IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[redacted]., by and through his parents, [redacted]. and [redacted].; [redacted]; and [redacted]; Plaintiffs,	:	Docket No.: OSAH-DOE-SE-0934064-33-Baxter
v.	:	09-145988
COBB COUNTY SCHOOL DISTRICT, Defendant.	:	

FINAL DECISION

Plaintiff, [redacted]., by and through his parents, and [redacted]. and [redacted]. individually (collectively "Plaintiffs") filed a due process complaint pursuant to the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA" or "Act"), 20 U.S.C. §§ 1400 to 1482, and its implementing regulations, 34 C.F.R. Part 300, against Defendant Cobb County School District ("District") alleging a denial of a free appropriate public education ("FAPE"). Attorney Chris Vance represented the Plaintiffs. Attorney Aric Kline represented the School District. Plaintiffs seek reimbursement for private services beginning October 23, 2008 through the hearing. For the reasons stated below, Plaintiffs' request for relief is **GRANTED in part**.

FINDINGS OF FACT

A. Background

1.

[redacted]. is a [redacted] year old boy that has been diagnosed with autism, apraxia, sensory integration dysfunction, and ocular motor apraxia. (Joint Exhibit ("Ex. J-__") 25, p. 242; Transcript ("T-__") 253, T-390.)

2.

As a resident of the District and a disabled student, [redacted]. is entitled to receive special education services pursuant to IDEA under the eligibility categories of autism and speech language disability. (Ex. J-58.)

3.

[redacted] was first placed in a District educational placement for the 2006-2007 school year. During that school year, [redacted] attended a special needs preschool. [redacted]. also participated in an extended school

year ("ESY") program. (Exs. J-12, J-14, J-15, J-21.)

4.

At an April 13, 2007 Individualized Education Plan ("IEP") meeting which included [redacted].'s parents and District employees (the "IEP Team"), the IEP Team reported that [redacted]. (a) "responds well and learns new skills through Discrete Trial teaching methods," (b) "has a difficult time with transitions throughout the routine of the day and over breaks," and (c) "has a weakness with dangerous situations." [redacted].'s IEP Team determined that [redacted] "require[ed] direct academic and behavior instruction in a discrete trial format for a major part of the instructional day." (Ex. J-15, pp. 156, 162.)

5.

For the 2007-2008 school year, [redacted]. received special education services in a special needs autism ("AU") preschool placement at Sanders Primary School ("Sanders"). [redacted].'s parents became concerned that he was losing his toileting skills and small emerging vocabulary. [redacted]'s teacher reported in September that [redacted] "cries excessively" in that setting. In addition, [redacted] received only about one hour a week of Applied Behavior Analysis Discrete Trial Training ("ABA DTT")[1] in the Sanders classroom. At an October 23, 2007 IEP meeting, it was reported that [redacted] had made no meaningful progress as well as regressed on some of his IEP goals and objectives. (T-110, T-273, T-282; Exs. J-27, p. 270, J-33, pp. 319-323.)

6.

Because [redacted] was regressing in the District's classroom, because he was not receiving intensive one-to-one ABA DTT, and because of other parental concerns regarding the placement, [redacted]'s parents rejected the IEP placement and program and gave notice of private placement at public expense at the October 2007 IEP meeting. (Exs. J-33, pp. 316-318; J-35, pp. 342-344.)

7.

[redacted]. filed a due process hearing request on August 12, 2008, regarding his placement at Sanders. In October 2008, these issues were resolved, and there are no issues prior to October 2008 presented to this Court for resolution.

[1] The District refers to DTT as Discrete Trial Instruction, but the parties agree that it is the same strategy. (T-457.)

B. R.K.'s Current Functioning & Educational Programming

8.

Since October 2007, [redacted]. has been receiving services from a private provider, May South, in his home. [redacted]. also receives occupational therapy, speech therapy, myofunctional therapy, vision therapy, and play therapy. (T-284; Plaintiffs' Exhibits ("Ex. P-__") 1-464; J-52 to J-56, J-60, J-80.)

9.

Ryan Schweck,[2] a board-certified assistant behavioral analyst, has provided [redacted]. educational programming for almost two years at the time of the hearing. Schweck testified that [redacted]. routinely becomes distracted, needs a very quiet environment in order to learn, and cannot learn in group situations with a lot of visual and auditory distractions. (T-135-36, T-157, 165, 168.)

10.

According to Dr. Jule Kagan,[3] [redacted]'s occupational therapist, [redacted]. is "an extremely involved child, and he is one of the more severely and profoundly involved autistic children that [she has] worked with... it takes a lot of work for him to even make small gains...." (Deposition of Dr. Jule Kagan ("Kagan Depo.") at 22.)

11.

When [redacted]. is placed in a noisy area, he screams, put his hands together very tightly, tenses up, and shakes. If too many people are around him or if too much visual or auditory stimulation is around him, [redacted]. becomes disengaged or takes flight. In addition, [redacted]. presents a danger to himself as he will take flight and put objects in his mouth. (T-166, T-311; Kagan Depo. at 14-17.)

12.

Since his private programming began, [redacted]. has made substantial progress, including learning to imitate, identify colors, coexist and interact with others, and tolerate the presence of familiar children. [redacted]'s program has followed the advice of the District psychologist and included ABA DTT and facilitation with neurotypical peers. The costs of this programming to [redacted]'s parents at the time of the hearing totaled $65,815.78. (T-319-20, T-324; Exs. P-1-463, J-36, p. 353.)

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[2] Schweck was qualified as an expert in ABA, ABA DTT, and providing ABA to children with autism. (T-134.)

[3] Kagan was qualified as an expert in occupational therapy to children with autism and sensory integration dysfunction. (Kagan Depo. at 8-9.)

C. October 23, 2008 IEP Meeting

13.

On October 23, 2008, the District convened an IEP meeting with the goal of potentially transitioning [redacted]. back to a public school district setting ("October 2008 IEP Meeting").[4] (T-464.)

14.

No District employees at the meeting had met [redacted]., had observed [redacted]. or evaluated [redacted]. The District teachers and paraprofessionals who had previously taught [redacted]. while he was enrolled in the District were not invited to the meeting by the District. District employees, however, had reviewed the current functioning information provided by [redacted]'s parents, including documentation from his vision therapist and myofunctional therapist. The District also contacted [redacted]'s private speech language pathologist and received information on his oral motor/myofunctional disabilities and treatment. (T-96, T-595; Exs. J-60, P-775-76.)

1. Goals & Objectives

15.

The IEP Team spent many hours creating [redacted]'s goals and objectives. Because the District did not have a current Assessment of Basic Language and Learning Skills-Revised ("ABLLS-R")[5] grid for [redacted]., the District's draft goals and objectives were created by cross-referencing [redacted].'s current functioning information from May South with the protocol for ABLLS-R. Based on this information, the District prepared draft goals and objectives for consideration at the IEP meeting. [redacted].'s parents also drafted proposed goals and objectives and provided those to the District the day before the meeting. (T-842-44.)

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[4] Plaintiffs' counsel attended the October 2008 IEP Meeting as well as the meetings in March and May 2009.

[5] An ABLLS-R is a comprehensive assessment of skill levels for students with autism, including socialization, language, self-help skills, and academic skills. This assessment contains twenty-six different skill categories. Both May South and the District use the ABLLS-R as a basis for developing appropriate programming. (T-148, T-843.)

16.

With respect to the goals and objectives proposed by [redacted].'s parents, Dr. Elizabeth Turnage,[6] the District's special education compliance consultant, testified that the parents' proposed goals and objectives were very person-specific and very location-specific, limiting the location of implementation to [redacted].'s home. For instance, the goals and objectives included such things as: (1) "[redacted]. will participate in a 'high five' gesture with his brother twice daily when appropriate" and (2) "[redacted]. will pull his spread up on his bed each morning before learning." Conversely, the goals and objectives proposed by the District were not location specific and could be implemented in a variety of settings, including the home. (T-469; Ex. J-57.)

17.

During the course of the meeting, [redacted].'s parents alleged that the District had predetermined [redacted].'s goals and objectives. (Exs. P-873, P-902.)

18.

Samantha Mills Hebenstreit,[7] a special education teacher at Bryant Elementary School ("Bryant"), testified that the final goals and objectives created for [redacted]. at the October 2008 IEP Meeting were appropriate for [redacted]. Further, Ben Weeks,[8] a board certified behavior analyst consulting for the District, testified that the final goals and objectives created for [redacted]., were, in his expert opinion, appropriate. Weeks further testified that the final goals and objectives comported with the results of [redacted].'s subsequent December 2008 ABLLS-R assessment conducted by May South. (T-846-47, T-1094.)

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[6] Turnage was qualified as an expert in the provision of educational services to students with disabilities, the development of programming for students with disabilities, the development of IEPs for students with disabilities, the development of IEPs for students with autism, and an expert with respect to IDEA compliance. (T-459-63.)

[7] Hebenstreit was qualified as an expert in the provision of special education services to students with autism, the development of IEPs for students with autism, and the provision of private therapy to students with autism. (T-830-36; Defendant Exhibit ("Ex. D-__") 169.)

[8] Weeks was qualified as an expert in ABA, the design of ABA classrooms in school district settings, and the provision of ABA services to students with autism in school district settings. (T-1080.)

2. ABA Discrete Trial Training

19.

At the October 2008 IEP Meeting, a considerable basis for discontent lay with the District's refusal to provide in [redacted]'s IEP a specific number of hours per week that [redacted] would receive one-to-one ABA DTT. (Ex. P-1049-51.)

20.

ABA is a predictable, well-structured educational methodology used to shape a student's behavior with appropriate reinforcement. This methodology has proven effective for the District's preschool students with autism. DTT is a teaching strategy used under the ABA methodology umbrella where students are presented with discrete, repetitive tasks to perform (generally in a one-to-one setting) and receive positive reinforcement when the students achieve success. This teaching strategy assists students with the acquisition of new skills. Natural Environment Training ("NET") is also a teaching strategy under the ABA methodology umbrella where students are provided an opportunity to generalize their skills learned in a discrete trial format in a more natural learning environment. ABA NET is used at all time throughout the day in the District's AU classrooms when students are not learning in a discrete trial setting. (T-138, T-457-58, T-631, T-967-68.)

21.

Schweck testified that according to recent research, including the 2007 Pediatric Journal, an early learner with autism needs a minimum of 20 to 25 hours a week of one-to-one intensive ABA DTT. According to Schweck, [redacted]., at a minimum, needs 20 to 25 hours a week of one-to-one intensive ABA DTT. (T-178-79.)

22.

Further, the District's Autism/ABA, Putting It All Together, Summer Training 2007 manual states that the characteristics of a potential autism ABA classroom candidate is a student who requires academic and behavior instruction in discrete trial format for the major part of their instructional day. (T-687-86; Ex. P-600.)

23.

The amount of weekly DTT hours was an important issue for Plaintiffs because they believed [redacted]. progressed with this strategy under May South. [redacted]. received approximately 18 hours of ABA DTT from May Institute. With intensive ABA DTT, [redacted]. improved in all of his ABA DTT programs the

last quarter before the hearing. (T-137, T-139-40, T-189, T-277, T-324-25.)

24.

[redacted].'s parents insistence on a specific amount of DTT per week was also because the District had previously provided far less ABA DTT than the amount referenced in his previous IEP (i.e., that DTT would be a major part of his instructional day). In addition, Plaintiffs provided testimony and evidence from District parents who indicated that their children's IEPs contained specific hours of ABA DTT per week, yet their children did not receive the stated amount. Even district employees testified that the amount of ABA DTT a student received varied day-to-day and week-to-week. (T-225-26, T-859-60; Exs. P-479, P-1261-65.)

25.

The District declined to provide a specific amount of hours per week, but insisted that if services were needed, then they would be provided. ABA DTT is generally not written into children's IEPs within the District because it is a teaching strategy and because the amount of ABA DTT a child receives per day is based upon how successfully a student is acquiring skills on a day-to-day basis. During the course of the IEP Meeting, it was discussed multiple times that [redacted]. would receive whatever ABA DTT he needed for appropriate implementation of his goals and objectives. Further, Turnage also testified that if ABA DTT is not written into a child's IEP, that does not mean that he or she will not receive the DTT. The parents of a child with autism in the District's program would know that an appropriate amount of ABA DTT is being provided to their child based upon data, sign-in sheets, and graphs that the District provides to the parents. (T-603-04, T-695-96, T-705; Ex. P-1049-51.)

26.

Instead of enumerating the number of hours ABA DTT would be provided, the IEP Team proposed that [redacted]. receive 360 minutes per day of services in a classroom that utilizes the principles of ABA throughout the entire day, whether it be DTT or NET. (T-629-33, T-739-40, T-962-63.)

27.

One issue that became apparent at the hearing was that [redacted]'s parents did not believe the District could handle a significant amount of one-to-one ABA DTT with the current staffing levels in the classroom. The District, however, was prepared to provide [redacted] with an additional paraprofessional in the classroom assigned only to him. Had [redacted] attended a District classroom during the 2008-2009

school year, he would have received this support, which was listed vaguely in [redacted]'s October 2008 IEP as only "1-on-1 assistance." At the hearing, it was clear that Plaintiffs were not aware that [redacted] would receive his own paraprofessional, even though the service was listed in the IEP. (T-790-92; T-1128-29; Exs. J-58, p. 696, P-866, P-999.)

3. Other Services

28.

At the October 2008 IEP Meeting, the IEP Team also offered [redacted] occupational therapy and speech therapy services. Specifically, the IEP Team offered to provide [redacted] with 120 minutes per week of speech language therapy, with 60 minutes of small group speech language therapy and 60 minutes of one-to-one speech language therapy. Vicky Carter, a speech language supervisor for the District, testified that, in her expert opinion, these speech services were appropriate for [redacted].[9] (T-811; Ex. J-58, p. 699.)

29.

Further, the IEP Team offered to provide [redacted] with 60 minutes per week of occupational therapy in a one-to-one setting. Jacqueline Wynter, an occupational therapist for the District, testified that, in her expert opinion, these occupational therapy services were appropriate for [redacted].[10] (T-927; Ex. J-58, p. 699.)

30.

In addition to these therapies, Plaintiffs wanted [redacted] to receive vision therapy, sensory integration therapy, and myofunctional therapy, all of which [redacted] was receiving through private providers. (Ex. P-900-1000.)

31.

[redacted]'s myofunctional and speech therapist, Sharon Wexler, testified that [redacted] required myofunctional therapy in order to improve his motor sequencing patterns and develop adequate oral muscle strength.[11] Wexler testified that [redacted] has progressed with this therapy. Carter disagreed,

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[9] Carter was qualified as an expert in the provision of speech and language services for students with speech language disabilities, the supervision of speech and language services for students with disabilities, programming for speech and language services for students with disabilities, and the development of individual programs for students with speech and language disabilities. (T-799; Ex. D-171.)

[10] Wynter was qualified as an expert in the area of occupational therapy and the provision of occupational therapy to students with autism. (T-914-15.)

[11] Wexler was qualified as an expert in speech language pathology, speech therapy, myofunctional therapy, apraxia, treating autistic children with apraxia and sensory integration dysfunction. (T-54.)

testifying that "there isn't any evidence that points to myofunctional therapy being an effective technique for improving speech sounds." To address the oral motor issues, the District proposed a goal that [redacted] would increase his vocalizations up to 50 words and added oral motor techniques to the objectives in an effort to meet [redacted]'s parents' requests. (T-66-68, T-809-11; Ex. J-58, p. 693.)

32.

[redacted]'s vision therapist, Nicole Gurbal,[12] also testified that he required vision therapy to address his tracking issues. [redacted] suffers from ocular motor dysfunction which makes it difficult for [redacted] to learn. Wynter, however, testified that the District offered several visual accommodations which would help with tracking and visual attention, and thus, specific vision therapy was not necessary. (T-398, T-923-30, T-400-01.)

33.

Finally, Kagan, [redacted]'s occupational therapist, testified that it was "imperative" for [redacted] to receive sensory integration therapy, which is an occupational therapy strategy. Kagan testified that without sensory integration therapy, [redacted] could not progress. Wynter, however, testified that a sensory diet and sensory strategies in the classroom can assist [redacted] with any sensory issues. (T-923-30, Kagan Depo. at 33, 42; Ex. J-58, p. 696.)

4. Placement

34.

As with the goals and objectives, placement also became a significant issue as [redacted]'s parents believed that the District had predetermined placement in a kindergarten through second grade small group autism placement ("K-2 AU placement") located at Bryant. This allegation was made, in part, because [redacted]'s parents contended that the District did not provide them with an opportunity to observe a small group *preschool* AU placement within the District before the October 2008 IEP Meeting. (T-373, T-473-75, T-467-69; Exs. P-873, P-1003-15.)

35.

In fact, the District had offered the Plaintiffs the opportunity to observe different placements, but the Plaintiffs did not receive the email. (T-420, T-474-76, T-1105-06; Exs. J-81, P-1013-15.)

36.

In spite of the contention that placement was predetermined, [redacted]'s parents requested that the

[12] Gurbal was qualified as an expert in developmental optometry, pediatric optometry, vision therapy, and

District consider placing [redacted]. in a small group preschool AU placement and the IEP Team agreed with this request. The District further offered [redacted]'s parents an opportunity to choose between two placement locations at Sanders and Baker Elementary School ("Baker"). The District acknowledged that the parents would likely not approve of the Sanders placement given [redacted]'s problems in the classroom a year earlier, even though the teacher had changed. (Ex. P-1071-72.)

37.

[redacted]'s parents made these allegations of predetermination even though their own proposed goals and objectives were specific to [redacted]'s home and/or specifically involved [redacted]'s brother, [redacted]., who did not attend a District school at the time. (Ex. J-57.)

38.

In fact, the Plaintiffs felt the home was the appropriate educational placement. [redacted]'s occupational therapist agreed, testifying that [redacted]. could not take the level of sensory input in a District classroom. And according to [redacted]'s speech therapist, he would not be able to maintain a level of organization or function in the noise level of the Sanders autism classroom. (T-45-62, T-66-69, T-73-74, T-83, T-873-74, Kagan Depo. at 19, 30.)

39.

In contrast, District witnesses testified that the small group preschool AU program provides a structured routine in classrooms that are specifically designed for students with autism. The classrooms contain visual schedules and supports as well as defined work areas to assist students with expectations throughout their day. Also, the ratio of educators to students in these classrooms is typically three educators to four students. (T-621-27.)

40.

Megan Ball,[13] the teacher for the small group preschool AU classroom at Sanders for the 2008-2009 school year testified that, in her expert opinion, this was an appropriate placement for [redacted]. Ball, who has provided ABA services in home-based settings as well as in school-based settings, testified that school district environments are more preferable than private home-based settings. She based this opinion on the access that students have to typical peers in the school settings as well as the foundations that a school-based setting provides for a later life in society. (T-960, T-980-81.)

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treating individuals with leaning-related vision disorders. (T-386.)

[13] Ball was qualified at the hearing as an expert in the provision of special education services to students with autism and the provision of special education services to special education students. (T-957-62; Ex. D-165.)

41.

Hebenstreit testified that the placement was appropriate for [redacted]. because it provides opportunities for NET, peer interaction, coping skills, and transition skills.[14] She described the classroom setting as a "mini real world" where students with autism can appropriately practice their skills. In her expert opinion, a one-to-one home-based setting for students with autism would not offer the same opportunities for [redacted]. to practice and generalize his skills. (T-847-50.)

42.

In addition, May South established that [redacted] could tolerate small-group settings. Specifically, May South's Treatment Plan states that "[h]e behaves appropriately when in play situations with peers, although he does not independently engage in taking turns or playing games with peers... In small group settings and with the assistance of a facilitator, he will sit appropriately with peers; however, in large groups he engages in vocal stereotypy and engages in escape behaviors." A small group setting with a one-to-one paraprofessional was the precise placement offered to [redacted] by the District at the October 2008 IEP Meeting. (Exs. P-1272, J-58, pp. 696, 699-700.)

43.

Once the IEP Team had agreed with the Plaintiffs that a preschool placement was appropriate, [redacted].'s parents were unwilling to formally agree because they wanted to first observe the locations. (Ex. P-1029-34.)

44.

In the Sanders classroom, Megan Ball became the preschool AU classroom teacher beginning in the 2008-2009 school year. Weeks observed Ball in her classroom environment for approximately 25 hours during the 2008-2009 school year, and testified that in his expert opinion, Ball ranks among the top percentile of all autism educators that he has observed throughout the course of his career.[15] Further, he found her to be very quick to accept feedback, exhibited appropriate behaviors in the classroom, and exhibited pride in her work and the accomplishments of her students. (T-1082, T-1086-90.)

45.

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[14] Before beginning her employment in the small group K-2 AU placement located at Bryant Elementary School in 2008-2009, Hebenstreit was employed as an ABA therapist in a clinical setting as well as in home-based settings where she taught students with autism. (T-835-36; Ex. J-169.)

[15] Throughout the course of Weeks's career, he has observed between 75 to 125 school district classrooms

Weeks also testified that the proposed Sanders placement was (1) a safe learning environment, (2) designed in such a way as to provide the students with an opportunity to learn, and (3) appropriate in size. He also observed a classroom that was operating consistently with ABA methodologies. (T-1083-84.)

5. Transition

46.

After the placement discussion, the IEP Team developed [redacted].'s transition plan for transitioning back into a District placement ("October Transition Plan"). A transition plan was deemed necessary because of [redacted].'s difficulties with transitioning and distractibility. During the course of this transition discussion, [redacted].'s parents insisted upon a very slow transition time even though some District educators believed that he did not require such a slow transition. (T-273, T-737, T-749-50, T-868, T-976-77, T-981-82; Ex. J-58, p. 707, P-1054-70.)

47.

For instance, Jean Watson, a District preschool lead teacher, testified that [redacted] could have successfully returned immediately back into a District placement without a transition plan.[16] She based this expert opinion on her review of [redacted].'s education records and personal knowledge of [redacted], including her observations of [redacted] in the preschool program during the 2006-2007 school year. Further, with respect to the several hundreds of students with autism within the District that Watson has assisted with transitioning into a preschool placement, Watson testified that no formal transition plans were required for any of these students, except for one student.[17] (T-647-48, T-657-58, T-672-73, T-719.)

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designed specifically for students with autism. (T-1078.)

[16] Watson was qualified as an expert in the provision of special education to special education students, the development of programming for special education students, the provision of education to students with autism, and the development of programming for special education students with autism. She was also qualified as an expert in transitioning students with autism. This was based, in part, upon her experience in transitioning preschool students into the District's preschool program through Georgia's early intervention program, Babies Can't Wait, her personal experience in transitioning between 40 to 50 students with autism into her classroom when she was teaching that had never been in school previously, and her experience in assisting with the transition of between 200 to 300 students with autism. Further, Watson drafted a seventy-five page article regarding the transitioning of students into preschool classrooms. (T-617, T-635-38, T-641, T-645-647.)

[17] In that scenario, the District called an IEP meeting to amend the student's IEP to shorten the student's day, but the student was able to transition into school within three weeks of implementation of that plan. (T-648.)

48.

Nevertheless, to address [redacted].'s parents' concerns regarding transition, the IEP Team developed a transition plan where [redacted]. would begin transitioning during the school day from 2:30 to 3:15 for five days during the month of November 2008 and then during preferred activities for eight to ten days as he could tolerate them. The IEP Team also agreed that his school day would be increased gradually by duration for up to an hour and then by the number of days as [redacted]. could tolerate until he could attend for a full day. IEP Team members agreed that [redacted]'s transition should be based on [redacted].'s tolerance level and done at his pace. (T-1054-70.)

49.

As part of [redacted].'s transition, [redacted].'s parents requested continuation of his home-based services during the transition period. When the District declined to pay for [redacted]'s current services, the October 2008 IEP Meeting quickly devolved. Plaintiffs became very upset, demanding that the District educate [redacted]. the next day. In response, the District stated that [redacted]. "could transition or start the next school day and receive services from the district." (T-479, T-536-38; Exs. P-1075-76; J-172, Third file 1:10:16-1:10:35.)

50.

The District declined to provide services even though, at the hearing, Watson and Hebenstreit agreed that during the October Transition Plan period, [redacted] needed educational programming to be provided a free appropriate public education. (T-721, T-882.)

6. Outcome of October 2008 IEP Meeting

51.

At the end of the meeting, Plaintiffs rejected the proposed IEP and gave notice pursuant to the IDEA of private placement at public expense, explaining that it was not appropriate for the District not to educate [redacted]. while he transitioned back into the school setting and it was not appropriate for the District to decline to place the number of hours of ABA DTT he would receive, if any, in [redacted].'s IEP. (T-269-70; Exs. P-1075, J-87.)

C. Events Following the October 2008 IEP Meeting

52.

A week after the IEP Meeting, the District wrote to [redacted].'s parents about several issues/action items that had arisen at the IEP Meeting, but entirely failed to acknowledge the parent's rejection of the IEP. (Ex. J-86.)

53.

This misstep of ignoring the Plaintiffs' rejection of the IEP initiated a flurry of letters between [redacted].'s parents and the District throughout the Fall/Winter of 2008-2009 with the Plaintiffs repeatedly claiming that the District was dishonest. While both parties testified that they were attempting to reach an agreement during this period, the letters indicate that the parties were not effectively communicating their position to the other. (Exs. J-87, J-99.)

54.

Throughout these letters, the parties disagreed about whether the District had been forthcoming in allowing [redacted].'s parents to observe other placements, whether the District had predetermined placement, whether [redacted].'s parents' experts could observe the proposed placements, and whether [redacted].'s parents were being unreasonable in not allowing the District to observe [redacted] or participate in an ABLLS-R assessment, even though they had initially agreed. (Exs. J-87, J-88, J-89, J-90, J-92.)

55.

Specifically, and important for this matter, in a November 21, 2008 letter the District attempted to resolve a critical issue with Plaintiffs. The District's letter stated that it was "willing to discuss the provision of home-based services, to be provided by District employees, during [[redacted].'s] transition back into the [District]." The District also granted [redacted].'s parents' request to allow [redacted].'s current private providers an opportunity to observe placements within the District. (T-424-25, T-484-85; Ex. J-88.)

56.

A month after the District's correspondence, [redacted].'s parents rebuked the District's offer of resolution. In their letter, [redacted].'s parents ignored the District's request to meet to discuss home-based services. Instead, [redacted]'s parents requested that the District provide a written agreement promising to pay for private services in the home and requested information that could have easily been requested at the IEP meeting. (T-425-27; Ex. J-89.)

57.

The District attempted a second time to reach a resolution with [redacted].'s parents in a January 9, 2009 letter. Again, the District demonstrated its willingness to provide home-based services during the transition by providing "[s]hould you choose to accept home-based services provided by the District, the services can begin as soon as possible." This correspondence also responded to many of the [redacted].'s parent's previous requests for information, including the requested schedules for the Sanders and Baker autism classes. These class schedules concerned [redacted].'s parents because the Baker schedule indicated that the children received DTT Monday through Thursday during a one-hour rotation with two other activities. (T-316, T-486; Exs. P-1201, J-90.)

58.

More than two and a half weeks after the District's second resolution letter, [redacted].'s parents responded by asking numerous questions regarding the proposed home-based services to [redacted]. and also stating that "[r]egarding your invitation to discuss home-based services from the District, given the untruthful nature of even the District's written communications to us, we request that if the District really does have such a proposal, to put it in writing." (T-430; Ex. J-92.)

59.

The District continued to placate [redacted].'s parents repeated and unnecessary requests while still, after two and half months, trying to schedule a meeting with the parents. In a February 10, 2009 letter, the District requested available dates and times when [redacted].'s parents were available to discuss an alternative transition plan for [redacted]. in an IEP Meeting setting. Pursuant to [redacted].'s parents' request, the District also provided a proposed written framework for home-based services. This framework consisted of the following: "[[redacted]] would receive a total of 40 hours of support in the home and/or school setting for a maximum of four (4) weeks. The support would be provided by a person of the District's choosing and supervised by a person of the District's choosing." (T-487-88; Ex. J-93.)

60.

Again, [redacted].'s parents' response was to delay meeting with the District to resolve these issues and again ask for more information regarding the District's proposal. (Ex. J-95.)

61.

On February 26, 2009, the District again replied to [redacted].'s parents' request, responding to specific inquiries and advising that the framework of home-based services was merely a proposal subject to

rejection, revision, or adoption by [redacted]'s IEP Team. The District's correspondence also reiterated its past repeated request for mutually agreeable dates and times to convene an IEP Meeting to discuss an alternative transition plan for [redacted]. (Ex. J-96.)

62.

Plaintiffs finally agreed to meet for an IEP Meeting almost a month after the District's third request, but limited the meeting duration and purpose to transition issues only. (T-489; Exs. J-100, J-104, J-105.)

D. <u>March 20, 2009 IEP Meeting</u>

63.

The District came to the meeting with a new proposed transition plan, something [redacted]'s parents seemed surprised by, even though the District's correspondence specifically stated that it wanted to create an "alternative" to the October Transition Plan. (T-277; Ex. J-104.)

64.

The IEP Team agreed that this new transition plan was to include further scheduling information to be provided by the District after the meeting. Thus, on March 30, 2009, the District sent a detailed transition plan to [redacted]'s parents. ("March Transition Plan"). (T-118.)

65.

The March Transition Plan was very thorough and detailed. The IEP Team proposed a transition over a course of six weeks, with one week of initial observation in the home. At the meeting, the IEP Team discussed that the transition would be data driven and could be sped up or slowed down based upon [redacted].'s tolerance. (T-564, T- 670; Exs. J-63, pp. 773-775, J-64, pp. 786-787.)

66.

This March Transition Plan also included reimbursement to [redacted]'s parents for the provision of ABA DTT therapy to be provided by [redacted]'s therapists in the home for ten hours per week for a maximum of five weeks while he transitioned. The plan also provided reimbursement for [redacted]'s private providers (up to ten hours) to accompany [redacted] on the bus and in the public school setting as he transitioned back into a public school setting. (T-491; Ex. J-63, p. 775.)

67.

During the initial observation phase of the March Transition Plan, Kelly Tucker Campbell, a behavior autism support teacher, would observe [redacted]'s private providers as they provided direct

therapy to [redacted] in his home environment. Campbell's observation and involvement was geared toward familiarizing the District with [redacted]'s home program, his reinforcers, his ABA DTT program, and verbal directions in order to provide continuity in a school-based setting. (T-495-96; Ex. J-64.)

68.

For Week One of the March Transition Plan, [redacted]'s private providers were to join him as he came to school during the end of the school day. This would assist [redacted]. with his comfort level in the school environment. During the second week of the transition plan, Campbell would remain with [redacted]. and would facilitate transitioning [redacted]. into the classroom setting for more time each day. Week Two would include DTT in the classroom and speech language therapy as well as occupational therapy. During Weeks Three through Five, [redacted]'s days would gradually increase and services within those days would increase. (T-664-71.)

69.

Watson and Weeks both opined that the March Transition Plan was appropriate. Weeks, however, stated that he would have rather seen the March Transition Plan be contingent upon objective data and that it lacked operational definitions of when [redacted]. would move to the next step of the transition. (T-664-68, T-704, T-1099-01.)

70.

At the end of the March 2009 IEP Meeting, [redacted]'s parents also requested to discuss Extended School Year ("ESY") services. The District did not want to accommodate this request because time was running short for the meeting based on [redacted]'s parents' demand that it be only two hours long and the District's impression that the meeting was only called to discuss transition. Instead, the District advised that an IEP Meeting could be reconvened in the near future to discuss ESY services. The District wanted to begin providing transition services to [redacted]. to obtain current functioning information before an ESY program would be created. This had been discussed with [redacted]'s parents at the October IEP Meeting. (T-490-92, T-585; Ex. J-58, p. 700.)

71.

At the conclusion of the March IEP Meeting, [redacted]'s parents again gave notice of private placement at public expense because 10 hours of ABA DTT a week during the transition was insufficient. In addition, [redacted]'s parents stated that they still needed to observe the Sanders placement in order to

make a determination regarding the small group preschool AU program.[18] (T-436-37; Ex. J-63, p. 776.)

E. Events Following the March 2009 IEP Meeting

72.

A week after the March IEP Meeting, [redacted].'s parents notified the District that they would like [redacted]. to transition back to the small group preschool AU placement located at Sanders. As was the usual course for [redacted].'s parent's correspondence, the letter also contained several inquiries regarding (1) why a particular District employee was chosen to assist [redacted]. with his transition, (2) transportation services offered by the District; and (3) the amount of time ABA DTT would be provided to [redacted]. per week. The District again responded to [redacted].'s parents' inquiries. (Exs. J-110, J-115.)

73.

In a second correspondence dated April 1, 2009, [redacted].'s parents sought information regarding: (1) a schedule of when a District representative would observe [redacted]. in his home; (2) alleged District-initiated alterations to [redacted]'s transition plan; (3) the amount of time ABA DTT would be implemented upon [redacted].'s transition; (4) programs and protocols regarding educational methodologies; and (5) any alleged problems or issues with Sanders Primary School. In this April 1 correspondence, the Plaintiffs also stated that they would seek reimbursement for ESY services because they could no longer delay plans for the summer and went ahead and made ESY arrangements. Thus, [redacted].'s parents notified the District that they were rejecting ESY services before the District could even convene an IEP meeting to offer such services. The District again responded to [redacted].'s parents' inquiries. (Exs. J-136, J-123.)

74.

On April 2, 2009, [redacted].'s mother observed the Sanders' small group preschool AU placement. During the course of this observation, she audio taped the observation without notifying the District or seeking permission.[19] She found the classroom to be in "total chaos," with students throwing

[18] Before the March IEP Meeting, some five months after the parents first advised that they wished to observe the preposed placement locations at Baker and Sanders, the parents had not yet observed these locations. [redacted].'s mother drove to Baker and testified that she decided not to go in and observe the small group preschool AU classroom because it was too far of a bus ride for [redacted], in spite of the fact that at the October 2008 IEP Meeting, she stated "I'm willing to drive my son to these locations. I don't need the bus to take him." (T-289, T-358, T-360-362; Ex. P-1031.)

[19] [redacted].'s mother also audio recorded more than one conversation that she had with the Sanders' paraprofessionals without requesting permission to record them and without advising the paraprofessionals of

food, lunches being turned over, DTT being given to two students verbally stimming, both in close proximity to each other such that they were setting each other off, students knocking over the DTT board, a student rolling around on the floor, a student shove a much smaller student out of the chair, students slapping one another, five students in a very small classroom, a classroom with an echo sound, DTT dividers that block out sight of the other student, but not the sounds in the classroom, a room visually crowded, furniture everywhere, and significant verbal stimming. (T-289-93, T-360-62; Ex. P-J.)

75.

The parties scheduled an IEP meeting for May 12, 2009 to discuss ESY services and [redacted]'s parents' concerns regarding the Sanders placement. (T-324; Ex. P-647.)

F. <u>May 12, 2009 IEP Meeting</u>

76.

At the May 12, 2009 IEP Meeting, the IEP Team recommended that [redacted] receive ESY services over an eleven-week period during the 2009 summer (May 25 to August 7). The proposal included 190 hours of services, consisting of the following: 128 hours of ESY services to be provided by the District in a small group special needs preschool placement and 62 hours of reimbursed services to be provided in [redacted]'s home by private providers. The District also offered, for an eight week period during the summer, the following: 60 minutes a week of small group speech-language services, 60 minutes a week of one-to-one speech-language services, and 60 minutes a week of one-to-one occupational therapy services (hereinafter the "May ESY Plan"). (Ex. J-76, p. 866.)

77.

The May ESY Plan was part of the District's third offer for a transition plan. More specifically, the IEP Team proposed (a) to transition [redacted] into a school-based setting beginning on May 13, 2009, before the ESY began on June 1, 2009, (b) to provide ESY for the 2009 summer, and (c) to provide school placement for the 2009-2010 school year ("May Transition Plan"). (Ex. J-76, P. 866.)

78.

According to the May Transition Plan, beginning the week of May 13th, [redacted] would attend the small group K-2 AU placement located at Bryant from 1:10 to 2:00 p.m. in Hebenstreit's classroom. During the next week, [redacted] would attend Hebenstreit's class from 12:30 to 2:00 p.m. During those

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her intent to record. (T-339-43.)

first two weeks of transition, the District agreed to reimburse [redacted]'s parents for the provision of private ABA DTT services in [redacted].'s home from May South providers. The District further offered to reimburse [redacted]'s parents for ten hours of ABA DTT to be provided by May South in [redacted]'s home during the third week of the transition plan from May 25 to May 29. Beginning on June 1, [redacted]. would begin his May ESY Plan at Bryant which would extend through August. On the days and weeks that the District was closed over the summer, the District again offered to reimburse for ABA DTT home-based services. (T-508-10; Ex. J-76, p. 866.)

79.

For the 2009-2010 school year, the IEP Team proposed that [redacted]. begin his placement in the same classroom at Bryant that he would attend during the ESY. Specifically, the placement offered by the IEP Team included the following: a full day small group K-2 AU placement, 60 minutes a week of small group speech language services, 60 minutes a week of one-to-one speech language services, and 60 minutes a week of one-to-one occupational therapy services. Included in [redacted].'s May 2009 IEP, just as it was included in his October and March IEPs, was one-on-one assistance to be provided by a paraprofessional dedicated only to [redacted]. (T-508-10; Exs. J-76, J-63, p. 762, J-58, p. 696.)

80.

Turnage testified that, in her expert opinion, the May ESY and Transition Plans were appropriate for [redacted]. because he would begin the initial phase of the transition to Bryant in the small group K-2 placement, where he would later receive ESY services and placement during the 2009-2010 school year with seamless services to be provided before the start of the 2009-2010 school year. Watson also testified that it "was an excellent transition plan because it used extended school year services in the school where there are so many fewer children in the school." Watson also supported this expert opinion by noting that [redacted]. would have received transition services and ESY services in the same school and classroom where he would receive services the next year and he would also be introduced to his teacher for the next school year during the transition period. (T-510, T-729-30.)

81.

[redacted].'s mother had observed the Bryant autism program prior to the IEP meeting and as late as August 31, 2009, for a total of 8 times. [redacted].'s mother observed children with autism in adaptive physical education class being overwhelmed with auditory input to the point they were covering their ears, interruption of the only child receiving ABA DTT in the classroom by the PE coach for 12

minutes, a child playing on the computer, physical and verbal stimming, and objects around the classroom that would pose a danger to [redacted]. (T-306-12.)

82.

At the end of the May 2009 IEP Meeting, Plaintiffs sought to accept the occupational therapy, speech, and four hours of reimbursement for ABA DTT, but declined to accept the remaining services. The District countered that anything less than the full amount of services offered in the May 2009 IEP would have not constituted free appropriate public education. Thus, Plaintiffs rejected the May 2009 IEP and gave notice of private placement at public expense. (T-511; Ex. J-76, p. 865.)

83.

On June 12, 2009, [redacted].'s parents requested a due process hearing.

CONCLUSIONS OF LAW

1.

In this case, Plaintiffs are seeking reimbursement for private services, so they, therefore, bear the burden of proving both that the District's proposed placements were inappropriate under IDEA and that the services they request reimbursement for were appropriate and necessary. Schaffer v. Weast, 546 U.S. 49 (2005).

A. IDEA Framework

2.

Under both the IDEA and Georgia law, students with disabilities have the right to a free appropriate public education ("FAPE"). See 20 U.S.C. § 1412(a)(1); 34 C.F.R. §§ 300.1, 300.101; Ga. Comp. R. & Regs. r. 160-4-7-.01(1)(a). The Supreme Court has developed a two-part inquiry to determine whether the 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. v. Rowley, 458 U.S. 176, 206-07 (1982). This standard requires that states provide a "basic floor of opportunity" through a program individually designed to provide an educational benefit. Rowley, 458 U.S. at 201.

3.

In determining whether an IEP provides an opportunity for a student to receive educational benefit, the Supreme Court in Rowley specifically held that the Act does not require that the education services provided to the disabled student "maximize each child's potential." Rowley, 458 U.S. at 198. The Act speaks in terms of an "appropriate" education, which the Supreme Court has interpreted as an "education to which access is provided be sufficient to confer some educational benefit upon the . . . child." Id. at 200.

4.

To comply with procedural standards in creating an IEP, the IDEA does not require that the District guarantee "to produce any particular outcome." Rowley, 458 U.S. at 192. Rather, if the IEP is "reasonably calculated" to enable a child to make adequate educational progress then the state has complied with its obligations under IDEA. Id. at 206-207.

5.

Consequently, public school IEPs cannot be compared to alternative private programs that purportedly maximize students' potential. Rather, the inquiry must remain focused on the services that the public school is offering to the disabled student. M.M. v. Sch. Bd. of Miami-Dade County, 437 F.3d 1085, 1101-03 (11th Cir. 2006); see also Gregory K. v. Longview Sch. Dist., 811 F.2d 1307, 1314 (9th Cir. 1987) (stating that court's review "must focus primarily on the District's proposed placement, not on the alternative that the family preferred").

6.

The Eleventh Circuit has also held that in determining whether an IEP provided adequate educational benefit, courts must pay great deference to the educators who develop the IEP. J.S.K v. Hendry County Sch. Bd., 941 F.2d 1563 (11th Cir. 1991).

B. Alleged Procedural Violations

7.

Plaintiffs allege that the District violated IDEA procedural requirements by preventing parental participation. Specifically, Plaintiffs contend that the parents were denied the right to participate (1) in determining placement and services (i.e., ABA DTT) for [redacted]., and (2) by being denied the ability to consent to some, but not all the services proposed.

8.

To prevail on a procedural claim, Plaintiffs must demonstrate that the alleged procedural inadequacies "(I) impeded the child's right to a free appropriate public education; (II) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or (III) caused a deprivation of educational benefits." 20 U.S.C. § 1415(f)(3)(E)(ii). Here, Plaintiffs claim that the District significantly impeded the parents' opportunity to participate. The Court does not agree.

1. Predetermination

9.

First, Plaintiffs claim that their procedural rights were violated because allegedly, prior to the October 2008 IEP Meeting, the District predetermined [redacted]'s placement in a District classroom (as opposed to in a home-based setting) and predetermined that [redacted]'s IEP would not provide ABA DTT.

10.

Predetermination may violate IDEA and constitute a denial of FAPE when it deprives parents' of meaningful participation in the IEP process which causes a substantive harm. Deal v. Hamilton County Bd. Of Educ., 392 F.3d 840, 857 (6th Cir. 2005). To support their position, Plaintiffs rely on two cases in which courts have found that the school district, in violation of IDEA, predetermined placement or predetermined that it would not provide ABA DTT. W.G. v. Bd. of Tr. of Target Range Sch. Dist. No. 23, 960 F.2d 1479, 1485 (9th Cir. 1992) (holding school district predetermined placement when no alternatives were considered); Deal, 392 F.3d 840, 857 (where parents could not provide evidence to change the school system's mind in determination of appropriate services, their participation was not meaningful and violated FAPE). Those cases, however, are distinguishable from this matter.

11.

Unlike the IEP team in W.G., the IEP Team in this matter considered several alternatives to the final placement. See W.G., 960 F.2d at 1484 (finding it improper that school district refused to consider any alternatives in spite of the parents' objections). In fact, the evidence reflects a thorough and thoughtful process in which the Plaintiffs were active participants. Even if the District formed an opinion regarding [redacted]'s placement in advance of the meeting, that did not prohibit the parents'

participation. N.L. v. Knox County Sch., 315 F.3d 688, 694 (6th Cir. 2003) (finding school district may form opinions prior to IEP meeting); Blackmon v. Springfield R-XII Sch. Dist., 198 F.3d 648, 657 (8th Cir. 1999) (holding IDEA does not prohibit school district from bringing proposed IEP to IEP meeting). Rather, the Plaintiffs, at the October 2008 IEP Meeting, actually persuaded the District to change its proposed initial placement in a K-2 AU classroom to an AU preschool placement.

12.

Similarly, the Deal decision is also distinguishable. In that case, the court found that the school district had pre-determined that it would not consider or provide ABA, and thus, effectively deprived the parents of any meaningful participation in the IEP process. 392 F.3d 840, 857. By steadfastly refusing even to discuss why it would not recommend an ABA program, the court found that the school district violated the procedural requirements of the IEP process. Id. In this case, the District agreed that R.K. should be placed in an ABA program. At the October 2008 IEP Meeting, Plaintiffs repeatedly discussed their interest in having the ABA DTT weekly hours in the IEP and the District repeatedly reminded Plaintiffs that [redacted]. would receive the amount of ABA DTT each week that he needed to accomplish his goals and objectives. Here, the District simply disagreed with Plaintiffs that having a specific amount of ABA DTT hours listed in the IEP was appropriate. This might not be the outcome that Plaintiffs wanted, but refusing to quantify ABA DTT hours in the IEP is not predetermination.

13.

Ultimately, the parents had ample opportunity to participate in, and at many times, control the IEP process. The District did not limit these opportunities by coming to the October 2008 IEP Meeting with a proposed placement or by determining that hours of ABA DTT should not be included in the IEP. Accordingly, the evidence does not support a finding that [redacted].'s placement was predetermined.

2. Consent to Services

14.

Plaintiffs also allege that their procedural rights were violated at the May 2009 IEP Meeting when the District refused to allow them to accept some educational services and decline other services. Thus, it appears that the Plaintiffs allege that the adoption of an IEP with only the services they wanted would have provided [redacted] with FAPE. Again, the Court does not agree.

15.

The Plaintiffs have failed to provide any evidence that demonstrates that the May 2009 IEP's package of proposed services was not required for FAPE, and thus, have failed to prove that accepting only some of the services was within the parents' rights.

16.

Further, Plaintiffs' reliance on 34 C.F.R. § 300.300(d)(3) is misplaced. That regulation provides that "a public agency may not use a parent's refusal to consent to one service or activity... to deny the parent or child any other service, benefit, or activity of the public agency..." In this case, the District did not deny [redacted]. any services necessary for FAPE. The regulation is not a method for Plaintiffs to pick and choose from that package of services. Accordingly, Plaintiffs have failed to demonstrate that their procedural rights were violated.

C. Alleged Substantive Violations

17.

Plaintiffs allege numerous substantive violations with the original IEP Plan (October 2008) and the revisions to this Plan (March 2009 and May 2009). These alleged violations involve the District's failure to provide a free appropriate public education to [redacted] by failing (a) to evaluate, identify, and address [redacted].'s ocular motor dysfunction and oral motor/myofunctional disabilities and provide other appropriate therapies, (b) to propose proper placement, (c) to provide educational services necessary for [redacted], and (d) to provide a timely ESY determination.

1. Evaluation & Identification of Disabilities & Provision of Related Services

18.

Plaintiffs allege that the District failed to evaluate, identify, and address [redacted].'s ocular motor dysfunction and oral motor/myofunctional disabilities. As such, Plaintiffs contend that the District failed to provide appropriate services (i.e., failed to provide sensory integration dysfunction therapy, vision therapy, and myofunctional therapy). The evidence does not support Plaintiffs' allegations.

19.

IDEA requires school districts to provide children with necessary related services such as "developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education." 34 C.F.R. § 300.34. These services include, "speech-language pathology and audiology services, interpreting services, psychological services, physical

and occupational therapy, recreation... early identification and assessment of disabilities in children, counseling services... orientation and mobility services, and medical services for diagnostic or evaluation purposes... and parent counseling and training." Id.; see Dekalb County Sch. Dist. v. M.T.V., 413 F. Supp. 2d 1322 (N.D. Ga. 2005) (holding District must reimburse parents for student's vision therapy services).

20.

First, Plaintiffs have failed to prove that the District did not evaluate and identify these disabilities. The evidence demonstrates that the District was aware of [redacted]'s vision and oral motor skill deficits after speaking with [redacted]'s providers and reviewing the provider documentation prior to the October 2008 IEP Meeting. The IEP Team discussed these disabilities at the meeting as well. Second, the IEP addressed [redacted]'s needs with appropriate related services. Specifically, the IEP Team proposed occupational and speech therapy, developed specific goals and objectives to address certain of these disabilities, and discussed the use of a sensory diet in the classroom setting. The District simply disagreed with Plaintiffs that additional therapies beyond the IEP Team's proposals were required to provide FAPE.

21.

Based on the preponderance of the evidence and with appropriate deference to the District's experts, the Court finds that the services provided in [redacted]'s IEP were sufficient for FAPE.

2. Placement

22.

Plaintiffs disagree with the IEP Team's decision to place [redacted] in a school-based setting, and instead, contend that [redacted] should be educated in a home-based setting. The Court is not persuaded by Plaintiffs' position.

23.

When it comes to placement, IDEA expresses a very strong preference for mainstreaming and requires that children be educated in the least restrictive environment, with nondisabled peers to the maximum extent possible. 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114(a)(2); see Rowley, 458 U.S. at 194. Indeed, restrictive placements, such as homebound placements, are generally disfavored and are to be used only as a last resort when other, less restrictive settings have failed. 64 Fed. Reg. 12,638 (Mar. 12, 1999) ("Home instruction is... the most restrictive type of placement..."). Given

IDEA's strong emphasis on educating disabled students in the least restrictive environment, requests for home instruction should be viewed skeptically.

24.

Here, the IEP Team proposed school-based placement at the October 2008, March 2009, and May 2009 IEP Meetings. At the October 2008 IEP and March 2009 IEP Meetings, the IEP Team proposed placement in the small group preschool AU placement and gave the parents a choice of two locations. A preschool setting, as opposed to the kindergarten class proposed by the District, was specifically requested by the Plaintiffs and agreed to by the IEP Team. And at the May 2009 IEP Meeting, the IEP Team proposed placement in the District's small group K-2 AU program located at Bryant Elementary School for the 2009-2010 school year.

25.

Each of these placements was appropriate for [redacted]. Both the preschool and K-2 AU classrooms are specially designed for students like [redacted]., who have an autism spectrum disorder. Both classrooms implement ABA strategies throughout the day (including providing students with as much ABA DTT as needed), and the teachers were specially educated to teach children with autism using ABA strategies. In addition, [redacted]. would have also received the assistance of a one-to-one paraprofessional dedicated only to him in order to address his unique needs. Further, these school-based settings would have provided [redacted]. with peer interaction, including general education peers.

26.

Plaintiffs legitimately expressed concerns about several potential issues associated with the specific classrooms. Based on the parents' observations, the classrooms could be loud and potentially too visually stimulating for [redacted]. Further, other children in these classrooms received far less ABA DTT than their parents believed they were promised or was necessary for their children. The District's ABA consultant, however, found no issues with the AU preschool classroom. Whether these concerns are warranted or not, the District must be provided an opportunity to provide [redacted]. with an appropriate education before the Court will entertain such a restrictive placement as a home-based program.

27.

Weighing the Plaintiffs evidence that [redacted]. could not learn in a school-based setting against IDEA's strong preference for mainstreaming and the appropriateness of the IEP Team's placements, the

Court concludes that the District's proposed placement and services for the 2008-2009 school year and proposed placement for the 2009-2010 school year were appropriate.

3. Educational Services

28.

The Plaintiffs also contend that the District failed to provide appropriate educational services by refusing to include ABA DTT in the IEP and by failing to provide any educational programming during [redacted]'s transition in the October 2008 IEP Plan. The Court disagrees that the District failed to offer appropriate educational services by not including ABA DTT hours in the IEP, but agrees with Plaintiffs that the District failed to provide the required educational programming in [redacted]'s October Transition Plan.

i. Hours of One-to-One ABA DTT

29.

One of the most significant issues in this case is whether the IEP must contain a specific amount of hours that [redacted] will receive ABA DTT each week. IDEA requires that IEPs contain, inter alia, a "statement of the special education and related services and supplementary aids and services... to be provided to the child." 20 U.S.C. § 1414(d)(1)(A).

30.

Questions of methodology used to address a disabled student's educational needs are squarely within the discretion of the IEP Team. 71 Fed. Reg. 46,665 (Aug. 14, 2006) ("There is nothing in [IDEA 2004] that requires an IEP to include specific instructional methodologies."); see M.M. v. Sch. Bd. of Miami-Dade County, 437 F.3d 1085, 1102 (11th Cir. 2006) (holding parents have no right to compel school district to provide a specific program); K.C. v. Fulton County Sch. Dist., 2006 U.S. Dist. LEXIS 47652, *39 (N.D. Ga. 2006) ("the use of a particular methodology to address a disabled student's educational needs is within the discretion of the educators who developed the IEP").

31.

Thus, if DTT is considered an educational methodology, then the IDEA does not require the IEP Team to specifically include it in the IEP. In this case, Plaintiffs contend that ABA DTT is not merely methodology, but was the only programming found to educate [redacted]. The evidence is clear that [redacted] progressed with intensive one-to-one ABA DTT in a quiet, distraction free environment. But such evidence alone does not elevate ABA DTT to a required service under 20 USC §

1414(d)(1)(A) and it is not sufficient to entitle [redacted]. to have a specific amount of hours of ABA DTT per week set forth in his IEP.

32.

Rather, the Northern District of Georgia just recently found that ABA DTT is a methodology that rests squarely within the discretion of educators. In A.G. v. Fulton County Sch. Dist., a case with many parallels to the instant case, the court considered a proposed placement for a young autistic student. No. 1:07-CV-598-ODE (N.D. Ga. Oct. 5, 2009). In the A.G. case, the parents requested continuation of an in-home program that included several hours of one-to-one ABA DTT. The school district, meanwhile, recommended an in-school placement in a program that included ABA and DTT as part of the program. In that program and similar to the District's program here, the amount and manner of DTT provided to each student depended on each student's individual needs and the goals/objectives listed in the student's IEP. Because ABA DTT was not written into the IEP, the plaintiffs similarly argued that the IEP was inappropriate because it failed to specifically provide for ABA and DTT.

33.

The A.G. Court rejected the parents' argument and affirmed the school district's offer of programming, stating that "merely because a disabled child's parents can indicate a 'better' educational methodology or program for their child does not mean that the IDEA entitles their child to that program." A.G., slip op. at 51. Thus, as long as the District otherwise provided the child with FAPE, the IEP was appropriate even though it contained no mention of ABA or DTT.

34.

Accordingly, the District's refusal to include a specific amount of ABA DTT in [redacted].'s IEP will not invalidate the IEP so long as the IEP as a whole guarantees FAPE. And here, the Court concludes that the IEP was designed to provide [redacted]. with an appropriate education, including placing him in a specially-suited classroom setting that employs ABA strategies throughout the day (including DTT). Further, [redacted]. was to receive ABA DTT for as much time as he needed each week, and through the weekly progress reports, [redacted].'s parents could have evaluated whether the ABA DTT was sufficiently appropriate.

ii. Transition

35.

By failing to provide any educational programming in the October 2008 IEP during [redacted]'s extended transition period, Plaintiffs contend that the District denied [redacted] a FAPE during that period. This Court agrees.

36.

Once the October Transition Plan was agreed to, Plaintiffs appropriately requested educational programming during the transition. The District offered no such programming, even though [redacted]'s transition was to begin with only 45 minutes a day at school and slowly increase over a course of weeks. Even the District's own experts testified that educational programming was appropriate and necessary during the October 2008 transition.

37.

The District's after-the-fact justification that [redacted] could have transitioned into the District without any transition plan is unpersuasive. At each IEP Meeting, the IEP Teams agreed that [redacted] required a transition period. Further, [redacted]'s providers testified that he would have difficulty transitioning, and in fact, had difficulty transitioning into the school setting previously. Thus, the Court concludes that a transition period was necessary, and educational programming during the period was appropriate.

38.

The District, however, quickly corrected this deficiency, issuing a letter offering home-based services during the transition. This letter and the three subsequent letters to [redacted]'s parents offering such services and providing a specific framework of the proposed services mitigate this violation. The District's revised transition plans created by the IEP Teams at the March and May IEP Meetings were appropriate to help [redacted] transition back into the classroom. The Plans were detailed and comprehensive and provided reimbursement for private services during the transition. Furthermore, both Plans were to be data driven and had the flexibility to be revised depending on [redacted]'s response and abilities to transition. These transition plans would have provided some educational benefit to [redacted] during his transition.

39.

Accordingly, the Court finds that the District violated IDEA when it failed to provide educational programming for [redacted] during his October transition, but it also remedied the violation with its offers

to provide home-based services.

4. Extended School Year

40.

Plaintiffs also allege that the District refused to discuss ESY at both the October and March IEP Meetings, and then only agreed to discuss ESY, just weeks before the end of the 2008-2009 school year, once the parents requested an IEP meeting. In addition, the Plaintiffs contend that the District had predetermined the ESY program for [redacted]. The Court reviewed the IEP minutes and transcript and the evidenced does not support these contentions.

41.

Extended School Year services are "special education and related services that are provided to a child with a disability beyond the normal school year of the public agency in accordance with the child's IEP and at no cost to the parents of the child and meet the standards of the [state educational agency]." 34 C.F.R. § 300.106 (b). "Each public agency must ensure that extended school year services are available as necessary to provide FAPE." 34 C.F.R. § 300.106.

42.

At the October IEP Meeting, the IEP Team specifically approved [redacted] for ESY services. Because the Team had limited information about [redacted] and it wanted to review [redacted]'s progress in his Goals and Objectives during the school year, it recommended reconvening the IEP Team closer to the end of the school year to discuss the specifics of the ESY program. Therefore, in October of 2008, the Plaintiffs knew that [redacted] would be receiving ESY services in the summer of 2009. While the services were not set out, it is reasonable to assume that the IEP Team wanted to better understand [redacted]'s progress before detailing the program.

43.

In March, the IEP Team reconvened specifically to discuss [redacted]'s transition. Again the IEP Team agreed that ESY was appropriate for [redacted], but was not prepared to discuss specifics. With only eight weeks left in the school year and knowing that [redacted] had difficulty with transitioning, Plaintiffs wanted to discuss ESY during the March 2009 IEP Meeting. The Court appreciates the Plaintiffs' position, but the Plaintiffs and District agreed prior to the March 2009 IEP Meeting to limit the discussion to transition services. Any allegation that the District was uncooperative is disingenuous.

44.

At the May 2009 IEP, the IEP Team developed an appropriate ESY program for [redacted]., which took into account his issues with transitioning and provided home-based services during periods when the District was closed. Because the ESY programming was made so close to the end of the school year, Plaintiffs contend that this case is similar to the ESY violations in Reusch v. Fountain, 872 F. Supp. 1421, 1431 (D. Md. 1994). The Court finds no such similarity. In Reusch, the school district, through delays, lack of notice, and its ESY process, systematically "minimized the availability of ESY to disabled children." Id. at 1433. In fact, it was the school district's goal not to provide ESY to its students, and thus, it had systemic issues with ESY. In comparison, the District here agreed in October to provide ESY and simply wanted a better understanding of [redacted].'s progress before settling on a program. The May 2009 IEP Meeting may have been late in the school year and may have, practically-speaking, put the Plaintiffs in the difficult position of determining whether to go ahead with their own ESY programming, but such timing constraints do not compare to the issues in Reusch. Rather, as discussed throughout this decision, many of the delays associated with [redacted].'s educational programming decisions may be attributed to the Plaintiffs' actions. In fact, had the District had the opportunity to educate [redacted]. during the 2008-2009 school year, the ESY process may have occurred much earlier. Instead, the IEP Team developed a thorough ESY program for [redacted]. without having educated him during the school year and proposed the program prior to the end of the school year, which the Court concludes was sufficiently timely.

45.

Finally, any allegation of predetermination regarding [redacted].'s ESY is odd. There is no evidence that the District prohibited the parents and their counsel from participating in the programming discussion. Rather, Plaintiffs' counsel stated at the meeting that the Plaintiffs were unwilling to debate the program and simply wanted to hear the District's ESY offer. One cannot claim a lack of collaboration and participation and yet frustrate the process by refusing to engage in it. Accordingly, the Court finds no such violation.

D. Remedy for IDEA Violation

46.

Because the Court has found an IDEA violation, it is authorized to "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415 (i)(2)(B)(iii). In cases in which a school district has

denied a child with disabilities the appropriate educational placement, parents are entitled to reimbursement for costs incurred in providing a placement. Jefferson County Bd. of Educ. v. Breen, 853 F.2d 853, 857-858 (11th Cir. 1988).

47.

Courts, however, have consistently denied reimbursement to parents whose actions have frustrated the school's efforts. A.A. v. Houston County Sch. Dist., CAF 5:05-CV-107-WDO, *17 (M.D. Ga. Jan. 3, 2006) (citing Loren F. v. Atlanta Indep. Sch. Sys., 349 F.3d 1309, 1312 (11th Cir. 2003)); see Doe v. Alabama Dep't of Educ., 915 F.2d 651, 663 (11th Cir. 1990) (holding relief may be denied when parental participation frustrates IEP process). Even where parents have had negative experiences with the same school district in the past, courts have still applied the statutory principal of unreasonableness. For example, it was acknowledged that a parent may be "overly cautious" after overcoming some bad experiences, including litigation, but a court still found "that the Parent's communications with [school district] personnel were preemptively adversarial in tone and contributed to the lack of true cooperation, and the ultimate breakdown in communication, between the parties." Hogan v. Fairfax County Sch. Bd., CAF 1:08-CV-250-JCC, *30 (E.D. Va. Aug. 3, 2009) (reduction in reimbursement costs due to parents' lack of cooperation).

48.

Here, the Court has found that the District denied [redacted] the appropriate educational programming during his transition period set forth in his October 2008 IEP. As such and given no evidence that the Plaintiffs' home-based program was not proper, the Plaintiffs are entitled to reimbursement for costs incurred in providing such placement.

49.

However, the Plaintiffs' refusal to acknowledge the District's offer to provide the appropriate educational programming warrants a reduction in reimbursement for the private services. By November 21, 2008, the District had backed away from its refusal to provide services during the transition and was attempting to meet its obligations under IDEA. But the Plaintiffs ignored this olive branch and continued to delay a resolution on this issue for over three months. Despite the District's attempt to mitigate its violation, Plaintiffs elected to prevent the collaborative process required of all parties by IDEA. Thus, the Court finds that Plaintiffs are only entitled to reimbursement for the period which begins with the October 2008 IEP Meeting, when District failed

to provide educational programming during [redacted].'s transition, and ends after they received the District's offer to resolve the parties' differences.

50.

As such, the Plaintiffs are entitled to reimbursement for their home-based programming beginning on October 24, 2008 through November 28, 2008, one week after they received the District's initial offer to provide services.

DECISION

IT IS HEREBY ORDERED THAT Plaintiffs are only entitled to compensatory education in the form of tuition and related services reimbursement for the period beginning October 24, 2008 through November 28, 2008.

SO ORDERED, this 2nd day of November, 2009.

AMANDA C. BAXTER
Administrative Law Judge