residential or home-based placement.

33.

The School District argues that because the methodology used at [redacted] is essentially the same as that used in the [redacted] satellite classrooms, transferring [redacted] to [redacted] would only be changing the "location" of his services, not his "educational placement." This argument is without merit under the particular facts of this case. First, "a change in educational placement" is not defined by the Act. *See* John M. v. Bd. of Educ. of Evanston Twp. High Sch. Dist. 202, 502 F.3d 708 (7th Cir. 2007)(The term "'educational placement' is not statutorily defined, so that identifying a change in this placement is something of an inexact science") (citation omitted). "In the typical case, educational placement means a child's educational program and not the particular institution where that program is implemented." Hill by & Through Hill v. Sch. Bd., 954 F.Supp. 251, 253 (M.D. Fla. 1997), *aff'd without decision*, 137 F.3d 1355 (11th Cir. 1998), *citing* Weil v. Bd. of Elementary & Secondary Educ., 931 F.2d 1069 (5th Cir. 1991), *cert. denied*, 502 U.S. 910 (1991); Concerned Parents & Citizens for Continuing Educ. at Malcolm X (PS 79) v. New York City Bd. of Educ., 629 F.2d 751 (2d Cir. 1980).

34.

In this case, given the specific provision in [redacted].'s IEP and the nature of [redacted] as an "isolated facility," a change from a [redacted] satellite classroom to [redacted] would change [redacted]'s educational program, not just the physical location of that program. As the Second Circuit found in Concerned Parents, "a decision to transfer a handicapped child from a special class in a regular school to a special school would involve the sort of fundamental alteration in the child's education requiring prior parental notification..." 629 F.2d at 754, *quoted in* John M., 502 F.3d at 714.[40] The [redacted] satellite classroom at [redacted] is a "special class in a regular school" and [redacted] is a "special school." Accordingly, any decision to transfer [redacted]. from [redacted] to [redacted] would fundamentally alter [redacted].'s education and require prior parental notification.

35.

W.C. v. Cobb County Sch. Dist., 407 F. Supp. 2d 1351 (N.D. Ga. 2005) does not dictate a different conclusion. In W.C., the federal district court heard an appeal relating to the HAVEN program. However, a key factual difference between that case and the instant case is that the W.C. began his placement at Fitzhugh Lee School. 407 F. Supp. 2d at 1355. In fact, the federal district court described the HAVEN program as follows:

> It begins as an in-center program, where the students receive intensive services and instruction in these areas. Once they achieve a level of fluency in those skills, the students have the opportunity to apply and

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[40] The Second Circuit looked to the federal regulation requiring school districts to have available a "continuum of alternative placements" to help determine what a change in educational placement was under the Act. Concerned Parents, 629 F.2d at 754. Under 34 C.F.R. § 300.115, alternative placements are identified as "instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions." IDEA makes a clear distinction between "special classes" within a regular school environment, such as a [redacted] satellite classroom, and a "special school" like [redacted].

> practice their skills in transition or merit classrooms[41] that are located in regular schools. As appropriate, the students also have the opportunity to access regular education classes in these schools.

Id. Under the specific facts of that case, the federal district court found that W.C. had received a FAPE while in the HAVEN program. Id. at 1362.

36.

The facts of this case are fundamentally different. [redacted], unlike W.C., will not be placed at [redacted] and work his way into a less restrictive, transition classroom. [redacted]'s behaviors were not severe enough to warrant a placement at [redacted] and his IEP Team agreed that he was capable of attending specials with regular education students on a daily basis and that it was important for him to do so. In fact, the [redacted] witnesses testified that [redacted] would not be transferred to [redacted] unless there was a serious deterioration in his behaviors such that he could not be contained in the regular education environment at [redacted] Elementary.

35.

The Court concludes that should [redacted]'s behaviors deteriorate to a new level of severity that would merit a transfer to [redacted], [redacted] would be entitled to prior written notice under the explicit procedural requirements of IDEA, as well under the spirit of the Act, which emphasizes "the role and responsibility of parents" and the importance of "full parental involvement." *See* 20 U.S.C. § 1400(c)(5)(B); M.M. v. Sch. Bd. of Miami-Dade, 437 F.3d 1085 (11th Cir. 2006) (In developing an IEP, parental involvement is critical; indeed, full parental involvement is the purpose of many of IDEA's procedural requirements). The School District's obstinate assertion that it could

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[41] It is unclear whether the "transition" or "merit" classrooms referred to in W.C. are the same in all respects as the MAC classrooms described in this case.

change [redacted]'s placement to [redacted] without the involvement of [redacted] was erroneous and misleading. As a result, [redacted] was not fully or accurately informed about [redacted]'s placement options or her procedural rights and was unable to meaningfully participate in the decision-making process. *See* 34 C.F.R. § 300.513(a)(2)(ii).

F. **REMEDY**

36.

IDEA "requires 'appropriate' relief, and "the only possible interpretation is that the relief is to be 'appropriate' in light of the purpose of the Act." Draper, 518 F.3d at 1285, *quoting* Sch. Comm. Of Burlington v. Dep't of Educ., 471 U.S. 359, 369 (1985). "[E]quitable considerations are relevant in fashioning relief...and the court enjoys 'broad discretion' in so doing." Id. (citations omitted). In addition, the Court may award compensatory education when school officials have failed to provide a student with a disability with an appropriate education. Id., *quoting* Todd D. ex rel. Robert D. v. Andrews, 933 F2d 1576, 1584 (11th Cir. 1991).

37.

Plaintiff requested compensatory education, including intensive speech and language therapy, sensory integration therapy, and two years in a private placement at [redacted]'s selection. The Court does not find that such relief is appropriate in this case. The Court has not found that the School District has failed to provide [redacted] with FAPE over the past two years, nor that the prospective placement is inappropriate. *See* 34 C.F.R. § 300.513(a)(3). Rather, the School District's single violation is a procedural one, albeit serious, and can be remedied by requiring full compliance with the Act's procedural safeguards and the following specific relief:

a) The School District shall notice and convene an IEP Team meeting for [redacted]. within two weeks of the issuance of this decision pursuant to 34 C.F.R. §§ 300.322, 300.324, 300.501(c). In addition to the contents specified under the regulations for the notice of this meeting, the School District shall include in the notice of the meeting a statement, in writing, that it shall abide by the Court's order regarding the rights of the parent to prior written notice of any transfer of [redacted]. from a [redacted] satellite classroom to a more restrictive placement, such as [redacted] School. The notice shall also include a list of all prospective placements to be considered at the IEP meeting.

b) [redacted]. shall be permitted to visit any prospective placement prior to the IEP Team meeting. In addition, [redacted].'s experts shall be permitted to visit and observe any prospective placement and such experts shall be permitted to attend the IEP meeting and report their assessments and recommendations to the Team. The date(s), duration and conditions for the visits shall be mutually-agreed upon by the parties.

c) At least three days prior to the scheduled IEP Team meeting, [redacted]. shall provide copies to the School District of (i) any reports or evaluations from [redacted].'s private service providers, including Dr. [redacted] and any speech therapist, and (ii) [redacted].'s educational records from his home study program since March 2007 to the present. The IEP Team shall consider any such reports, records, or evaluations in connection with the development of [redacted].'s IEP.

IV. DECISION

Defendant Cobb County School District denied Plaintiff a free and appropriate public education by significantly impairing her opportunity to participate in the decision-making process at the March 19, 2008 IEP meeting. Accordingly, Plaintiff is entitled to the prospective relief outlined above.

IT IS SO ORDERED, this 15th day of August, 2008.

KIMBERLY W. SCHROER
Administrative Law Judge