IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[redacted]., by and through her parents, [redacted]. and [redacted].; [redacted].; and [redacted].; Plaintiffs,	:	10-148391 Docket No.: OSAH-DOE-SE-1001093-112-Baxter
v.	:	
PICKENS COUNTY SCHOOL DISTRICT, Defendant.	:	

FINAL DECISION

Plaintiff, [redacted]., by and through her parents, [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 Pickens County School District ("District") alleging a denial of a free appropriate public education ("FAPE"). Attorney Jonathon Zimring represented the Plaintiffs. Attorney Harold Eddy represented the School District. For the reasons stated below, Plaintiffs' request for relief is **GRANTED in part**.

FINDINGS OF FACT

A. Medical & Educational Background

1.

[redacted]. is a [redacted] year old girl that has been diagnosed with Atypical Rett's Syndrome, though she does not have the genetic marker for Rett's. (Transcript ("T-__") 1104.)

2.

Rett's Syndrome is an extremely rare disease that primarily affects females and progresses through four stages. Stage 1 is a period of normal development after birth. Stage 2 is a period of rapid degeneration, affecting cognitive skills, communication and language, and physical skills. Stage 3 is known as a pseudo stationary period, where the child continues to slowly lose physical skills, but may have an increased interest in communication. Finally, Stage 4 is another period of degeneration where the person loses more ambulation and, if not already so, becomes wheelchair bound. Rett's Syndrome is currently listed as a Pervasive Developmental Disorder ("PDD") on the autism

spectrum. (T-1158-66, T-1852-53, T-1098-99, T-2068.)

3.

[redacted]. is diagnosed with Atypical Rett's because she has only some of the Syndrome's conditions. For instance, [redacted]. does not have the dramatic degenerative condition, is ambulatory, and does not have the hand movements commonly associated with the Syndrome. In fact, Dr. Leslie Rubin,[1] [redacted].'s developmental pediatrician, has seen no degeneration of [redacted] over the past ten (10) years, and District witnesses identified no reliable signs of degeneration as well. The common consensus among the witnesses is that [redacted]. is in Stage 3, or the plateau stage, of the disorder, which many girls remain in for most of their lives. (T-1195, T-1485-87, T-1489-90; Defendant's Exhibits ("Ex. D-__") N at p. 148, D-T at p. 100.)

4.

[redacted]. has also been diagnosed with mental retardation, although it is unclear whether [redacted]. has profound mental retardation, which requires an IQ score of 20 or below, or moderate to severe mental retardation, which requires an IQ score of 20 to 49. Her cognitive functioning, however, has been listed as the equivalent of a three month old baby, but her functional skills are thought to be a few months higher. (T-1883, Plaintiffs' Exhibit ("Ex. P-__") 56; Ex. D-M at pp. 40-46.)

5.

In addition, [redacted]. has been diagnosed with coordination problems. [redacted]. suffers from seizures, which have been relatively managed since Spring 2009. [redacted]. has also had chronic constipation since she was a young child, which is treated with medication, but can cause behavioral issues due to the discomfort. (T-886, T-1101, T-1150.)

6.

Currently, [redacted]. attends Pickens County Middle School in the District, and has attended District schools since 1999. Since [redacted]. has PDD and a language impairment, she is eligible for special education and related services from the District. (Exs. D-E, P-29 at p. 100234.)

B. [redacted].'s Current Functioning

7.

[redacted]. is nonverbal, and the sounds she makes, such as crying, are unintentional communication.

[1] Dr. Rubin was certified as an expert in developmental pediatrics, developmental disabilities, and the

[redacted]. can assist to a degree in dressing and other self-help skills, but has not been taught to be independent or functional. She is not toilet trained, but assists to a very limited degree in the toileting routine. (Ex. D-M at 38-39, Ex. P-25 at 100183; Amended Complaint ¶ 2.)

8.

Further, [redacted]. has balance issues, including dragging one of her feet when she walks. [redacted]. will not sit for extended or even short periods of time and would prefer to wander aimlessly around a room. In 2008, [redacted]. began dropping to the floor at school—a problem that caused her and District employees harm. (T-604, T-681, T-1390-91, T-1810; Exs. P-43, D-N at p. 589.)

9.

[redacted]. has a small amount of reinforcers, including walking, eating, and watching Sesame Street. While she has a very short attention span, [redacted]. is more engaged than other children at her level and diagnosis. (T-362, T-616, T-2092.)

10.

Both Plaintiffs' and Defendant's experts testified that it is possible for [redacted]. to obtain additional skills. The extent of those additional skills was highly disputed. Dr. Robert Montgomery,[2] a psychologist and board certified behavior analyst ("BCBA"), testified that it was not reasonable to expect [redacted]. to obtain skills normally associated with the cognitive functioning of a three year-old, like toilet training. Further, Dr. Gary Mesibov,[3] a University of North Carolina professor of psychology and director of the TEACCH program, opined that [redacted]. will not gain "a lot of skill development." Dr. John Langone,[4] former chair of the University of Georgia Department of Special Education and Communication, however, testified that when it comes to developmentally disabled students, it is not appropriate to wait for developmental milestones to occur before implementing skill training because otherwise, the developmentally disabled student will never receive the training. Dr. Langone agreed that [redacted]. will likely not acquire a complete set of skills, but believed in the special education principle of partial participation, in which E.W. may be taught a part of the skill. For example, [redacted]. may not become toilet-trained, but may learn pieces of the skill (such as

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diagnosis and treatment of children with developmental disabilities. (T-1094.)

[2] Dr. Montgomery was certified as an expert in providing education, testing, and determining the appropriateness of placement for children with PDD. (T-1859.)

[3] Dr. Mesibov was certified as an expert in psychology, developmental disabilities and delays, and developing programming for children with autism. (T-2087.)

[4] Dr. Langone was certified as an expert in special education. (T-916-17.)

indicating the need to use the restroom or helping with undressing). (T-939, T-943-44, T-1910, T-2060, T-2194.)

C. Implementation of the 2008-2009 IEP

11.

In May of 2008, the IEP Team developed [redacted].'s 2008-2009 IEP. [redacted].'s parents attended and participated in the May 2008 IEP Meeting with an advocate and an "attorney/advocate." (Ex. P-28 at pp. 100217-220.)

12.

During the 2008-2009 school year, [redacted].'s parents became concerned about the following issues: (a) [redacted].'s educational instruction, (b) the extent [redacted]. walked during the day, (c) the use of a gait belt & Rifton chair, (d) the sufficiency of the related services, and (e) [redacted].'s Behavior Intervention Service Plan.

1. [redacted].'s Educational Instruction

13.

For the 2008-2009 school year, [redacted]. was placed in Gloria Genzman's classroom with nine other students. [redacted] is primarily separated from her class in a sensory room. The District specially designed the sensory room for [redacted]. because of [redacted].'s parents concerns that she was over stimulated in a classroom. Occasionally, other children with disabilities are brought to the room. Therapists also provide instruction in the sensory room. No evidence was presented regarding the extent Genzman interacts with [redacted]., but [redacted]. does have a paraprofessional assigned solely to her throughout the day. (T-560, T-1665-67, T-1671-72; Exs. P-25, P-60 at p. 200055, P-66, P-67.)

14.

Based on videos from across the school year, [redacted].'s time in the sensory room is either spent wandering around the room aimlessly without instruction, or when instruction was provided, it was from a paraprofessional, not Genzman. In addition, the videos do not document the use of the strategies provided by [redacted].'s Behavior Intervention Service Plan to reduce behaviors of concern. (T-591, T-368-70; Exs. P-66, P-67, P-71.)

2. Extent of Walking During the School Day

15.

Based on the information provided in the daily sheets, the District walked [redacted]. around the school for hours every day. [redacted].'s 2008-2009 IEP provided that she would receive 60 to 90 minutes of walking each day. On some days, walking was the predominate activity for [redacted]. during her instructional day, at times reaching over four hours of walking. No reliable testimony was provided that during those periods of walking, [redacted]. received instruction. (T-1055; Exs. P-25 at p. 100224, P-57, P-59.)

16.

James Dawson,[5] a board-certified associate behavioral analyst that developed a behavior intervention plan for [redacted]., testified that anytime a person is given significant amounts of a reinforcer (like walking), the value of the reinforcer is diminished. (T-362.)

3. Use of the Gait Belt & Rifton Chair

17.

As a method to manage [redacted].'s balance issues and frequent dropping to the floor, the District relies on a "gait belt" that is fastened to [redacted]. and has a handle for an aide to hold. The District also employs a Rifton chair for [redacted].'s safety. (T-468; T-1825.)

18.

At the May 2008 IEP Meeting, [redacted].'s parents expressed concern that the gait belt remained on when it was not in use and that the District employee's were not specifically trained in using the gait belt. [redacted].'s parents also expressed concerns about the prolonged use of the Rifton chair. [redacted].'s mother proposed that the Rifton chair be used for "certain activities such as: eating, therapies, and academic instruction." (T-482, T-567; Ex. P-28 at 100220.)

19.

[redacted].'s mother met with the District in the Fall of 2008 and discussed that for every five minutes [redacted]. sat in the Rifton chair, she would be allowed ten minutes free from the chair. (T-797.)

20.

The evidence indicates that the gait belt and Rifton chair are necessary equipment for [redacted].'s safety

[5] Dawson was certified as an expert in special education of children with autism and in the field of behavior

and instruction. Dr. George Fincher,[6] a District consultant on supportive devices, observed [redacted]. and concluded in a written report that "[redacted]. was very unstable walking down the hall" and that "[o]bservation in the naturalistic settings this day clearly demonstrated [[redacted]] has motor instability/motor control issues requiring significant interventions to protect her and staff from possible injury. The continued use of a seatbelt when seated and a gait belt when walking should be strongly considered by the appropriate school officials and IEP team." (Ex. P-43.)

23.

Cassie Logan,[7] [redacted].'s physical therapist, testified that the gait belt is necessary during [redacted].'s physical therapy so that they may complete more challenging therapies safely. Logan did not think the gait belt was necessary throughout the day, especially not when [redacted]. was simply in the sensory room. Logan understood [redacted].'s parents' concerns regarding the gait belt and Rifton chair during the 2008-2009 school year, and was under the impression that the District had addressed these issues through the additional training she conducted. (T-1391-93, T-1432.)

4. Related Services

24.

Attendance logs indicate that during the 2008-2009 school year, [redacted]. received significantly less occupational therapy than what the IEP Team agreed was appropriate. The IEP provided that [redacted]. would receive 90 minutes of occupational therapy each week. Yet, [redacted]. received much less than that. For instance, [redacted]. received only twenty-five (25%) percent of her therapy from March 2009 to May 2009, and at other times of the year, she also received less therapy than scheduled. A similar pattern of missed therapy sessions occurred with speech and language services, with more than thirty-five (35%) percent of the sessions not provided or accounted for. (T-1569-80; Exs. D-N at pp. 91-102, 113-23, P-28 at p. 100227.)

25.

District experts, Drs. Montgomery and Mesibov, agreed that it was not appropriate for [redacted]. to not receive her agreed-upon therapies. (T-2148, T-2050.)

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analysis. (T-339.)

[6] Dr. Fincher was certified as an expert in special education and supportive devices for children with disabilities. (T-1808.)

[7] Logan was certified as an expert in physical therapy. (T-1386.)

5. Behavior Intervention Service Plan

26.

In October 2008, the District created, and [redacted].'s parent approved, a Behavior Intervention Service Plan ("BIP") for [redacted]. to address certain targeted behaviors such as dropping to the floor, grabbing, pinching, and the self-injurious behavior of biting. This BIP required the District to take daily data collection on the frequency of these targeted behaviors. (Ex. P-37.)

27.

The District failed to collect data from September 2008 through January 2009 with no explanation. Charting the data the District did collect, Dawson found no discernable reduction in targeted behaviors during the 2008-2009 school year and during the 2009 extended school year. In Dr. Montgomery's expert opinion, the lack of data was not appropriate. (T-350, T-2021; Exs. P-57, P-59, P-60 at pp. 200058. 200063.)

28.

In addition to the lack of data, Dawson also testified that collecting only frequency data is insufficient to accurately reflect [redacted].'s progress. Instead, data should identify the time, duration, locations, staff and/or intensity of the behaviors. But Dr. Montgomery disagreed, opining that additional types of data were unnecessary to understand [redacted].'s behaviors. (T-349-52, T-1926-27; Ex. P-57.)

29.

One intervention included in the BIP concerned [redacted].'s parents. Specifically, the BIP provided that when [redacted]. bites herself, an aide should apply a light nose pinch. This technique is part of the protocol of the Crisis Prevention Institute, an organization that has developed a program of nonviolent behavior management and de-escalation, and as such, Dr. Montgomery testified that it was an appropriate intervention. Both Dawson and Dr. Rubin testified, however, that this technique was unnecessary and inappropriate. No evidence was presented that [redacted]'s parents expressed their concern prior to the due process complaint. (T-373-74, T-1211, T-1881-83.)

D. 2009-2010 IEP

30.

For the 2009-2010 school year, the IEP Team held an IEP Meeting on April 23, 2009 ("April 2009 IEP Meeting"). [redacted].'s parents attended the meeting with their advocate, Rachel Barron.[8] The relevant concerns of the Plaintiffs and advocate from the meeting and the final IEP include (a) lack of progress reports, (b) IEP Goals and Objectives, (c) lack of related services, (d) Extended School Year services, and (e) placement.

31.

Midway through the meeting, Dr. Christine Barker, the District's Special Education Director and the representative of the agency, left the meeting that she was a required participant under IDEA without informing [redacted].'s parents. In addition, Cindy Dobbins, [redacted].'s behavioral specialist, also left the meeting early. When Dobbins left the meeting, [redacted].'s mother stated that she hated for Dobbins to leave. Dobbins would have been the right person to interpret the BIP and evaluation results, particularly as they related to the behavior data. When the District employees left, the Plaintiffs did not seek to have the meeting adjourned or continued. (Ex. P-60 at pp. 200055, 200085, 200098.)

1. Progress Reports from 2008-2009 School Year

32.

Prior to the IEP meeting, Plaintiffs had attempted, but had been unable to obtain all the data and the degree of progress for [redacted]. during the 2008-2009 school year. In December 2008, [redacted]'s parents requested her educational records and received some, but not all of those records, during the Spring 2009. At the April 2009 IEP Meeting, Barker was aware that [redacted].'s parents' request for information on her progress was being unanswered, but took no action to remedy the problem. (T-259-62, T-649-50, T-657-72, T-714-15, T-726.)

33.

When [redacted].'s parents and their advocate asked for data at the meeting, Genzman stated that she does not take data and just "eyeballs" it. When asked for the third quarter progress report, Genzman responded that it was in her classroom. When questioned about it again, she stated that the report "did not get...done." Further, District employees admitted that they decided not to take data on

[8] Barron is employed by the Zimring Law Firm as a parent advocate. (T-161.)

certain goals. No evidence was presented that indicates that [redacted].'s parents were notified of this decision. Finally, the District also tried to down play the usefulness of a progress report, contending that such a report would not demonstrate [redacted].'s progress and "does not represent anything." (Ex. P-60 at pp. 200038, 200064, 200105, 200180, 200186.)

34.

The progress reports the Plaintiffs did receive provided little information. No evidence was presented that demonstrated how the District establishes where [redacted]. was on her goals and objectives at the beginning of the school year. Without a "baseline" [redacted].'s parents found it difficult to monitor what progress she had made. Further, on the progress reports, [redacted]. received a "W," meaning "working on", for most of her goals. [redacted].'s parents could not determine from this description what actual progress had been obtained or not obtained. (T-715-17; Ex. P-34.)

35.

Mary Jane Carswell,[9] [redacted].'s occupational therapist, testified that [redacted]. had made some occupational therapy progress. [redacted]. has learned to use a utensil to eat and has developed a lateral pinch. However, it was unclear when this progress occurred. Further, she has learned to take non-food items out of a container. None of this was shared with the parents at the April 2009 IEP Meeting. (T-1523, T-1528-30.)

2. Goals & Objectives

36.

Going into the IEP Meeting, the District was aware that [redacted].'s parents were not happy with [redacted].'s lack of progress. [redacted].'s parents had informed the District as early as January 2009 that [redacted].'s lack of progress was a concern. (T-649-50, T-758-61; Ex. D-N at p. 621.)

37.

The April 2009 IEP Team produced a set of Goals and Objectives that were very similar to, if not the same as, those set forth in the 2008-2009 IEP. The 2009-2010 IEP contained ten objectives with the primary focus on self-help, daily living, and communication skills. The only significant difference in these Goals and Objectives from the previous IEPs was a change in expectations depending on the Goal or Objective. For instance, one of the 2008-2009 objectives was, "When [redacted]'s name is

[9] Carswell was certified as an expert in occupational therapy. (T-1522.)

called, she will maintain eye contact with the caller...for at least 2 seconds within 5 seconds of the cue." That goal contained a "criteria of mastery" of seventy percent (70%). Likewise, in 2009-2010, the IEP Team basically repeated this goal, but reduced the criteria of mastery to fifty percent (50%). Of the ten 2009-2010 Goals, four were Goals practically the same as the 2008-2009 Goals, but with lower criteria of mastery. One Goal provided a higher criteria of mastery and two other Goals remained the same. (Exs. P-25 at p. at 100187, P-28 at p. 100223, P-29 at 100240.)

38.

To [redacted]'s parents and advocate, the reduction in criteria in four out of the ten Goals was troublesome because it seemed an inappropriate solution for the fact that [redacted] was not making progress. In response, a District employee stated that [redacted]'s 2008-2009 goals were "too ambitious." Ultimately, the IEP Team reduced the criteria due to a concern regarding the lack of progress that [redacted] had made in achieving these Goals and Objectives during the 2008-2009 school year. (Ex. P-60 at pp. 200107, 200126-27.)

39.

And yet Barker testified that Goals and Objectives must be both measurable and developed in such a way that they may be achieved within a given school year. If Goals and Objectives were not obtained over a period of years, Barker testified that those Goals and Objectives would not be appropriate. Barker, however, asserted that it was not the District staff's fault that [redacted] did not achieve her IEP Goals and Objectives. (T-264-66.)

40.

Further, even though Dr. Mesibov believed that [redacted]'s programming was appropriate, he also testified that it was not appropriate to have the same IEP Goals and Objectives year after year. The IEP Team must assess the results and change its strategy when no progress is made. Laurie Jimenez,[10] a BCBA, agreed with Dr. Mesibov and testified that if an IEP goal is not met, it is not appropriate to write the same goal the next year. Further, Dr. Mesibov testified that had the IEP Team believed [redacted] was degenerating, the IEP Goals and Objectives should have been designed as maintenance goals, and not improvement goals. (T-1322, T-2092-93, T-2139, T-2142, T-2150, T-2152-53.)

[10] Jimenez was certified as an expert in special education of children with significant developmental disabilities and in the field of behavior analysis. (T-1286.)

41.

Finally, toilet-training was one goal that was discussed extensively at the hearing, but was not discussed at all during the IEP Meeting. Even with supports, Dr. Montgomery testified that it would be unreasonable to expect that an educational program could enable [redacted] to develop skills necessary for toileting. Further, Dr. Mesibov opined that based on the current research, children like [redacted] are not independently toileting. (T-1955-57, T-1966-67, T-2102.)

42.

Even though the District maintained extremely limited data and progress on [redacted], Dr. Montgomery concluded based on this data that the District's 2008-2009 programming was appropriate. This limited and unreliable data significantly calls into question his conclusion. (T-1960-61.)

3. Related Services

43.

One 2008-2009 IEP Objective related to assistive technology provided that [redacted] would "utilize a voice output device to greet peers/adults upon arrival in a situation with minimal physical prompts." The IEP set a criteria of mastery at eighty percent (80%). For the 2009-2010 IEP, the IEP Team revised this objective to state that [redacted] would "utilize a switch to request a preferred activity" and provide a forty percent (40%) criteria of mastery. The criterion of using the device and learning to use it to communicate was eliminated without mastery. (Exs. P-28 at 100223, P-25 at 100187.)

44.

For the 2009-2010 school year, the District modified the existing 2008-2009 BIP's behavior goals. Otherwise, the BIP remained the same. In Dawson's opinion, however, the BIP should have been revised for the 2009-2010 school year to address any changes to [redacted]'s behaviors. (T-1314; Exs. P-37, P-38, P-39, D-N at pp. 50-76.)

4. Extended School Year Services

45.

At the meeting, Plaintiffs requested 30 hours a week of extended school year ("ESY") services for the entire summer. The IEP Team determined that [redacted] would not regress without the Plaintiffs' requested ESY, and thus, offered only to provide thirty (30) hours of services over a course of two

weeks for the 2009 summer. (T-1929-31; Ex. P- 60 at pp. 20080-101.)

5. Placement & Outcome of April 2009 IEP Meeting

46.

Uncharacteristically, the IEP Team discussed placement prior to discussing [redacted].'s proposed Goals and Objectives. When Plaintiffs requested that they first discuss Goals and Objectives, the IEP Team "tabled" the placement discussion and never brought it up again. In Barker's opinion, [redacted].'s placement had not been completed at the conclusion of the April 2009 IEP Meeting. (T-246; Ex. P-60 at pp. 70-77, 77.)

47.

There is no evidence that indicates [redacted].'s parents had decided, prior to the April 2009 IEP Meeting, to send [redacted] to residential placement. The evidence is clear, however, that [redacted].'s parents began considering residential placement as an alternative to District placement as early as Fall 2007. Beginning in the Fall 2008, [redacted].'s parent began researching and visiting facilities, and in December 2008, the Plaintiffs hired the Zimring Law Firm. [redacted].'s mother felt the decision for residential placement was a difficult decision to make given that [redacted] is their only child. (T-644, T-800, T-806; Ex. P-56 at p. 100425.)

48.

The first time the District became aware of Plaintiffs' interest in private placement was at the end of the April 2009 IEP Meeting. At that time, [redacted].'s mother stated "we want to put the...district on notice that we may be seeking private placement at public expense." [redacted].'s parents did not inform the IEP Team that [redacted] had been accepted into a residential facility in Massachusetts or that [redacted] had been evaluated by staff of AdvoServ, a Florida residential facility, in April 2009. (T-850, T-852-53; Exs. P-53, P- 55, P-60 at p. 200180.)

49.

At the conclusion of the meeting, Barker believed that the Plaintiffs had two options. The Plaintiffs could either reject the IEP or [redacted] could attend ESY and Plaintiffs could file a due process complaint. Ultimately, the Plaintiffs chose to accept the ESY services offered, even though they felt the services were insufficient, and to file a due process complaint. (T-254.)

50.

After the meeting, the District sent a letter to [redacted]'s parents stating it believed its program was appropriate and that funding for private placement was rejected. In response, [redacted]'s mother emailed the District to correct the IEP minutes to reflect that she "might" be seeking private placement at public expense, not that she was definitely seeking placement. (T-801-03; Ex. P-5C.)

51.

At some point after [redacted]'s mother's response to the District, [redacted]'s parents decided that [redacted] did require residential placement. They did not seek an IEP meeting with the District or otherwise inform it of their decision, except with the filing of a due process complaint. (T-805, T-841.)

E. Proposed Residential Placement

52.

Plaintiffs' choice for residential placement is AdvoServ's Carlton Palms Educational Center ("AdvoServ") in Mount Dora, Florida.

53.

The AdvoServ residential treatment center provides several different types of services to children and adults. Significantly, AdvoServ has a behavioral-medical unit with an integrated school that it believes would be the proper placement for [redacted]. That unit already serves students with as severe mental and cognitive delays as [redacted] (T-1248-49, T-1251, T-1255, T-1313-17; Ex. P-70.)

54.

AdvoServ provides a 24-hour treatment environment, coordinating treatment between the staff, classroom aides, teachers, and therapists. AdvoServ relies on applied behavior analysis ("ABA") approaches in its education.[11] Two certified BCBAs service the behavioral-medical unit. As part of AdvoServ's ABA approach, data is collected throughout the day and reviewed daily by a BCBA. (T-1281; Ex. P-70.)

55.

A typical day for a student in the behavioral-medical unit begins when the teachers wake the students and begin teaching self-help tasks in the natural environment. Students attend class until 3:00 p.m. and then transition to leisure time, which involves less academic activities. (T-1303-6.)

[11] While the District did not refer to its program as an ABA program, it utilized many of the same principles of

56.

AdvoServ has evaluated [redacted] and provided her parents an initial indication of appropriateness for admission.[12] Upon arrival, AdvoServ would conduct a 30 day assessment period of [redacted]. and then its staff would develop the IEP and treatment plan with the parents' participation. (T-1248-49, T-1251, T-1255, T-1313-17; Ex. P-70.)

57.

In the past, Dr. Montgomery has considered AdvoServ a "highly respected and competent facility" where [redacted] would receive more instruction. AdvoServ, however, would not provide the one-to-one assistance from a paraprofessional that the District currently offers [redacted] and which Dr. Montgomery felt she needs. Rather, AdvoServ has a ratio of one-to-three in the classroom and one-to-five during leisure activities. In contrast, Jimenez testified that educational isolation limits interaction with others, an important goal for disabled children. (T-1291, T-1307, T-1965-66, T-1986, T-1989, T-2014.)

58.

Dr. Mesibov concluded that [redacted] does not need residential placement because the District's program was a "pretty good program." This opinion was based on a one-day observation of [redacted] after the filing of the due process complaint. In contrast, Dr. Rubin testified that a residential placement was an appropriate placement for [redacted]. Dr. Rubin opined that a 24-hour-a-day program would provide the consistent programming that [redacted] needs, especially given the fact that at her age the "window of opportunity for intensive intervention" was closing and that she has not made progress in the District's program. (T-1140, T-2106.)

F. The Resolution Meeting

59.

After the Plaintiffs filed a due process complaint, the parties agreed to a resolution session. Plaintiffs appeared for the resolution meeting with the same advocate (Rachel Barron) that had attended the April 2009 IEP Team Meeting. Harold Eddy, the District's attorney, was also present, and a confrontation ensued. Eddy refused to allow the District to proceed with the resolution so long as

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instruction.

[12] Plaintiffs are required to have [redacted]'s blood drawn and tested and provide supplemental medical information for final admission.

Barron attended. In Eddy's opinion, IDEA did not allow the parents the right to have an advocate at the meeting, especially one that worked for the Plaintiffs' attorney. Further, Eddy was upset that Plaintiffs' attorney had not informed him that he would not attend the resolution session. (Exs. P-62, P-65.)

60.

Eddy became indignant, not allowing Barron an opportunity to discuss the misunderstanding. Eddy badgered Barron to find authority supporting her participation in the resolution meeting. To [redacted]'s father, Eddy's demeanor also became physically threatening at one point. (T-486-87; Exs. P-62, P-65.)

61.

Throughout the confrontation, Barron indicated that the parents wanted to proceed with a resolution and ultimately, waited for the District and Eddy to "cool off" before finally leaving the resolution session location without any participation by the District. (Exs. P-62, P-64, P-65.)

CONCLUSIONS OF LAW

1.

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.

2.

In determining whether an IEP provides an opportunity for a student to receive educational benefit, the Supreme Court 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 which is sufficient to confer some educational benefit upon the child. Id. at 200.

3.

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. Further, 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, 1573 (11th Cir. 1991).

A. Alleged Procedural Violations

4.

Plaintiffs allege that the District procedurally denied [redacted]. FAPE by: (a) withholding [redacted].'s progress reports and other school records, (b) not providing adequate progress reports, (c) not providing Prior Written Notice, and (d) violating the Notice of Procedural Safeguards.

5.

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 have demonstrated procedural inadequacies in the process, but have failed to prove by a preponderance of the evidence that these inadequacies significantly impeded [redacted].'s parents' opportunity to participate in the process.

1. Withholding School Records

6.

Plaintiffs claim that the District denied access to certain documents in [redacted].'s educational record, thus preventing [redacted].'s parents a full opportunity to participate in the process. Here, the evidence demonstrates that the District did not provide all of [redacted].'s records upon her parents' request.

7.

IDEA requires that parents have the opportunity to examine all records relating to their child. 20 U.S.C. § 1415(b)(1). While the District did not provide all of [redacted]'s educational records, Plaintiffs failed to demonstrate by a preponderance of the evidence how this significantly impeded the parents' opportunity to participate in the decision-making process. The Court, therefore, concludes that the Defendant's denial of access to these records is not an IDEA procedural rights violation.

2. Inadequate & Missing Progress Reports

8.

Plaintiffs also allege that the District denied [redacted] FAPE by failing to provide adequate progress reports for Fall 2008 and by failing to provide any progress reports for Spring 2009. In terms of the adequacy of the Fall 2008 reports, Plaintiffs argue that simply providing that [redacted] was "working" on her goals was insufficient to provide an adequate measure of progress, and thus, significantly impeded [redacted]'s parents' right to participate in the IEP process.

9.

IDEA requires that parents are provided periodic progress statements, but IDEA does not provide any specific requirements as to the contents of these progress statements. 34 C.F.R. § 300.320(a)(3)(i)- (ii).

10.

Here, the District did not provide progress reports for the Spring 2009, and provided vague reports for the Fall 2008. [redacted]'s parents, however, did receive daily information sheets documenting [redacted]'s day. Further, at the April 2009 IEP Meeting, [redacted]'s parents discussed [redacted]'s progress during the 2008-2009 school year with District employees.

11.

The District's failure to provide the Spring 2009 progress reports constitutes a violation of 34 C.F.R. § 300.513. [redacted]'s parents, however, were not significantly impeded in their opportunity to participate in the decision-making process without these reports or with the vague Fall 2008 reports. Doe v. Ala. Dept. of Educ., 915 F.2d 651, 662 (11th Cir. 1990) (holding deficiencies had no impact on parental participation); C.M. v. Bd. of Educ., 1298 F. App'x 876, 881 (3rd Cir. 2005) (finding

parents were not deprived of participation rights when parents actively participated in IEP development). Accordingly, these violations do not amount to a denial of FAPE.

3. Failure to Provide Prior Written Notice

12.

Plaintiffs allege that the District denied [redacted] FAPE by failing to provide prior written notice regarding changes in the IEP's Goals and Objectives and the District's denial of [redacted]'s parents requested ESY services.

13.

IDEA requires prior written notice when a District proposes or refuses "to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child." See 34 C.F.R. § 300.503(a). Here, [redacted]'s parents understood the rationale behind the IEP's Goals and Objectives and the District's denial of requested ESY services.[13] Accordingly, based on the facts presented in this case, the Court finds no violation of the prior written notice requirements.

4. Violation of the Notice of Procedural Safeguards

14.

Finally, Plaintiffs allege that the District denied [redacted] FAPE by violating the Notice of Procedural Safeguards. Specifically, Plaintiffs allege that the District did not provide this Notice with the Complaint, and that the District failed to comply with the Notice when it did not inform [redacted]'s parents that it released her records to and allowed observations by its experts.

15.

IDEA requires that parents are provided a Notice of Procedural Safeguards once a year or on the first due process request. 20 U.S.C. § 1415(d)(1); 34 C.F.R. § 300.504(a). The evidence indicates that Plaintiffs received the Notice at the April 2009 IEP Meeting. Beginning prior to the April 2009 IEP Meeting, competent and knowledgeable counsel represented the Plaintiffs. Further, Plaintiffs failed to sufficiently demonstrate how the District violated the consent requirements related to observations

[13] [redacted].'s parents also did not give notice of private placement at public expense. Instead, [redacted]'s parents informed the District that they were considering private placement, and the District followed up with a letter notifying the parents that the District's program was appropriate. Any confusion was caused by [redacted]'s parents. Of course, had the District's Special Education Director stayed for the entire meeting, this confusion

of [redacted]. Thus, the Plaintiffs have not met their burden in demonstrating that any alleged procedural inadequacies significantly impeded [redacted]'s parents' opportunity to participate. Accordingly, the Court finds no denial of FAPE.

B. Alleged Substantive Violations

16.

Plaintiffs allege numerous substantive violations associated with the 2008-2009 and 2009-2010 IEPs. Specifically, Plaintiffs allege that the District: (a) failed to provide measurable IEP Goals and Objectives, (b) inappropriately used a Gait Belt and Rifton chair, (c) failed to provide appropriate ESY services, (d) excessively walked [redacted], (e) failed to collect behavioral data, (f) failed to implement or provide appropriate related services, (g) failed to provide adequate progress, and (h) failed to provide services with appropriate sufficiency, duration, and frequency.

1. Failure to Provide Measurable Goals & Objectives

17.

Plaintiffs allege that the District failed to provide sufficiently measurable goals in [redacted]'s IEPs. IDEA provides that an IEP must have "measurable" goals. 34 C.F.R. § 300.320(a)(2); see Evans v. Bd. of Ed. of Rhinebeck Sch. Dist., 930 F. Supp. 83, 98 (S.D. N.Y. 1996) (failure of measurable objectives denies FAPE).

18.

[redacted].'s 2008-2009 IEP required the District to measure [redacted].'s progress on her Goals and Objectives through teacher observation. Based on discussions at the April 2009 IEP Meeting regarding [redacted]'s parents' inability to determine [redacted].'s progress, the IEP Team revised the 2009-2010 IEP to provide for the measurement of progress through teacher observation and data collection. The Plaintiffs have failed to demonstrate how these collection methods are not appropriate methods, if actually implemented, of measuring a student's progress.

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may have been resolved.

2. Use of Gait Belt & Rifton Chair

19.

Plaintiffs contend that the District inappropriately used a gait belt and Rifton chair with [redacted] and failed to reduce her dependency on these supportive devices. Based on the evidence presented, the Plaintiffs have failed to meet their burden in proving that the District's use of these supportive devices was inappropriate. Rather, the District provided sufficient evidence that [redacted]'s balance issues and inability to sit for any period of time necessitated the limited use of the gait belt and Rifton chair. District employees were trained in the use of the devices and the appropriate circumstances to use them. Plaintiffs also failed to provide sufficient evidence that the IEP should have addressed the goal of reducing the dependency on these supportive devices. Without such evidence, the Court finds that the District's use of these supportive devices was appropriate.

3. Extended School Year Services

20.

Plaintiffs contend that the 2009-2010 IEP failed to provide sufficient Extended School Year services. The Court does not agree.

21.

ESY 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). A student is entitled to such services if "in there [sic] absence, [s]he would be likely to regress over the summer, 'significantly jeopardize[ing]' the benefits from the school year." C.P. v. Leon County Sch. Bd., 2005 U.S. Dist. LEXIS 46271, *31 (N.D. Fla. 2005) (citing Johnson v. Indep. Sch. Dist. No. 4, 921 F.2d 1022, 1027 (10th Cir. 1990)).

22.

The issue in this matter is whether the IEP Team's offer of 30 hours of ESY services over a two week period for Summer 2009 was sufficiently adequate. The analysis of whether [redacted]'s level of achievement would be jeopardized by a summer break in her structured educational programming "should proceed by applying not only retrospective data, such as past regression and rate of recoupment, but also should include predictive data, based on the opinion of professionals in

consultation with the child's parents as well as circumstantial considerations of the child's individual situation at home and in...her neighborhood and community." Johnson, 921 F.2d at 1028. Plaintiffs failed to provide sufficient evidence that the ESY services offered were inadequate, that [redacted] would regress without additional ESY services or that the limited ESY services would significantly jeopardize the benefits, if any, from the school year. Thus, the Court finds the District's offer of ESY services appropriate.

4. Excessive Walking

23.

Plaintiffs allege that the hours of walking [redacted] received each day was excessive and violated FAPE. Based on the evidence presented, this Court agrees.

24.

The evidence indicates that the District walked [redacted] upwards of four hours each day during the 2008-2009 school year even though [redacted]'s IEP provided that she would walk 60 to 90 minutes each day. The District contends that it collected walking data anytime [redacted] was not sitting down and conducted educational instruction during these walking periods. No reliable evidence was provided to support these contentions. Rather, the District presented testimony of witnesses that did not collect the walking data or conduct the walking, but simply "understood" what the data collection represented. Such evidence is insufficient to counter the District's own data collection sheets which provided the specific amount of minutes/hours [redacted] was walked each day. Further, based on the Court's review of the testimony, the videos, the data collection sheets, and the IEP, the Court rejects the District's contention that appropriate instruction occurred during these periods of walking. Accordingly, the Court finds these periods of walking excessive and concludes that the District failed to provide [redacted] with FAPE in violation of IDEA.

5. Failure to Collect BIP Data

25.

Plaintiffs allege that the District's failure to collect data required by [redacted]'s BIP constitutes a substantive violation of FAPE. This Court agrees.

26.

The evidence demonstrates that the District failed to collect baseline data for [redacted] and then failed to collect any on-going data, as required by [redacted]'s BIP, from September 2008 through January 2009. The District provided no explanation for the lack of data, and its own experts testified that it was not appropriate for data not to be taken for half of the 2008-2009 school year. Without this data, the District and [redacted]'s parents could not evaluate the BIP's effectiveness or [redacted]'s progress toward resolving the targeted behaviors of concern. The lack of data collection rendered the BIP meaningless as a tool for understanding and resolving [redacted]'s behaviors of concern. Without an effective BIP, [redacted]'s educational instruction was significantly impeded by her behaviors. Accordingly, the Court finds that the District's failure to collect data is a substantive violation of IDEA that resulted in the District's failure to provide [redacted] with FAPE.

6. Failure to Implement the IEP's Related Services & Provide Appropriate Related Services

27.

Plaintiffs contend that the District failed to sufficiently implement the IEP's related services and failed to provide appropriate related services. Specifically, Plaintiffs claim that [redacted] received far less occupational and speech therapy than the IEP required. Plaintiffs also allege that [redacted]'s physical therapy and BIP were insufficient.

28.

To provide FAPE, the District must "provid[e] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Rowley, 458 U.S. at 203. Further, the IEP must address positive behavioral interventions and supports. 20 U.S.C. § 1414(d)(3)(B).

a. Failure to Provide Occupational & Speech Therapy

29.

During the 2008-2009 school year, [redacted] received far less occupational and speech therapy than required by her IEP. In fact, for the month of March, [redacted] received no occupational therapy. Here, this lack of services is significant given all parties contentions that [redacted] demonstrated very little to no progress in 2008-2009.

30.

To prove the District failed to provide FAPE, Plaintiffs, however, must show more "than a de minimis failure to implement all elements of that IEP, and, instead, must demonstrate that the [District] failed to implement substantial or significant provisions of the IEP." Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 (5th Cir. 2000) (emphasis added).

31.

Here, the Court finds that [redacted]'s occupational therapy was a significant provision of her IEP. In fact, many of her eleven IEP Objectives were based on occupational therapy. Further, the record is murky as to how much instruction, if any, [redacted]. received from her special education teacher on a weekly basis so her time with the occupational therapist was important instructional time with a trained specialist. The evidence here indicates that [redacted] did not receive sufficient support services to enable her to benefit educationally. Accordingly, the Court concludes that the District's failure to provide a substantial portion of [redacted]'s occupational and speech therapy constitutes a failure to implement a significant provision of her IEP, and thus, failed to provider her with FAPE in violation of IDEA.

b. Failure to Provide Appropriate Physical Therapy & Assistive Technology Services

32.

Plaintiffs also contend that [redacted].'s physical therapy and assistive technology services were inappropriate to meet her needs. But Plaintiffs presented insufficient evidence to provide this Court with support for these contentions. For instance, while this Court may recognize that someone with balance issues may benefit from physical therapy, without sufficient evidence to support this hypothesis, Plaintiffs have not met their burden on this issue. Further, the Plaintiffs' assistive technology evidence was not sufficient to meet their burden of demonstrating that the District failed to provide FAPE.

c. Failure to Prepare an Appropriate Behavior Intervention Plan

33.

Finally, Plaintiffs allege numerous claims related to [redacted].'s BIPs. First, Plaintiffs claim that the District failed to conduct a timely Functional Behavioral Assessment ("FBA"), but failed to pursue

this argument in any helpful way.[14] Second, Plaintiffs contend that [redacted]'s BIP was inadequate because it contained an alleged aversive. The Court is not persuaded by the Plaintiffs' evidence that the use of a light nose pinch is an inappropriate aversive, especially in light of the District testimony that the technique is used and approved by the Crisis Prevention Institute.

34.

Third, Plaintiffs contend that the District did not update the BIP for the 2009-2010 school year. The Court is concerned that the only change in [redacted]'s BIP from the 2008-2009 school year to the 2009-2010 school year was a dramatic decrease in expectations for appropriate behavior. Basically, the District focused on the same behaviors, but simply expected far less from [redacted]. Given the lack of data regarding [redacted]'s progress, the Court understands why the BIP remained the same. Ultimately, the Court is not aware of any legal requirement that a BIP must change from year to year if the same behaviors are a concern.

35.

Finally, the Plaintiffs allege that the BIPs were inadequate because only frequency data was required.[15] Dawson, Plaintiffs' behavior analyst expert, believed an appropriate BIP should contain data collection related to location, time, intensity, etc. While this testimony was persuasive, the Court credits Dr. Montgomery's testimony that such data collection was unnecessary to understand [redacted]'s behavior. Providing the District with the appropriate deference and understanding that the District must only provide a basic floor of opportunity, this Court finds the collection of frequency data only was sufficient to provide FAPE.

36.

Accordingly, the Court concludes that the District's BIPs provided [redacted] with appropriate behavior intervention services, and thus, did not violate IDEA.

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[14] IDEA does not require an FBA except in the context of student discipline for children with disabilities. 34 C.F.R. § 300.530(d)(1)(ii) and (f)(1)(i).

[15] When a school district elects to create a BIP, the Act does not require any specific provisions with respect to the development of a BIP. Alex R., ex rel. Beth R. v. Forrestville Valley Cmty. Sch. Dist. No. 221, 375 F.3d 603, 614-15 (7th Cir. 2004).

7. Inadequate Progress

37.

The most significant claim by Plaintiffs is that the District continued year after year with similar IEP Goals and Objectives with little to no progress made.

38.

An IEP must be "likely to produce progress, not regression or trivial educational advancement." Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245, 248 (5th Cir. 1997). Further, an appropriate education is one that makes "measurable and adequate gains in the classroom." Draper v. Atlanta Indep. School Sys., 480 F. Supp. 2d 1331, 1345 (N.D. Ga. 2007). If a child's annual goals are not achieved, then the child's IEP must be revised to "address ... any lack of expected progress toward the annual goals." 20 U.S.C. § 1414(d)(4)(A). This standard is balanced by a basic IDEA principle that a mastery of Goals and Objectives is not required to provide FAPE, and a school district must not guarantee "to produce any particular outcome." Rowley, 458 U.S. at 192.

39.

The evidence demonstrates that the IEP's Goals and Objectives were practically the same from the 2008-2009 school year to the 2009-2010 school year even though [redacted]. had made no meaningful or, by some testimony, any progress. That lack of progress is troubling, but lack of progress alone may not rise to an IDEA violation. To address this lack of progress, the District decreased the level of expectation rather than revising the Goals and Objectives. Again, reducing expectations does not necessarily indicate a denial of FAPE if the IEP Team reasonably believed these reductions would allow [redacted]. to progress. Here, the record is void of evidence regarding the reason behind the reduction of expectations or the appropriateness of such action. Instead, the Court credits Dr. Mesibov's testimony that IEP Goals and Objectives which result in no progress for the child, should be revised. Here, the District, aware of [redacted]'s parents increasing concerns regarding her lack of progress and aware of its failures to implement significant portions of the 2008-2009 IEP, chose the easiest method of handling [redacted]'s lack of progress, i.e., reducing expectations. The Court, however, was not provided evidence to indicate that this reduction in expectations will likely produce progress.

40.

In defending its IEPs, District contends that [redacted]. has a degenerative disease, and thus, it should not be held accountable for demonstrating academic progress. The evidence does not support this

contention. In fact, the District's sole basis for this contention rests with its employee's research of Rett's Syndrome on the internet and a psychological evaluation that simply quotes from the diagnostic manual. This contention even contradicts the District employee's own observations that [redacted] has had no degeneration. Accordingly, there is no probative evidence of any degeneration, nor is it a basis to discount the lack of progress.

41.

At the same time it argues [redacted] cannot progress, the District also contends that [redacted]. has made progress, presenting evidence from [redacted]'s occupational therapist that [redacted]. has gained additional skills. But at the time of the April 2009 IEP Meeting, the District could not point to any progress, did not discuss this skill acquisition, and did not revise [redacted]'s IEP to foster this skill acquisition. "In evaluating the appropriateness of an IEP, the Court must determine the measure and adequacy of an IEP at the time it was offered to the student and not at some later date." Draper, 480 F. Supp. 2d at 1345.

42.

Finally, the District's attempts to question their own understanding of [redacted]'s disabilities is untenable. The District provided services to [redacted]. for years, conducted their own evaluations, and reviewed Dr. Rubin's evaluations. Unfortunately, an inordinate amount of time was spent at the hearing regarding the sufficiency of [redacted]'s evaluations.[16] The Court, however, finds such arguments not relevant to whether this District created and implemented IEPs likely to produce progress.

43.

Ultimately, the Court finds the tenor of the District's position to be one of status quo. The District points to the severity of [redacted]'s disability as an impediment to its IDEA obligation to provide an IEP likely to produce progress. While the Court found the District's experts credible regarding the limited potential for [redacted] to obtain skills, such limited potential does not excuse the District from

[16] The District repeatedly argued that had it known what the Plaintiffs' wanted (toilet-training, cessation of gait belt/Rifton chair, etc.), it would have required additional medical evaluations to confirm such IEP additions were appropriate. Whether the District is correct is not relevant for this proceeding. The IEP Team completed and the District implemented the 2008-2009 and 2009-2010 IEPs. Those IEPs and the District implementation are before this Court. Since the Plaintiffs did not contend in their Complaint that the District's evaluations were insufficient, this Court will not address the District's apparent admission that its evaluations were insufficient. Finally, if the District truly believes, as it stated throughout the hearing, that the Plaintiffs were uncooperative because they were unwilling to agree to evaluation requests after the filing of the due process complaint, IDEA provides an appropriate mechanism for the District to obtain such evaluations. 34 C.F.R. §

attempting to help [redacted] obtain some progress. Based on the multiple excuses for [redacted]'s lack of progress, the Court simply does not believe the District wants to provide or is capable of providing an educational programming for [redacted] likely to produce progress. Accordingly, the Court concludes that the District has failed to provide [redacted] FAPE in violation of IDEA.

8. The Sufficiency, Duration, Frequency of Services

44.

Plaintiffs also contend, in the most general of terms, that [redacted]'s IEPs were flawed because the sufficiency, duration, and frequency of services provided in the IEPs were inadequate. The Court agrees. The Court's finding that the IEPs were insufficient to provide an appropriate education inherently calls into question the sufficiency, duration and frequency of the services contained within it.

C. Remedy for IDEA Violation

45.

When an IDEA violation has been found, the Court may grant such relief as it determines is appropriate. 20 U.S.C. § 1415 (i)(2)(B)(iii). In this matter, Plaintiffs seek placement of [redacted] in a residential facility, and have identified AdvoServ as their placement of choice. At the present time, AdvoServ has given [redacted] initial approval subject to medical information and a final assessment.

46.

In summary, the Court concludes that the District failed to provide [redacted] FAPE by allowing [redacted] to wander aimlessly around the sensory room without instruction, or when instruction was provided, it was with an aide, not her special education teacher, walking her excessively during her instructional day, failing to provide substantial portions of her related services, failing to collect data required by her BIP, and failing to develop IEPs likely to produce progress. Since this Court has made a determination that the District has failed to provide [redacted] with FAPE, the analysis turns to whether the proposed private placement is proper. Burlington Sch. Com. v. Commonwealth of Mass., 471 U.S. 359, 370 (1985). (holding appropriate relief may include "a prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private

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300.300(c)(ii).

school." Here, the Court finds that residential placement is proper. In addition, the District's failure to provide [redacted] FAPE also supports an award of compensatory services. Draper v. Atlanta Indep. School Sys., 518 F.3d 1275, 1289 (11th Cir. 2008) ("Compensatory awards should place children in the position they would have been in but for the violation of the act.") Compensatory awards compensate for past failures, and thus, do more than provide "some benefit" as required by ordinary IEPs. Id.

47.

In finding that private placement is proper, the Court finds that [redacted] requires a more intensive and broader program than what has been offered by the District. The record demonstrates that a program of increased duration and intensity, in a residential setting allowing 24-hour services and treatment will provide an educational program in which [redacted] is provided a reasonable opportunity to progress. Further, such program will compensate [redacted] for the lack of services she received from the District.

48.

In terms of the specific placement, the Court finds that the AdvoServ facility is an appropriate program for [redacted] The Court disagrees with the District's contentions that AdvoServ implements an educational methodology that is not appropriate for children with Rett's. The District's support for this contention rests with a 1995 study conducted on three girls. Because of the Syndrome's rarity, the District's own experts testified that no one has any significant experience with these children. Thus, a program will not be improper simply because it has no experience with Rett's children and a methodology cannot be eliminated simply because one narrow 1995 study questions its outcome. AdvoServ, however, does have experience teaching children with severe to profound mental retardation like [redacted], the disability which in fact has been a significant impediment to her progress.

49.

Finally, the District would like this analysis framed as one in which [redacted]'s parents maintain unrealistic expectations for [redacted]'s skill acquisition. While [redacted] may not obtain all the skills these parents hope for, expecting an education which is likely to provide progress is not unrealistic, it is required by law. [redacted]'s parents continued for years under the District's care, and even when their concerns for [redacted] were increasing, the parents continued to work with the District. [redacted]'s parents genuinely struggled with the decision to seek private placement. Had it not been for the District's lack of leadership and commitment in resolving the Plaintiffs' concerns, this matter may not have

come before this Court. Once the Plaintiffs' filed their due process complaint, it was as if the gauntlet had been thrown and a level of adversarial behavior began. The District's behavior at the resolution session was childish and inappropriate. Based on that behavior alone, the Court finds any allegation by the District (and plenty were made) that the Plaintiffs were uncooperative, ironic and lacking a basis in reality.[17] While the Court does not see the District's post-complaint hostility as a dispositive factor in the initial failures to provide FAPE, it does allow its existence as part of the considerations supporting relief.

50.

Accordingly, the District's failure to provide [redacted]. FAPE and its hostility toward the Plaintiffs warrants the award of private residential placement for [redacted] for two years, one year for each IEP. Further, the Court finds that a program such as at the AdvoServ facility is appropriate and compensatory to [redacted]'s needs and prior loss of FAPE.

51.

In the event that placement at the AdvoServ is not available, Plaintiffs shall identify three schools from which the Defendant may choose another appropriate private placement with an expense less than or equal to the cost associated with placement at AdvoServ.

DECISION

IT IS HEREBY ORDERED THAT [redacted]'s prospective placement for two years will be in residential placement. Said placement shall be paid by the District.

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 4th day of December, 2009.

AMANDA C. BAXTER
Administrative Law Judge

[17] Further, the Court is baffled that District counsel would advise Dr. Montgomery, a District expert, not to comply with Plaintiffs' subpoena.