

IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

1/4/2010

[REDACTED],

: 10-158752

Plaintiff,

: Docket No.:
: OSAH-DOE-SE-1009365-67-SCHROER

v.

GWINNETT COUNTY SCHOOL
DISTRICT,

Defendant.

FINAL DECISION

I. INTRODUCTION

On October 6, 2009, Plaintiff **[REDACTED]**, through his mother, **[REDACTED]**, filed a due process complaint pursuant to the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA"). The due process hearing was held before the Office of State Administrative Hearings ("OSAH"), over four days on November 12, 16, 18, and 23, 2009. Andrea Landers, Esq. and Craig Goodmark, Esq. represented Plaintiff. Victoria Sweeney, Esq. and Jennifer Jones, Esq. represented Defendant Gwinnett County School District. The record remained open until December 14, 2009, in order for the parties to review the transcript and file post-hearing briefs. The deadline for the issuance of this decision was extended pursuant to 34 C.F.R. § 300.515(c).

II. FINDINGS OF FACT

1.

[REDACTED] is **[REDACTED]** years old and is in first grade. He attends McKendree Elementary School in the Gwinnett County School District ("School District"). **[REDACTED]** has Down's syndrome, a genetic disorder that affects his mental and physical development. **[REDACTED]** was

diagnosed with Down's syndrome at birth and has multiple developmental delays across a range of domains, including mental retardation, fine and gross motor delays, and expressive and receptive language delays. In addition, [REDACTED] has chronic ear problems, which at times have affected his hearing and hindered his acquisition of speech and language skills. (Tr. 20-21, 380-81; Ex. D-16)

2.

[REDACTED] currently is placed in a special education classroom for students with mild intellectual disabilities. Two of the primary issues Plaintiff raised in this case are whether the goals and objectives proposed by the School District for [REDACTED] fit his ability and skill level and whether [REDACTED] is properly placed in a classroom designed for students with mild or moderate intellectual disabilities.

A. Educational Background

1. 2006-2007 School Year

3.

[REDACTED] entered the School District in November 2006, when he enrolled in a Pre-Kindergarten class for students with Significant Developmental Delays ("SDD") at Parsons Elementary School. Prior to his enrollment, [REDACTED] was evaluated by the School District in order to determine his eligibility for special education services. On September 21, 2006, the School District prepared two eligibility reports that found [REDACTED] eligible for services under two disability categories – SDD and Speech/Language Impairment – based on a variety of assessment tools.¹ The reports concluded that [REDACTED], who was

¹ The testing instruments included the Mullen Scales of Early Learning, the Preschool Evaluation Scale, the Vineland Adaptive Behavior Scales-II, the Preschool Language Scale-4, and the Developmental Assessment of Young Children.

approximately three-and-a-half years old, demonstrated skills “consistent with children approximately 15 months of age.” The reports further concluded that [REDACTED] had a receptive and expressive language disorder, as well as limited oral-motor abilities, which “negatively impact his ability to communicate and participate effectively within the educational environment...” Both eligibility reports identified a “Revaluation Date” of September 20, 2009. (Tr. 25-26; Exs. D-211-215)

4.

In March 2007, [REDACTED]’s Individualized Education Program (“IEP”) Team met to consider his placement for the next school year. The IEP Team proposed that [REDACTED] be placed in a classroom for students with moderate intellectual disabilities (“Moderate classroom”) and [REDACTED] signed the IEP, indicating her agreement with the placement. However, in or around April 2007, [REDACTED] was evaluated by a private psychologist, David Cantor, in connection with a custody and visitation case involving [REDACTED]’s father. Based on Dr. Cantor’s evaluation, which is discussed below, [REDACTED] requested that the IEP Team meet to consider changing [REDACTED]’s proposed placement from a Moderate classroom to a classroom for children with mild intellectual disabilities (“Mild classroom”). (Tr. 26-31; Exs. D-163-176; D-173-183)

5.

Dr. Cantor is an expert in the areas of psychology and neuro-psychology, as well as evaluation, assessment and educational planning related to children with developmental delays. Dr. Cantor and his colleagues conducted a developmental psychological evaluation of [REDACTED] on April 30, 2007, just after [REDACTED] turned five years old. The evaluation took place in a “low stimulus” testing room, which is designed to

minimize distractions and, ideally, optimize the performance of the test taker.² Although [REDACTED] began the evaluation in a friendly and cooperative mood, he became uncooperative and disinterested as the testing progressed. [REDACTED] had a number of brief outbursts, during which he attempted to hit the examiner or leave the room. Even in the low-stimulus environment, [REDACTED]'s inattention and behavior, coupled with his language deficits, made it difficult for Dr. Cantor to obtain a "true measure of [REDACTED]'s cognitive levels." (Tr. 26-31, 387-90, 448-49; Exs. D-227-235)

6.

Nevertheless, Dr. Cantor was able to make certain conclusions regarding [REDACTED]'s level of functioning. Specifically, Dr. Cantor found that [REDACTED] had significant developmental delays across a wide range of domains – cognitive, communicative, and fine and gross motor. [REDACTED]'s cognitive abilities were at an almost three-year-old level and his language skills and motor skills were even more delayed, falling in the two-year-old range. Dr. Cantor made a "rough" estimate, based on his testing, that [REDACTED] was functioning in the "mild mentally impaired range."³ Further, Dr. Cantor considered

² Children with developmental disorders may have difficulties filtering out sensory stimulus, such as bright lights, noises, and colors. In an attempt to obtain testing data that reflects a child's optimal abilities, Dr. Cantor uses a low-sensory room to help the child stay focused and attentive during testing. According to Dr. Cantor, when a child such as [REDACTED] is asked to perform similar tasks in a "less than optimal environment," such as a school classroom, the child is likely to perform at a lower level than in the controlled testing environment. (Tr. 387-88, 396-99, 402-04, 448-49)

³ Dr. Cantor explained that the instrument he used for measuring cognitive ability, the Bayley Scales of Development for Infant and Toddlers-3 (the "Bayley"), was an accepted instrument for use with significantly developmentally delayed children. However, because the Bayley is designed to assess infants and toddlers and is not normed for someone [REDACTED]'s age, Dr. Cantor acknowledged that the Bayley testing instrument does not give an accurate assessment of IQ and provides only a very rough estimate of [REDACTED]'s developmental functioning. Although other testing instruments were available, Dr.

█████'s attention problems to be the biggest impediment to his acquisition of skills and learning. Accordingly, Dr. Cantor made recommendations regarding the physical structure of █████'s classroom and recommended that █████'s IEP include a behavioral component. In addition, Dr. Cantor recommended speech therapy and occupational therapy ("OT") to work on █████'s functional deficits. (Tr. 391, 399-402, 419; Exs. D-231, D-233)

7.

On August 16, 2007, the IEP Team met to review █████'s proposed placement in the Moderate classroom in light of Dr. Cantor's evaluation and █████'s concerns. █████ attended the meeting, along with an advocate, and expressed her wish that █████ be placed in a Mild classroom, rather than a Moderate classroom. █████ also told the IEP Team that █████ had already demonstrated some of the skills at home that were identified as goals and objectives in his IEP. The Team discussed a number of options, including conducting a reevaluation, collecting data on █████'s performance while in the Moderate classroom, and reconvening to review the placement. █████ did not agree with the Moderate classroom placement and was concerned that he would get "locked" into the placement if he started the school year there. Because of her misgivings with the Moderate classroom, █████ chose to home-school █████ at the beginning of the 2007-2008 school year. (Tr. 31-32; Exs. D-163-76)

Cantor's use of additional instruments was somewhat limited due to cost. (Tr. 433-35; Ex. D-231)

2. 2007-2008 School Year

8.

█████ home-schooled █████ from August 2007 until February 2008, when she enrolled him in the Gwinnett Special Needs School. While at the Gwinnett Special Needs School, █████, who was almost six, attended a pre-kindergarten class with three- and four-year-olds, which included both regular education and special needs children. The class was small, with only six students, a teacher and a para-professional. According to reports from his teachers from the Gwinnett Special Needs School, █████'s behavior in the classroom did not interfere with his learning. (Exs. D-105, D-140)

9.

In April 2008, █████ arranged for Dr. Cantor to conduct a follow-up evaluation. █████ was again uncooperative with the examiner and Dr. Cantor reported that it was difficult to establish and maintain rapport with █████. Dr. Cantor found that █████ adapted to new tasks slowly and required constant encouragement during testing. Once again, due to his inattention and behavior issues, Dr. Cantor was able to make only a "gross estimate" of █████'s abilities. As in his first evaluation, Dr. Cantor used the Bayley test and the results suggested "essentially an arrest in cognitive skills" since the previous year. (Dr. Cantor estimated █████'s cognitive age to be approximately three years old, the same as in 2007.) Based on his testing, Dr. Cantor determined that █████'s expressive language skills remained significantly delayed, but that his receptive language and fine and gross motor scores were up from the past year. Dr. Cantor concluded that █████'s scores on the Bayley test were likely lower than his true abilities because of █████'s poor behavior during the administration of the test. He opined that █████ is "most likely"

functioning in at least the mild retarded range.⁴ (Tr. 403-05, 422-23; Ex. P-6)

3. 2008-2009 School Year

Dr. Dickerson's Evaluation

10.

█████ returned to the School District for the 2008-2009 school year. In the summer before his reenrollment, █████ signed a "Parental Consent for Reevaluation" form, agreeing to allow the School District to conduct an evaluation of █████. Over two days in July 2008, Dr. Claudia Dickerson, a School District psychologist, conducted a psychological evaluation of █████ at Oakland Meadows School. Unlike Dr. Cantor's low stimulus testing room, Dr. Dickerson conducted her evaluation in a large, cluttered room, which was prone to interruptions, such as the school's intercom, inadvertent knocking on the two-way mirror, and a teacher walking through to an adjoining room. On the first day of testing, █████ was able to attend to the tasks for a short period of time despite these interruptions. However, after approximately 45 minutes of testing his performance deteriorated and he was unable to maintain attention to the tasks even after a break. During the second day, █████'s inattention was even more pronounced. However, he did not exhibit the aggressive behaviors toward Dr. Dickerson that were present during Dr. Cantor's evaluation. Rather, the evidence shows that █████ established a positive rapport with Dr. Dickerson, hugging her and giving her a kiss on the cheek when he left the

⁴ According to Dr. Cantor, there may be an "upper ceiling" on the academic achievements that a child with Down's syndrome is capable of attaining. However, it is often difficult to estimate through formal testing the highest potential for children with Down's syndrome because of issues relating to attention and communication skills. Plaintiff's speech and language expert, Heidi St. John, opined that █████ was not cognitively impaired at all, notwithstanding Dr. Cantor's testing. However, the Court finds Ms. St. John's opinion to be unsubstantiated and outside her area of expertise, and thus gives it little weight. (Tr. 264, 278-79, 448)

session. (Tr. 37, 322, 362, 364; Exs. D-250-263)

11.

Dr. Dickerson, like Dr. Cantor, concluded that [REDACTED]'s poor attention during testing led to results that were "not expected to be the very best performance of which [REDACTED] was capable..."⁵ Nevertheless, Dr. Dickerson considered the results to be a "reasonably valid estimate of his functioning," at least in the context of a standardized testing environment with an unfamiliar examiner. Based on her administration of two cognitive tests – the Differential Ability Scales – Second Edition ("DAS-II") and the Universal Nonverbal Intelligence Test ("UNIT") – Dr. Dickerson concluded that [REDACTED]'s overall cognitive functioning was significantly below average, falling within the moderate range of intellectual disability.⁶ Dr. Dickerson also conducted testing of [REDACTED]'s adaptive skills, academic achievement, and behavior, determining that [REDACTED] had significant delays in adaptive behaviors, that he had some pre-reading skills, and that his behavior did not appear to present significant problems in school or at home. (Tr. 339, 352-53, 368-69; Exs. D-254-262)

⁵ During cross-examination, Dr. Dickerson acknowledged that other factors, such as [REDACTED]'s poor motor skills and his expressive language deficits, could also negatively affect his performance on parts of the test. Jonathan McKee, [REDACTED]'s private occupational therapist, also testified that [REDACTED]'s performance on some of Dr. Dickerson's tests would be affected by his fine motor delays. (Tr., 302-03, 341-46)

⁶ Dr. Dickerson admitted that certain of [REDACTED]'s cognitive testing scores were on the border between mild and moderate mental retardation when using DSM-IV (Diagnostic and Statistical Manual of Mental Disorders) standards. (Tr. 352-53)

Development of IEP

12.

█'s IEP Team met on August 22, 2008 to develop his IEP for the 2008-2009 school year. █ was accompanied by an advocate and two attorneys, as well as the director of the Gwinnett Special Needs School. The School District also had two attorneys present at the meeting, as well as teachers and representatives from both the Mild and Moderate classroom programs. After much discussion relating to █'s present levels of performance and consideration of possible goals and objectives for █'s IEP, the August meeting ended because one of █'s attorneys had to leave. █ agreed to allow the School District to draft proposed goals and objectives and the IEP Team reconvened on September 29, 2008. (Tr. 41-42; Exs. D-132, D-149-162)

13.

During the September 29th meeting, the IEP Team finalized the goals and objectives for █'s IEP. The evidence in the record shows that █ was a full and active participant in the meeting and that many of █'s requested modifications or additions to the goals and objectives were accepted by the IEP Team and incorporated into █'s IEP.⁷ Some of the objectives adopted by the IEP Team covered skills that █ reportedly had mastered while at the Gwinnett Special Needs School. However,

⁷ For example, █ requested that the IEP Team add a goal about understanding the concepts of "some, none or all," and the IEP Team agreed. (Ex. D-135) █'s attorney asked that the description of one goal be changed from "personal/self-help" to "adaptive," and that change was made. (Ex. D-136) On other issues, the IEP Team compromised on goals. For example, the School District had proposed a goal that █ pay attention to a task for five minutes, and █ requested that the goal be changed to fifteen minutes. The IEP Team compromised and set the goal as ten minutes. (Ex. D-137) On other issues, such as whether to focus on multiple phonological patterns or just one at a time, █ and the School District "agreed to disagree." (D-139)

because the Special Needs School did not collect data on those skills, the Team incorporated those skills within some of the IEP goals and objectives.⁸ In addition, some of the goals and objectives adopted by the IEP Team covered skills that ██████ had mastered in a one-on-one setting in private therapy, but the Team wanted ██████ to master those skills in the classroom setting as well.⁹ The School District assured ██████ that new goals and objectives could be added during the school year if ██████ demonstrated mastery of those skills early. (Tr. 607-08, 610-12, 644-45; Exs. D-135-148)

14.

With respect to placement, the Team discussed whether ██████ should be placed in an SDD Kindergarten classroom or a self-contained Mild or Moderate first grade classroom. The SDD Kindergarten classroom initially under consideration was a collaborative classroom, where special education students and regular education students are co-taught by a special education teacher and a regular education teacher in the same

⁸ For example, the director of the Gwinnett Special Needs School reported to the IEP Team that ██████ could “recognize” numbers 1 through 20. However, she had no data about ██████’s performance of this skill, such as how consistently he recognized the numerals, if he needed cues to perform the task successfully, or if he could recognize the numerals in multiple contexts. Therefore, the IEP Team established an objective that ██████ be able to “count” up to 20, which is a different and higher skill than simply recognizing the numbers. Id.

⁹ Both Heidi St. John, ██████’s private speech therapist, and Jonathan McKee, ██████’s private occupational therapist, described skills that ██████ exhibited in private sessions that he did not consistently demonstrate in the school setting. However, both Ms. St. John and Mr. McKee admitted that ██████ may not be able to generalize those skills across settings, and that a true test of whether he has mastered a skill would be whether he can demonstrate that skill in a classroom setting with the same independence and consistency that he shows in private sessions. Anne Holloway, a special education coordinator for the School District, also testified that when considering whether a student has mastered a goal or objective, an IEP Team often looks for mastery in a variety of settings and with minimal prompts, which is not always the case in private therapy. (Tr. 213-17, 219, 230, 240-41, 248-50, 268, 291-93, 297-99, 306, 311-12, 653-55)

classroom. The rate of learning is faster than in a self-contained classroom and the collaborative classroom may have up to 20 students. The Moderate classroom was described as having a curriculum that covers academic, social, motor, and adaptive skills, with an emphasis on adaptive skills. There is more adult support in the Moderate classroom, with a ratio of 2 teachers to 11 students, and the pace is slower and involves more repetition. Finally, the Mild classroom was described as faster-paced and more academic than the Moderate classroom. The ratio in a Mild classroom is either 1:10 or 2:13. (Exs. D-141-143)

15.

██████ preferred a placement in the SDD Kindergarten, but the School District was concerned about whether ██████ could keep pace with the regular education students. The School District recommended the Moderate classroom, but agreed that a placement in the Mild classroom would be reasonable. Near the end of the September 29th meeting, someone from the School District advised the Team that there was a fourth placement option, not previously-considered: a self-contained SDD kindergarten classroom with five students at Jackson Elementary. The IEP Team agreed that this placement would be appropriate for ██████, as it would allow ██████ to work at a slower pace in a small group for academic instruction and participate in a general education class for up to two hours per day, for lunch, center time, calendar time, recess, and specials. (Tr. 44-45; Exs. D-108, D-144-148)

16.

Unfortunately, the Jackson Elementary SDD classroom was not set up as initially described by the School District. Rather, it was a collaborative Kindergarten classroom

with approximately 20 regular education students and two special education students. Thus, a few days following the IEP meeting, [REDACTED] met with educators from McKendree Elementary School ("McKendree") and agreed to change [REDACTED]'s placement to McKendree's first grade Mild classroom. On the IEP Change Form, which [REDACTED] signed, the IEP Team noted that [REDACTED] had not been to Kindergarten and will not have a full year of first grade during the 2008-2009 school year. Therefore, the Team "will consider allowing [REDACTED] to stay in the same Mild-ID first grade class for the 2009-2010 school year, as was proposed during the 9/29/08 IEP meeting." (Tr. 45-47; Exs. D-102-03)

T.B.'s Progress in the Mild Classroom

17.

[REDACTED]'s teacher at McKendree was Betty-Sue Garrish. Soon after [REDACTED] entered Ms. Garrish's class in October 2008, she noticed that he was not performing as well in the classroom as was described in the IEP. Ms. Garrish grew concerned that [REDACTED] would not be able to meet his IEP goals and objectives and discussed these concerns with [REDACTED] (Tr. 180-81, 469-71)

18.

Prior to the winter break, the School District attempted to schedule an IEP meeting to determine [REDACTED]'s grade level and to review [REDACTED]'s goals and objectives. [REDACTED] was not able to meet with the IEP Team until January 30, 2009. Two attorneys attended the meeting with [REDACTED] and the School District's counsel was also present. The IEP Team decided that [REDACTED] would be considered a Kindergarten student, not a first grader, and be assessed as such at the end of the school year. In addition, the IEP Team agreed to revise

or eliminate some of [REDACTED]'s goals and objectives.¹⁰ (Tr. 138, 470-71; Exs. D-70, D-74, D-99-101, D-382-34)

19.

Ms. Garrish used a number of different strategies in an attempt to improve [REDACTED]'s performance on his IEP goals. However, his rate of progress did not increase. Less than two months later, on March 12, 2009, the IEP Team met to discuss whether [REDACTED] needed extended school year services ("ESY services"). The IEP Team noted that "[w]hile [REDACTED] was making progress on goals and objectives the skills he is acquiring are emerging." Specifically, out of four targeted objectives, [REDACTED] was making "minimal progress" on two of the objectives and "progressing as expected" on two. The IEP Team recommended that [REDACTED] receive ESY services over the summer to assist him in developing these emerging skills. (Tr. 468-69, 471-72; Exs. D-51-53)

20.

At certain times during the school year, Ms. Garrish collected data on [REDACTED]'s progress on his IEP goals. For example, Ms. Garrish collected data in approximately December 2008, March 2009, and May 2009 on a variety of objectives, such as tracing letters or naming lowercase letters. [REDACTED] performed inconsistently on many of his objectives during the year, with his level of mastery appearing to decrease on some of his

¹⁰ [REDACTED] testified at the hearing that she did not wish to change any of the goals and objectives and that the purpose of the January 2009 meeting was to reduce the number of goals and objectives to make it easier for the School District to collect data. (Tr. 48-49) However, the minutes from the January 2009 meeting indicate that [REDACTED] made a number of requests to modify the goals and objectives, many of which were considered and adopted by the IEP Team. (Ex. D-101)

objectives from March to May.¹¹ According to Ms. Garrish, [REDACTED]'s performance on his objectives was often inconsistent and she believed that his regression during this time was borne out of his frustration over the pace of the Mild classroom, which was overwhelming him. (Tr. 148-65, 525-26; Ex. 726)

4. 2009-2010 School Year

21.

[REDACTED]'s placement at the beginning of the current school year was in the Mild classroom at McKendree, taught by Ms. Garrish and a para-professional. Of the eight other students in [REDACTED]'s current class, most are second graders, and one student is a first grader like [REDACTED]. In every area – math, language arts, adaptive skills, and social skills – [REDACTED]'s performance is significantly below the rest of the students in his class. In fact, because he cannot keep pace with the other students, [REDACTED] is not able to meaningfully participate in group instruction. Rather, Ms. Garrish works with [REDACTED] one-on-one, in what the School District describes as a “class within a class.”¹² (Tr. 505-15, 527, 571,

¹¹ At an IEP Meeting in September 2009, [REDACTED] reported that [REDACTED] “lost 30% of his hearing in his right ear and 10% in his left ear from May 2009 through the beginning of August 2009. He had permanent ear tubes placed in his ears approximately one week before school started.” Ms. Garrish testified that [REDACTED]'s hearing was not a problem before May 2009, but it is unclear from the record whether his hearing loss had a negative impact on his performance of tasks during the May data collection period. [REDACTED] testified that when [REDACTED]'s ears were clogged or infected, he did not hear certain sounds as well and she would observe regression and a decline in attentiveness. In addition, the School District conducted an audiometric evaluation on September 2, 2009, after [REDACTED] failed a hearing test in school. Mild hearing loss was still present in [REDACTED]'s left ear, but the audiologist concluded that [REDACTED]'s hearing was adequate for educational testing in a quiet, one-on-one setting. (Tr. 21, 251-52, 499, 528; Exs. D-17, D-204, D-217)

¹² Anne Holloway, the special education coordinator for moderate, severe and profound intellectual disabilities for the School District, observed Ms. Garrish's class room while the other students were working independently on decoding words and then writing those words in sentences. At the same time, Ms. Garrish was working separately

22.

█████ engages in parallel play with his peers, but does not spontaneously interact with the other students in his class. Ms. Garrish has attempted to facilitate his engagement with other children by practicing social skills, modeling appropriate interaction, and encouraging █████ to seek help from peers. Nevertheless, █████ is still unable to engage with other students without prompts. █████ also needs assistance and prompts when going to the restroom or traveling around the school to participate in first grade regular education activities. The other first grade student in the Mild classroom can accomplish these activities independently. (Tr. 510-14)

23.

According to Ms. Garrish, it is vital for all students, including █████, to experience some level of success in the classroom. Children are motivated by their achievements and even █████'s private speech therapist acknowledged that █████ needs times when he is "successful in order to continue to get him to do work." Ms. Garrish tries to create opportunities in her classroom for █████ to be successful when he is with his peers. For example, █████ might be called on to identify the day of the week on Tuesdays during calendar time because Tuesday is the only day of the week that █████ knows. However, █████ rarely is able to achieve success in the Mild classroom without Ms. Garrish's intervention. (Tr. 215, 508, 515-16, 523-24)

with █████, who was tracing the letters in his name. Ms. Holloway observed that █████ was isolated from his instructional peers in the Mild classroom and that he was the lowest functioning student in the class. (Tr. 573-74, 631-32, 650)

School District Proposes Placement in a Moderate Classroom

24.

Because of these concerns, the School District recommended that the IEP Team consider changing [REDACTED]'s placement to a Moderate classroom when his current IEP expired at the end of September 2009. In a Moderate classroom, the teaching methodology is different than in a Mild or regular education classroom. There is a great deal of repetition of skills and the curriculum is presented in multiple ways, using different sensory modalities to reinforce the skill or concept being taught. In addition, students in a Moderate classroom have greater opportunity to use their acquired skills in practical, real-world settings, so that those skills will be meaningful to the students. (Tr. 574-75, 645-48)

25.

Both Ms. Garrish and Ms. Holloway opined that [REDACTED] would make more academic progress in the Moderate classroom than in the Mild classroom. In fact, Ms. Holloway, who is an expert in planning and implementing programming for children with SDD, testified that [REDACTED] is very similar to children she has taught and observed in Moderate classrooms. According to Ms. Garrish, who has taught [REDACTED] for over a year, the greater repetition and multi-sensory approach used in the Moderate classroom would help [REDACTED] acquire and maintain skills that he is only inconsistently demonstrating in her classroom. In addition, [REDACTED] would have instructional peers in the Moderate classroom, with whom he could keep pace and interact on a similar developmental level. The Court finds that if [REDACTED] remains in the Mild classroom, the gap between [REDACTED] and the other students likely would continue to grow and [REDACTED] would not acquire the skills needed for him to become

independent. (Tr. 185, 524, 526-27, 574, 648)

26.

Finally, both Ms. Holloway and Ms. Garrish stated that if [REDACTED] excelled in a Moderate classroom, the IEP Team would revise his IEP goals and objectives and reconsider his placement options, including increased time in a general education setting or a return to the Mild classroom. (Tr. 527-28, 576)

[REDACTED] Refused to Provide Written Consent for Reevaluation

27.

According to the initial eligibility reports, dated September 21, 2006, [REDACTED] was due for another comprehensive evaluation by September 20, 2009. Although [REDACTED] had undergone a psychological evaluation with Dr. Dickerson in July 2008, the School District believed that it was essential to conduct a full reevaluation, not only for eligibility purposes but because the reevaluation data would be valuable to the IEP Team in determining [REDACTED]'s goals and objectives and his appropriate placement. (Ex. D-381)

28.

Prior to the beginning of the school year, Ms. Garrish spoke to [REDACTED] about the need for a reevaluation and [REDACTED] verbally agreed and signed the consent form. However, [REDACTED] did not check the box on the consent form to indicate that she, in fact, consented to the evaluation. Ms. Garrish contacted [REDACTED] to discuss this omission and when [REDACTED] learned that the School District was seeking a comprehensive evaluation, including a psychological, [REDACTED] said "absolutely not." In fact, when Ms. Garrish sent [REDACTED] a notice for a reevaluation meeting to discuss [REDACTED]'s eligibility, [REDACTED] sent the notice back, with the following notation: "I DO NOT GIVE MY PERMISSION FOR THIS EVALUATION."

(Tr. 472-75; Ex. D-202)

29.

On or about August 24, 2009, Jennifer Niday, the assistant principal at McKendree, sent a letter to ██████, proposing to conduct a three-year reevaluation of ██████. She explained that it was important for the School District to reevaluate students every three years to determine continued eligibility for services. In addition, Ms. Niday advised ██████ that ██████'s IEP Team will use these "fresh evaluations" to "accurately determine present levels of performance, areas of strength and areas of need, and in making necessary programming decisions." Ms. Niday identified some of the possible assessment instruments that the School District would use in the reevaluation, including The Test of Early Mathematics Ability ("TEMA"), the Test of Early Reading Ability ("TERA"), and the Brigance Comprehensive Inventory of Basic Skills ("Brigance"), none of which had been administered previously by either the School District or Dr. Cantor. Ms. Niday noted in the letter that ██████ had refused to give consent for the reevaluation or any updated testing and therefore the data used to determine ██████'s eligibility for services and his appropriate IEP would be limited. (Tr. 121-22, 658; Exs. D-211-14, D-228, D-251, D-381, P-6)

30.

██████ refused to provide consent for a reevaluation following receipt of Ms. Niday's letter. At the due process hearing, ██████ testified that she did not consent because she was confused about why it had to be done and she did not understand the importance of the testing. ██████ also testified that "it was a matter of do I want to put him through another one of those big things when we haven't needed that in order to do an IEP

previously.” Although [REDACTED] acknowledged that the information “would be helpful,” she considered it more of an unnecessary formality.¹³ Also, she wanted the School District to wait until 2011, which would be three years from Dr. Dickerson’s 2008 psychological evaluation. (Tr. 123-24, 531; Exs. D-202, D-426)

31.

On or about August 25, 2009, Ms. Niday sent a second letter to [REDACTED] regarding the reevaluation. Specifically, Ms. Niday was responding to [REDACTED]’s request for written documentation regarding the School District’s legal right to conduct a three-year reevaluation. Ms. Niday informed [REDACTED] that she had forwarded this request to the School District to answer. [REDACTED] testified that she requested this information because she was trying to understand what was “underneath” the School District’s request for a “major reevaluation in order to do eligibility and IEP. I didn’t get it.... So I wanted to see the law because I’m interested in that.” (Tr. 124-25, 660-61; Exs. D-374-75)

32.

On or about September 2, 2009, John Shaw, the School District’s Director of Compliance, sent a letter to [REDACTED] providing the legal citation to the federal regulation regarding reevaluations, as well as the text of the regulation. Mr. Shaw also reiterated the School District’s request for reevaluation “because it has been three years since a comprehensive evaluation has occurred, and because the child’s needs warrant a reevaluation.” Following receipt of Mr. Shaw’s letter, [REDACTED] continued to request information from Ms. Niday about the reason for the reevaluation and requesting “the

¹³ Ms. Niday testified that she spoke with [REDACTED] on the telephone following [REDACTED]’s receipt of her letter and that she explained the importance of the reevaluation to [REDACTED]. Ms. Niday also sent [REDACTED] another Parental Consent for Reevaluation form on or about August 21, 2009. (Tr. 658-59; Ex. D-216)

actual TEXT of the law to which John Shaw is referring in it's [sic] entirety." (Tr. 125, 661-62; Exs. D-373, D-385-88)

33.

█'s IEP Team met on September 25, 2009. At that meeting, which is discussed in more detail below, █ verbally agreed to sign the consent to reevaluate █ as long as certain conditions were met. Specifically, █ requested that a listing of the test instruments and accommodations be included with the consent form before she signed it. On September 29, 2009, Michelle Williams, a School District psychologist, sent a letter to █, listing a number of possible test instruments that might be used to assess █'s cognitive, motor, behavioral, speech and language, and achievement abilities. The letter also included a copy of the parental consent form for █ to sign and return to the School District. Despite her verbal agreement and the School District's fulfillment of her request for additional information, █, to date, has not returned a signed consent form to the School District. (Tr. 664-65; Exs. D-41, D-368-69)

34.

The Court finds that █'s refusal to consent to the reevaluation was unreasonable and that her explanation for her refusal was disingenuous. █'s private occupational therapist, Mr. McKee, reevaluates █'s progress every six months. More importantly, █ has arranged for Dr. Cantor to conduct three separate psychological evaluations of █ in less than three years.¹⁴ █ herself has acknowledged that the

¹⁴ Dr. Cantor conducted a third evaluation of █ approximately two weeks before the due process hearing. However, the evaluation was not disclosed to the School District five days before the hearing as required under 34 C.F.R. § 300.512(b) and the Pre-Hearing Order in this case. Consequently, the results of the evaluation were excluded from the hearing. (Tr. 411-417)

information from the reevaluation would be helpful to the IEP Team. Moreover, there is no evidence in the record that the School District's proposed evaluations would cause any injury or harm to [REDACTED]. In fact, [REDACTED]'s reaction to Dr. Cantor's evaluation, during which he became aggressive and tried to leave the room, was far worse than [REDACTED]'s reaction to Dr. Dickerson's evaluation.¹⁵ Finally, the Court finds that the School District provided [REDACTED] with clear information regarding the proposed testing instruments, the value of the testing to the IEP Team, and the legal authority supporting its reevaluation request. (Tr. 286, 300)

September 17, 2009 Reevaluation Conference

35.

The IEP Team met on September 17, 2009 for a reevaluation conference. [REDACTED] was accompanied by an attorney and the School District also was represented by counsel. As Ms. Niday warned, the data reviewed by the IEP Team was limited because of [REDACTED]'s repeated refusals to consent to new testing. Nevertheless, the IEP Team was able to review historical test results, as well as anecdotal reports and data regarding his progress on his IEP goals and objectives, which showed that [REDACTED] had mastered only one objective and had demonstrated minimal or no progress on over twenty other objectives. Based on this information, the Team concluded that it had enough information to make an eligibility determination and it found that [REDACTED] remained a child with a disability. (Tr. 663-74; Exs. D-203-09)

¹⁵ Ms. Garrish testified that she was "shocked" to learn that [REDACTED] had been aggressive toward the evaluator in Dr. Cantor's office because [REDACTED] was "not aggressive at all." (Tr. 487)

September 2009 IEP Meetings

36.

The IEP Team met immediately following the reevaluation conference on September 17th to review [REDACTED]'s IEP. The meeting was continued to September 25th and [REDACTED] was accompanied by an attorney and an advocate at the second meeting. [REDACTED] presented reports to the Team from [REDACTED]'s private therapists, which again indicated that in some areas [REDACTED] was functioning at a higher level in his private therapy sessions than he was in the classroom. However, as Ms. Garrish pointed out and as [REDACTED]'s private therapists acknowledged, the private setting is different, and often less challenging, than the school setting. The IEP Team agreed that [REDACTED] should stay in a self-contained special education classroom for most of his instructional day and that he should continue to attend lunch, calendar, and specials with his regular education peers. However, the IEP Team disagreed regarding the appropriate self-contained classroom in which to implement [REDACTED]'s IEP. The School District members of the Team, including Ms. Garrish, recommended placement in a Moderate classroom, which [REDACTED] opposed. The Team was "locked" and [REDACTED] indicated her intent to file a due process hearing request and invoke the "stay-put" provision under IDEA. (Exs. D-14-43)

Plaintiff's Due Process Complaint

37.

[REDACTED] filed a due process hearing request on October 2, 2009. The complaint alleged that the School District's proposed placement is more restrictive than the current placement. Plaintiff requested prior written notice from the School District regarding why such a placement was recommended. The complaint also alleged that because

§§'s private therapists have reported that §§ has already mastered some of the goals proposed by the IEP Team, the IEP fails to offer §§ a free, appropriate public education. With respect to a proposed remedy to these alleged IDEA violations, Plaintiff requested that the School District provide §§ timely prior written notice, that §§ remain in his last-agreed upon placement until resolution of the due process complaint, and that §§ be reevaluated and the IEP Team reconvened to consider the results of the reevaluation.

38.

On November 3, 2009, Plaintiff filed a letter attempting to amend the due process complaint just nine days before the scheduled start of the due process hearing. The School District objected to this late amendment and the Court denied Plaintiff's request to amend the complaint under 34 C.F.R. § 300.508(d)(3). See Order issued on November 10, 2009.

III. CONCLUSIONS OF LAW

A. General Law

1.

The pertinent laws and regulations governing this matter include IDEA, 20 U.S.C. § 1400 *et seq.*; federal regulations promulgated pursuant to IDEA, 34 C.F.R. § 300 *et seq.*; and Georgia Department of Education Rules, Ga. Comp. R. & Regs. ("Ga. DOE Rules"), Ch. 16-4-7.

2.

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

on all issues is a preponderance of the evidence. OSAH Rule 616-1-2-.21(4).

3.

Under IDEA, students with disabilities have the right to a free appropriate public education (“FAPE”). 20 U.S.C. § 1412(a)(1); 34 C.F.R. §§ 300.1, 300.100; Ga. DOE Rule 160-4-7-.01(1)(a). “The purpose of the IDEA generally is ‘to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living’” C.P. v. Leon County Sch. Bd., 483 F.3d 1151 (11th Cir. 2007), *quoting* 20 U.S.C. § 1400(d)(1)(A).

B. The School District’s Reevaluation Request was Authorized and Warranted.

1. The School District is Required to Reevaluate Children with Disabilities Every Three Years.

4.

The triennial reevaluation process is an important part of the educational planning for disabled children. Both federal regulations and Georgia Department of Education rules require that a School District conduct a reevaluation “at least every 3 years, unless the parent and the [School District] agree that a reevaluation is unnecessary.” 34 C.F.R. § 300.303(b)(2); Ga. DOE Rule 160-4-7-.04(3)(a).

5.

IEP Teams use information from triennial reevaluations, coupled with other relevant information, to make critical determinations for disabled children, including the nature of the child’s disabilities, the educational needs of the child, the child’s present

levels of academic achievement and developmental needs, and the special education and related services needed to enable the child to meet IEP goals. 34 C.F.R. § 300.305(a)(2). IDEA regulations mandate that reevaluations must be “sufficiently comprehensive to identify all of the child’s special education and related services needs” and should cover “all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.” 34 C.F.R. § 300.304(c)(4) & (6).

6.

The School District in this case conducted a comprehensive evaluation of [REDACTED] in September 2006, when he entered the School District. Thus, his triennial reevaluation was due to take place by September 2009. Plaintiff presented no legal authority to support [REDACTED]’s position that the three-year period was tolled during the 2008-2009 school year, when [REDACTED] was home-schooled and attended private school. Rather, the Court concludes that a child’s absence from the School District increases the importance of the triennial reevaluation, as there may be gaps in available data from the period of absence. The Court further concludes, based on the evidence in the record, that the psychological evaluation conducted by Dr. Dickerson in July 2008 did not constitute a full and comprehensive reevaluation that would reset the clock for the triennial reevaluation. Among other things, Dr. Dickerson’s testing did not include specific assessment of [REDACTED]’s speech and language skills or his motor skills, areas in which [REDACTED] has difficulty and which affect his performance during testing and in the classroom.¹⁶ The Court concludes

¹⁶ In addition, a comprehensive reevaluation should include a formal assessment of [REDACTED]’s functional behavior in the classroom setting. Dr. Dickerson’s assessment of [REDACTED]’s

that the School District was authorized and, in fact, was required to conduct a comprehensive triennial evaluation of [REDACTED] by September 2009.

2. The School District Properly Determined that [REDACTED]'s Educational Needs Warranted a Reevaluation.

7.

In addition to a triennial reevaluation, the IDEA requires the School District to ensure that a reevaluation of a child with a disability is conducted if either "the [School District] determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation," or "[i]f the child's parent or teacher requests a reevaluation." 34 C.F.R. § 300.303(a)(1) & (2). Such reevaluations may not occur more than once a year, unless the parent and the School District agree otherwise. 34 C.F.R. § 300.303(b)(1).

8.

Even assuming *arguendo* that the triennial reevaluation was not due in September 2009, the Court concludes that the School District was obligated to reevaluate [REDACTED] at the start of the 2009-2010 school year. [REDACTED]'s academic achievement was flagging and he was not meeting his IEP goals and objectives. In fact, as Plaintiff pointed out at the hearing, [REDACTED] was regressing in a number of areas as of May 2009. In addition, despite considerable efforts by his classroom teacher and revisions to his IEP objectives, [REDACTED]'s performance in the classroom lagged behind the progress being reported by his private therapists. Finally, both Dr. Cantor's and Dr. Dickerson's past efforts to obtain test results that reflected [REDACTED]'s true abilities were hampered by [REDACTED]'s inattention and

behavior did not include an observation or assessment of him in the classroom, but was limited to her analysis of reports from other observers.

behavior, diminishing the usefulness of these evaluations to the IEP Team.¹⁷ Accordingly, the need for current, reliable testing was even greater. Under these circumstances, the Court concludes that the School District had a duty to reevaluate [REDACTED] in September 2009 in order to address his educational needs and improve his academic achievement and functional performance.

C. The School District Properly Informed [REDACTED] of the Reevaluation.

9.

Before the School District conducts a reevaluation, it must provide notice to the parents of the child, describing any evaluation procedure it proposes to conduct. 34 C.F.R. § 300.304(a). In addition, such notice must explain why the School District wishes to conduct the evaluation and include a statement regarding a parent's procedural safeguards under IDEA. 34 C.F.R. § 300.503(b). After providing notice but prior to conducting the reevaluation, the School District must obtain the parent's informed consent.¹⁸ 34 C.F.R. § 300.300(c)(1)(i). If a parent refuses to consent to a reevaluation, the School District may, but is not required to, pursue the "consent override procedures"

¹⁷ The federal regulations require that reevaluations include assessments that are selected and administered so as to best ensure that the results reflect a disabled child's aptitude or achievement level, rather than reflecting the child's impaired sensory, manual or speaking skills. 34 C.F.R. § 300.304(c)(3). Although the difficulties experienced by Dr. Cantor and Dr. Dickerson during their evaluations of [REDACTED] are understandable, the School District is obligated under IDEA to structure its reevaluation in such a way as to maximize the likelihood that the test results closely reflect [REDACTED]'s true ability and achievement level.

¹⁸ Informed parental consent is not required if the School District can demonstrate that it has taken reasonable measures to obtain such consent and the child's parents failed to respond. See 34 C.F.R. § 300.300(c)(2); Ga. DOE Rule 160-4-7-.04(3)(c). In this case, although the School District took reasonable measures to obtain [REDACTED]'s consent, [REDACTED] affirmatively refused consent, as discussed *infra*, and did not simply fail to respond.

established under IDEA. 34 C.F.R. § 300.300(c)(1)(ii).

10.

The term “consent” is defined under IDEA regulations to mean written consent.

Consent means that –

(a) The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication;

(b) the parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom....

34 C.F.R. § 300.9 (emphasis added); Ga. DOE Rule 160-4-7-.21(11).

11.

The Court concludes that the School District in this case made reasonable efforts to obtain [REDACTED]'s informed consent. The School District, on numerous occasions and through personal meetings, telephone calls, and written communications, explained to [REDACTED] why the School District was seeking her consent for the reevaluation, described the testing instruments that would be used, and provided her with requested information regarding the legal authority for the reevaluation request. [REDACTED], who was represented by at least one attorney at almost every IEP Team meeting and who appeared during the due process hearing to be an intelligent, resourceful parent, was provided sufficient information to make an informed decision regarding the School District's request for her consent to reevaluate [REDACTED].

D. 's Refusal to Consent Bars Plaintiff's Claims under IDEA.

12.

The evidence in the record clearly shows that refused to sign the written consent for reevaluation. Consequently, under the controlling case law in this circuit, Plaintiff's claims for special education services under the IDEA due process procedures are barred. The prerequisite that parents consent to an evaluation by the School District before pursuing claims for special education services under the IDEA has been recognized by this Court, as well as numerous federal courts.¹⁹ In 2006, the Eleventh Circuit Court of Appeals found that "[e]very court to consider the IDEA's reevaluation requirements has concluded 'if a student's parents want him to receive special education under IDEA, they must allow the school itself to reevaluate the student and they cannot force the school to rely solely on an independent evaluation.'" M.T.V. v. Dekalb County Sch. Dist., 446 F.3d at 1160, *quoting* Andress v. Cleveland Indep. Sch. Dist., 64 F.3d at 178-79. The *M.T.V.* Court held that the school district had a right to condition continued

¹⁹ See G.J. v. Muscogee County Sch. Dist., OSAH-DOE-IEE-0908379-106-Miller (2008); M.T.V. v. Dekalb County Sch. Dist., 446 F.3d 1153, 1160 (11th Cir. 2006); Doe v. Eagle-Union Community Sch. Corp., 2 Fed. Appx. 567 (7th Cir. 2001)(unpublished decision) ("by refusing to allow Doe to be evaluated under IDEA, the plaintiffs have waived any claim they might be able to raise under the Act"); Andress v. Cleveland Indep. Sch. Dist., 64 F.3d 176, 178-79 (5th Cir. 1995) ("If a student's parents want him to receive special education under IDEA, they must allow the school itself to reevaluate the student and they cannot force the school to rely solely on an independent evaluation"); Gregory K. v. Longview Sch. Dist., 811 F.2d 1307, 1315 (9th Cir. 1987) (if parents want child to receive special education under the Act, they are obligated to permit testing); Dubois v. Conn. State Bd. of Ed., 727 F.2d 44, 48 (2^d Cir. 1984) ("Before a school system becomes liable under the Act for special placement of a student, it is entitled to up-to-date evaluative data"); H.G. v. Audubon Bd. of Ed., 2006 U.S. Dist. LEXIS 94932 (D. Conn. June 14, 2006) (if parents wanted child to receive special education accommodations under IDEA, they were required to allow the District to evaluate the child); P.S. v. Brookfield Bd. of Ed., 353 F. Supp. 2d 306 (D. Conn. 2005) (Board was entitled to perform requested evaluation and parents lost right to reimbursement by failing to make child available for evaluation).

special education services on a reevaluation by an expert of its choice. *Id.*

13.

In addition, the Court finds that [REDACTED]'s refusal to sign the consent form was unreasonable, given that [REDACTED] understood the usefulness of the reevaluation, had no reason to believe that [REDACTED] would be harmed by the proposed reevaluation, and had arranged to have [REDACTED] privately reevaluated during the same period that she was refusing to consent to the School District's evaluation. The Eleventh Circuit, in *Loren F. v. Atlanta Indep. Sch. Sys.*, held that "[e]ven when a FAPE is not provided, courts can nevertheless deny reimbursement if a parents own actions frustrated the school's efforts." 349 F.3d 1309, 1312-13 (11th Cir. 2001)(citations omitted).

14.

In the due process complaint, Plaintiff alleged that the School District denied him FAPE because the IEP Team's proposed goals and objectives included skills that his private therapists reported he had already mastered. Although this claim is without merit,²⁰ the Court concludes that [REDACTED]'s refusal to allow the School District to reevaluate [REDACTED] significantly hindered the development of [REDACTED]'s IEP. Information from the reevaluation could have been used by the IEP Team to determine [REDACTED]'s optimal abilities and his current functioning, which would have assisted in the development of goals and objectives and the identification of services that were specifically designed to improve [REDACTED]'s performance in the classroom. The Court concludes that [REDACTED]'s role in limiting the relevant information available to draft goals for [REDACTED] precludes Plaintiff, on equitable

²⁰ Plaintiff's own experts testified that [REDACTED] may not be able to generalize the skills he learns in his private therapies to a classroom setting, and that it would be an appropriate goal for [REDACTED] to demonstrate those skills independently in a more challenging, classroom environment.

grounds, from seeking redress for alleged deficiencies in the proposed IEP goals. *Id.*, at 1319, n.10 (if parents significantly hindered or frustrated the development of an IEP, the court may be justified in denying equitable relief on that ground alone).

E. **§.§.'s Placement in the Moderate Classroom is Appropriate.**

15.

In the alternative, the Court concludes that the evidence in the record supports the IEP Team's recommended placement in the Moderate classroom. Although Ms. Garrish and the School District tried to provide §.§. with supports and services to allow him to progress in the Mild classroom setting, §.§. is unable to keep pace with his peers and his own academic performance is languishing. Further, the Court credits the testimony of the School District's educators regarding the suitability of the methodology used in the Moderate classroom to address §.§.'s disabilities and educational needs. Although the Court agrees that the IEP Team must give thoughtful consideration to the disparity between §.§.'s achievements in private therapy and his progress in the classroom, this factor alone does not justify leaving §.§. in a placement where he is not making academic progress.

16.

Finally, Plaintiff argued that placement in a Moderate classroom would violate the "specific directive" in IDEA that disabled children be placed in the "least restrictive alternative." See Greer v. Rome City Sch. Dist., 950 F.2d 688, 695 (11th Cir. 1992) (subsequent history omitted); L.G. v. Sch. Bd. of Palm Beach County, 255 Fed. Appx. 360 (11th Cir. 2007)(unpublished decision). Specifically, states are required to develop procedures that ensure that --

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

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

34 C.F.R. § 300.114.

17.

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

18.

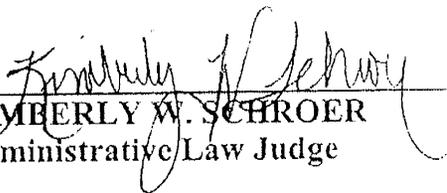
Under the particular facts of this case, the Court concludes that the choice between a Mild or Moderate classroom for [REDACTED] does not implicate the LRE provisions of IDEA. First, whether [REDACTED] is placed in the Mild or Moderate classroom does not affect the amount of time that [REDACTED] will spend with his regular education peers. Both the Mild and the Moderate classrooms are self-contained special education classrooms, separate from the regular education students in the school, and neither party disputes that [REDACTED]

needs a self-contained setting for his academic instruction. In either placement [REDACTED] will be able to attend specials, such as physical education, music, and art, as well as lunch, recess and calendar time, with other regular education students. Accordingly, the Court concludes that [REDACTED] will be mainstreamed to the maximum extent possible under either placement option and the choice of a Moderate classroom placement does not violate the LRE mandate.

IV. DECISION

Based on the foregoing Findings of Facts and Conclusions of Law, Plaintiff's request for relief is **DENIED**.

SO ORDERED, this 4th day of January, 2010.


KIMBERLY W. SCHROER
Administrative Law Judge