

5/11/2009

IN THE OFFICE OF STATE ADMINISTRATIVE TRIALS
STATE OF GEORGIA

☐☐☐, By and Through His Parents,
☐☐☐ and ☐☐☐,¹

Plaintiffs,

v.

ATLANTA INDEPENDENT SCHOOL
SYSTEM,

Defendant.

09-130152

Docket No:
OSAH-DOE-SE-0918883-60-Gatto

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FINAL ORDER

COUNSEL: Jonathan A. Zimring, ZIMRING LAW FIRM, for Plaintiffs.

Sherry H. Culves, JONES, CORK & MILLER, LLP, for Defendant.

GATTO, Judge

I. INTRODUCTION

This action came before the Court pursuant to a Complaint filed by Plaintiffs ☐☐☐ and his father ☐☐☐ and his mother ☐☐☐, against Defendant Atlanta Independent School System (“AISS”) alleging that the Defendant failed to offer him a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §§1400 *et seq.*, and its implementing regulations, 34 C.F.R. Part 300.² For the reasons indicated below, the Court finds that the AISS did not offer FAPE to ☐☐☐ in conformity with IDEA.

¹ Initially, this action was styled in the name of ☐☐☐. However, the Complaint refers to “Plaintiffs” indicating that the parents were also party Plaintiffs.

² Plaintiffs’ Complaint identifying eleven (11) problems consisting of one hundred fifty-one (151) paragraphs.

II. FINDINGS OF FACT

☹☹ is ☹☹☹☹ years of age and has autism, a language impairment, is functionally non-verbal, has fine-motor limitations, impaired cognitive skills, and can be aggressive, verbally and physically, to himself, though he is not self-injurious. He can also strike or hit himself in the chest, head and back, due to lack of communication, in a non-injurious fashion. ☹☹ is IDEA eligible under the eligibility of autism and speech and language impairment, as established by Defendant AISS.

☹☹'s disabilities adversely impact his ability to learn, to obtain functional skills, to progress, and to functionally lead a more appropriate life in his home, his community, and at school. His communication limitations can frustrate him and interfere with instruction, his ability to learn from instruction, and can cause or contribute to adverse behaviors and aggression. His fine-motor limitations also adversely impact his ability to learn and require individual adjustment in the manner and method of instruction. His autism alters his ability to engage socially, limits his functional skills, limits his ability to relate to others, contributes to his language disorder, contributes to his sensory disorder and sensory limitations, and otherwise adversely impacts his learning. He cannot protect himself or report abusive treatment.

In 200☹ ☹☹ started attending special education classes in the Atlanta Independent School System at E. Rivers Elementary School, where he attended until the spring of 200☹. In the fall of 200☹ ☹☹ began attending Morris Brandon Elementary School because it was his home school and because he was no longer in an eligible age group to attend E. Rivers Elementary School. Additionally, ☹☹'s "individualized education program" ("IEP") team determined that the special education classroom at Morris Brandon was appropriate for ☹☹, as

children with autism can be educated in multiple special education classrooms, depending on the child's level of cognitive functioning.

§§.s disabilities require a functional educational program, necessary and appropriate behavioral intervention in a structured environment, with appropriate applied behavioral analysis (“ABA”) services, direct and professional intervention in language, occupational therapy, use of assistive technology and an effective and functional method of communicating with §. AISS has agreed with §.s need for an “ABA program” and assumed the duty to provide such “specialized instruction.” §. can learn to progress with appropriate specialized instruction of sufficient duration and frequency based on adequate assessment provided by trained and supervised personnel, in a safe and caring environment. This requires specialized instruction of an appropriate and adequate duration and frequency, based on research based principles such as through Applied Behavioral Analysis or ABA instruction and behavioral interventions.

On January 24, 2007, Mrs. §. requested a change of placement for her son due to the severity of §.s disability, his aggressive behaviors, and his need for individualized attention. Mrs. §. mentioned a program at the Margaret Mitchell School which she was interested in looking into for §. The program at the Margaret Mitchell School is a part of the North Metro Program, a Georgia Network for Educational and Therapeutic Support (“GNETS”) program (formally known as the “Psychoeducational Network”), which is a public therapeutic program designed to prevent children from requiring residential or other more restrictive placements.³ The

³ The North Metro program is operated pursuant to GDOE R. & Reg. § 160-4-7-.15 (2007). The purpose of the GNETS is to prevent children from requiring residential or other more restrictive placements by offering cost-effective comprehensive services in local areas. An IEP team may

North Metro Program serves students in the North Fulton, Gwinnett, Buford City, and Atlanta Independent School Systems. Margaret Mitchell is a center-based program located in the Atlanta Independent School System.

Following Mrs. [REDACTED]'s request, AISS set up a meeting at the North Metro Program at the Margaret Mitchell School for Mrs. [REDACTED] and Carol Geist, a coordinator for AISS' Program for Exceptional Children.⁴ In late January 2007, Mrs. [REDACTED] and Carol Geist met with Alan Taylor, the school social worker, and Gail Healey, the program coordinator at North Metro. Mrs. [REDACTED] was given a tour of the facility, detailed information about the program and the students it serves, and an opportunity to view the autism classroom. As a result, in February of 2007, [REDACTED]'s IEP team, to include Mrs. [REDACTED], met and decided to change [REDACTED]'s placement from the special education classroom at Morris Brandon to the autism classroom in the North Metro Program. [REDACTED] was served in North Metro's autism classroom at the Margaret Mitchell School beginning in February 2007 through the end of the 2007-2008 school year.

[REDACTED]'s 2008-09 IEP provided an autism placement for 27.5 hours per week, language services for one (1) hour a week, occupational therapy for one (1) hour a week, and adaptive P.E. for a half (½) hour per week. The 2008-09 IEP also had a behavioral intervention plan ("BIP"). It also had both "goals" and "objectives." It had no preventive strategies or positive behavioral

consider in-class services by a GNETS program for a child with an emotional and behavioral disorder based upon documentation of the severity of the duration, frequency and intensity of one or more of the characteristics of the disability category of emotional and behavioral disorders (EBD). This documentation must include prior extension of less restrictive services and data which indicate such services have not enabled the child to benefit educationally. GNETS programs are required to utilize evidence-based positive behavioral interventions, supports and other strategies designed to increase children's resilience and social-emotional competence.

interventions, and strategies or supports to address behavior. Page 2 of the BIP identified a behavior management system, direct instruction and other interventions, ending in the use of “ETC” to describe interventions. It identified specific interventions upon failure of the BIP to be effective, including denial of extra curricular activities, denial of privileges, a classroom management plan, isolation, physical restraint, removal, restitution, suspension and monitored seclusion.

The IEP minutes reflect a review of the Assessment of Basic Language and Learning Skills (“ABLBS”) and that [REDACTED] “works well one-to-one w/ discrete trial instruction,” noting that he “can become angry and loud when he does not get his way.”⁵ He was “not using verbal language to initiate communication.” Goals were developed from the ABLBS and the IEP Team minutes indicated that “services focused on assessment by that ABLBS, discrete trial instruction, and support from autism consultants in an environment that will be supportive of behaviors typical of students w/ autism.” It was agreed that AISS would address moving [REDACTED] to North Metro in Fulton County due to the move of the school program. Mrs. [REDACTED] called Ms. Healey and asked where his placement was to be, and she was told to bring him to North Metro while they worked on the transfer. Defendant failed to provide transportation or make arrangements for services timely and [REDACTED] missed the first day of instruction. This was avoidable and inappropriate.

Ms. Healey denied that the parents had raised concerns or objections concerning [REDACTED]’s

⁴ Carol Geist has since retired, but held this position at that time.

⁵ The ABLBS is a device for assessing skills in children with language and learning deficits and is most commonly used in the process of the development of a behavioral program for children in the autism spectrum.

program, lack of progress, and behavioral deterioration. She testified that [REDACTED]'s parents were pleased with the program. In contrast, Mr. and Mrs. [REDACTED] testified they expressed their concerns with [REDACTED]'s deterioration in behavior, lack of progress, and the continuation of goals and objectives without mastery from year-to-year. Mrs. [REDACTED] was surprised when she reviewed the minutes, and this led her to decide to record subsequent meetings and events so there would be an actual record. On cross examination of Ms. Healey, notes from the IEP meeting and prior notes from Judith Book, the psychologist at North Metro, were identified, which documented the parents' expressed concerns with behaviors and lack of progress. Ms. Healey offered no explanation for the conflict between her testimony and these records of the IEP meeting. The Court credits Plaintiffs' testimony and finds that concerns with the lack of behavioral and academic progress were before the IEP Team in 2007- 2008.

[REDACTED] was provided an extended school year ("ESY") program in 2007 and 2008. This was the AISS standard program offered all the children, which lasted only five (5) weeks and consisted of four (4) hours per day, four (4) days a week. ESY was not discussed at the IEP meeting. There are no minutes of the consideration of its duration, frequency, or scope, and Plaintiffs were simply told, as a matter of AISS and North Metro policy and practice, how much and when it would be provided. However, as a child with cognitive identified impairments, and as a child with autism, [REDACTED] is a class member in *Georgia Ass'n of Retarded Citizens v. McDaniel*, 716 F.2d 1565, 1567-1568 (11th Cir. Ga. 1983), which required that the ESY program must be considered on an individual basis (the refusal to consider or provide year round education programs is contrary to the defendants' obligations under the [IDEA] and § 504 of the Rehabilitation Act of 1973 to provide a free public education serving each handicapped child's

particular needs). The Court finds that Defendant's failure to consider ESY for [REDACTED] on an individual basis procedurally and substantively denied and delayed the provision of FAPE to him and materially contributed to his lack of progress.

An IEP meeting was held on October 2, 2008. This was called by [REDACTED]'s parents based upon their concerns with the program, injuries to [REDACTED] on September 8, 2008 that occurred at school, the issues concerning the Fulton County North Metro program, and lack of progress. The minutes reflect concerns raised by the parents concerning the placement, requests for additional speech, and requests for an AT evaluation. The family also requested a listening program be used. [REDACTED]'s special education teacher, Sherri Jones, was not at this meeting, as she had taken a medical leave. Ms. Healey provided no current information or data concerning the classroom to the parents, stating that it was in Sherri Jones' "computer" and that she did not have access to it. No such computer data was ever introduced. AISS and North Metro rejected Mrs. [REDACTED]'s request for additional language services at the meeting. There was no "written notice" concerning the parents' request and AISS' rejection of the requested additional language services.

Mrs. [REDACTED] was concerned with the amount of instruction, and she raised this at the October 2, 2008 IEP meeting when she saw the daily schedules for the first time and [REDACTED] was only given a half (½) hour of discrete trial training a day. Ms. Healey at first testified that these concerns were not raised, but the minutes reflect that Ms. [REDACTED] "looked at the schedule and thought [REDACTED] had too little time on task. She wants statistics on the discrete trials." In addition, Ms. [REDACTED], at the meeting raised concerns with the lack of instruction in the afternoon, as [REDACTED]'s schedule for lunch began at 12:15 p.m., then followed at 12:45 p.m. with an hour of "quiet time/snack," and then an unexplained forty-five (45) minute of "sensory," a half (½) hour of recess, and then fifteen (15)

minutes of cleaning up. Ms. Healey agreed that none of these activities were ABA services. The listening program for a half hour in the morning and gym were also not discrete trial training or ABA services either. This schedule was an inadequate amount of instruction for [REDACTED] and not appropriate. It did not provide adequate ABA instruction daily, or weekly, for his needs or for him to progress. It wasted unnecessary teaching time.

Plaintiffs raised concern with the frequency of ABA instruction and infrequency and lack of data and analysis of the discrete trials. Contrary to the schedule, the discrete trial daily progress reports show only twenty-three (23) days of discrete trial services out of forty-nine (49) school days. In addition, contrary to the schedule, on many of these twenty-three (23) days, the discrete trial objectives which were to be implemented were not. Similarly, there is no data on extended sequence, matching functions, or requests. Therefore, the Court finds that AISS failed to implement the discrete trial training found on the schedule. It failed to implement daily discrete trial training and provided an inappropriate level of ABA instruction, and an inappropriate amount of personalized instruction for [REDACTED] to progress.

The IEP required “ABA consulting.” AISS/North Metro defined its placement as an ABA program and class. The Court finds, based, in part, on the admissions of Defendant’s witnesses and supportive evidence that this was not an ABA program or class. The Court further finds that the failure to provide an ABA program and class was a material breach of placement, the parents’ rights of participation and consent, denied the parents significant procedural FAPE, and denied [REDACTED] a substantially appropriate program.

Evidence was presented concerning the requirement under IDEA for scientifically based research methodologies. The provision of ABA instruction is one of the research based

methodologies permissible under IDEA, and endorsed by “Educating Children with Autism.” The methodology requires twenty-five (25) hours per week of continuous, twelve (12) month per year instruction. The research based methodology requiring such durational program could not be provided on the schedules offered by Defendant, and there is no evidence that these were provided in 2007-2008. The Court finds that the instruction provided did not provide ABA classroom instruction supported by scientific research, and that such research was available, practical and ignored. The Court finds this violated the IEP and placement in a material way, procedurally and substantively denied and delayed the provision of FAPE, and materially contributed to the lack of progress.

The progress report for the nine (9) weeks of fall through October 2, 2008 demonstrates that on some critical skills, such as identifying persons, ~~Q9~~ had regressed from the prior school year and ESY. It also demonstrates that there was a lack of progress. Part of the report is difficult to assess, as Defendant admitted there was no baseline taken, which is necessary to monitor progress and assess evaluation reports to allow one to know where the child began. Sherri Jones testified she did not consult, nor did AISS or North Metro give her the opportunity to consult with the ESY teacher or the teachers from the prior years. She did not participate in the drafting of the IEP. The failure to take baseline is heightened by the lack of data and the failure to analyze the ABA data.

Data in discrete trials is kept daily with instruction, and in ABA services should be analyzed regularly. It can indicate a lack of progress which can create serious problems. It allows one to track progress and to provide appropriate services. This is often done by ABA consultants, but can be done periodically and by classroom teachers. It is required where the

ABLIS is part of the curriculum or where objectives are taken and administered pursuant to the ABLIS developmental sequences utilizing ABA. Defendant failed to assess, graph or periodically track the data or the progress, rate of progress, or lack of progress and failed to provide this information in 2007-2008 and in 2008-2009. This is a material failure of an “ABA Program,” and is one reason Defendant’s expert testified this was not an ABA program.

The fall 2008 progress report also has very serious problems. Sherri Jones was examined concerning this when called adversely by Plaintiffs and questioned concerning the source of percentages since the percentages on the progress report were significantly inflated and far exceeded the actual data. On the demonstrated objective for the time period through October 9th, it was at around 20% but reported as 45%. The Court finds the progress reports are erroneous and inflated ~~Q1~~’s functional performance and hid his lack of progress. The Court further finds that this progress report, when coupled with the absence of instructional data, demonstrated the lack of adequate instructional methodology, inadequate instruction as to frequency, and inadequate rates of progress.

Prior year progress reports and the prior IEPs show that goals were the same year after year and were not measurable. The progress reports and IEPs demonstrate that identical goals and identical objectives were carried over from year to year with regularity. The Court finds that, coupled with the admissions and findings that objectives are to be mastered within the school year for which they are designed, if not sooner, that this shows a lack of reasonable progress. These objectives over the years were established as obtainable in a year even though the AISS

program often took 2 or 3 years, if the objectives were ever obtained and maintained at all.⁶ The Court concludes that these actions were procedurally a breach of the placement and commitment of the program, significantly interfered in parent participation, resulted in false positives concerning the child's progress, and denied procedural and substantive FAPE.

The BIP contains no positive behavioral instructional interventions. On direct, Ms. Healey testified that the fact that they were not in the IEP did not mean they were not being used, and she testified that the parents knew they were being used. These facts led Ms. Healey later to admit that the IEP was not complete. Inasmuch as the BIP and IEP were not complete, the Court finds them to be inappropriate. In addition, prior BIPs reviewed at trial contained such interventions in decreasing amounts. Therefore, the Court finds that the BIP, as part of the IEP, is inappropriate and inadequate. These BIPS are further evidence of the lack of progress and decreasing behaviors.

The BIP reviewed at trial only contains things that Plaintiffs call "punishments." The Court does not find that these are all punishments, but they are only after-the-fact interventions such as restitution, isolation, suspension, and restraint, which are not a plan to teach ~~and~~ replacement behaviors and to moderate his adverse behaviors by themselves in the absence of behavioral positive instructional interventions. The Court finds that this portion of the BIP is also inappropriate, not individually based, and, as part of the IEP, denies FAPE.

⁶ Ms. Healey testified that part of the program was periodic meetings between staff to assess the progress reports, progress or lack of progress. In addition, she said several of these meetings occurred to discuss the October 2, 2008 concerns of Plaintiffs. Sherri Jones testified that there were no such meetings, no such discussions and that a discussion concerning progress or lack of progress did not occur, and she did not believe the data rose to the level of requiring a meeting. The Court finds no such meetings or considerations occurred.

The IEP documents also identify a “behavioral management plan” in the classroom. Sherri Jones did not testify about this or identify this plan. None of the educational records identify the plan. There is no evidence that this plan exists. The Court finds this reference inadequate and does not represent actual identified or implemented services, systematically designed to intervene and correct [REDACTED]’s behavior.

Plaintiffs raised concerns with the lack of behavioral data and the failure to track or keep data on [REDACTED]’s behavior. Defendant called Mr. Roselione and Mrs. Barron as their expert witnesses. They initially said that behavioral data was taken, but then each admitted that there was no behavioral data for the 2008-09 school year, and none for the spring of 2008. Sherri Jones said she took behavioral data, but could not provide it or identify it. The Defendant failed to introduce or identify behavioral data for the spring of 2008 and the 2007-08 school year. The behavioral data available at trial was from a classroom teacher at Morris Brandon, prior to the change of placement to North Metro. The Court finds that there was no behavioral data.

AISS manual provisions, supported by expert testimony, addressed the need to conduct a Functional Behavioral Assessment (“FBA”) as part of the development of the BIP for students like [REDACTED]. The record does not reflect that a FBA was done to support the behavioral interventions, the writing of the BIP, or the identification of the antecedents or functions of [REDACTED]’s behavior. The AISS Manual requires both the taking and analysis of behavioral data in identified problem areas and requires the development and use of a FBA or similar analysis. The Court finds the absence of an up-to-date FBA and data analysis to be inappropriate and to have caused or to be a denial of FAPE.

Defendant, through Ms. Healey, introduced an ABLLS assessment done by Ms. Peterson

in the fall and spring as a post-test of 2008. Plaintiffs' experts, Ms. Mitchell and Ms. Lacinak, addressed this ABLLS and ABLLS-R, noting it was not the up-to-date or correct ABLLS. As Defendant's expert, Brian Roselione, recognized, the ABLLS assessment he was provided was only two (2) pages long, incomplete, and was not the full assessment. The Court finds this assessment was inappropriate and not done as recommended by the test publisher. Further, Ms. Healey testified that the program was to use the ABLLS as a curriculum and to provide ABA instruction. This led to out-of-date instructional objectives, denying FAPE.

The IEP meeting initially placing [REDACTED] at North Metro was addressed on direct by Ms. Healey. She testified concerning the need for individuals with knowledge of [REDACTED], concerning their staff and the need for teachers and others from the referring program. On cross-examination, she admitted that Ms. Wolfcale, the teacher who knew [REDACTED], was invited but did not attend, that Ms. Framer, the AISS speech and language pathologist, was invited but did not attend, and the AISS occupational therapist, was invited but did not attend. Ms. Healey conceded that there was no written excusal for any of these persons. She acknowledged that she was aware of the obligation of having people in attendance or obtaining a written excusal from the parents. Ms. Healey admitted that this failure to have these individuals at the IEP meeting was important and significant, restricting parent participation and restricting the information available to the parents. The Court finds that the initial placement in February, 2008 placing [REDACTED] at North Metro was held in violation of IDEA and interfered in parent participation rights.

Ms. Healey was questioned concerning the instructional schedule in 2008-09 and admitted that the amount of ABA provided was unknown to her and the IEP Team in 2007 and that she could not tell the amount from the IEP document. She admitted, as did Ms. Stokes, that

an obligation existed to present and establish the duration, frequency and scope of services. Mrs. Healey was only able to testify with certainty that [REDACTED] received ABA services for a ½ hour of discrete trial based on the schedule and throughout the day, since the “classroom was a throughout-the-day ABA instructional program.” The IEP requires a statement of the amount, duration and frequency of services. The Court finds this was not in this IEP and that this omission violates IDEA and denies FAPE.

Ms. Healey defined ABA instruction as instruction with data collection. When questioned concerning this, she agreed that quiet time was not ABA instruction, nor was recess, nor was snacks, nor was lunch, nor was P.E., nor was the listening program, and that sensory met the definition only when occupational therapy services were provided on two of the days. Ultimately, Ms. Healey agreed that she would have needed information from the family to “appropriately” add to the positive behavior strategies, and that this did not occur. This testimony supported the inadequacy of the instruction and the amount of the instruction. When provided data sheets, Ms. Healey agreed that these data sheets from 2007-08 did not have the information required on them.

Addressing ESY, after Ms. Healey testified that ESY should be a continuation of “the same services during ESY that he had on his IEP,” she admitted that [REDACTED] only received half the occupational therapy required in his IEP. Ms. Cummings also testified about ESY and on cross-examination explained the policy of maintaining services and explained how ESY is “supposed” to be discussed and resolved. This includes addressing all breaks in programming, including fall, winter and spring breaks. The Court finds that AISS did not consider or provide ESY as required or as suggested is necessary by Healey and Cummings. This is a violation of IDEA and a

significant denial of FAPE, procedurally and substantively.

Ms. Healey testified on direct that the measurable annual goals were appropriate. On cross examination, she identified the differences between annual goals and short-term objectives and agreed that the AISS Manual requires measurable annual targets to be achieved within a year, differentiating these from the objectives. She also testified that in the future she would amend the IEPs to make sure there were measurable goals. Ms. Stokes testified and admitted that there is a difference and each must be measurable. Ms. Baron, called as an expert by AISS admitted there is a difference, that each must be measurable, and that there is a significant educational injury for their absence. The Court finds that there is a difference between measurable goals and measurable objectives. Each, if provided, must be measurable. The IEPs failed to have such goals and violated IDEA, denying FAPE.

Defendant AISS called two witnesses, Ms. Baron and Mr. Roselione as autism experts. Addressing behavioral data, Ms. Barron agreed that the taking of daily behavioral data is not difficult or complex, is commonly done, and would be important for a child in a Psychoeducational center program. She admitted that this data needs to identify more than frequency, but also the duration and intensity of the events and that the data identified for Ms. Barron in 2007-08 could only be used to establish frequency, and frequency counts are not sufficient to analyze a child with autism's behavior who is in a Psychoeducational center. Ms. Barron also addressed the issue between measurable goals and objectives, recognizing the difference and admitted that the goals must be measured separately, and, if objectives are written, these need to be measured separately. Ms. Barron admitted that she looked at very limited records of S.F., acknowledged that she was not an ABA consultant to his classroom, and

had limited access to the classroom a year ago. On cross examination, she identified that she was a program consultant, not an ABA consultant, could not identify who was the ABA consultant, and had insufficient information to have opinions concerning the appropriateness of [REDACTED]'s program in 2007 - 2008 or the adequacy of his progress. Her testimony was generalized and failed to address specific areas in which he may have learned or progressed. She admitted that [REDACTED] was not meeting or mastering IEP goals or meeting or mastering IEP objectives, and that she knew that many of these goals and of the objectives were carried over from year to year.

Ms. Pamela Barron is a consultant for NOVA Southeastern University Autism Consortium. She had brief observations in the 2007-08 school year, was not currently familiar with [REDACTED] or his program, and never provided individual consulting to any children at North Metro. She recognized the well-established practice which contributes to the appropriateness of programs of utilizing regular consultants to make judgments about practice and progress, change goals and objectives, and move through the IEPs. She recognized this was not occurring in [REDACTED]'s class. She also admitted on cross-examination that ABLLS objectives, which are not obtained for months and are worked on for months or years, require this expertise, as they can raise serious questions.

Mr. Brian Roselione was called as an expert by Defendant, also from NOVA Southeastern University Center for Autism. He had only been given four (4) documents by Defendant and two (2) of those were only partial portions of ABLLS assessments and did not contain the entire evaluation. When asked whether [REDACTED]'s IEP incorporated ABA instruction, he testified only that there were goals which could be used for such instruction. He also agreed with Plaintiffs' experts Ms. Lacinak and Ms. Mitchell that it is properly administered through input

and questioning of parents. His testimony as to [REDACTED], like that of Ms. Barron, was generalized and non-specific. He also acknowledged he was not the ABA consultant to [REDACTED] and was not given enough time by Defendant to perform those tasks and that it was not his job to see they were implementing the program or taking adequate data. The behavioral data he had reviewed on direct was only partial data from the 2007-08 school year, not the year he had observed. He admitted that he could not identify the Psychoeducational evaluation he reviewed, he had not reviewed current 2008-09 behavioral data, and he did not know whether there was any. He also admitted that there should be ABC data, but it only existed from the year before, and he could not explain why the BIP had not changed. Based upon this testimony, the Court cannot credit or rely on the opinions of Mr. Roselione to the appropriateness of [REDACTED]'s IEP or the adequacy of the instruction provided.

However, the Court does rely on Mr. Roselione's testimony, in combination with other witness testimony, concerning what can and should occur in an ABA instructional program. He agreed that in an appropriate ABA program, there should be a behavior analyst working with the program and validating the activities. He agreed that for such methodology, there is an obligation to document the work, including keeping appropriate data for review. In addition, if there was a behavior analyst available to [REDACTED], he would have had the obligation to see that unqualified and unsupervised persons were not impacting the program adversely or promoted for their services. He agreed that there was no functional behavior assessment for [REDACTED], and that an appropriate program and his ethical standards would have required that one be done in order to develop an adequate behavior intervention plan. He agreed that ethical standards required the keeping of data and that this was essential to an appropriate program. The Court finds that the

services provided to [REDACTED] were not appropriate ABA services, and this was contrary to the IEP and denied FAPE.

[REDACTED] was injured at school on September 8, 2008. The injuries were not reported promptly to the Family, nor were incident reports provided on a timely basis. The North Metro response to these injuries was inconsistent with the commitment to the parents and inadequate. The explanation by AISS of the injuries is not consistent with the visual injuries, and if accepted as true, indicates a significant behavioral episode to which there is no identified educational response.

[REDACTED] was not injured and had no bruises on the morning of October 21, 2008. He was not injured on the school bus. The Court finds he was not injured at home after arriving home on October 21, 2008, nor was he injured during the night of October 21, 2008, or on the morning of the 22nd. [REDACTED] was injured at school in his instructional program on October 21, 2008. His injuries were caused by multiple infliction of trauma. They were caused by his being struck by a hand or an object by an adult. [REDACTED]'s pants were torn, not at the seam but on the back pocket, on October 21, 2008. The Court finds this tear is not due to a "growth spurt," but consistent with his being lifted and struck while being held from the back of his pants by an AISS adult. [REDACTED]'s bruising and injuries could not be observed due to the length of his pants. The tear in his pants was discovered in the late-afternoon, consistent with the time Plaintiffs contend he was struck. His injuries might have been observed if he had been taken to the bathroom in the afternoon, but the Court finds there is no evidence this occurred and finds it did not occur. On the day in question, an unidentified adult said to [REDACTED] "do you want a hit, a be-quiet hit?" Based upon a preponderance of the evidence, the Court finds that [REDACTED] was physically abused and injured in his

classroom at North metro during the instructional day. [REDACTED]'s father observed the injuries the next morning while he was assisting [REDACTED] in bathing.

Plaintiffs immediately sought an explanation and investigation of these events. AISS failed to follow legally required and ethically required steps to promptly notify DFCS and law enforcement officials. AISS failed to immediately implement an internal investigation, consistent with its own policies. Plaintiffs filed complaints with the law enforcement officials and with DFCS. Only after AISS and North Metro learned of the existence of the parents' complaints were reports made by mandatory reporters and by Defendant to appropriate officials for investigation.

Plaintiffs sought another meeting to address their concerns about the abuse and lack of instruction. AISS scheduled and then cancelled this IEP meeting. A second IEP meeting was ultimately held in November, 2008. Again, AISS denied that abuse had occurred at school, and refused to change the placement, alter the placement, provide additional or adequate support to [REDACTED] in the placement, or otherwise amend any aspect of the IEP, or specialized instruction, or related services, or behavioral support or placement.

After the IEP meetings, since his parents were not provided with an adequate explanation of the event occurring on October 21, 2008, [REDACTED] did not return to the AISS and the environment in which he had been abused. Plaintiffs requested interim at home and in the community placement, which AISS denied. AISS subsequently threatened [REDACTED]'s parents with criminal charges as parents of a truant for not returning [REDACTED] to North Metro. The Court finds that these threats were done to coerce and to harass Plaintiffs. Because of the threats of criminal charges, and on the advice of their counsel, [REDACTED]'s parents placed [REDACTED] privately.

The classroom at North Metro was admittedly inappropriate. Inappropriate discussion, comments, and language were identified and admitted by Defendant, through Ms. Healey and Sherri Jones. On cross-examination, Sherri Jones admitted that at some point in the day on October 21st in [REDACTED]'s classroom in front of the children she made an inappropriate comment about the size of a man's penis and discussed how to make and mix martinis. She also admitted that someone that day told one of the students to "sit down, stupid." Sherri Jones also admitted that on that same day in the classroom, there was an incident with [REDACTED] being found eating pizza out of the trash can and that one of the paraprofessionals said, "I mean, he was chilling" and Sherri Jones responded, "finger licking good", laughing, "he was chilling with that." And then the paraprofessional said, "Yeah, eating out of the garbage." On that same day, the due-process secretary, Chiquita Jackson, said to Sherri Jones concerning Ms. [REDACTED] that "she is crazy; his mama must be two cans short of a six pack." None of the Defendant's or North metro's employees have ever been formally disciplined as a result of this conduct. The inference from the evidence, including the lack of contact with the Family, the failure to take data, the failure to chronicle or address behavior, and the previous failures to investigate, all support the inappropriateness of the classroom. [REDACTED] was intentionally injured in that classroom by trauma, by someone in the control of AISS and he was verbally abused. ⁷

⁷ Defendant filed a motion *in limine* opposing the introduction of a digital tape Mrs. [REDACTED] made of the day of [REDACTED] on October 21, 2008 by sewing a digital recorder into the lapel of [REDACTED]'s shirt. The Court ruled that the tape was inadmissible under subsections (a) and (b) of O.C.G.A. § 24-4-48, which allow for the admissibility of audio recordings if the authenticating witness is unable to be present or to testify at the hearing "because of death or then existing physical or mental illness or infirmity." Specifically, the Court ruled that an authenticating witness must first have been available and capable of authenticating the audio recording at the time it was recorded and the parties stipulated that [REDACTED] was never capable of authenticating the recording. Plaintiff also

The Court finds that the program and placement offered to the parents was not provided or implemented. This includes the failure to implement an ABA program and consulting. The Court finds that the duration of the instructional portions of the program was inappropriate denying FAPE. The Court finds that the IEP meetings for the initial placement of 2007 and after were in breach of IDEA and a denial of FAPE, including the failure to have necessary persons at the meeting and to allow Plaintiffs the right of excusal. The Court finds that the IEP failed to have measurable goals. The Court finds that the IEPs in question for the years in question failed to have many measurable objectives.

The Court finds that the program failed to make reasonable progress. This includes progress identified in objectives. The Court further finds that this was inappropriate based upon the failure to have ABA consulting or to adjust the failure of achieving goals, rather than continuation of these objectives over years. The Court finds that the behavioral intervention plan was inappropriate. This includes the finding that the functional behavior assessment was not done but necessary. The Court finds that the failure to keep data is a failure to implement the promised and required in this case, based upon the placement, an ABA program. The Court finds

argued that the audio recording was admissible under subsection (c) of O.C.G.A. § 24-4-48, arguing that recording “fairly and accurately captured the conditions, events or statements recorded.” The Court did not agree since subsection (c) applied only to those situations where the recording is produced “at a time *when the device producing the items was not being operated by an individual person or was not under the personal control or in the presence of an individual operator*”(emphasis added). The Court ruled that this provision was not applicable since the recording device was being operated by or under the personal control or in the presence of either [REDACTED] or Mrs. [REDACTED]. Finally, the Court ruled that the recording was inadmissible under *Solomon v. Edgar*, 92 Ga. App. 207 (1955) since neither [REDACTED] nor Mrs. [REDACTED] could identify all the persons on the recording. Nonetheless, the Court ruled that Plaintiffs could use the audiotape for impeachment purposes or to refresh the recollection of a witness through the use of a headphone array.

that the Defendant's own witnesses admitted the inappropriateness of certain goals and objectives and of certain activities and relies upon such admissions.

It is not disputed that his placement is implemented through an ABA program. The Court finds that Summit Learning Center appropriately provides and implements an ABA instructional program for . It provides expert consulting, and its data shows reasonable and significant progress. The Court finds such services are appropriate for him.

III. CONCLUSIONS OF LAW

The IDEA, 84 Stat. 175, as amended, 20 U.S.C.A. § 1400 *et seq.* (main ed. and Supp. 2005), is a Spending Clause statute that seeks to ensure that "all children with disabilities have available to them a [FAPE]." § 1400(d)(1)(A). A FAPE is defined as special education and related services that "(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the [IEP] required under section 1414(d)." 20 U.S.C. § 1401(9).

To provide a FAPE, a school formulates an IEP during a meeting between the student's parents and school officials. §§ 1414(d)(1)(A)-(B). An IEP is a written statement for each disabled child that includes a statement of the child's present levels of academic achievement and functional performance, a statement of measurable annual goals, a description of how the child's progress toward meeting annual goals will be measured, a statement of the special education and related services to be provided to the child, and a statement of the program modifications or

supports for school personnel that will be provided for the child. § 1414(d)(1)(A). The IEP team consisting of the parents of the child, school officials, and if appropriate, the disabled child, reviews the child's IEP at least annually to determine whether the annual goals for the child are being met, and the IEP team revises the IEP as appropriate. § 1414(d)(4). Under IDEA, school districts must create an IEP for each disabled child. § 1414(d).⁸ If parents believe their child's IEP is inappropriate, they may file a due process complaint. *See* § 1415(f).

In the present case, the Court finds that AISS has failed to provide a free *appropriate* education to ~~OP~~. The Court concludes that that based upon the evidence presented, the IEP and placement for the 2007-2008 school year was not appropriate and did not offer or provide FAPE, that the IEP and placement for the 2007 ESY was not appropriate and did not offer or provide FAPE, that the IEP and placement for the 2008-2009 school year was not appropriate and did not offer or provide FAPE, and that the IEP and placement for the 2008 ESY was not appropriate and did not offer or provide FAPE.

⁸ The IEP sets out the child's present levels of academic achievement and functional performance; establishes measurable annual goals, including academic and functional goals; describes how the child's progress toward meeting the annual goals will be measured and when periodic reports on the progress the child is making toward meeting the annual goals will be provided; the special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child, and modifications or supports for school personnel that will be provided for the child, the extent, if any, to which the child will not participate with nondisabled children in the regular class; any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child; if applicable, why the child cannot participate in the regular assessment and why the particular alternate assessment selected is appropriate for the child; and the projected date for the beginning of the services and modifications and the anticipated frequency, location, and duration of those services and modifications. § 1414(d).

"[T]he Act contemplates that such education will be provided where possible in regular public schools . . . , but the Act also provides for placement in private schools at public expense where this is not possible." *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 369, 369, 105 S. Ct. 1996, 2002-03 (1985); *Cerra v. Pawling Cent. Sch. Dist.*, 427 F.3d 186, 192 (2nd Cir. 2005). Although the Act "reflects a structural preference in favor of providing special education in public schools," when a public school fails to provide an adequate education in a timely manner a placement in a private school may be appropriate. *Loren F. ex rel. Fisher v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1312 (11th Cir. 2003). "[A] disabled student is not required to demonstrate that he cannot be educated in a public setting. Under [the Act], the relevant question is not whether a student could in theory receive an appropriate education in a public setting but whether he will *receive* such an education." (Emphasis added.) *Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 248-49 (3d Cir. 1999). Here, the Court concludes that ~~OO~~ will not *receive* an appropriate education at the AISS in the future.

The Court may award educational services to be provided prospectively to compensate for a past deficient program. *Reid ex rel. Reid v. Dist. of Columbia*, 365 U.S. App. D.C. 234, 401 F.3d 516, 522 (D.C. Cir. 2005); *see Burlington*, 471 U.S. at 369. "Compensatory education involves discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency's failure over a given period of time to provide a FAPE to a student." *G v. Fort Bragg Dependent Schs.*, 343 F.3d 295, 309 (4th Cir. 2003). Appropriate relief is designed to ensure that the student is appropriately educated within the meaning of the IDEA and to provide the educational benefits the school district should have supplied in the first place. *Reid*, 401 F.3d at 524. The Court has broad discretion to grant

such relief as it finds appropriate. § 1415(i)(2)(C)(iii); *Burlington*, 471 U.S. at 369, 374. In fashioning equitable relief, the Court must consider all relevant factors and use a flexible approach to address the individual child's needs with a qualitative, rather than quantitative focus. *Florence County Sch. Dist. v. Carter*, 510 U.S. 7, 16, 114 S. Ct. 361, 126 L. Ed. 2d 284 (1993); *Reid*, 401 F.3d at 524. Compensatory awards should compensate, and this means that they must do more than provide "some benefit" as required by ordinary IEPs. *Reid*, 401 F.3d at 525. In short, compensatory education is necessary to preserve a handicapped child's right to a free and appropriate education. *Jefferson County Bd. of Educ. v. Breen*, 853 F.2d 853, 857 (11th Cir. 1988) (quotations omitted).

The Court concludes that AISS' refusal to give Plaintiffs an explanation of the events that occurred on October 21, 2008 is particularly appalling given that [REDACTED] is non-verbal and did not have the ability to inform his parents of his mistreatment by employees of AISS or North Metro. Further, AISS' subsequent threats to file charges against the parents if they did not bring [REDACTED] back to school, coupled with the admissions by his special education teacher of the inappropriate treatment of him in the class, AISS' failure to take steps to discipline the adult educators involved, and the failure on the part of AISS to provide [REDACTED] with an appropriate education, leads the Court to conclude that AISS can only promise more of the same inappropriate treatment of [REDACTED] if he were to continue to be educated by AISS.

Therefore, the Court concludes that AISS has forfeited its right to continue to educate [REDACTED] and [REDACTED] is entitled to a prospective private placement at public expense for the remainder of [REDACTED]'s educational entitlement. The Court concludes that the Summit Learning Center is an

appropriate placement and appropriately provides and implements an ABA instructional program for [REDACTED] that addresses [REDACTED]'s individualized needs.⁹ The Court also concludes that [REDACTED] is entitled to one year of compensatory educational entitlement to be provided at the end of the Plaintiffs educational entitlement and further, that Plaintiffs are entitled to reimbursement for privately provided services and private assessments. Accordingly,

IV. ORDER

IT IS HEREBY ORDERED THAT [REDACTED] shall receive one year of compensatory education to be provided at the end of the Plaintiffs educational entitlement and further, that Plaintiffs shall be reimbursement by AISS for privately provided services and private assessments in the amounts stipulated to at trial for the two (2) years prior to the filing of their Complaint through the 2008-2009 school year, including but not limited to direct services, related services, and transportation or travel services.

IT IS FURTHER ORDERED THAT [REDACTED]'s prospective placement for the remainder of his educational entitlement shall be in a private school at the Summit Learning Center. Said private school placement shall be paid for by AISS in the amounts stipulated to at trial and shall include the provision of adequate AT evaluation and instruction and the provision of AT devices, as well as individual private speech and language services.¹⁰¹¹

⁹ A stipulation was reached at trial as to the claims for reimbursement and the amounts for current and prospective placements and services.

¹⁰ In the event that placement at the Summit Learning Center is no longer available, Plaintiffs shall choose another private school that appropriately provides and implements an ABA instructional program for [REDACTED] that addresses [REDACTED]'s individualized needs with an expense less than or equal to the cost associated with placement at the Summit Learning Center.

IT IS FURTHER ORDERED THAT any additional relief sought by Plaintiffs in their Complaint has specifically been considered, is not deemed to be necessary or appropriate, and is therefore **DENIED**.

SO ORDERED THIS 11th day of May, 2009.



JOHN B. GATTO, Judge

¹¹ The Court strongly urges the AISS to adopt and enforce a mandatory system of reporting to DFACS and to law enforcement, if one does not exist, of any injury occurring in any AISS or North Metro classroom. The Court also strongly urges the AISS to take steps to appropriately discipline any of its employees identified on the audio recording as having engaged in inappropriate conduct in the presence of ~~the~~ and to file a complaint with the Georgia Professional Standards Commission related to the special education teacher's inappropriate conduct (and any other employee that engaged in inappropriate conduct) identified on the audio recording that is the holder of an educator certification issued by the Georgia Professional Standards Commission.