IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[redacted] by and through [redacted] and [redacted] and [redacted]	
Petitioners,	**Docket No.:**
	OSAH-DOE-SE-[redacted]-106-SCHROER
v.	14-294471
MUSCOGEE COUNTY SCHOOL DISTRICT,	
Respondent.	

FINAL DECISION

I. INTRODUCTION

On May 5, 2014, [redacted] through his parents, [redacted] and [redacted] filed an amended 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") on June 6, 2014. [redacted] parents appeared *pro se*. Respondent Muscogee County School District was represented by Melanie Slaton, Esq. The deadline for the issuance of this decision was extended pursuant to 34 C.F.R. § 300.515(c) in order to allow the parties to file post-hearing briefs.

II. FINDINGS OF FACT

1.

[redacted] is a [redacted]-year-old boy who lives with his family in Columbus, Georgia. Until last spring, [redacted] attended Blanchard Elementary, a school in the Muscogee County School District ("School District"). At that time, [redacted] was identified as a student with a disability under IDEA and was receiving special education services under an Individualized Education Program ("IEP") first developed in May 2012. In or around April 2013, when [redacted] was in fifth grade, his parents

withdrew him from the School District. He has been homeschooled since that time.

2.

[redacted] parents filed a due process complaint against the School District on April 2, 2014. On April 22, 2014, this Court found that large portions of the complaint were insufficient, and granted Petitioners leave to file an amended complaint. See *Order on Sufficiency of Due Process Complaint.* Petitioners filed an amended due process complaint on May 5, 2014, alleging various violations of IDEA and seeking reimbursement for out-of-pocket expenses, including tutoring fees, attorney's fees, and insurance co-payments, as well as prospective relief in the form of private school tuition and other therapies.[1]

A. Summary of [redacted] Educational Background

3.

[redacted] began kindergarten at Blanchard Elementary School during the 2006-2007 school year. Shortly thereafter, he was identified as a student with a speech and language disability, and the School District began providing speech therapy and occupational therapy ("OT") services pursuant to an IEP. In October 2009, when [redacted] was in second grade, his IEP reflected that he had made improvements in his "fine/gross motor skills, body awareness, and visual perceptual skills for performance in school related tasks." Although his IEP team found that [redacted] continued to exhibit a "mild receptive and expressive language disorder which impacts his ability to access

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[1] Even after the amendment, Petitioners' due process complaint was disjointed and difficult to decipher. To the extent that Petitioners' amended complaint attempted to assert claims arising prior to IDEA's two-year statute of limitation, Petitioners failed to allege or prove sufficient facts to warrant tolling the statute of limitations. 20 U.S.C. § 1415(f)(3)(D); 34 C.F.R. 300.511(f). See *infra*, at p. 19. Factual findings regarding events prior to the limitations period are made only "as background material and to provide context for the claims, not to support a violation of the IDEA." Draper v. Atlanta Indep. Sch. Sys., 480 F. Supp. 2d 1331, 1341 (N.D. Ga. 2007), aff'd, 518 F.3d 1275 (2008).

the general curriculum," the IEP team reduced his OT services to thirty minutes of consultative services per month and continued weekly speech therapy services. The IEP noted that [redacted] "social, emotional, adaptive behavior, cognitive, motor skills and physical health are all within normal limits." (Testimony of [redacted]; Ex. P-7; Ex. R-23)

4.

In September 2010, when [redacted] was in third grade, his IEP team met to review [redacted] IEP and to develop a new IEP for the 2010-2011 school year. The September 2010 IEP summarized [redacted] performance on various academic tests, including the Criterion Referenced Competency Test ("CRCT"). [redacted] most recent CRCT scores met expectations in Reading and Math, but fell just shy of meeting expectations in English/Language Arts. The IEP noted that [redacted] had made "tremendous progress" toward his annual speech goals in terms of voice, fluency, and articulation, but that he continued to exhibit a mild receptive and expressive language disorder that had a negative impact on his ability to perform in language arts. With respect to OT services, the IEP stated that [redacted] had met or exceed all his OT goals for the year and that the team recommended that he be dismissed from OT services.[2] The team recommended that [redacted] continue to receive speech therapy services on a reduced basis – thirty minutes per week – and that the delivery model be changed from pull-out to collaborative.[3] The IEP team agreed to

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[2] [redacted]'s parents agreed to his dismissal from OT services at that time. (Testimony of [redacted]; Ex. R-2)

[3] The School District delivers special education services through a variety of methods. Pull-out services refer to services provided to a student outside his regular education classroom, usually in a small-group or individual setting. See generally Ga. Comp. R. & Regs. 160-4-7-.07(e)(d)(2). Collaborative or supportive services refer to services provided in the student's regular classroom, where both the classroom teacher and special education personnel provide instruction and support to the student. Consultative services are primarily indirect services, with special education personnel consulting with the student's regular education teacher to develop strategies to assist the student in the classroom. See generally, Ga. Comp. R. & Regs. 160-4-7-

implement additional teaching strategies to help [redacted] with writing and math and to reconvene if those strategies were unsuccessful. With the exception of a 794 score in math, [redacted]'s CRCT test scores at the end of third grade were all at or above the "meets expectation" score of 800: English/Language Arts: 800; Math: 794; Reading: 820; Science: 843; Social Studies: 816. (Ex. R-2; Ex. P-22)

5.

[redacted] attended fourth grade during the 2011-2012 school year. Although neither party tendered the 2011-2012 IEP into evidence at the hearing, it appears that the IEP team met and developed an IEP for [redacted] in the fall of 2011, which continued to include speech therapy services.[4] According to his mother, [redacted] began developing a heightened sensitivity to loud noises around this time, and he was becoming very frightened of storms. [redacted] also began having more difficulty performing his academic work at the beginning of fourth grade. Due to increased academic and behavioral concerns, including failing grades in reading and math, difficulties processing information, and anxiety triggered by loud noises (as reported by his mother), Blanchard Elementary's Student Support Team ("SST") met regarding [redacted] in January 2012 as

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.07(3)(d)(1). (Testimony of Ogburn)

[4] Both parties identified IEP documents from the fall of 2011 in their amended exhibits lists, but neither party tendered those documents, and they were not admitted into evidence at the administrative hearing. In addition, Petitioners submitted an amended exhibit list on the day of the hearing, but the numbers on their tendered exhibits did not always match the numbers and description of the documents on the amended exhibit list. Thus, Exhibit P-31 is identified on the amended exhibit list as "IEP 10/3/11 meeting," but the Exhibit P-31 tendered and admitted into evidence at the hearing was a document entitled "Cognitive and Educational Evaluation" from May 2012. For purposes of this decision, the Court will consider only documentary evidence that was identified, offered and admitted as an exhibit on the record during the administrative hearing.

part of the Georgia Department of Education's Response to Intervention ("RTI") process.[5] (Testimony of [redacted], Ogburn; Ex. P-22)

6.

First, [redacted] met with other members [redacted] SST on January 19, 2012 to develop Tier 1 interventions. The team identified [redacted]'s strengths as his good behavior and his ability to get along well with others.[6] His weaknesses were identified as reading comprehension and writing. The team also developed goals for [redacted] in reading and math, and identified various instructional interventions, such as a reading summary notebook, a daily math journal, a book study group, a writing club, and small group opportunities for math instruction. On or about February 21, 2012, the SST reviewed [redacted] progress with these interventions. According to the minutes of the SST meeting, [redacted] continued to struggle with reading and had difficulty staying on task when things did not interest him. The team developed a Tier 2 plan, which continued most of the interventions from the Tier 1 plan, including a reading summary notebook, a graphic organizer, and frequent conferences with his teacher. The SST agreed to schedule a Tier 3 meeting if [redacted]

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[5] Under IDEA, states are required to adopt criteria for determining whether a child has a specific learning disability as defined in 34 C.F.R. § 300.308(c)(10). See 34 C.F.R. 300.309. Georgia uses a four-tiered RTI model to identify students with specific learning disabilities. Georgia's guidelines require that schools use research-based instructional interventions, which should increase in intensity according to a students' progress as he moves through the tiers. (Testimony of Ogburn, [redacted]) See generally Genna Stienberg, Amending § 1415 of the IDEA: Extending Procedural Safeguards to Response-to-Intervention Students, 46 Columb. J.L. & Soc. Prob. 393, 408, n. 83, 84 (2013) (Georgia is one of twelve states mandating RTI), citing *Implementation Manual*, GA. DEP'T OF EDUC., http://www.doe.kl2.ga.us/Curriculum-Instruction-and-Assessment/Special-Education-Services/Pages/Implementation-Manual.aspx.

[6] A student background questionnaire completed by [redacted] around this time indicated that [redacted] participated in youth sports, choir, and sleepovers with friends. There is no evidence in the record that [redacted] had any problems getting along with other students or any problems with social interactions. Rather, [redacted] acknowledged that [redacted] had friends at school, including "best buddies" whom he has known since kindergarten. (Ex. P-29; Testimony of Lewis, Edwards, Malcomb, [redacted]

did not show significant progress in reading, writing and math with these interventions. (Testimony [redacted] Ogburn; Exs. P-22, P-23, P-24)

7.

On March 20, 2012, [redacted]'s SST met to review his progress. According to the minutes of the meeting, although [redacted] had shown some improvements in writing, he had not responded to classroom interventions and continued to struggle in reading and math.[7] Benchmark testing from the beginning of the school year indicated that [redacted] was performing within the average range, although one assessment indicated below-grade level reading scores. Contrary to his academic struggles, the SST noted that [redacted] had met all his OT and articulation speech goals established in his IEP. The SST minutes again noted that [redacted] "gets nervous around loud sounds, fireworks, or thunderstorms." The SST team recommended that [redacted] receive a full psychological evaluation, and [redacted] agreed. (Ex. P-27)

B. <u>Evaluations and Eligibility Determination</u>

8.

In May 2012, Dr. Jennifer Edwards, a licensed school neuropsychologist with the School District, conducted a psycho-educational evaluation of [redacted] According to Edwards, [redacted] was polite, made great eye contact, and demonstrated good social skills throughout her two days of testing. Based on the testing, [redacted] overall intellectual ability was determined to be in the low range for his age, although due to a "significant amount of scatter amongst subtests," Edwards cautioned that his scores may be an underestimate of his cognitive abilities. For example, [redacted]

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[7] On the SST Problem Identification Checklist, completed on March 20, 2012, the SST identified significant concerns in reading comprehension, certain areas of written expression, and mathematics reasoning. The SST noted no concerns for oral expression, social skills or motor skills and only mild concern for some categories of basic reading, study skills, and other areas. (Ex. R-28)

had low scores in subtests relating to short-term memory and working memory, indicating a moderate to severe delay in those areas. However, he scored in the normal or average range in other subtests, such as sound blending and sequential logic tasks. In the area of academic achievement, [redacted] tested below his age and grade in math reasoning, reading comprehension, and written expression, although he scored slightly above his peers in math calculation. Edwards made a number of recommendations for instructional interventions for [redacted] in her reports, including use of mnemonics, increased writing practice, and other strategies. (Exs. P-30, P-31; Ex. R-23; Testimony of Edwards)

9.

On May 22, 2012, the SST met to review the results of Edward's evaluation and consider [redacted] eligibility for special education services for a specific learning disability. The SST determined that [redacted] was a child with a specific learning disability in the areas of reading comprehension, math reasoning, and written expression. The team also determined that [redacted] had a "potential processing weakness" in the area of short-term memory. The Special Education Eligibility Report, which was signed and agreed to by all the team members, including [redacted] did not identify any concerns for [redacted] in the area of sensory, emotional or behavioral functioning.[8] (Exs. P-32, P-33)

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[8] According to Janet Malcomb, [redacted] fifth grade math and social studies teacher, [redacted] did not display any observable signs of anxiety relating to loud noises in the school setting, such as fire alarms, assemblies, or the lunchroom. In fact, the only time [redacted] was observed to be anxious by any witnesses from Blanchard Elementary was once when his mother picked him early from school. Neither Malcomb nor any other Blanchard Elementary staff perceived a negative impact on his educational performance due to anxiety or sensory sensitivity. (Testimony of Malcomb; Lewis)

C. May 22, 2012 IEP

10.

The School District also developed an amended IEP for [redacted] on May 22, 2012 based on his new eligibility category and the evaluation results. At the May 22, 2012 meeting, [redacted] IEP team reviewed his most recent standardized test scores, including his CRCT test scores, Brigance assessment of basic skills, and other testing.[9] The IEP team also established goals and objectives for [redacted] in math and writing[10] and identified student supports and testing accommodations, including extended time, oral reading of test questions, and frequent monitored breaks. In terms of special education services, the May 22, 2012 IEP team agreed that [redacted] would receive 60 minutes per day of supportive instruction in English/Language Arts ("ELA") and Reading, as well as 30 minutes per week of special education services in math.[11] According to Edwards, the May 22, 2012 IEP team appropriately took into account her recommendations for interventions and goals. (Testimony [redacted] Ogburn; Ex. R-29)

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[9] [redacted] CRCT scores for fourth grade were slightly below expectations for Reading (795), Math (783), and English/Language Arts (796), but met expectations for Science (814) and Social Studies (821). [redacted] achieved the following grade equivalents on the Brigance assessment, which was administered at the end of his fourth grade year: Word Recognition: 3.6; Comprehends Passages: 4.5; Computational Skills: 3.3; Problem Solving: 1.1; Sentence Writing: 1.7. (Ex. P-46; Ex. R-29)

[10] Upon review of the annual goals and short-term objectives identified in the May 22, 2012 IEP, the Court finds that Petitioners failed to present any probative evidence that the goals and objectives were not specific and measurable or that the IEP failed to include sufficiently-detailed benchmarks to determine progress and mastery. (Ex. R-29)

[11] The evidence in the record is somewhat confusing regarding what the May 2012 IEP team decided regarding how the special education math services would be delivered to [redacted] Exhibit R-29, the document identified by the School District as the May 2012 IEP, provides for 30 minutes, one time per week, of "Supportive Instr.-Consult" in the area of math. Notwithstanding the word "consult" in this IEP document, the Court finds that the preponderance of the evidence in the record shows that the May 2012 IEP team initially agreed that [redacted] would receive some "supportive instruction" in math provided directly to [redacted] in his classroom, as opposed to only indirect, consultative services. (Ex. P-56; Testimony of Ogburn, Petitioner)

11.

Following the May 22, 2012 IEP team meeting, Robert Ogburn, a special education teacher at Blanchard Elementary, prepared the official IEP document. However, when entering the information onto the computer, Ogburn made a mistake. The May 22, 2012 IEP team considered and agreed upon daily supportive instruction in ELA and Reading to be provided by a special education para-professional, who would be present in [redacted] general education fifth-grade classroom to assist and support [redacted] and other special education students during ELA and Reading lessons. As Ogburn explained at the administrative hearing, the School District typically provides this type of collaborative instruction by pairing a special education para-professional with a regular education teacher. At the IEP meeting, the team, including [redacted] discussed in detail the proposed collaborative arrangement, including the identity of the special education para-professional who would be assigned to [redacted] ELA and Reading class. However, when Ogburn was generating the May 22, 2012 IEP document, he mistakenly identified the provider of supportive instruction in ELA and Reading as a "special education teacher," rather than a "special education para-professional."[12] (Testimony of Ogburn, Tabor; Exs. R-29, R-42)

12.

Prior to the start of the 2012-2013 school year, Ogburn reviewed all the IEPs for his special education students and discovered his mistake with respect to the listed provider of ELA and Reading services. In addition, over the summer, Blanchard Elementary personnel decided

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[12] Ogburn credibly testified that he generated the IEP document through a new data system called Infinite Campus, which allowed him to populate certain sections of the IEP using a drop-down menu. When Ogburn was filling in [redacted] May 22, 2012 IEP, Ogburn erroneously clicked on the "special education teacher" tab, rather than "special education para-professional" tab, when identifying the provider of supportive services in ELA and Reading. (Testimony of Ogburn)

that certain high-functioning students with disabilities, including [redacted] could be served appropriately through a consultative model in certain academic areas, such as math, rather than through direct, instructional support in the classroom. On August 9, 2012, [redacted] visited Blanchard Elementary during student registration, at which time Ogburn attempted to discuss both his error on the IEP relating to the provider of ELA and Reading services and the change to a consultative model for math services. Based on the evidence in the record, however, the Court finds that [redacted] who had come to the school for the purpose of expressing her dissatisfaction over [redacted] placement in the fifth-grade classroom of Tony Golden,[13] either did not fully understand this information from Ogburn or did not retain it. Moreover, the probative evidence in the record is not sufficient to find that [redacted]s signature, which appears on a document that purports to be the "minutes" from an "IEP team meeting" on August 9, 2012, is a genuine or effective acknowledgement of [redacted]s consent to a change in the May 2012 IEP.[14] Rather, the Court finds that it was not until September 20, 2012, when the IEP team reconvened to address [redacted] parents' concerns, that the IEP was properly amended to reflect that supportive services in ELA and Reading would be provided by a para-professional, not a special education teacher. At that time, the para-professional was providing 60 minutes of supportive services in Golden's classroom for ELA and Reading, and Ogburn was consulting weekly with Malcomb, [redacted]

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[13] [redacted] was placed in Golden's class with both regular education and other high-functioning special education students. [redacted] did not believe that Golden was a suitable teacher for [redacted] because he had a loud voice and a strong personality. Blanchard Elementary's principal, Tim Smith, considered [redacted]s request to transfer [redacted] out of Golden's classroom, but denied the request on or about August 31, 2012, after talking to [redacted] and observing him in Golden's classroom. (Testimony [redacted] Ogburn; Exs. P-37, P-50)

[14] A School District representative later admitted that there was no "team meeting" on August 9, 2012, and that Ogburn's informal attempt to obtain [redacted]'s written approval of the amendment at that time was improper. See *infra*, at ¶ 15.

math teacher, regarding [redacted] performance in math.[15] The IEP team also addressed [redacted] parents' concern regarding [redacted] possible sensory issues relating to loud noises. Specifically, the team agreed to send the information "to the occupational therapist for assessment and to determine if OT services are warranted." (Testimony of Ogburn, Malcomb, Tabor, [redacted] Ex. R-29; Exs. P-41, P-46)

13.

On September 25, 2012, a few days after the September 20, 2012 IEP team meeting, Carol Hendrix, the due process facilitator for the School District, emailed [redacted] to "explain another change to the IEP that you'll see when Mr. Ogburn completes it...." Hendrix stated:

> By state definition, consultative services total an hour or less per month.[16] They are normally delivered 15 minutes once a week, 30 minutes every 2 weeks, or in some cases, an hour once a month. They were currently written for 30 minutes weekly which would total 2 hours/month and would not meet the consultative definition. We certainly want to meet [redacted] needs with his services, and the amount of service time can be changed any time the IEP team feels another service model is warranted. But for the current consultative time, we will need to make that adjustment.

[redacted] responded to Hendrix that same day, stating that she did not understand Hendrix's message because she thought [redacted] would be meeting with a special education teacher at least once a

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[15] As of September 20, 2012, [redacted] was making progress on his math goals. The IEP team decided, however, that if [redacted] needed more direct services in math, his IEP could be amended to include more restrictive services, such as supportive or pull-out services. The September 20, 2012 meeting minutes continued to identify the amount of consultative math services as "30 minutes/1xweek." (Exs. P-41, P-46)

[16] The School District did not provide a citation to the State rule defining consultative services. However, Hendrix's understanding does not appear to be consistent with the Georgia Department of Education's Special Education Rules Implementation Manual, which provides that although an IEP team may determine any amount of consultative services, "[i]n order to report the services for FTE, consultation is defined as at least one segment per month of direct services." See http://www.gadoe.org/Curriculum-Instruction-and-Assessment/Special-Education-Services/Pages/Implementation-Manual.aspx (emphasis added).

week. [redacted] also did not understand how a "teacher's aid (parapro) in the class is helping him" or "how it counts for him receiving services." (Testimony of [redacted]; Exs. P-42, P-50)

14.

[redacted] did not receive a written copy of the September 2012 IEP minutes until early November 2012. On Wednesday, November 6, 2012, she emailed Hendrix, again expressing her confusion and dissatisfaction with the change in services to [redacted] particularly the change in the provision of special education services in math. She continued to express her belief that under the May 2012 IEP, Ogburn was supposed to meet directly with [redacted] once a week for 30 minutes for math. Hendrix responded to [redacted] on November 7, 2012.[17] Among other things, Hendrix passed on Ogburn's offer to "work with [redacted] for 30 minutes after school each day (Monday through Thrusday...)" or "to change the consultative services to a pullout math class with a special education teacher." (Exs. P-49, P-50)

15.

On Monday, November 12, 2012, Hendrix emailed [redacted] after having spoken with Ogburn and Principal Smith. First, Hendrix acknowledged that on August 9, 2012, when [redacted]

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[17] The Court has reviewed Hendrix's email, and understands [redacted]s confusion over the sometimes sloppy and inexact information being provided by the School District. For example, Hendrix began her email by incorrectly stating that the May 2012 IEP provided that math services would be provided as supportive services for 60 minutes, five times per week by a special education teacher, rather than a paraprofessional. As described *supra*, the issue regarding the paraprofessional related to ELA and reading, not math. Hendrix also stated that Ogburn attempted to call [redacted] to discuss the change to consultative math services on "9/8/12," when it is clear from the context that Hendrix meant August 8, not September 9. Further, Hendrix acknowledged that the IEP amendment document inaccurately characterized the impromptu discussion Ogburn had with [redacted] during school registration as an IEP "team meeting." Finally, Hendrix stated that "reading" was not listed as a specific weakness in terms of accommodations for the CRCT. However, Dr. Edward's evaluation and the SST eligibility report states that [redacted] has a specific learning disability in "reading comprehension," and the May 2012 IEP called for oral reading of test questions and explanation and paraphrasing of directions for clarity. (Exs. P30 – P32, P-52)

came to the school distraught over [redacted] placement in Golden's class, [redacted] may not have "heard or understood" Ogburn's statements regarding changing his math services from supportive to consultative services. According to Hendrix, "[t]he school want[ed] to correct that" by offering [redacted] math services in a pullout setting for up to five days per week, 30 minutes per day. In addition, the school "offered afternoon tutoring in math to provide compensatory services for the lack of supportive services written in the May IEP." Hendrix stated that she would write a new IEP once [redacted] decided how often she wished [redacted] to receive pull-out math services and whether she wanted the afternoon tutoring as compensatory services.[18] (Ex. P-56)

D. <u>December 14, 2014 IEP Meeting</u>

16.

After scheduling difficulties in November, [redacted] IEP team reconvened on December 14, 2012. [redacted] teachers reviewed his progress, noting continued struggles in reading, particularly with Accelerated Reader ("AR") tests, but improvement in writing and math. The team decided that [redacted] would be permitted to demonstrate his comprehension of reading material either by taking an AR test or by doing a project on the material. [redacted] requested 30 minutes of pullout instruction per week to address [redacted] continued reading difficulties, and the team agreed. The team decided to continue supportive services for ELA for five hours per week and consultative services for math for one hour per month. In addition, the team agreed that [redacted] would have access to IXL, an online math practice program, to assist him in working on math concepts that

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[18] A few days later, on November 14, 2012, in response to an email from [redacted] Hendrix stated that Smith and Ogburn agreed that, with respect to the changes to [redacted]'s math services, it was "not in keeping with best practice to go from supportive to consultative before he had any services at all" and that [redacted] IEP had been "improperly changed." However, Hendrix reiterated that the school's proposed compensatory services, which included direct math instruction through a pullout classroom and afternoon tutoring, appeared to be a good resolution. (Ex. P-56) It is not clear from the evidence in the record what [redacted]s response was to this offer or whether these services were ever provided to [redacted]

he missed in previous grades. The team also discussed the possible need for OT services relating to [redacted]'s sensitivity to loud noises outside of school, such as fireworks, balloons, and thunderstorms. [redacted] classroom teachers reported that they had not observed any anxiety regarding loud noises, nor did it appear to affect his educational performance in any way. Accordingly, the occupational therapist, who attended the IEP meeting, concluded that it was not appropriate to address these issues through OT in the school setting. (Ex. P-62; Ex. R-30; Testimony of Ogburn)

E. <u>Implementation of December 2012 IEP and Progress</u>

17.

The School District assigned [redacted] a new case manager, Ruth Owen. In January 2013, Owen, who was on medical leave but still responding to emails, corresponded with [redacted] regarding the implementation of the December 2012 IEP services. On January 10, 2013, Owen notified [redacted] that Ogburn would begin pullout instruction for reading for 30 minutes on Fridays. Also on Fridays, Ogburn would visit Malcomb's class during math for fifteen minutes to assess [redacted] progress. Throughout January 2013, [redacted] expressed her frustration over the amount and difficulty of [redacted]'s homework, the quality and consistency of the consultative services provided by Ogburn, a drop in one of [redacted] math grades relating to "place value," and his continued delays in reading. (Exs. P-64, P-65, P-66, P-67)

18.

According to Malcomb, [redacted] was doing well in social studies and was making progress in math around this time. Instead of the IXL online math program, Malcomb used a different program called TenMarks with [redacted] which she considered superior to IXL and which students seemed to prefer over IXL. Malcomb credibly testified that she discussed the TenMarks

program with [redacted] and that [redacted] was using it at home as well as at school for math practice. In addition, Malcomb explained that [redacted] grade in math relating to place value had gone from a "3," indicating mastery, to a "2," indicating that the skill was "in progress," because the concepts were getting more difficult. He was not failing math and was doing well on his CRCT practice tests. (Testimony of Malcomb)

19.

On or about March 21, 2013, [redacted] again took portions of the Brigance assessment of basic skills. In every area tested, [redacted] showed significant growth and improvement.[19] On other assessments, however, [redacted] continued to either fall below expectations, including the fifth grade writing assessment, or achieve inconsistent or fluctuating results, such as on the STAR Reading tests and AR tests. (Exs. P-87, P-88, P-91, P-95, P-96, P-98, P-99, P-101; Testimony of [redacted]., Ogburn)

F. March 27, 2013 IEP Meeting and Withdrawal of [redacted] from School

20.

On March 27, 2013, the last day of school before spring break, [redacted] IEP team reconvened to discuss [redacted] parents' concerns. [redacted] parents were given a packet, which included a draft IEP and a notice of their parental rights. According to [redacted] she was observing signs of severe anxiety in [redacted] at home, including bed wetting and insomnia. She also believed that the School District was not implementing [redacted] IEP or providing the services necessary to

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[19] On the Brigance test for reading comprehension, [redacted] grade-equivalent score was 4.5 in 2012 and improved to 5.3 in 2013. In the area of math computation, [redacted] went from a grade equivalent score of 3.3 in 2012 to 6.8 in 2013. In math problem solving, [redacted] improved from a 1.1 grade equivalent in 2012 to a 3.0 in 2013. Finally, in sentence writing, [redacted] improved from a 1.7 grade equivalent in 2012 to a 3.0 in 2013. Although [redacted] acknowledged these improvements, she attributed them primarily to private tutoring services that [redacted] parents arranged during that school year. (Testimony [redacted] Ogburn; Exs. P-76, P-95)

address [redacted]'s disability. There is little information in the record about what occurred at the March 27, 2013 IEP meeting.[20] However, when school began again after spring break, [redacted] signed paperwork to withdraw [redacted] from school. Since that time, [redacted] has been homeschooled and received various services from private providers, including tutors from Sylvan Learning Center and a speech therapist, although information about the nature and cost of these services was not put into evidence during the due process hearing. In addition, the School District has offered some services and evaluations to [redacted] as a homeschooled student, but there is insufficient evidence in the record to show the timing or the exact nature of these offered services, or Petitioners' response. (Testimony [redacted] Lewis; Ex. P-76)

21.

According to [redacted] [redacted] has made "significant progress" since being homeschooled. However, [redacted] testified that he still has "deficits," and continues to suffer from high anxiety and sensory problems. Although Petitioners have asserted that [redacted] has been evaluated and diagnosed by various healthcare providers, Petitioners failed to produce probative, admissible evidence regarding these evaluations or diagnoses at the due process hearing. (Testimony of [redacted] Amended Due Process Complaint)

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

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[20] Although Petitioners made allegations about the March 27, 2013 IEP meeting in their amended due process complaint, they failed to present evidence at the hearing regarding exactly who was present, what was discussed, or what actions were taken by the IEP Team. See Amended Due Process Complaint, at p. 6.

Department of Education Rules, Ga. Comp. R. & Regs. ("Ga. DOE Rules"), Ch. 16-4-7.

2.

Petitioners bear the burden of proof in this matter. Schaffer v. Weast, 546 U.S. 49 (2005); Ga. DOE Rule 160-4-7-.12(3)(l); 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.

Claims brought under IDEA are subject to a two-year statute of limitations. 20 U.S.C. § 1415(f)(3)(C); 34 C.F.R. §§ 300.507(a)(2), 511(e). The limitation period begins as of the date the parent "knew or should have known about the alleged action that forms the basis of the due process complaint." Id. IDEA provides two exceptions to the statute of limitations in the event that (i) the school district withholds information from the parent that was required to be provided under IDEA or (ii) the school district made specific misrepresentations that it had resolved the problem forming the basis of the complaint. 20 U.S.C. § 1415(f)(3)(D); 34 C.F.R. § 300.511(f). Petitioners bear the burden of proving that a tolling exception applies. See Schaffer v. Weast, 126 S. Ct. 528, 533-37 (2005); M.M. v. Lafayette Sch. Dist., No. CV -9-4624, 2012 U.S. Dist. LEXIS 15631, at *62 (N.D. Cal. Feb. 9, 2012); see also D.K. v. Abington Sch. Dist., 696 F.3d 233, 245-49 (3rd Cir. 2012).

4.

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).

5.

The United States Supreme Court has developed a two-part inquiry to determine whether a school district has provided FAPE: "First, has the State complied with the procedures set forth in the Act? And second, is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 (1982). "This standard, ... has become know as the Rowley 'basic floor of opportunity' standard." C.P., 483 F.3d at 1152, citing JSK v. Sch. Bd., 941 F.2d 1563, 1572-73 (11th Cir. 1991). See also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1280 (2008). Under the Rowley standard, a disabled student "is only entitled to some educational benefit; the benefit need not be maximized to be adequate." Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1292 (11th Cir. 2001).

6.

If a parent disagrees with a child's IEP or believes the school district has violated IDEA in terms of the identification, evaluation, educational placement or the provision of FAPE, the parent is entitled to file a due process complaint. 34 C.F.R. § 507(a). In addition, because the definition of FAPE requires special education and related services that are provided "in conformity with the IEP," a parent can also seek relief under IDEA if the school fails to implement a "substantial," "material," or "essential" provision of the IEP. B.F. v. Fulton County Sch. Dist., 2008 U.S. Dist. LEXIS 76714, *72 (N.D. Ga. 2008), citing Van Duyn v. Baker Sch. Dist., 502 F.3d 811, 822 (9th Cir. 2007); Houston Indep. Sch. Dist. V. Bobby R., 200 F.3d 341

(5th Cir. 2000); Neosho R-V Sch. Dist. V. Clark, 315 F.3d 1022 (8th Cir. 2003).[21]

7.

Parents can also bring a claim under IDEA if the school district has failed to comply with the "comprehensive system of procedural safeguards designed to ensure parental participation in decisions concerning the education of their disabled children." Honig v. Doe, 484 U.S. 305, 308 (1988). However, "'[v]iolation of any of the procedures of the IDEA is not a per se violation of the Act.'" K.A. v. Fulton County Sch. Dist., 741 F.3d. 1195, 1205 (11th Cir. 2013), quoting Weiss v. Sch. Bd., 141 F.3d 990, 996 (11th Cir. 1998). Under IDEA, in order to prove a denial of FAPE based on a procedural violation, Petitioners must show that the procedural inadequacies "(i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit." See 34 C.F.R. § 300.513(2); 20 U.S.C. § 1415(f)(3)(E). In Weiss, the Eleventh Circuit held that where a family has "full and effective participation in the IEP process . . . the purpose of the procedural requirements are not thwarted." 141 F.3d at 996. See also K.A. v. Fulton County Sch. Dist., 741 F.3d at 1205 (no relief warrant where no evidence of prejudice to student or parents from defects in notice or delay in furnishing records).

B. **Statute of Limitations Bars Claims Prior to April 2, 2012.**

8.

Petitioners filed their initial due process complaint on April 2, 2014. Having considered the evidence in the record, the Court concludes that Petitioners' claims arising before April 2, 2012 are barred by IDEA's two-year statute of limitations. Petitioners failed to present any

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21 The failure to implement must be more than *de minimus* failures. Id.

evidence that they were prevented from filing a due process complaint prior to April 2, 2012 because of specific misrepresentations by the School District or because the School District withheld information that it was required to provide to parents under IDEA. 34 C.F.R. § 300.511(f). Accordingly, the Court will consider only those claims raised by Petitioners in the Amended Due Process Complaint that arose on or after April 2, 2012.

C. Petitioners Proved Violations of IDEA Based on the Changes to [redacted] Math Services, but Are Not Entitled to Relief.

9.

The IDEA regulations provide that "[c]hanges to the IEP may be made either by the entire IEP Team at an IEP Team meeting, or as provided in paragraph (a)(4) to this section, by amending the IEP rather than by redrafting the entire IEP." 34 C.F.R. 300.324(a)(6). Subparagraph (a)(4) of that section permits the School District to make changes to an IEP after an annual IEP meeting if the parent and the School District "agree not to convene an IEP Team meeting for the purpose of making those changes, and instead … develop a written document to amend or modify the child's current IEP." 34 C.F.R. 300.324(a)(4).

10.

The Court concludes, based on the Findings of Facts above, that the School District violated these procedural safeguards when it changed the services that [redacted] was to be provided in math from direct, supportive services to indirect, consultative services without either first obtaining [redacted] parents' informed consent or convening an IEP team meeting. Similarly, the School District violated the safeguards when it unilaterally reduced the amount of math services from thirty minutes per week to one hour per month. The Court further concludes that the School District's informal efforts to try to discuss these changes with [redacted] on August 9, 2012 did not comply with the IEP change procedures set forth in the IDEA regulations. Finally, the

Court concludes that from August 2012 to November 2012, the School District failed to properly implement a material provision of [redacted] May 2012 IEP relating to math services, resulting in a substantive denial of FAPE.

11.

IDEA provides that when a court finds a statutory violation, it "shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C)(iii). See Cobb County Sch. Dist. v. A.V., 961 F. Supp. 2d 1252, (N.D. Ga. 2013). The courts have interpreted this to mean that a court has "broad discretion" to "fashion discretionary equitable relief." Florence Cnty Sch. Dist. Four v. Carter ex rel. Carter, 510 U.S. 7, 15-16 (1993) (internal quotations and citations omitted); Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1285 (11th Cir. 2008), quoting Sch. Comm. Of the Town of Burlington, Mass. v. Dep't of Educ. of Mass., 471 U.S. 359, 374 (1985). In addition to prospective compensatory education, reimbursement of expenditures for special education services paid by parents pending review is also available under IDEA if such services are deemed appropriate. Draper v. Altanta Indep. Sch. Sys., 480 F. Supp 2d 1331, 1352-53 (N.D. Ga. 2007), aff'd 518 F.3d 1275 (11th Cir. 2008), quoting G. v. Fort Bragg Dependent Schs., 343 F.3d 295, 309 (4th Cir. 2003), Burlington, 471 U.S. at 369. The amount of reimbursement and prospective relief to be awarded are to be "determined by balancing the equities. Factors that should be taken into account include the parties' compliance or noncompliance with state and federal regulations pending review, the reasonableness of the parties' positions, and like matters." Burlington v. Dep't of Educ., 736 F.2d 773, 801-801 (1st Cir. 1984), *aff'd sub nom.* Burlington, 471 U.S. at 359.

12.

Having considered all the evidence in the record, the Court concludes that the School District's violations do not merit any relief under the circumstances in this case. First, although

the procedural violations significantly impeded [redacted] parents' opportunity to participate in the decision-making process, the School District remedied the violations when it convened IEP Team meetings in September and December 2012, where the changes to math services were considered and addressed. With respect to the failure to implement the May 2012 IEP provisions relating to math services from August to November 2012, the School District offered reasonable compensatory services on or about November 14, 2012, when Hendrix offered daily thirty-minute pullout sessions in math, as well as afternoon math tutoring. The Court concludes that the offered services were reasonably calculated to compensate Petitioners for the substantive denial of FAPE. If Petitioners failed to avail themselves of the offered compensatory services, any residual educational injury would be a result of their own actions. See Bd. of Educ. of the Toledo City Sch. Dist. v. Horen, 2010 U.S. Dist. LEXIS 982321 (N.D. Ohio 2010).[22] Moreover, Petitioners did not show that, in fact, the violations caused a deprivation of educational benefit to [redacted] Rather, the preponderance of the evidence showed that [redacted] was making progress in math around this time, notwithstanding the reduced math services provided by the School District from August to November 2012.[23]

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[22] In Horen, the federal district court found that a School Board violated parents' procedural rights to participate in an IEP team meeting, during which the rest of the IEP team decided to move the student from one school to another, a move the court found to be inappropriate. Id. at *87-91. Nevertheless, the court held that the parents were not entitled to any relief because the School Board never implemented the proposed change; rather, the Board offered to keep the child in the appropriate, "stay-put" placement while the parties resolved their dispute. Id. The child's parents refused to send her to the stay-put placement or the proposed new placement, instead withdrawing her from school entirely. Id. The court held that any injury to the student due to the proposed inappropriate placement "could, had her parents acted otherwise, have been avoided entirely." Id.

[23] Even if the Court had concluded that Petitioners were entitled to reimbursement for out-of-pocket expenses for private math tutoring provided to [redacted] to offset the School District's failure to provide the agreed-upon supportive services, Petitioners failed to present any evidence regarding the amount, nature, cost or timing of such services. Therefore, even if the Court had

D. **Petitioners Failed to Prove Their Remaining Claims.**

1. Correction of IEP to Reflect Agreed-Upon Provider of ELA and Reading Services Did not Constitute a Violation of IDEA.

13.

The evidence in the record proved that the May 2012 IEP team agreed that a special education para-professional would provide supportive services to [redacted] for ELA and reading during the 2012-2013 school year. When Ogburn realized his mistake in filling out the IEP form and notified [redacted] that he would be correcting his error, his correction did not amount to a change to the IEP requiring prior written notice, a meeting of [redacted] IEP team, or his parents' consent. Moreover, after [redacted] questioned the change and expressed some concern, the School District acted appropriately to convene a meeting of the IEP team on September 20, 2012, which confirmed the assignment of a para-professional to support [redacted] regular education teacher during ELA and reading lessons. Finally, Petitioners failed to present any evidence to show that a special education teacher, rather than a para-professional, was required to provide appropriate special education services to [redacted] in ELA and reading, or that such an arrangement was not reasonably calculated to provide him some educational benefit.

2. Petitioners Failed to Prove that [redacted] 2012-2013 IEP was not Reasonably Calculated to Provide Educational Benefit.

14.

The May 2012 IEP team developed measureable goals and objectives for [redacted] and offered special education services and accommodations that addressed his three areas of learning disability: reading, math and writing. Petitioners did not present any probative evidence to

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determined that such relief was warranted, there is no evidence in the record upon which to base a determination of an appropriate award.

support a finding that the services, supports, or accommodations identified in the IEP were not reasonably calculated to provide [redacted] some educational benefit. Rather, both the testimony of his teachers and his performance on the assessments in March 2013 showed that [redacted] was making progress, and in some areas, such as math problem solving, significant progress. Although [redacted] was not meeting expectations in every area, he showed marked improvement in many areas and there is no evidence that the special education services offered and provided by the School District were not sufficient to allow him to access the curriculum or make "measurable and adequate gains in the classroom." See JSK v. Sch. Bd., 941 F.2d 1563, 1573 (11th Cir. 1991). Accordingly, the Court concludes that [redacted] IEP for the 2012-2013 school year was reasonably calculated to enable [redacted] to receive educational benefit and did not deny him FAPE under Rowley.

3. School District Was Not Obligated to Evaluate or Provide Services to [redacted] for Anxiety or Sensory Deficits not Observed in the School Setting.

15.

During 2012 and 2013, Petitioners' mother repeatedly told Blanchard Elementary staff about her concerns relating to [redacted] response to loud noises and his increasing anxiety while at home. However, the evidence in the record shows that [redacted] did not manifest any signs of anxiety, social problems, or any other sensory deficits while in the school setting. Rather, his educational records, psycho-educational evaluation, and all his teachers indicated that [redacted] demonstrated good social skills, appeared to enjoy boisterous school events, and showed no signs of anxiety due to loud noises while at school. Nevertheless, the IEP team agreed in September 2012 to refer the issue to the School District's OT, who told the IEP team in December 2012 that, notwithstanding reports from home of anxiety due to loud noises, no such

signs were observed in the school setting and thus further evaluation or services at school were not warranted.

16.

The Eleventh Circuit has held that an "appropriate education" under IDEA "means 'making measurable and adequate gains *in the classroom.*'" L.G. ex. rel. B.G. v. Sch. Bd. of Palm Beach County, 255 Fed. Appx. 360 (11th Cir. 2007), quoting JSK, 941 F.2d at 1573 (emphasis added). In fact, the Eleventh Circuit "has specifically held that generalization across settings is not required to show an educational benefit. 'If "meaningful gains" across settings means more than making measurable and adequate gains in the classroom, they are not required by IDEA or *Rowley*.'" Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 (11th Cir. 2001), quoting JSK, 941 F.2d at 1573. See also M.W. v. Clarke County Sch. Dist., 2008 U.S. Dist. LEXIS 75278 (M.D. Ga. 2008) (parent training and home behavioral plan only required as "related services" under IDEA to the extent necessary to allow the child to progress *in the classroom*)(emphasis in original); R.H. v. Fayette County Sch. Dist., 2009 U.S. Dist. LEXIS 78627 (N.D. Ga. 2009). In this case, Petitioners failed to prove that [redacted] anxiety relating to loud noises affected his ability to make measurable or adequate gains in the classroom or had any negative impact on his performance at school. Accordingly, Petitioners failed to prove that the School District violated IDEA during the 2012-2013 school year by failing to conduct an assessment of or provide services related to [redacted]'s reported anxiety issues while at home.

4. School District did not Violate IDEA by Using the TenMarks Math Program Rather than IXL.

17.

Petitioners assert that the School District violated IDEA by using a different online math practice program than the one identified in [redacted] IEP. However, based on the uncontroverted

testimony of [redacted] math teacher, the program she chose to use with [redacted] was a superior program, which [redacted] used both at home and at school. Petitioners presented no evidence to show that TenMarks was an inferior program to the IXL program identified in the December 2012 IEP, or that IXL had unique properties that TenMarks lacked. Accordingly, Petitioners failed to show that the use of TenMarks by the School District as an online aid to [redacted] as opposed to IXL, denied [redacted] a FAPE or prevented him from make adequate gains in the classroom.

5. Petitioners Failed to Present Sufficient Evidence to Establish Their Remaining IDEA Claims.

18.

Petitioners mentioned a number of other claims in their amended due process complaint. However, the Court concludes, based on the evidence in the record, that Petitioners failed to present sufficient evidence to prove any of these remaining claims, including allegations relating to the School District's (i) failure to allow inspection of educational records, (ii) breach of confidentiality, (iii) misrepresentations, (iv) failure to develop "complete" IEPs, (v) failure to provide an independent educational evaluation in or around October 2012, and (vi) denial of participation with non-disabled peers in book club and AR rewards programs. In fact, in many instances, Petitioners did not even address or present any evidence on these allegations during the administrative hearings. Accordingly, the Court concludes that Petitioners are not entitled to relief on any of their remaining claims.

IV. DECISION

Although Respondent Muscogee County School District violated IDEA with respect to the provision of special education services in math to [redacted] from August to November 2012,

Petitioners are not entitled to any relief based on such violation. As Petitioners failed to prove any of their remaining claims, Petitioners' request for relief is hereby **DENIED**.

SO ORDERED, this 14th day of July, 2014.

KIMBERLY W. SCHROER
Administrative Law Judge