BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[redacted], by and through his parent, [redacted], and [redacted],	:	10-222129
Plaintiffs,	:	
	:	**Docket No.:**
v.	:	**OSAH-DOE-SE-1034017-141-Howells**
	:	
TROUP COUNTY SCHOOL DISTRICT,	:	
Defendant.	:	

FILED
OCT 18 2010
OFFICE OF STATE ADMINISTRATIVE HEARINGS

FINAL DECISION

On June 8, 2010, Plaintiffs filed their due process hearing request ("Complaint") alleging that the Troup County School District ("District" or "Defendant") violated the IDEA mediation process and mediation agreement, and asserting claims for harassment and retaliation for exercise of protected rights including advocacy under IDEA, and for discrimination under the ADA and Section 504 of the Vocational Rehabilitation Act. The thrust of Plaintiffs' Complaint is the District's alleged breach of an IDEA Mediation Settlement Agreement which resolved a previous due process hearing request in [redacted] *v. Troup County School District*, OSAH-DOE-SE-1003295-141-Walker ("[redacted]*1*").

For the reasons set forth below, the undersigned finds that Plaintiffs have failed to state a claim under IDEA "relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education." 20 U.S.C. § 1415(b)(6). Instead, Plaintiffs' breach of an IDEA Mediation Settlement Agreement is a state-law breach of contract claim, over which this administrative tribunal has no jurisdiction. Alternatively, if this Tribunal does have jurisdiction, Plaintiffs failed to prove a denial of a FAPE.

Procedural History

The Complaint contains many paragraphs asserting issues that were raised or could have been raised in [redacted] *1*. On June 15, 2010, the District moved to dismiss any claims that were resolved by the Mediation Settlement Agreement. On July 15, 2010, this Tribunal granted the District's motion, to the extent that Plaintiffs were asserting any issues, allegations, or claims previously stated or which could have been stated up to and including the completion of the extended school year 2010.

In their Complaint, Plaintiffs asserted claims against the District's Special Education Director, Dr. Lakshmi Sankar, in her individual capacity. Plaintiffs acknowledged that they did not believe that this Tribunal had jurisdiction over Dr. Sankar in her individual capacity. However, they raised the claims to avoid any problems concerning a failure to exhaust administrative remedies. Plaintiffs moved for the appointment of a special process server, to serve Dr. Sankar. On July 16, 2010, this Tribunal denied the motion and ruled that it had no jurisdiction over Dr. Sankar, in her individual capacity.

Plaintiffs' Complaint also contained allegations that the District breached the Agreement by choosing an evaluator with a conflict of interest (*i.e.*, Dr. Robert Montgomery). The undersigned bifurcated the hearing and granted Plaintiffs time to provide legal authority to support their claim. Upon review of Plaintiffs' authority, the undersigned found that Plaintiffs failed to state a claim upon which relief could be granted and dismissed the claim as to the District's choice of evaluator.

After the various claims were dismissed, the only remaining claims relate to Plaintiffs' allegations that the District breached the Agreement by failing to timely evaluate [redacted] and failing to pay up to $66,960.00 for two 18 week programs.

Prior to the start of the hearing, the undersigned ruled that the Agreement was ambiguous to the extent that the term "program" is not defined in the Agreement. Accordingly, parol evidence was allowed. The hearing was conducted on July 29 and 30, August 9 and 25, 2010. The record closed on September 17, 2010, with receipt of the parties' post-hearing submissions.[1]

Findings of Fact

1.

[redacted] filed a due process complaint on July 31, 2009, styled [redacted] *v. Troup County School District*, OSAH-DOE-SE-1003295-141-Walker ("[redacted] *I*"). In that matter, the parties participated in mediation, which ultimately resulted in a Mediation Settlement Agreement (the "Agreement") executed on September 11, 2009. (Ex. P-4.)

2.

The Agreement "resolve[d] all issues, allegations, and claims stated or which could have been stated up to and including he completion of [Extended School Year] 2010" "as to the School District and any of its representatives, except against Dr. Sankar in her individual capacity, and except for violations of this Agreement." (Ex. P-4, at 1, 3.)

3.

The Agreement provides, in pertinent part, as follows:

> 1. The Troup County School District (the "School District") agrees to pay LindaMood Bell up to $66,960 for two 18 week programs[2] (for a total of 36 weeks for [redacted].].
>
> 2. The School District will reimburse the family for mileage while [redacted] is at LindaMood Bell as follows: (a) transportation to and from Atlanta and LaGrange once a week; and (b) transportation between LindaMood Bell and Aurora Strategies up to five (5) days a week for completion of a seven (7) week program, at the State of Georgia legal rate.

[1] The Parties stipulated to the extension of the 45-day rule contained in 34 C.F.R. § 300.515(a) and agreed that October 18, 2010 would be the deadline for the Final Decision.
[2] The term "program" is not defined in the Agreement.

3. Upon presentation of receipts and/or other generally accepted forms of proof of payment, except for mileage as described in Paragraph 2 where no receipts will be required, the School District will reimburse the parents up to $19,000 for services provided by Aurora Strategies, as well as for housing expenses, including utilities (but excluding food, entertainment or any other living expenses) while [redacted] is enrolled or between the first and second sessions, or attending LindaMood Bell as provided for in Paragraph 1 above. . . .

4. The family acknowledges that the programming described in Paragraphs 1 and 3, above, is not a School District placement, nor an IEP placement for stay put purposes or otherwise, but is in settlement of the pending due process hearing . . ..

5. As a condition of this Agreement, when LindaMood Bell begins providing the program to [redacted] described in Paragraph 1, the Parents will withdraw [redacted] from the School District for the remainder of the 2009-2010 school year, including 2010 ESY.

* * *

7. The family agrees to provide copies of all private evaluations to the School District for review and consideration and to make [redacted] available for a comprehensive evaluation in all areas of suspected disability by experts of the School District's choosing within 30 days of the date of this Agreement. . . . The results of these evaluations will not effect (sic) the agreed upon provision of services described in Paragraphs 1 and 3 above.

8. The family will be entitled to enroll [redacted] in the School District for the 2010-11 school year. As part of the enrollment, the family will provide reasonable advanced notice so that information can be gathered and an IEP meeting can be held no later than July 15, 2010. The parties recognize that [redacted] may not have completed the program as of the date of the IEP meeting and that the School District may not have all relevant information by that time, but the Family desires that an IEP meeting be held on or before July 15, 2010. This meeting and all future meetings shall be governed by IDEA and state IEP meeting provisions applicable at the time. Plaintiffs shall attempt to provide available records concerning [redacted]'s completion of the LindaMood Bell program as soon as they are available to the Defendant. Upon [redacted]'s reenrollment, his home school shall be Westside Magnet unless the parties mutually agree otherwise.

(Ex. P-4, at 1.)

4.

Pursuant to the terms of the Agreement, [redacted]'s parent withdrew him from the school district on September 21, 2009. [redacted] enrolled in LindaMood Bell on September 28, 2009. (Tr. 525-527.)

LindaMood Bell Services

5.

The District signed two contracts for service with LindaMood Bell. The first contract is dated September 22, 2009, and was executed by Dr. Sankar on September 25, 2009. (Exs. P-29, D-25, at GM 000247-249.) It provides for 360 one-to-one sessions[3] at a rate of $93.00 per session, to begin on or after September 28, 2009 and terminate on or before February 27, 2010. The total retail cost of the 360 sessions was $33,480.00. However, because the District pre-paid the tuition, LindaMood Bell gave the District a 25% discount. The discount reduced the amount of the tuition by $8,370.00, resulting in a total payment of $25,110.00. *Id.*

6.

The second contract signed by the District is dated February 2, 2010, and was executed by Dr. Sankar on February 4, 2010. (Exs. P-31, D-25, at GM 000258-260.) It provides for 360 one-to-one sessions at a rate of $93.00 per session, to continue on February 12, 2010 and terminate on or before May 28, 2010. The total retail cost of the 360 sessions was $33,480.00. However, because the District again pre-paid the tuition, LindaMood Bell gave the District a 25% discount, reducing the cost to $25,110.00. *Id.*

7.

Lauren Tupper is the Director for the Atlanta LindaMood Bell Learning Center. Ms. Tupper uses the term "program" to mean the substantive module or curriculum that she would

[3] The contract describes the one-to-one sessions as 55-minute sessions.

recommend for a child. For example, she uses the term "program" to refer to the "On Cloud Nine" math program or the "Visualizing and Verbalizing" language comprehension program. At one point in Ms. Tupper's testimony she denied that "18 week program" had any significance in LindaMood Bell nomenclature. (Tr. 124, 150, 245.) However, she also acknowledged that LindaMood Bell does have something called a "school program," which consists of 360 hours. The fee for the school program is calculated by multiplying the hourly rate by 360 hours and applying a 25% discount for prepayment. She further acknowledged that the school program is "typically a 12 week, 6 hour-a-day program," but that it can be conducted 4 hours per day for 18 weeks. (Tr. 232, 292-93, 295.)

8.

The contracts between the District and LindaMood Bell were negotiated with and executed by the LindaMood Bell corporate office in California. Ms. Tupper did not participate in negotiating or writing the contracts. (Tr. 218-19, 231; Ex. D-25, at GM 000246-253, 000257-260.)

9.

[redacted]. attended the program at Aurora Strategies in the afternoons for seven weeks, between October 19, 2009 and December 14, 2009. (Tr. 264, 689; Ex. D-25, at GM 000303, 000309-312, 000320, 000329.) Initially, [redacted]. attended LindaMood Bell for four hours per day. (Ex. D-32, at GM 000383.) Once [redacted] completed the seven weeks at Aurora Strategies, his mother requested that he be allowed to attend LindaMood Bell six hours per day, as opposed to four hours per day. (Tr. 276-77.) [redacted] began attending LindaMood Bell six hours per day, as of January 4, 2010. (Ex. D-32, at GM 000385.)

10.

[redacted]. attended LindaMood Bell for 18 weeks, between September 28, 2009 and February 4, 2010. (Ex. D-32, at GM 000383-385.) [redacted] attended LindaMood Bell for an additional 13 weeks, between February 8, 2010 and May 21, 2010. (Ex. D-32, at GM 000386-388.)

11.

[redacted]'s mother asserts that the services provided for in the Agreement were necessary to provide [redacted] a FAPE. (Tr. 657, 693-94.) However, she did acknowledge that [redacted] received some benefit from the LindaMood Bell services he received. (Tr. 752, 873.) Ms. Tupper also agreed that [redacted] made some progress while at LindaMood Bell. (Tr. 168-169.)

Evaluations

12.

Prior to filing the Complaint in [redacted] *1*, Plaintiffs had private evaluations of [redacted] conducted, including an evaluation through the University of North Carolina. In the [redacted] *1* Complaint, Plaintiffs did not seek additional evaluations. Rather, they sought only reimbursement of the private evaluations. (Tr. 684-85; [redacted] *1* Complaint, at 41.)

13.

The language in the Agreement supports a finding that the evaluations were for the primary benefit of the District, as the evaluations were to be conducted by "experts of the School District's choosing." (Ex. P-4, ¶ 7.) Pursuant to the Agreement, Plaintiffs were obligated to make [redacted] available for the evaluations within 30 days of the Agreement. *Id.*

14.

Plaintiffs first contacted the District on September 21, 2009, via email, regarding the evaluations described in the Agreement. Plaintiffs stated that it would be "optimum for your

district evaluation to be completed prior to the beginning of the Lindamood Bell program, or during the holiday breaks from the Lindamood Bell services, to prevent missing valuable instruction sessions, which would further impede [[redacted]'s] progress." (Ex. P-57.)

15.

On October 1, 2009, Dr. Sankar sent an email to Plaintiffs describing the types of evaluations it wished to conduct. In the email, Dr. Sankar stated that the District was willing to conduct the evaluations during the following week. She further stated that the District was also willing to conduct the evaluations outside of the 30-day timeline, pursuant to Plaintiffs' request to limit [[redacted]'s time away from his educational services. In closing, Dr. Sankar asked Plaintiffs to communicate their preference. (Ex. P-58.)

16.

As of October 6, 2009, Plaintiffs had not responded to Dr. Sankar's October 1, 2009 email. Thus, Dr. Sankar sent another email on October 6, 2009, reiterating a willingness to work with the Plaintiffs to conduct the evaluations outside of the 30-day timeline. (Ex. P-58.)

17.

Plaintiffs emailed Dr. Sankar on October 7, 2009, regarding the evaluations. In the email, Plaintiffs stated that they would have liked these evaluations to have been conducted prior to [[redacted]'s enrollment in LindaMood Bell. However, Plaintiffs agreed that the evaluations could be conducted outside of the 30-day timeline. Plaintiffs proposed November 11, 2009, as a date for the evaluations, as that would be the first scheduled holiday break from LindaMood Bell. (Ex. P-58.)

18.

On October 23, 2009, Dr. Sankar emailed Plaintiffs regarding the evaluations. She identified "Dr. Montgomery," a clinical psychologist in the Atlanta area to conduct the psychological evaluation. She stated that Dr. Montgomery prefers to evaluate students for no longer than 3 hours on any given day. He would begin the evaluation on November 11, 2009, but would likely need two additional 3-hour time slots on other days. Dr. Sankar identified Vickie Clark, a speech and language pathologist, to conduct the speech and assistive technology evaluations. Ms. Clark would be available in February. Finally, Dr. Sankar identified Rachel MacArthur, the District's occupational therapist to conduct the occupational therapy ("OT") evaluation. The consent forms for the evaluations were attached to the email. (Ex. P-58.)

19.

Plaintiffs responded to Dr. Sankar's email on October 27, 2009. Plaintiffs expressed their displeasure with and opinion that stretching the evaluations out over months was in violation of the Agreement. Plaintiffs stated that Dr. Montgomery would need to evaluate [redacted] on November 11, 2009 and if necessary November 13, 2009. (Ex. P-58.)

20.

On November 3, 2009, Dr. Sankar notified Plaintiffs that Dr. Montgomery would conduct and complete the psychological evaluation on November 11, 2009. She also stated that Rachel MacArthur could conduct the OT evaluation on November 12, 2009. Dr. Sankar asked Plaintiffs to let her know if they would be available on November 12, 2009 for the OT evaluation. (Ex. P-59.)

21.

Plaintiffs responded to Dr. Sankar's email on November 4, 2009. They stated that they would make [redacted] available on November 11, 2009, for the psychological evaluation and on November 12, 2009 for the OT evaluation. (Ex. P-59.)

22.

The psychological evaluation by Dr. Montgomery was completed on November 11, 2009. The report was provided to the District on December 21, 2009. (Exs. P-38, P-60.) The assistive technology ("AT") and OT evaluations were completed on November 12, 2009. (Exs. P-35, P-37.) The speech language evaluation was conducted on December 23, 2009. (Ex. P-36.)

Conclusions of Law

1.

As an initial matter the undersigned has grave reservations about whether this administrative tribunal is the appropriate jurisdiction for Plaintiffs' claims. Pursuant to 20 U.S.C. § 1415(e)(2)(F)(iii), IDEA Mediation Settlement Agreements are "enforceable in any State court of competent jurisdiction or in a district court of the United States."[4] This administrative tribunal is not a "State court of competent jurisdiction" or a federal district court *See* 20 U.S.C. § 1415(i)(2)(A) (providing for civil actions in a "State court of competent jurisdiction" or a federal district court *to contest the administrative decision*; thus impliedly recognizing that this administrative body is not a "State court of competent jurisdiction.") (emphasis added).

[4] This provision was added by the 2004 Amendments and became effective on July 1, 2005. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446; 34 C.F.R. § 300.506(b)(7); *see also Pedraza v. Alameda Unified Sch. Dist.*, No. C 05-04977 VRW, 2007 U.S. Dist. LEXIS 26541, at *10-13 (N.D. Cal. Mar. 27, 2007) (recognizing that, as of July 1, 2005, IDEA Mediation Settlement Agreements are enforceable in federal court).

2.

Rather, the Office of Administrative Hearings is an executive branch agency charged with conducting impartial administrative hearings in contested cases between state agencies and private parties. *See* O.C.G.A. §§ 50-13-2(1), 50-13-13, 50-13-40(a); Ga. Comp. R. & Regs. r. 616-1-1-.01. The jurisdiction of this Tribunal is limited to that conferred by the Georgia Administrative Procedures Act or other specific state or federal statutes and rules. *See* O.C.G.A. § 50-13-1, *et seq*.

3.

In the context of IDEA, this administrative tribunal has jurisdiction over due process complaints "relating to the identification, evaluation or education placement of [a child with a disability], or the provision of a free appropriate public education." 20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.507(a); O.C.G.A. § 50-13-2(1) (defining agency to include the Georgia Department of Education); *see also* Ga. Comp. R. & Regs. r. 160-4-7-.12(3) (Georgia Department of Education Rule describing the procedures for due process hearings). As a general proposition, this Tribunal does not have jurisdiction over state-law contract claims. Thus, where an IDEA complaint does not assert a claim related to the identification, evaluation, or educational placement of a child with a disability or the provision of a FAPE to a child with a disability, this Tribunal has no jurisdiction over enforcement of an IDEA Mediation Settlement Agreement.

4.

Two unpublished Eleventh Circuit cases have held that parents were required to exhaust administrative remedies prior to bringing a claim in federal district court for breach of an IDEA settlement agreement. Both cases are distinguishable. In *J.P. v. Cherokee County Board of Education*, the Eleventh Circuit relied on the district court's determination that the "dispute '[a]t

its heart, . . . is about a failure to sufficiently provide a [FAPE] to [J.P.] and the adverse educational consequences of that failure.'" 218 Fed. Appx. 911, 913 (2007). The Eleventh Circuit further stated, "Because J.P.'s alleged injuries *primarily* relate to the provision of his FAPE, and thus constitute educational injuries . . . , Plaintiffs were required to exhaust administrative remedies before filing this court action." *Id.*

5.

The *J.P.* court did not discuss the substance of the portion of the settlement agreement allegedly breached by the school district. Rather, it simply stated that the alleged injuries primarily related to the provision of FAPE. Furthermore, the settlement agreement in *J.P.* resulted from a 2001 due process complaint and the alleged breach occurred in November of 2003. *Id.* Thus, both the settlement and alleged breach occurred before the 2004 amendments providing for enforcement of mediation settlement agreements in state or federal court. Moreover, there is no indication in the opinion that the settlement agreement was a "mediation" settlement agreement. Accordingly, the court did not address the provision at issue here.

6.

In another unpublished opinion, the Eleventh Circuit concluded that the parent's claim that the school district breached the IDEA settlement agreement "is also primarily a challenge relating to the provision of a FAPE and must be addressed administratively." *School Board of Lee County, Florida v. M.M.*, 348 Fed. Appx. 504, 511 (2009). The settlement agreement in that case was not a mediation settlement agreement. Thus, the court did not address 20 U.S.C. § 1415(e)(2)(F)(iii), providing for enforcement of mediation settlement agreements in state or federal court.

7.

As noted *supra*, neither of the Eleventh Circuit cases addressed enforcement of mediation settlement agreements. Nor is the undersigned aware of any other binding authority requiring a party seeking to enforce an IDEA mediation settlement agreement (entered into after July 1, 2005) to exhaust administrative remedies, despite the clear language of 20 U.S.C. § 1415(e)(2)(F)(iii). This Tribunal is aware of a decision from the Eastern District of California, in which the court decided that the Plaintiff was required to exhaust administrative remedies when the alleged breach relates to a student's receipt of a FAPE, despite the language in 20 U.S.C. § 1415(e)(2)(F)(iii). *Hayden C. v. Western Placer Unified School District*, No. 2:08-CV-03089-MCE-EFB, 2009 U.S. Dist. LEXIS 39952, at *9 (E.D. Cal. May 11, 2009).

8.

The interpretation by the *Hayden C.* court appears to render 20 U.S.C. § 1415(e)(2)(F)(iii) superfluous. Parties to an IDEA dispute are already entitled to bring a civil action in a state court of competent jurisdiction or a federal district court if they are aggrieved by the administrative decision pursuant to 20 U.S.C. § 1415(i)(2)(A). Thus, if exhaustion of administrative remedies is required before going to state or federal court to enforce a mediation settlement agreement, then there is no need for 20 U.S.C. § 1415(e)(2)(F)(iii).

9.

Given the plain language of 20 U.S.C. § 1415(e)(2)(F)(iii), as noted above, the undersigned has grave reservations about this Tribunal's jurisdiction over Plaintiffs' claims regarding the alleged breach of the mediation settlement agreement. Those concerns are further exacerbated by the unique facts and circumstances related to the Agreement.

10.

In particular, the Agreement provides that it "resolves all disputes that have been brought or could have been brought through and including the completion of the [extended school year] 2010." Thus, unlike other IDEA cases where the parties assert violations of IDEA *in addition to* breach of the settlement agreement, this case pertains solely to breach of the Agreement, as any other claims during the time at issue were waived.

11.

Furthermore, in *J.P.* and *M.M.*, the children were enrolled in the school district and were being served pursuant to an IEP. In stark contrast, the Agreement in this case provides:

> The family acknowledges that the programming described in Paragraphs 1 and 3 , above is not a School District placement, nor an IEP placement for stay put or otherwise, but is a settlement of the pending due process hearing. . . .
>
> As a condition of this Agreement, when LindaMood Bell begins providing the program to [redacted] described in Paragraph 1, the Parents will withdraw [redacted] from the School District for the remainder of the 2009-2010 school year, including 2010 ESY.

(Findings of Fact, ¶ 3.) [redacted]'s parent did, in fact, withdraw [redacted] from the school district on September 21, 2009. Therefore, at the time of the alleged breach of the Agreement, [redacted] was not enrolled in the school district and was not being served by an IEP. Based on the unique facts of this case, it appears that Plaintiffs have not and cannot assert a viable IDEA claim "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(6)(A).

12.

On at least one occasion, the Eleventh Circuit has acknowledged that a parent's claim regarding a breach of an IDEA settlement agreement is not always a claim "brought under"

IDEA. In *Robert K v. Cobb County School District*, the court addressed whether the plaintiffs were a "prevailing party" for the purpose of awarding attorney's fees. *Robert K. v. Cobb County School District*, 279 Fed. Appx. 798 (2008). The court determined that "[p]laintiffs prevailed only on a state-law breach of contract claim that by their own admission did not involve IDEA." *Id.* at 801. The court held that "plaintiffs did not prevail on a claim 'brought under' § 1415 of the IDEA" and therefore were not entitled to prevailing party status. *Id.*

13.

In deciding whether the *Robert K.* Plaintiffs brought a claim under IDEA, the court noted that "plaintiffs' breach of settlement agreement claim did not require any adjudication of plaintiffs' rights under the IDEA or any consideration of the text of the IDEA." *Id.* Thus, to assert an IDEA claim, the "complaint must state a violation of an IDEA right regarding 'the identification, evaluation, or educational placement of the child or the provision of a [FAPE].'" *Id.*

14.

In the instant case, Plaintiffs have not stated or, as discussed *infra*, established an IDEA claim. While Plaintiffs' Complaint refers to IDEA and to some extent alleges IDEA violations, the allegations are conclusory and are not the primary thrust of Plaintiffs' Complaint.[5] Moreover, because [redacted] was not enrolled in the school district and the LindaMood Bell services were not an IEP placement; the undersigned concludes that IDEA rights do not apply. The thrust of Plaintiffs' Complaint is the alleged breach of certain provisions of the Agreement. Adjudication of Plaintiffs' claims requires only application of Georgia contract law.

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[5] *See* Complaint, ¶¶ 61, 72. The undersigned recognizes that paragraphs 34 through 55 of Plaintiffs' Complaint assert violations of IDEA rights; however, those paragraphs contain allegations related to claims that were or could have been asserted in [redacted] *I*, and thus were waived by the Agreement. Those claims were dismissed on July 15, 2010.

15.

The parties acknowledge that 20 U.S.C. § 1415(e)(2)(F)(iii) provides for the enforcement of IDEA Mediation Settlement Agreements in state courts of competent jurisdiction and federal district court. However, they argue that Section 1415(e)(2)(F)(iii) does not provide the exclusive jurisdiction for enforcement of IDEA Mediation Settlement Agreements. For the reasons stated above, the undersigned does not agree.

16.

For the reasons stated above, this Tribunal concludes that it dose not have jurisdiction to provide relief for Plaintiffs' claims. However, even assuming that this Tribunal does have jurisdiction over Plaintiffs' claims, for the reasons that follow, Plaintiffs have failed to prove an IDEA violation entitling them to relief.

Burden of Proof

17.

Plaintiffs bear the burden of proof on all issues. Under IDEA, the party seeking relief bears the burden of proof. *Schaffer v. Weast*, 546 U.S. 49, 57-58, 62 (2005) (Plaintiffs in IDEA case have burden of proof at administrative hearing). Furthermore, as Plaintiffs allege the District breached the Agreement, Plaintiffs bear the burden to prove the breach. *See* O.C.G.A. § 24-4-1.

Standard for Analyzing a Claim for Breach of an IDEA Mediation Settlement Agreement

18.

Although the Eleventh Circuit has not directly addressed the proper analysis of an alleged breach of an IDEA settlement agreement, at least one district court has endeavored to analyze such a claim in a manner consistent with other Eleventh Circuit precedent. *E.D. v. Enterprise*

City Bd. of Educ., 273 F. Supp. 2d 1252, 1260 (M.D. Ala. 2003); *see also Board of Educ. of Township High School Dist. No. 211 v. Michael R.*, No. 02 C 6098, 2005 U.S. Dist. LEXIS 17450, at *66-67 (N.D. Ill. Aug. 15, 2005) (adopting the approach taken by the *E.D.* court). In *E.D.*, the court noted that the Eleventh Circuit refused to adopt a *per se* rule with respect to procedural violations of IDEA. *E.D.*, 273 F. Supp. 2d at 1260. "In the Eleventh Circuit, the procedural violation must be shown to have harmed the student to entitle the plaintiff to relief." *Id.* (citing *Doe v. Alabama State Dep't of Educ.*, 915 F.2d 651, 663 (11th Cir. 1990)). Therefore, the court concluded that the Eleventh Circuit would not adopt a *per se* rule with respect to an alleged breach of settlement agreements. *E.D.*, 273 F. Supp. 2d at 1260.

19.

Accordingly, to establish an IDEA claim for breach of a settlement agreement, Plaintiff must prove: (1) a breach of the settlement agreement, and (2) a denial of a FAPE. *Id.*

Breach of the Agreement

20.

A "settlement agreement is a contract subject to construction by the court." *Flagg Energy Dev. Corp. v. GMC*, 223 Ga. App. 259, 260 (1996); *Pounds v. Brown*, 303 Ga. App. 674 (2010); *Edmond v. Englehard Corp.*, No. 5:08-CV-56(MTT), 2010 U.S. Dist. LEXIS 103567, at *10 (M.D. Ga. Sept. 30, 2010) (quoting *Flagg*, 223 Ga. App. at 260). It is governed by state contract law. *Flagg*, 223 Ga. App. at 260; *Wong v. Bailey*, 752 F.2d 619, 621 (11th Cir. 1985); *Clough Mkt. Servs. v. Main Line Corp.*, 313 Fed. Appx. 208, 211 (11th Cir. 2008) (citing *Wong*, 752 F.2d at 621).

21.

"The cardinal rule of [contract] construction is to ascertain the intention of the parties." O.C.G.A. § 13-2-3. The court must first look to the four corners of the contract. *Sharple v. Air Touch Cellular of Georgia*, 250 Ga. App. 216, 218 (2001) (citing *Terry v. State Farm Fire and Ins. Co.*, 269 Ga. 777, 778-79 (1998)). If the terms of the contract are unambiguous, then the contract is enforced according to its terms and "no construction is necessary or even permissible." *In re Club Assocs.*, 951 F.2d 1223, 1230 (11th Cir. 1992) (quoting *Stern's Gallery of Gifts, Inc. v. Corporate Property Investors, Inc.* 176 Ga. App. 586, 593 (1985)); *Duffett v. E & W Properties, Inc.*, 208 Ga. App. 484, 486 (1993).

22.

When the court determines that there is an ambiguity, ordinarily "[o]nly if the ambiguity is not resolved by application of the rules of construction may parol evidence be introduced to explain the agreement." *Livoti v. Aycock*, 263 Ga. App. 897, 902 (2003) (citing *Kobryn v. McGee*, 232 Ga. App. 754, 756 (1998)). "'Ambiguity' is defined as duplicity, indistinctness, an uncertainty of meaning or expression used in a written instrument." *Novelty Hat Manufacturing co. v. Wiseberg*, 126 Ga. 800, 801 (1906).

LindaMood Bell Services

23.

Prior to the beginning of the hearing, the undersigned ruled that the term "program" was ambiguous, as it was not defined in the Agreement. *See Raymond Rowe Furniture Co. v. Simms*, 84 Ga. App. 184, 186 (1951) (holding that the contract was ambiguous as it was completely lacking as to a description of the model, style and size of the object of the sale, i.e., a refrigerator). Furthermore, the term "program" is susceptible to more than one meaning. *See*

United States Fidelity & Guaranty Co. v. Gillis, 164 Ga. App. 278, 281 (1982) (finding that a policy manual contained provisions susceptible to more than one reasonable interpretation, and was therefore ambiguous). This was borne out by the evidence at the hearing. In particular, Ms. Tupper, the Director of the Atlanta LindaMood Bell Learning Center, testified that she uses the term "program" to mean the substantive module or curriculum. However, she also acknowledged that there is such a thing as a "school program" at LindaMood Bell, and that program is defined by the number of hours.

24.

Having determined that the term "program" was ambiguous, the Tribunal must now apply the rules of construction. *Livoti*, 263 Ga. App. at 902. Paragraph 1 of the Agreement provides that the District "agrees to pay LindaMood Bell up to $66,960 for two 18 week programs (for a total of 36 weeks for [redacted])." Plaintiffs assert that this means that the District was required to pay for LindaMood Bell services up to the financial limit of $66,960.00 or the durational limit of 36 weeks, whichever came first. The District argues that the parties' intent was that the District pay for two 18 week programs of 4 hours per day, five days per week. The District relies on the unique dollar amount of $66,960.00 and Plaintiffs' actions prior to the mediation. During the hearing, it also became apparent that the District also relies on the negotiations during the mediation, which the undersigned ruled were confidential and therefore inadmissible. 20 U.S.C. § 1415 (e)(2)(G); 34 C.F.R. § 300.506(b)(8).

25.

Plaintiffs point out that the Agreement contains no reference to sessions, hours per day or days per week. Plaintiffs further argue that this provision of the Agreement should be construed against the District because it was the District's obligation to pay for the services. O.C.G.A. §

13-2-2(5) ("If the construction is doubtful, that which goes most strongly against the party executing the instrument or undertaking the obligation is generally to be preferred"). The undersigned agrees with Plaintiffs. It was the District's obligation to pay for the services, therefore the District should bear the risk of the failure to include additional terms to define or limit its obligation. *See Franklin v. Franklin*, 262 Ga. 218 (1992) (construing the settlement provision against the party who undertook the obligation). As the Agreement stands, the undersigned finds Plaintiffs' construction of the contract to be reasonable and the most supported without resorting to outside information or terms.

26.

It is undisputed that the District paid a total of $55,220.00 for LindaMood Bell services pursuant to the Agreement. The evidence established that [redacted]. attended a total of 31 weeks of LindaMood Bell. Accordingly, the undersigned concludes that the District breached the Agreement, to the extent it did not pay up to $66,960.00 for 36 weeks of LindaMood Bell programming.

Evaluations

27.

Plaintiffs also argue that the District breached the Agreement, in that it did not conduct the evaluations within the 30-day timeline in the Agreement. Plaintiffs' argument is without merit. The Agreement provides, in pertinent part:

> The family agrees to . . . make [redacted] available for a comprehensive evaluation in all areas of suspected disability by experts of the School District's choosing within 30 days of the date of this Agreement.

(Finding of Fact ¶ 3.) The obligation described in this provision of the Agreement was the Plaintiffs' obligation, not the District's. The Agreement contains no deadline for completion of

the evaluations. The evidence at the hearing established that Plaintiffs withdrew [redacted]. from the District 10 days after the Agreement was executed, and enrolled [redacted]. in LindaMood Bell on September 28, 2009, 17 days after the date of the Agreement. Moreover, Plaintiffs expressed a preference that the evaluations not interfere with [redacted].'s services at LindaMood Bell. The District took this preference into consideration and agreed to work with Plaintiffs in this regard. As the 30-day timeline in the Agreement refers to Plaintiffs' obligation to *make* [redacted] *available* for the evaluations, not an obligation to conduct or complete the evaluations within that time frame, the undersigned concludes that Plaintiffs have failed to establish that the District breached the Agreement with respect to the evaluations.

Denial of a FAPE

28.

Having found that the District breached the Agreement regarding payment of the LindaMood Bell services, this Tribunal must determine whether Plaintiffs demonstrated that the breach denied [redacted] a FAPE. As an initial matter, it appears that Plaintiffs cannot establish a FAPE violation. At the time of the breach, [redacted] was not enrolled in the school district. Additionally, the parties agreed that the LindaMood Bell programming "is not a School District placement, nor an IEP placement for stay put or otherwise, but is a settlement of the pending due process hearing." (Findings of Fact, ¶ 3.)

29.

Even if the [redacted].'s withdrawal from the school district and the language in the Agreement does not remove Plaintiffs' claims from the scope of IDEA, Plaintiffs presented no evidence, but

for the conclusory testimony of [redacted]'s mother, that the specific LindaMood Bell programming contained in the Agreement was required to provide [redacted] with a FAPE.[6]

30.

"A denial of a FAPE is difficult to establish." *E.D.*, 273 F. Supp. 2d at 1263. IDEA does not create an obligation to "maximize each child's potential." *Board of Educ. v. Rowley*, 458 U.S. 176, 198 (1982). Rather, when IDEA speaks in terms of an "appropriate" education, it refers to one that provides a basic floor of opportunity to allow the child to receive some educational benefit. *Id.* at 200. Mastery of goals and objectives are not required to provide a FAPE; indeed, Congress recognized that "in many instances the process of providing special education and related services to handicapped children is not guaranteed to produce any particular outcome." *Id.* at 192. "While a trifle might not represent 'adequate' benefits . . . maximum improvement is never required." *E.D.*, 273 F. Supp. 2d at 1263 (quoting *JSK v. Hendry County Sch. Bd.*, 941 F.2d 1563, 1573 (11th Cir. 1991)).

31.

In the instant case, Plaintiffs failed to establish that the District's breach of the Agreement amounted to a denial of a FAPE. Plaintiffs presented no expert testimony or testimony from educators that two LindaMood Bell programs, each of 18 weeks duration, was required to provide [redacted] with some educational benefit. In fact, Plaintiffs' mother acknowledged that [redacted] benefitted from the LindaMood Bell services that he did receive.[7]

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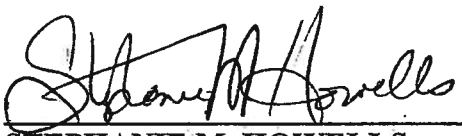
[6] Like the *E.D.* Court, the undersigned can conceive of a scenario in which the District may have agreed to things in the Agreement that it does not strictly consider necessary to provide a FAPE to [redacted]. *See E.D.*, 273 F. Supp. 2d at 1260.

[7] Having concluded that Plaintiffs failed to establish a denial of FAPE, the undersigned also concludes that Plaintiffs failed to meet their burden of proof on their Section 504 and ADA claims. *See A.B. v. Clarke County Sch. Dist.*, No. 3:08-CV-041, 2009 U.S. Dist. LEXIS 27102, at *53 (M.D. Ga. Mar. 30, 2009) (plaintiffs must prove "'more than a simple failure to provide' FAPE"). Under Eleventh Circuit law, both the ADA and the Rehab Act require proof of intentional discrimination or bad faith. *See K.C. v. Fulton County Sch. Dist.*, No. 1:03-CV-3501-TWT, 2006 U.S. Dist. LEXIS 47652, at * (N.D. Ga. 2006). Plaintiffs presented no evidence of intentional

Decision

For the forgoing reasons, this Tribunal concludes that it does not have jurisdiction over Plaintiffs' claims. However, even assuming it does have jurisdiction, Plaintiffs have failed to establish an IDEA violation. Accordingly, Plaintiffs' request for relief is **DENIED**.

SO ORDERED this 18th day of October, 2010.



STEPHANIE M. HOWELLS
Administrative Law Judge

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discrimination or bad faith. Similarly, Plaintiffs failed to present any evidence of retaliation. Therefore, their retaliation claims are without merit.