BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[redacted] **by and through** [redacted] **Petitioner,**	:	
	:	**Docket No.**
v.	:	**1735860-OSAH-DOE-SE-31-Howells**
CLAYTON COUNTY SCHOOL DISTRICT, Respondent.	:	

FINAL DECISION

I. INTRODUCTION

Petitioner [redacted] is a student eligible for services under the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA"). On or about May 9, 2017, Petitioner [redacted] ("Petitioner's mother") filed a Due Process Hearing Request ("Complaint") contending that Clayton County School District ("District" or "Respondent") violated [redacted]'s rights under IDEA, and her parental rights related to participation as a member of [redacted] Individualized Education Program ("IEP") Team.

On June 6, 2017, the District filed a Motion for Summary Determination. Petitioner's mother filed a response on June 26, 2017, in opposition to the District's motion. On July 31, 2017, this Court ruled on the District's initial Motion for Summary Determination, dismissing the following claims from Petitioner's Complaint: the location of [redacted]'s services, the District's failure to consider hospital/homebound instruction, the failure to consider ESY services, and the denial of FAPE related to enrollment issues. On August 3, 2017, this Court ruled on the District's second Motion for Summary Determination, dismissing the following claims from Petitioner's Complaint: the failure to use assistive technology ("AT") with consistency and fidelity, and the failure to provide [redacted] sensory breaks.

Petitioner's remaining claims were heard before the undersigned administrative law judge on August 10, 11, 14, and 15, 2017. Petitioner was represented by his mother.[1] Randall Farmer, Esq. represented Respondent Clayton County School District. The record remained open until September 8, 2017 to allow the parties to file proposed findings of fact and conclusions of law.

II. FINDINGS OF FACT

1.

[redacted] was born on May [redacted] and is currently [redacted] years old. He is eligible to receive special education services under IDEA categories of Mild Intellectual Disability (MID) and Speech-Language Impairment (SLI). [redacted] is also eligible for the related services of speech and occupational therapy (OT). (Exhibit R-1 at CCPS-011226, 011235.)[2]

2.

After attending school within the District between 2010-2014, [redacted] was served through a private program from the spring semester of the 2014-2015 school year through the 2015-2016 school year.[3] [redacted] re-enrolled in the District at the beginning of the 2016-2017 school year, as a sixth grade student. (Id. at CCPS-011226, 011238-39; R-59.)

3.

Before the start of the 2016-2017 school year—and before [redacted] re-enrolled in the District—an IEP meeting was held on July 22, 2016 to develop an annual IEP for [redacted] review

[1] Petitioner's mother is an attorney licensed in Georgia.

[2] Respondent's Exhibits are identified herein with "R-" numbers, while Petitioner's Exhibits are identified with "P-" numbers. Citations to the transcript from the hearing are identified with a "T," followed by the page number of the transcript that corresponds to the cited testimony.

[3] Elements of [redacted]'s educational history are described herein "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 (11th Cir. 2008). The Petitioner and District entered into a settlement agreement dated October 8, 2014. The terms of the settlement agreement released the District from all claims arising under any and all federal, state, and local constitutions, statutes, ordinances, and regulations, arising from and/or out of any educational services or program offered and/or provided to [redacted] by the District through August 5, 2016, or the first day of the District's 2016-2017 school year, whichever date occurred later. (R-59.)

the results of two Independent Educational Evaluations (IEEs) (Psychological and Assistive Technology), and discuss an OT assessment for [redacted] among other things. At this meeting, Ms. Evelyn Dixon, the Special Education Coordinator for the District, served as the representative for the District (hereinafter "LEA representative"). (R-1 at CCPS-011228-29, 011238-39; T. 688-89.)

4.

During the July 22, 2016 IEP Team meeting, the IEP Team agreed that on a weekly basis [redacted] would receive twenty (20) hours of small group instruction in English-Language Arts, Math, Science, and Social Studies; he would participate in General Education and Connection Classes with the support of a paraprofessional; he would receive one (1) hour of speech therapy in a small group; and he would receive thirty (30) minutes of occupational therapy in a small group. Accommodations, supplementary aids and services, and additional supports were discussed and included in [redacted]s IEP. Finally, Extended School Year (ESY) services were discussed. The IEP Team determined that a decision on ESY services would be made prior to May 1, 2017. (R-1 at CCPS-011235-36, 011238-39.)

5.

Placement options were also discussed at this meeting. The IEP Team agreed that the appropriate placement for [redacted] would be in a functional mild intellectual disability ("MID") classroom. The District has two middle schools with functional MID classrooms, Kendrick Middle School (Kendrick) and Jonesboro Middle School. [redacted]s home school is Mundy Mill Middle School. Kendrick was selected as [redacted]s service school for the 2016-2017 school year. (R-1 at CCPS-011226, 011236-39; P-18.)

6.

The accommodations, supplementary aids and services, and additional supports in [redacted]s July 22, 2016 IEP included extended time for tests; individual administration of tests; explaining and paraphrasing directions for clarity for tests; access to assistive technology (text reader, word prediction software, auditory word processor, and software to assist in math concepts and writing output); sensory breaks as needed; tracking devices or overlays when reading; adult support during transitions; pencil grip; foot stool support to increase posture and position; and training for staff in the AT supports prescribed by [redacted]s IEP. (R-1 at CCPS-011235-39.)

7.

At the July 22, 2016 IEP meeting, the IEP Team considered the request of Petitioner's mother to include specific reading programs in [redacted]s IEP, such as Orton-Gillingham or Lindamood-Bell. After discussion, the IEP Team determined that the Unique Learning System (ULS) curriculum, implemented in a small group classroom was appropriate to meet [redacted]s reading needs. (R-1 at CCPS-011239.)

8.

Finally, the IEP Team considered whether [redacted] required a Behavior Intervention Plan ("BIP") for the 2016-2017 school year. The IEP Team agreed, at that time, [redacted] did not require a BIP because he was not demonstrating any problematic behaviors. (R-1 at CCPS-011230; T. 691-92.)

9.

A copy of [redacted]s IEP from July 22, 2016 was sent to Petitioner's mother on July 25, 2016, after the District finalized the meeting minutes. (R-1 at CCPS-011225; T. 690-91.)

10.

Ms. Catherine Johnson Dunk was [redacted]s teacher in the functional MID classroom at Kendrick. She was also [redacted]s case manager during the 2016-2017 school year. Ms. Dunk taught [redacted] language arts, reading, writing, math, science, and social studies. [redacted] spent around eighty (80) percent of his time in the functional MID classroom with Ms. Dunk. Additional support was also provided to [redacted] by a paraprofessional. (T. 426-27, 474; R-1.)

11.

An initial parent conference was held on August 19, 2016. At this parent conference, Petitioner's mother was introduced to Kendrick staff members. Charity Howell, [redacted]s speech therapist, provided information to Petitioner's mother regarding [redacted]'s speech therapy and the time of day [redacted] was receiving speech therapy services. Ms. Deborah Kelley, the assistive technology specialist, shared information about the assistive technology supports [redacted] was receiving. In addition, [redacted]s behavior was discussed at this meeting. Ms. Dunk believed [redacted] was "testing his boundaries behaviorally to see what he can try in the classroom for attention seeking purposes." Petitioner's mother requested for the District's behavioral specialist to evaluate [redacted] and identify appropriate strategies to address [redacted]s disruptive behavior. In response to her request, Ms. Dunk informed Petitioner's mother that she was "working on balancing what is needed" to address [redacted]s behavior and requested additional time before having the District's behavioral specialist evaluate [redacted] A copy of the parent conference document was sent to Petitioner's mother later that day. (R-2 at CCPS-011266-68.)

12.

A second parent conference was held on October 18, 2016 to address parental concerns, primarily related to the ULS curriculum and V.M.'s disruptive, attention seeking behavior. Ms.

Jacqueline Trina Smith provided an overview of the different components of the ULS curriculum, including placement levels, benchmark assessments, and monthly pre- and post-tests. At this conference, Petitioner's mother was informed that [redacted] was not completing benchmark assessments. This was the first time Petitioner's mother was informed [redacted] was not completing the benchmark assessments. Petitioner's mother was told that Ms. Dunk could contact Dr. Sheila Cook, an instructional specialist for the District, or Ms. Jacqueline Trina Smith, a special education coordinator for the District, for assistance in the future to ensure [redacted] was completing the ULS benchmark assessments. The District also informed Petitioner's mother their behavioral specialist, Pamela Jordan, had observed [redacted] but had "not provided any feedback on strategies used for behavior" to Ms. Dunk. Finally, Petitioner's mother asked about [redacted] participating in a comprehensive reading program. The District informed her that it would evaluate [redacted] for Language Live and Read 180 to determine which program would best serve [redacted]s reading needs. A copy of the minutes from this parent conference was sent to [redacted]'s parents later that day. (R-3 at CCPS-011272-75; P-42; T. 612, 694.)

13.

In addition to the formal IEP meetings and parent conferences held between Petitioner's mother and members of [redacted]s IEP Team during the 2016-2017 school year, there were numerous in-person meetings, telephone communications, and e-mails between District employees and Petitioner's mother over the course of the school year. (R-1, R-2, R-3, R-25, R-26; P-3, P-4, P-6, P-24, P-25, P-32, P-37, P-48, P-49, P-50, P-51, P-52, P-55, P-59, P-61, P-74, P-79, P-83, P-85, P-86, P-88, P-95, P-96, P-100, P-104, P-106, P-107, P-108, P-109, P-111, P-118, P-119, P-119A, P-120, P-122, P-124, P-126, P-127, P-131, P-136, P-142, P-148, P-149, P-152, P-156, P-157, P-158, P-161; T. 447-48, 452-55.)

14.

On February 15, 2017, [redacted] stopped attending school at Kendrick. On or about February 24, 2017, Petitioner's mother provided the District with a letter, dated February 20, 2017, from [redacted]s pediatrician, Dr. [redacted]. The letter stated, in pertinent part, as follows: "[B]ecause of the negativity and hostility at his current school, [redacted] has been having mental and emotional stress which has caused school avoidance and anxiety. I believe that for [redacted] to thrive in his academic endeavors and to preserve his mental and emotional health he needs to transition to home schooling where his environment can be controlled and remain consistent and nurturing." (P-126; T. 698-99.)

15.

Home schooling is an option if parents decide that they do not want to send their child to traditional school. When a child is being home schooled, the District is not educating the child. Based on Dr. Ahn's letter, the District believed that Petitioner's mother was going to home school [redacted] On March 3, 2017, Petitioner's mother clarified that she was seeking homebound/home-based instruction for [redacted][4]. She further stated that she was requesting an IEP Team meeting to discuss homebound/home-based services. The District communicated with Petitioner's mother to schedule the requested IEP meeting. (P-106, P-108, P-109; T. 300, 699-700.)

[4] Compare Ga. Comp. R. & Regs. 160-4-7-.07(3)(d)(6) (school districts are obligated to provide "homebound" instruction, which is also known as hospital/homebound services, to students with disabilities who are placed in a "special education program and have a medically diagnosed condition that will significantly interfere with their education and requires them to be restricted to their home or a hospital for a period of time"), with Ga. Comp. R. & Regs. 160-4-7-.07(3)(d)(4) (home-based instruction is considered by an IEP team for reasons other than medical concerns; home-based instruction is a short-term placement, and available when the parent(s) and LEA agree to the placement).

16.

On March 13, 2017, an IEP Team meeting was held to discuss placement options for [redacted] Petitioner's mother requested that [redacted]s IEP Team consider "all options on the continuum of services be considered including homebound/home-based services and all school assignments/options to be discussed." All members of the IEP Team were in attendance at the March 13, 2017 IEP meeting, including Ms. Dixon, Ms. Dunk, Charity Howell (Speech Therapist), Nathalie Dugger (Occupational Therapist), Dr. Kimberly Dugger (Principal at Kendrick Middle School), Terdra Brooks (Language Live Instructor), Jacqueline Trina Smith (Special Education Coordinator), Pamela Jordan (Behavior Specialist), [redacted]s parents, and a consultant who was there on behalf of [redacted]s mother, Kristina Anderson-Zuppan. (T. 701; R-7 at CCPS-012325.)

17.

During the meeting, Petitioner's mother and her consultant, Ms. Anderson-Zuppan, requested [redacted] be assigned to a different school. The District asked for clarification from Petitioner's mother regarding her request for "homebound/home-based services" for [redacted] Petitioner's mother explained she sought a change in [redacted]s school assignment. Ms. Anderson-Zuppan told the IEP Team that [redacted] could not attend Kendrick because it was volatile. In response, Evelyn Dixon, a coordinator in the District's Department of Exceptional Students, stated that if Kendrick is a volatile environment for [redacted] which is resulting in mental and emotional distress for [redacted] the IEP Team should consider homebound services for [redacted] Ms. Dixon further explained that if the IEP Team is considering homebound services there are guidelines to follow and forms to complete, such as a medical certification form, before [redacted]

would qualify for homebound services. Ms. Dixon provided Petitioner a copy of the medical certification form during the meeting. (P-W 170313, P-109.)

18.

The IEP Team also discussed [redacted]s present levels of performance and current academic progress, Petitioner's mother's concerns regarding Language Live, the ULS curriculum, paraprofessional support for [redacted] and a comprehensive reading program. The March 13, 2017 IEP meeting ended without the parties agreeing on an appropriate placement for [redacted] or any changes to [redacted]s IEP. A copy of the March 13, 2017 IEP minutes and [redacted]s amended IEP were emailed to Petitioner's mother on May 22, 2017. (P-W 170313; R-7.)

19.

After the March 13, 2017 IEP meeting, the District reached out to Petitioner's mother on several occasions attempting to schedule a follow-up IEP Team meeting. The parties were unable to agree upon a mutually acceptable date and time. (T. 708; P-122, P-127.)

20.

On April 21, 2017, Petitioner's mother responded to an email from the District stating her team was not available to meet on the date proposed by the District for the follow-up IEP Team meeting. In her email response, Petitioner's mother did not provide alternate dates for a follow-up meeting. Petitioner's mother instead gave her permission for [redacted]s IEP to be amended to reflect home-based services. (P-127.)

21.

Later that day, Dr. Katrina King, the then District's Director of the Department of Exceptional Students, responded to Petitioner's mother stating: "Please provide three additional dates that you are available. The District will continue to work with you as we always have to

schedule a meeting at a mutually agreeable date and time for all relevant team members. As it relates to your request for "Home-based Services", it will need to be discussed during the IEP team meeting." (P-127.)

22.

Petitioner's mother did not respond, or follow-up, to Dr. King's email to schedule a follow-up IEP Team meeting. On or about May 9, 2017, Petitioner's mother filed the Complaint against the District. (T. 390-91.)

23.

Discussion of All Placement Options

In the email confirming her availability for the March 13, 2017 IEP Team meeting, Petitioner's mother stated the purpose of the meeting was to discuss "homebound/home based" services for [redacted] Accordingly, the District began the March 13, 2017 IEP Team meeting by stating the meeting was being held to discuss all placement options on the continuum of services, including hospital homebound and home-based services. The IEP Team was not able to agree upon a placement option for [redacted] (P-109, P-W 170313; T. 702-03.)

24.

On March 14, 2017, Petitioner's mother provided the District a second letter from [redacted]'s pediatrician, Dr. [redacted] dated March 13, 2017. The letter stated, in pertinent part, as follows: "[redacted] is a patient of [redacted] Pediatrics. He is currently under my medical care. Please excuse [redacted] from school from 2/16/2017 through the present until he is released to go back to school." The District interpreted this letter to mean [redacted] was under the medical care of Dr. [redacted] to treat the psychological issues noted in Dr. [redacted]'s February 20, 2017 letter to the District. (P-106, P-126; T. 708-09.)

25.

The District received letters from Petitioner's mother and Dr. [redacted] requesting that [redacted] be educated in a home setting. Dr. [redacted] is [redacted]'s pediatrician. She is not a psychiatrist or psychologist, nor did she treat [redacted] for anxiety or any other psychological issues. Dr. [redacted] did not observe [redacted]'s behavior and academic performance at Kendrick, or in a clinical setting. Dr. [redacted]'s recommendations that [redacted] be educated in a home setting were based upon information provided by [redacted] Petitioner's mother, and Dr. [redacted] (P-126; T. 90-91, 104-07.)

26.

With respect to her February 20, 2017 letter, Dr. [redacted] testified she was recommending [redacted] "transition to being at home and still doing his regular schoolwork, just like kids who actually have some type of, you know, medical, post-surgical kind of issues." Dr. [redacted] testified she did not know the difference between homeschooling, homebound, and home-based services. (T. 103.)

27.

In addition to information provided by [redacted] and Petitioner's mother, Dr. [redacted] testified her recommendations were made after reviewing [redacted]s treatment notes from Dr. [redacted], [redacted]s psychologist since March 2016. Dr. [redacted] testified he made no recommendation for [redacted] to be educated in a home setting because of his "lack of contact" with the school. Although, Dr. [redacted] "could understand from her perspective [i.e., Petitioner's mother] that it was not a good environment for her son." Dr. [redacted] testified he did not know the difference between homeschooling, homebound, and home-based services. (T. 48, 68-70, 73-74, 106.)

28.

Failure to Implement IEP

a. Progress Monitoring in Unique Learning System

The ULS curriculum is used within the District for its modified-curriculum students. Modified-curriculum students are students who have intellectual disabilities and are in functional program classrooms. The ULS curriculum was used in [redacted]s functional MID classroom at Kendrick, and was used to instruct [redacted] in all academic subjects (language arts, math, science, and social studies). (T. 455-56, 591-92.)

29.

The ULS curriculum is a research-based curriculum used to teach the standards for the particular grade level that a student is in, but it is modified in order to instruct students at their individual levels. More specifically, the ULS curriculum has three built-in differentiated levels of instruction—Level 1, 2, and 3. The differences between the three levels of instruction relates to the amount and type of visual supports provided to the student. (T. 592, 595-96.)

30.

A student's level of instruction in the ULS curriculum is assigned based on the student's profile data. The student's profile data is derived from a series of questions. A student's level of instruction in the ULS curriculum is not based on any benchmark tests or assessments. The District provided training to Kendrick staff members on how to complete a student's profile data in the ULS curriculum sometime in late September 2016. (T. 618-19, 621.)

31.

The majority of the ULS curriculum is delivered to students in an online format. However, the curriculum has various other methods of providing instruction, including in whole group and small group settings. (T. 679.)

32.

When whole-group instruction takes place in a ULS classroom, a teacher instructs the whole-group at the highest level in the ULS curriculum, Level 3. When a teacher places students into small groups, or instructs a student individually, the teacher instructs on Level 1, 2, or 3, depending on the level of the student or students involved as determined by their ULS profile data. (T. 595-96.)

33.

[redacted]s ULS profile data was not accurate at the beginning of the 2016-2017 school year. At that time, [redacted]s profile data showed that he was on Level 1. However, Ms. Dunk instructed [redacted] at Level 2 and Level 3 of the ULS curriculum. Ms. Dunk's decision to instruct [redacted] at higher levels of the ULS curriculum was based upon the goals and objectives in [redacted]s IEP, Ms. Dunk's observations of [redacted] and [redacted]s student work product. [redacted]s ULS profile data was updated after Ms. Dunk received appropriate training from the District on completing profile questions for the ULS curriculum sometime in late September 2016. (T. 458-59, 619)

34.

The ULS curriculum also includes benchmark assessments that are administered to students. The benchmark assessments relate to a variety of subjects. Benchmark assessments are grouped by different subject areas. The ULS benchmark assessments take place three times a year—once at the beginning of the year, once in the middle of the year, and once at the end of

the year. Teachers may select what benchmark assessments are completed by students, so long as a benchmark assessment is completed by every student in each of the different subject areas. If a student does not complete their benchmark assessments, the District has support specialists to assist teachers to ensure the student's benchmark assessments are completed. Ms. Dunk was aware of these support specialists. (T. 530-37, 609-10.)

35.

At the beginning of the 2016-2017 school year, Ms. Dunk administered benchmark assessments to the students in her class, including to [redacted] [redacted] completed some benchmark assessments at this time. Specifically [redacted] completed phonemic awareness, word recognition list 1, word recognition list 2, and a reading level assessment. Ms. Dunk testified she would have had [redacted] complete seven other benchmark assessments at the beginning of the school year in addition to the four described benchmark assessments. [redacted] did not complete the seven other benchmark assessments because he was inconsistent with his work habits. Ms. Dunk administered additional benchmark assessments to [redacted] in October 2016 and January 2017. Prior to withdrawing from Kendrick, [redacted] had not completed benchmark assessments in every subject area identified by the ULS curriculum. Ms. Dunk did not administer a final set of benchmark assessment for [redacted] at the end of the school year due to [redacted]s withdrawal. (T. 460-64, 526-27; R-27.)

36.

In addition to the benchmark assessments, another method of tracking [redacted]s progress in the ULS curriculum was through monthly pre- and post-tests. These tests relate to the content being taught in a particular month to students. The ULS curriculum requires monthly pre- and post-tests to monitor a child's progress in the months between benchmark assessments. [redacted] did

not complete all of the required monthly pre- and post-tests for the ULS curriculum. A student's level in the ULS curriculum impacts which pre- and post-tests are appropriate for the student to take. (T. 535, 617; R-27)

37.

The District's expert on the ULS curriculum, Ms. Jacqueline Trina Smith, testified that the ULS curriculum protocols must be followed in order for a student to receive educational benefit from the curriculum. Ms. Dunk failed to follow the protocols of the ULS curriculum. Ms. Dunk testified she never reached out to Dr. Sheila Cook, or Ms. Jacqueline Trina Smith, for assistance to ensure [redacted] was completing his benchmark assessments, or his monthly pre- and post- tests. Further, Ms. Dunk testified "it was a failure on [her] part" not contacting the District's support specialists. Ms. Dunk opined that [redacted] was making appropriate progress in the ULS curriculum based on personal observations and work samples produced by [redacted] (T. 542-46, 645-46.)

38.

b. Progress Monitoring of IEP Goals and Objectives

At the beginning of the 2016-2017 school year, Ms. Dunk reviewed and familiarized herself with [redacted]s IEP, including his specific goals and objectives. (T. 428-29, 449.)

39.

While enrolled at Kendrick, Ms. Dunk incorporated [redacted]s IEP goals and objectives into the work [redacted] was completing in the MID classroom. She incorporated [redacted]s IEP goals and objectives through both the ULS curriculum and classroom work. (T. 449-50.)

40.

Ms. Dunk monitored [redacted]s progress on his IEP goals and objectives by observing him in the classroom and reviewing his completed ULS assignments and his work on classroom handouts. She used this information to prepare [redacted]s formal progress reports. (T. 449-51; R-25.)

41.

Formal progress reports are prepared and sent home approximately every nine (9) weeks by the District. Ms. Dunk prepared formal progress reports for [redacted] in October 2016, January 2017, and March 2017 based on [redacted]s classroom handouts, teacher observation and completion of ULS assignment. (T. 450-52; R-25.)

42.

Ms. Dunk provided informal progress updates through weekly reports that were provided to Petitioner's mother via email in addition to the formal progress reports. These weekly reports contained information on [redacted]s work, progress, and behavior. Ms. Dunk also provided Petitioner's mother with work samples and adapted grading rubrics. (T. 452-55, 556-57; R-26.)

43.

[redacted]s speech and occupational therapy goals and objectives were tracked through the District's Goal Solutions platform. The Goal Solutions platform is used by the District to track services for students. Therapists enter the dates and times that they provide services to a student into the Goal Solutions platform, along with progress information about the status of a particular student's goals. While this information was entered into the Goal Solutions platform, the IEP progress reports provided to Petitioner's mother by the District in October 2016, January 2017,

and March 2017 contained no information on [redacted]s speech and occupational therapy goals and objectives. (T. 184, 552-60, 709-13; R-16, R-45; P-L.)

44.

c. Assistive Technology

[redacted] IEP stated, in pertinent part, as follows: "staff will use appropriate prescribed tools (online programs, etc.) to assist in teaching [[redacted] to keyboard and use AT devices." Ms. Dunk received training on the AT supports outlined in [redacted]s IEP. The ULS curriculum includes AT supports such as text reader, word prediction software, auditory word processor, and software to assist in math concepts and writing output. (R-1 at CCPS-011235; T. 473-74.)

45.

While in Ms. Dunk's classroom, [redacted] utilized Co-Write, Write Out Loud, and Kurtzweil 3000 under Ms. Dunk's supervision. To access these programs, [redacted] had to use a computer and a keyboard. Ms. Dunk observed [redacted] using a keyboard in her classroom without any problems. Based on her observations, Ms. Dunk believed the AT tools were effective in allowing [redacted] to access the curriculum. (T. 472-75.)

46.

[redacted]s IEP did not require or provide for additional AT evaluations during the 2016-2017 school year. (R-1.)

47.

d. Provision of Additional Supports and Services

At the start of the 2016-2017 school year, Ms. Dunk observed [redacted] displaying disruptive behaviors in the classroom, including use of inappropriate language, making comments at

inappropriate times, violating others personal space, and knocking things over on other students' desks. (T. 429.)

48.

In response to these behaviors, Ms. Dunk implemented strategies to address [redacted]s problematic behaviors. One strategy she used was verbal redirection. Ms. Dunk would provide [redacted] an appropriate thing to say instead of something inappropriate. To address [redacted]'s issues with personal space, she set up zones and taught [redacted] how to assess personal space. To address [redacted]s inappropriate comments and blurting out, Ms. Dunk implemented a point system to award appropriate behavior demonstrated by [redacted] Further, Ms. Dunk used verbal praise, snacks, and high fives in her classroom and with [redacted] (T. 429-30.)

49.

Ms. Dunk collected data on [redacted]s behaviors in the classroom, beginning on August 18, 2016. The data collected by Ms. Dunk showed the frequency [redacted]s disruptive behavior. It did not describe the behaviors or include any antecedents or consequences. Ms. Dunk did not share this data with Petitioner's mother. In order to keep [redacted]s parents apprised of what was going on with him behaviorally, Ms. Dunk also included information regarding his behavior in the weekly reports she sent home, along with information on things that Ms. Dunk was doing to address [redacted]s behavior. (R-22; T. 436-37, 452-55, 509-10.)

50.

During the August 19, 2016 Parent Conference, Ms. Dunk informed Petitioner's mother of some of the behavioral issues she was seeing in [redacted] and also conveyed information regarding steps she was taking to address those behaviors in the classroom. Petitioner's mother

requested the District's behavioral specialist, Pamela Jordan, come to Kendrick to observe [redacted]s behaviors. (T. 148-49, 430-33.)

51.

Pamela Jordan, the District's behavioral specialist, conducted observations of [redacted] on September 1, 12, and 21, 2016. Ms. Jordan observed that [redacted] engaged in behaviors such as blurting out and other attention-seeking behavior. She did not see [redacted]demonstrate any physical or verbal aggression during her observations. (T. 862, 865; R-18; P-88.)

52.

On the dates of her observations, Ms. Jordan witnessed Ms. Dunk utilize strategies such as redirection, modeling behavior, providing reminders of expectations, implementing proximity control, providing one-on-one support and assistance, providing positive feedback, using low-tone cues, and implementation of social skills to address [redacted]'s disruptive behaviors. Ms. Jordan observed from time to time Ms. Dunk would have to address [redacted]s behavior more than once, but Ms. Dunk would continue to utilize the strategies until [redacted] was back on task. (T. 864-67.)

53.

Ms. Jordan discussed her observations with Ms. Dunk. Ms. Jordan did not offer additional strategies to Ms. Dunk because Ms. Dunk was already utilizing the strategies that Ms. Jordan would have suggested based upon her observations [redacted] (T. 434-35; T. 868-70.)

54.

Ms. Dunk prepared an antecedent behavior consequence ("ABC") analysis of [redacted]'s behaviors in October 2016. Ms. Dunk collected this information to see how frequently [redacted]'s most problematic behaviors were occurring, to identify triggers for those behaviors, and to

document the effectiveness of consequences. Ms. Dunk conducted the ABC analysis of [redacted]s behaviors in response to [redacted]s behaviors becoming more aggressive relative to his behavior at the beginning of the school year. Due to [redacted]s increasingly aggressive behavior, Petitioner's mother, on or about October 18, 2016, requested that Ms. Jordan make additional observations of [redacted] (T. 437-39, 502; R-23.)

55.

Petitioner's mother had Shonda Thomas observe [redacted]s behavior in Ms. Dunk's classroom. Ms. Thomas is an educational specialist and advocate. Ms. Thomas observed [redacted]s classroom behavior on August 31, 2016 for twenty (20) minutes. Ms. Thomas' observations occurred prior to Ms. Dunk noticing [redacted]s increasingly aggressive behavior in October 2016. August 31, 2016 was the only time Ms. Thomas observed [redacted]s classroom behavior. Ms. Thomas' report notes that disruptive behaviors among students started when the teacher left the classroom, including behaviors from [redacted] However, when the teacher returned to the classroom, the teacher was able to regain the students' engagement. (T. 375-78.)

56.

On February 15, 2017, however, a more serious behavioral incident occurred. On that day, [redacted] was in silent lunch in the cafeteria. Ms. Dunk looked over and saw that [redacted] was talking to students who were not in Ms. Dunk's class. As Ms. Dunk began to walk over to [redacted] she heard him use inappropriate language towards her and the other students. In response Ms. Dunk provided redirection to [redacted] at his lunch table. Ms. Dunk walked away, but [redacted]s behavior continued. Ms. Dunk returned to [redacted]s lunch table to redirect him again. [redacted] then got up and left the cafeteria, heading towards the school's front office. Ms. Dunk followed [redacted] to the front office and told [redacted] that he needed to return to the cafeteria. [redacted] responded by using inappropriate language towards Ms. Dunk. The inappropriate language was overheard by

Kendrick's Safety Resource Office ("SRO"). The SRO told [redacted] that it was "inappropriate for him to be using that kind of language towards his teacher and that he needed to listen and comply with [her] directions." Thereafter, [redacted] returned to the cafeteria, collected his things, and walked back to Ms. Dunk's classroom. As he was walking back to the classroom, [redacted]s disruptive behavior continued. At that point, Ms. Dunk conferenced with [redacted] to discuss his behavior, prepared a "write up" of the incident, and walked [redacted] back to the front office. (T. 445-46; P-95.)

57.

Later that day, Ms. Dunk sent an email to Petitioner's mother concerning [redacted]s behavior that day. In her email, Ms. Dunk noted that [redacted] physically pushed her, threw things on the floor, yelled, cursed, pushed, and hit other students with his lunch box. She also noted in her email that she conferred with [redacted] about the incident and that he "acknowledged his behavior and stated how he could do better." Ms. Dunk's email concluded by stating she was aware that Petitioner's mother was "concerned about [[redacted]s] behavioral and overall success at school" and that she was "open to any strategies that you have used with [redacted]" (P-95.)

58.

In response to the February 15, 2017 incident, the principal at Kendrick, Dr. Kimberly Dugger, scheduled a conference with Petitioner's parents regarding [redacted]s behavior. The conference took place on February 17, 2017. (T. 447-48; P-96, P-100.)

59.

The purpose of the February 17, 2017 conference was to discuss [redacted]s behavior and develop an action plan regarding discipline for [redacted] The conference was attended by [redacted]s parents, Dr. Dugger, Ms. Dunk, and Ms. Stacey Black (Assistant Principal at Kendrick). At the

time of the February 17, 2017 conference, [redacted]'s IEP Team did not have an action plan in place to address [redacted]s behaviors. (P-100.)

60.

The February 17, 2017 conference resulted in a proposed action plan. The proposed action plan included putting [redacted] at the front of the line during transitions, reviewing hallway videos where incidents occurred, providing silent lunch to [redacted] in isolation from other students, and calling the parents when [redacted] used profanity. (P-100) Other recommendations resulting from this meeting were to give [redacted] an opportunity to go to the front office if he needed to share information, the provision of a cool down area for [redacted] and to increase [redacted]s access to sensory breaks. These latter recommendations were not listed in the action plan drafted as a result of the February 17, 2017 conference. (P-100; T-448.)

61.

The District asked Ms. Jordan sometime in late February 2017 to observe [redacted] again in the classroom. On February 24, 2017 Ms. Dunk provided Ms. Jordan with behavioral data and information related to [redacted] that she had been collecting since August 2016. Ms. Jordan attempted to observe [redacted] on February 28, 2017. She was unable to observe [redacted] because [redacted] did not return to Kendrick after the February 15, 2017 incident. This was the first time Ms. Jordan attempted to observe [redacted] since September 21, 2016. (T. 440-42, 870-71; R-24.)

62.

Denial of FAPE

a. Comprehensive Reading Program

During the July 22, 2016 IEP meeting, Petitioner's mother requested that [redacted] be provided with a comprehensive reading program. Petitioner's mother based her request on "the

recommendation of the Independent Psychological Evaluation (IEE) conducted in November 2014 which recommended a comprehensive reading program such as Wilson, Orton Gillingham, or Lindamood-Bell." A comprehensive reading program "encompasses the five areas specific to the National Reading Panel's research [related to] phonemic awareness, phonics, vocabulary, fluency, and comprehension." (R-1 at CCPS-011239; Complaint, p. 6; T. 589.)

63.

Dr. Warren Walter conducted the neuropsychological evaluation of [redacted] in November 2014. Dr. Walter's IEE recommends that the selected mode of reading instruction for [redacted] be modified accordingly for [redacted] While the IEE mentions examples of reading programs, it did not require a specific reading program. (P-C, p. 24.)

64.

The IEP Team considered Petitioner's mother request for a comprehensive reading program at the July 22, 2016 IEP meeting. However, the IEP Team determined that the small group classroom would be sufficient to meet [redacted]s education needs as the District already had the ULS curriculum in place, which includes a comprehensive reading program component. (R-1 at CCPS-011239; T. 606.)

65.

Petitioner's mother made several other inquiries with the District related to comprehensive reading programs, and what reading programs are utilized by the District. Ms. Smith testified that the ULS curriculum includes a comprehensive reading program component. The reading component of the ULS curriculum encompasses the five areas specific to the National Reading Panel's research. In the ULS curriculum, students are given instruction in

phonemic awareness, phonics, vocabulary, comprehension, and fluency on a weekly basis. (T. 604-05.)

66.

b. Language Live Reading Program

In response to Petitioner's mother's continued concerns regarding [redacted] reading deficits, the District agreed to evaluate [redacted] for a program called Language Live. Language Live is used within the District as a reading intervention program and is designed to assist students whose reading ability is three (3) or more grade levels behind in reading. Language Live is a computer based program with supplemental one-to-one support services for reading. (R-3 at CCPS-011274; T. 655-56, 666, 694-95, 785.)

67.

[redacted] was evaluated for Language Live and qualified in October 2016. In or around November 2016, [redacted] began attending Language Live classes.[5] [redacted]s Language Live instructor was Ms. Terdra Brooks. [redacted] attended Language Live classes every other day for seventy-five (75) minutes, in the place of another Connections Class, Physical Education. Connections classes are classes outside of the core academic subject areas. (P-161; T. 385-86, 783-86.)

68.

Language Live is divided into two portions, a computer-based portion and a teacher-led portion. The computer-based portion of Language Live focuses on word training, while the teacher-led portion focuses on text training. [redacted] did not receive any teacher-led instruction in Language Live during the 2016-2017 school year. [redacted]s instruction in Language Live was strictly computer-based. (T. 810, 829-30, 838.)

[5] Language Live was not included in [redacted]s IEP. (R-1, R-7.)

69.

Ms. Brooks testified that [redacted] did not receive any teacher-led instruction on text training because he enrolled in her class in November 2016 and was behind the other students. If [redacted] had enrolled in Language Live in August 2016, he would have received teacher-led instruction on text training. [redacted] was the only student in his Language Live class that did not receive teacher-led text training. (T. 838-40.)

70.

Language Live can allow students to repeat previously completed computer-based assignments. Language Live allows the teacher to re-set a student's grade on an assignment so that they can repeat the previously completed assignment. Ms. Brooks did not select the option to allow [redacted] to repeat assignments he had already completed. Ms. Brooks believed [redacted] would become frustrated and it would have a negative impact on his success in the program. (T. 797-98.)

71.

From January 30, 2017 through February 27, 2017, Ms. Brooks was out on leave from the District. During that time, there was a substitute teacher in [redacted]'s Language Live classroom. Ms. Brooks left the substitute teacher with her lesson plans and also spoke with her verbally. Ms. Brooks testified she did not know whether [redacted] substitute teacher was trained in Language Live. Based on her review, Ms. Brooks found that [redacted] did make progress in Language Live from the time he started in November 2016 through February 2017. (T. 787-88, 803, 846.)

72.

Parental Rights

Ms. Smith prepared and completed the minutes for the March 13, 2017 IEP meeting. The March 13, 2017 IEP meeting ended abruptly when the parties were unable to come to a consensus on [redacted]s educational placement. It is unclear whether the District ended the March 13, 2017 IEP meeting, or Petitioner's mother exited the meeting. At the conclusion of the meeting, the minutes of the March 13, 2017 IEP meeting were not read. (T. 646-47.)

73.

The District does not have a written requirement that the IEP minutes be read at the end of each meeting. (T. 679-80.)

74.

The District provided Petitioner's mother a copy of the March 13, 2017 IEP meeting document on or around May 22, 2017. The District acknowledged that the delay in providing the March 13, 2017 IEP meeting document was due to an oversight. (T. 771-72; P-131; R-7.)

75.

Dr. Shelia Cook conducted staff training at Kendrick on February 1, 2017. Dr. Cook's training session focused on students with Down Syndrome and autism. Prior to Dr. Cook's training session, Ms. Dunk had previously given trainings on special education issues and Down Syndrome while working as a teacher development specialist in the District. (P-140; T. 476-77.)

76.

The District determined that it would not be appropriate for Petitioner's mother to attend the February 1, 2017 training session because it was a staff-based training encompassing information related to all students with disabilities in the school, not just [redacted] individually. (T. 606; P-52.)

77.

Petitioner's mother attended all IEP meetings and parent conferences for [redacted] during the 2016-2017 school year, and there were numerous communications between the District and Petitioner's mother over the course of the year. (R-1, R-2, R-3, R-26; P-3, P-4, P-6, P-24, P-25, P-32, P-37, P-48, P-49, P-50, P-50, P-51, P-52, P-55, P-59, P-61, P-74, P-79, P-83, P-85, P-86, P-88, P-95, P-96, P-100, P-104, P-106, P-107, P-108, P-109, P-111, P-118, P-119, P-119A, P-120, P-122, P-124, P-126, P-127, P-131, P-136, P-142, P-148, P-149, P-152, P-156, P-157, P-158, P-161; T. 447-48.)

78.

Safe, Positive, Conducive Environment

Petitioner's mother raised concerns about incidents involving [redacted]s glasses, allegations of other students writing on [redacted]s pants; and of students making lewd comments towards [redacted] in the locker room at Kendrick. Petitioner's mother asserted that [redacted]s glasses were damaged on more than one occasion and that his glasses went missing for several weeks from November 8, 2016 through December 2, 2016. (T. 155-59, 171; P-24, P-61, P-79.)

79.

Ms. Dunk never observed any students writing on [redacted]s pants. She observed [redacted] writing on his pants on two separate occasions. In addition, Ms. Dunk never observed another student damage [redacted]'s glasses. On several occasions Ms. Dunk observed [redacted] playing with his own glasses. Kendrick investigated the various allegations when they arose and took appropriate steps based upon their findings. Based upon their investigations, Kendrick personnel could not determine if other students damaged [redacted]s glasses, or if [redacted]was responsible for damaging his glasses. Kendrick personnel were also not able to determine if other students wrote on [redacted]s

pants, or if [redacted] wrote on his own pants. After Petitioner's mother raised concerns regarding things that were happening in the locker room at school, the school administrators put policies in place to ensure that [redacted] did not have to go into the locker room. (T. 158, 442-44; P-24, P-79.)

80.

Petitioner's mother did not observe [redacted] being bullied, students writing on [redacted]'s pants, or students damaging [redacted]s glasses. When she was present at Kendrick, Petitioner's mother did observe other students being bullied and other students being hit in [redacted]'s classroom. (T. 379.)

81.

At the March 13, 2017 IEP meeting, Petitioner's mother and her advocate, Ms. Anderson-Zuppan, requested that [redacted] be assigned to a different school because Kendrick was a "hostile environment." The District asked Petitioner's mother to clarify what made Kendrick a hostile environment. Ms. Anderson-Zuppan responded by stating no law required Petitioner's mother to define hostile environment. Petitioner's mother did not provide an explanation to the District about what made Kendrick a hostile environment. (T. 703-04.)

III. CONCLUSIONS OF LAW

1.

The pertinent laws and regulations governing this matter include IDEA, 20 U.S.C. § 1400 *et seq.*; federal regulations promulgated pursuant to IDEA, 34 C.F.R. § 300 *et seq.*; and Georgia Department of Education Rules, Ga. Comp. R. & Regs. ("Ga. DOE Rules"), Ch. 160-4-7.

2.

The Court's review is limited to the issues Petitioner raised in the Complaint and which have not been dismissed through summary determination; Petitioner may raise no other issues at

the due process hearing unless the opposing party agrees or acquiesces. See 20 U.S.C. § 1415(f)(3)(B); see 34 C.F.R. § 300.511(d).

3.

IDEA enables a parent to bring challenges to the "identification, evaluation, or educational placement of the child, or the provision of a free appropriate education to [the] child" by filing a due process complaint. 20 U.S.C. § 1415(b)(6)(A); Shaffer v. Weast, 546 U.S. 49, 62 (2005). The "[IDEA] 'creates a presumption in favor of the education placement established by a child's IEP, and the party attacking its terms bears the burden of showing why the educational setting established by the IEP is not appropriate.'" Id.; see Ga. Comp. R. & Regs. 160-4-7-.12(3)(n) ("The party seeking relief shall bear the burden of persuasion with the evidence at the administrative hearing."). Thus, in this case, Petitioner bears the burden of persuasion and must produce sufficient evidence to support the allegations raised in the Complaint.

4.

Brief Overview of IDEA

The purpose of IDEA 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 future education, employment, and independent living . . . ." 20 U.S.C. § 1400(d)(1)(A).

5.

The IDEA requires school districts to provide a student eligible for student education services a free appropriate public education ("FAPE") in the least restrictive environment ("LRE"). 20 U.S.C. § 1412; 34 C.F.R. §§ 300.17, 300.114-300.118. The requirement to provide a FAPE is satisfied by providing personalized instruction with sufficient support services to

permit the child to benefit educationally from that instruction. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982). The Supreme Court in *Rowley* defined a FAPE as follows:

> Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child.

Id. at 200-201.

6.

In *Rowley*, the Supreme Court set out a two-part inquiry to determine if a local education agency satisfied its obligation to provide a FAPE to a student with disabilities. Id. at 206. First, a determination must be made as to whether there has been compliance with the procedures set forth in the IDEA, and second, whether the IEP, as developed through the required procedures, is "reasonably calculated to enable the child to receive educational benefit." Id. at 206-207.

7.

In 2017, the Supreme Court clarified the second portion of this inquiry: "[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." Endrew F. ex rel. Joseph F. v. Douglas County School District, 137 S. Ct. 988, 999 (2017). This requirement does not require that a child's IEP bring the child to grade-level achievement, but it must aspire to provide more than a *de minimis* educational progress. Id. at 1000-01.

8.

In matters alleging a procedural violation of IDEA, the undersigned may find that a child did not receive a FAPE only if 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. 20 U.S.C. § (f)(3)(E)(ii); 34 C.F.R. § 300.513(a). In other words, an IDEA claim is viable only if those procedural violations affected the child's, or parents, substantive rights. See Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 518 (2007) (holding "parents enjoy rights under IDEA, they are entitled to prosecute IDEA claims on their own behalf).

9.

Discussion of All Placement Options[6]

The Complaint alleges that [redacted]'s IEP Team failed to discuss all placement options at the March 13, 2017 IEP meeting. Specifically, Petitioner's mother contends home-based instruction was the appropriate placement option for [redacted] and the District failed to consider it as a placement option. IDEA contemplates a continuum of educational placements to meet the needs of children with disabilities. Depending on the nature and severity of their disability, a child may be instructed in the following educational placements: (1) the general education classroom with age-appropriate non-disabled peers; (2) outside the general classroom with other individuals or in small groups; (3) at a separate day school or program; (4) through home-based instruction; (5) a residential placement in-state or out-of-state; or (6) hospital/homebound instruction. 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.115; Ga. Comp. R. & Regs. 160-4-7-.07(3)(d).

10.

In addition to offering a continuum of educational placements, IDEA requires schools districts to educate children with disabilities in the "least restrictive environment" ("LRE") possible. 20 U.S.C. § 1412(a)(5). IDEA allows "removal of children with disabilities from the

[6] The Court dismissed Petitioner's claims regarding school location and the failure to consider and/or provide homebound services for [redacted] in the July 31, 2017 Order Granting Partial Summary Determination.

regular educational environment . . . only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." Id. The goal of this statutory requirement is to "mainstream" children with disabilities to the maximum extent possible, reserving more restrictive educational placements for children with special needs. It is up to the IEP Team to determine the LRE for each student. 34 C.F.R. § 300.116(a). While mainstreaming is not required, the IDEA maintains a strong preference for it. 20 U.S.C. § 1412(a)(5); Beth B. v. Van Clay, 282 F.3d 493, 498 (7th Cir. 2002) (holding a "district must mainstream [a student] -- that is, provide her an education with her nondisabled peers -- to the 'greatest extent appropriate."). Along the continuum of alternative educational placements, from least restrictive to most restrictive, home-based instruction is one of the most restrictive. 34 C.F.R. § 300.115(b)(1).

11.

When an IEP team considers hospital/homebound instruction, Georgia DOE regulations[7] provide that a school district must receive a completed medical referral form prior to the IEP team implementing hospital/homebound instruction. Ga. Comp. R. & Regs. 160-4-2-.31(2)(a)(4). The medical referral form must be completed by the licensed physician or licensed psychiatrist treating the student for the presenting diagnosis that requires the student to be restricted to their home for a period of time. Id.

[7] School districts shall provide hospital/homebound services for students with disabilities who are placed in a "special education program and have a medically diagnosed condition that will significantly interfere with their education and requires them to be restricted to their home or a hospital for a period of time." Ga. Comp. R. & Regs. 160-4-7-.07(3)(d)(6).

12.

In contrast, home-based instruction may be considered by an IEP team for reasons other than medical concerns. Home-based instruction is a short-term placement, available when the parent(s) and LEA *agree* at an IEP meeting with the following considerations:

(i) A free and appropriate public education (FAPE) is provided and includes access to the general curriculum and an opportunity to make progress toward the goals and objectives included in the IEP;
(ii) home-based services must be reviewed no less than quarterly by the IEP team; and
(iii) all IEPs that require home-based placements will include a reintegration plan for returning to the school setting.

Ga. Comp. R. & Regs. 160-4-7-.07(3)(d)(4).

13.

A child's educational placement must be appropriate for their unique situation. Both federal and state regulations provide that "[i]n selecting the LRE, consideration [must] be given to any potential harmful effect on the child or on the quality of services that he or she needs." 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.116(d); Ga. Comp. R. & Regs. 160-4-4-.07(2)(d); see also Greer v. Rome City School Dist., 950 F.2d 688, 696 (11th Cir. 1991), *quoting* Daniel R.R. v State Bd. of Educ., 874 F.2d 1036, 1045 (5th Cir. 1989) ("[N]o single factor will be dispositive under this test. 'Rather, our analysis is an individualized, fact-specific inquiry that requires us to examine carefully the nature and severity of the child's handicapping condition, his needs and abilities, and the schools' response to the child's needs.'"). This balancing of considerations—potential harm versus quality of necessary services—in order to determine the LRE is a task delegated to the IEP team under IDEA. R.L. v. Miami-Dade County Sch. Bd., 757 F.3d 1173, 1177 (11th Cir. 2014) ("Among the decisions that must be made by the IEP team is the educational placement—that is, the setting where the student will be educated—which must be

'based on the child's IEP'") (*citing* 34 C.F.R. §§ 300.116(a)-(b)); Marc V. v. North East Indep. Sch. Dist., 455 F. Supp. 2d 577, 594 (W.D. Tex. 2006), *aff'd* 242 Fed. Appx. 271 (5th Cir. 2007) (finding an IEP team was not required to consent to hospital/homebound instruction, or home-based, placement prescribed by physician and, in fact, there is no authority under IDEA for an IEP team to delegate its duty to ensure an IEP in the least restrictive environment).

14.

Petitioner's mother failed to present sufficient evidence that home-based instruction was appropriate for [redacted]. The District's representative, Ms. Dixon, began the March 13, 2017 IEP Team meeting by noting that the meeting was being held "to discuss all placement options on the continuum of services, including hospital homebound and home-based services." Based upon the documents provided to the District by Petitioner's mother, indicating [redacted] was under the medical care of a doctor, the District's representative suggested that *hospital/homebound* instruction should be considered by the IEP Team for [redacted]. An IEP team is not required to discuss *every* educational placement option; rather, an IEP team must discuss appropriate option(s) based upon the student's educational needs. Plano Independent School District, 107 LRP 32129 (TX SEA 2006) (emphasis added). Home-based instruction may be an appropriate educational placement, in certain situations, for *non-medical reasons*. However, Petitioner's mother did not explain what non-medical reason justified home-based instruction for [redacted] in a more restrictive setting that would eliminate [redacted]'s interactions with his peers. Rather, she made vague allegations of a hostile environment that were not supported by the evidence. See Dep't of Educ., Haw. V. Katherine D. ex rel. Kevin and Roberta D., 727 F. 2d 809, 817 (9th Cir. 1983) ("The congressional preference for educating handicapped children in classrooms with their peers is made unmistakably clear in section [1412(a)(5)]."). More importantly, Petitioner

has not and cannot show that he is entitled to home-based instruction without the agreement of the District. Ga. Comp. R. & Regs. 160-4-7-.07(3)(d)(4). Finally, to the extent Petitioner presented evidence that the District failed to discuss home-based instruction as an educational placement option for [redacted] during the March 13, 2017 IEP meeting, such evidence tended to suggest only a possible procedural violation that did not impede [redacted]'s right to a FAPE, impede his parents' opportunity to participate in the IEP process, or deprive him of an educational benefit. See U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2); K.A. v. Fulton Cnty. Sch. Dist., 741 F.3d 1195, 1203-05 (11th Cir. 2013).

15.

Failure to Implement IEP[8]

a. Progress Monitoring in Unique Learning System

The Complaint alleges the District inadequately monitored [redacted]s progress in the ULS curriculum. Specifically, Petitioner's mother alleges the District failed to conduct benchmark assessments, or monthly pre- and post-tests, as required by the ULS curriculum. By failing to adhere to the curriculum's protocols with fidelity and consistency, Petitioner's mother alleges [redacted] did not receive the maximum benefit of the curriculum.[9]

16.

The question of what standard to apply to failure-to-implement claims under the IDEA has not been addressed by the Eleventh Circuit. However, "the consensus approach to this question among federal courts that have addressed it has been to adopt a standard articulated by

[8] The Court dismissed Petitioner's claims regarding Extended School Year ("ESY") services in the July 31, 2017 Order Granting Partial Summary Determination. Additionally, Petitioner's claims regarding the District's failure to use assistive technology tools with fidelity and consistency, and to allow sensory breaks for [redacted] were dismissed in the August 3, 2017 Order Granting Second Partial Summary Determination.

[9] School districts are not required to maximize the educational benefit received by an eligible student under IDEA. See Doe v. Bd. of Educ., 9 F.3d 455, 459-60 (6th Cir. 1993) (holding that the IDEA requires a school district to provide "the educational equivalent of a serviceable Chevrolet ... not ... a Cadillac").

the Fifth Circuit. S.S. v. Howard Rd. Acad., 585 F.Supp. 2d 56, 67 (D.D.C. 2008) (*quoting* Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 (5th Cir. 2000)); see generally Schoenbach v. District of Columbia, 309 F. Supp. 2d 71, 83 n.10 (D.D.C. 2004) (*citing* Bobby R.); J.P. ex rel. Peterson v. County Sch. Bd. of Hanover County, Va., 447 F. Supp. 2d 553, 567--68 (E.D. Va. 2006) (collecting cases); Manalansan v. Bd. of Educ. of Baltimore City, 2001 U.S. Dist. LEXIS 12608, 2001 WL 939699, [**6] at *11--15 (D. Md. Aug. 14, 2001) (finding FAPE deprivation based on the standard articulated in *Bobby R.*); Melissa S. v. Sch. Dist. of Pittsburgh, 183 Fed. Appx. 184, 2006 WL 1558900, at *2 (3d Cir. 2006) (adopting *Bobby R.* standard); Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 (8th Cir. 2003) (citing *Bobby R.* with approval).

17.

In *Bobby R.*, the court held:

> [T]o prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. This approach affords local agencies some flexibility in implementing IEP's, but it still holds those agencies accountable for material failures and for providing the disabled child a meaningful educational benefit.

Bobby R., 200 F.3d at 349. Thus, a court reviewing failure-to-implement claims under IDEA must ascertain whether the aspects of the IEP that were not followed were "substantial or significant," or, whether the deviations from the IEP's stated requirements were "material." Id. Petitioner's mother does not need to show [redacted] "suffer[ed] demonstrable educational harm in order to prevail in an implementation failure claim, although the child's educational progress, or lack of it, may be probative." L.J. v. Sch. Bd., 850 F. Supp. 2d 1315, 1320 (S.D. Fla. 2012).

18.

The ULS curriculum was the curriculum used by the District to implement [redacted]s July 22, 2016 IEP and provide instruction in core academic subject areas. Ms. Smith, the District's Coordinator for Special Education services and expert on the ULS curriculum, testified in order for a student to receive educational benefit from the ULS curriculum, protocols for the curriculum must be followed. Ms. Smith testified that Ms. Dunk failed to follow the ULS curriculum protocols for [redacted] by failing to conduct monthly pre- and post-tests. The Court finds this deviation to be a material failure to implement [redacted]s IEP. The District's failure resulted in a denial of FAPE for V.M.

19.

b. Progress Monitoring of IEP Goals and Objectives

The Complaint alleges there was inadequate progress monitoring and reporting on [redacted]s IEP goals because the District failed to produce underlying data supporting the progress reports provided to Petitioner's mother. In addition, Petitioner's mother alleges she was not provided progress reports related to [redacted] speech therapy and occupational therapy goals. IDEA requires the District to provide periodic reports on the progress the child is making toward meeting the annual goals described in the child's IEP. 20 U.S.C. § 1414(d)(1)(A)(i)(III); 34 C.F.R. § 300.320(a)(3); Ga. Comp. R. & Regs. 160-4-7-.06(1)(d)(2). A student's IEP must contain a schedule of when and how a student's progress will be reported to their parent(s). 20 U.S.C. § 1414(d)(1)(A)(i)(III); 34 C.F.R. § 300.320(a)(3)(i); Ga. Comp. R. & Regs. 160-4-7-.06(1)(d)(2). Neither IDEA nor its implementing regulations prescribe the frequency or the content of progress reports, although regulations suggest that this could be done through quarterly or other

periodic reports, concurrent with the issuance of report cards. See 34 C.F.R. § 300.320(a)(3)(i); Ga. Comp. R. & Regs. 160-4-7-.06(1)(d)(2).

20.

Petitioner's mother received documentation of [redacted]s progress throughout the 2016-2017 school year through a variety of means. These included weekly notes, phone calls, electronic mail, and multiple meetings with various school officials. With the exception of Petitioner's mother's testimony that the District did not report [redacted]s progress to her, the evidentiary record shows otherwise. Petitioner's mother did not meet her burden of establishing that the District inadequately monitored and reported on [redacted]'s IEP goals. To the extent Petitioner's mother presented evidence on the lack of progress reports related to [redacted]s speech therapy and occupation therapy, such evidence tended to suggest only a possible procedural violation that did not impede [redacted]'s right to a FAPE, impede his parents' opportunity to participate in the IEP process, or deprive him of an educational benefit. See U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2); K.A. v. Fulton Cnty. Sch. Dist., 741 F.3d 1195, 1203-05 (11th Cir. 2013).

21.

c. Assistive Technology

The Complaint alleges that the District deprived [redacted] of a FAPE by not teaching [redacted] to keyboard and how to appropriately use the AT devices prescribed by his IEP, which adversely affected [redacted]s ability to access AT supports such as text reader, word prediction software, Kurzweil 3000, and Language Live. In addition, the Complaint alleges the District failed to appropriately train Kendrick staff in the usage of AT devices prescribed by [redacted]s IEP and failed to complete ongoing AT evaluations of [redacted] during the 2016-2017 school year.

22.

When an IEP is developed, IDEA requires the IEP team to consider—among other things—the child's communication needs and "whether the child needs assistive technology devices and services." 20 U.S.C. §§ 1414(d)(3)(B)(iv), (v); 34 C.F.R. § 300.324(a)(2)(i)-(v); Ga. Comp. R. & Regs. 160-4-7-.06(18)(b)(5). An AT device is "any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability." 20 U.S.C. § 1401(1); 34 C.F.R. § 300.5. AT services refer to any service that "directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device." 20 U.S.C. § 1401(2); 34 C.F.R. § 300.6. AT services may also include an evaluation of the child's AT needs, the purchase or acquisition of an AT device, training or technical assistance for the child and the child's family, if appropriate, on a specific AT device, and training or technical assistance for staff, as needed, working with the child and the AT device. 34 C.F.R. § 300.6.

23.

Petitioner failed to present sufficient evidence that the District failed to teach [redacted] to keyboard or how to appropriately use the AT devices prescribed by his IEP. While Petitioner's mother testified that [redacted] had difficulty using a keyboard, Ms. Dunk testified that [redacted] did not have difficulty using a keyboard in her classroom. Petitioner also failed to present evidence that the District failed to train Kendrick staff how to appropriately use AT devices prescribed by [redacted]s IEP. Further, [redacted]s IEP did not provide for ongoing AT evaluations, nor did Petitioner's mother show why ongoing AT evaluations were necessary for [redacted] Therefore, Petitioner also failed to establish this claim.

24.

d. Provision of Additional Supports and Services

The Complaint alleges the District failed to have a behavioral specialist evaluate [redacted] and make appropriate recommendations to address disruptive behavior. IDEA requires that if a child's behavior impedes his or her own learning or that of others, the IEP team must "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." 20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2); Ga. Comp. R. & Regs. 160-4-7-.06(18)(b)(1); see generally Neosho R-V School Dist. v. Clark, 315 F.3d 1022, 1028 (8th Cir. 2003) (finding that a student did not receive FAPE when the student's IEP failed to provide an adequate behavior management program); County School Bd. of Henrico County, Vir. V. Palkovics ex rel. Palkovics, 285 F. Supp. 2d 701, 709 (E.D.Va. 2003) (20 U.S.C. § 1414(d)(3)(B)(i) did not require the inclusion of a behavior intervention plan in the IEP until student's behavior impeded his own learning or the learning of others).

25.

Although, Petitioner's mother did not clearly articulate her request, the District should have recognized a functional behavioral assessment (FBA) was needed for [redacted]'s disruptive behaviors.[10] The general purpose of an FBA is to provide the IEP team with additional information, analysis, and strategies for dealing with undesirable behavior, especially when it is interfering with a child's education. The process involves identifying the core or "target" behavior; observing the student, preferably in different environments, and collecting data on the target behavior, antecedents, and consequences; formulating an hypothesis about the cause or

[10] Regulations promulgated by the Georgia DOE define an FBA as: a systematic process for defining a child's specific behavior and determining the reason why (function or purpose) the behavior is occurring. The FBA process includes examination of the contextual variables (antecedents and consequences) of the behavior, environmental components, and other information related to the behavior. Ga. Comp. R. & Regs. 160-4-7-.21(20).

causes of the behavior; developing an intervention or interventions to test the hypothesis; and collecting data on the effectiveness of the interventions in changing the behavior. The information should be presented in a manner useful for future work on the child's behavioral issues and is useful in the formation of a behavioral intervention plan (BIP).[11] See Independent School Dist. No. 2310 (SEA MN 1998) 29 IDELR 330. In *Long v. Dist. of Columbia*, the Court stated "it is important to note that 'the IDEA . . . recognizes that the quality of a child's education is inextricably linked to that child's behavior,' and '[an] FBA is essential to addressing a child's behavioral difficulties, and, as such, it plays an integral role in the development of an [appropriate] IEP.'" 780 F. Supp. 2d 49, 61 (D.D.C. 2011) (citations and internal quotations omitted).

26.

In this case, the District failed to evaluate [redacted]s escalating behavior during the 2016-2017 school year in a timely manner. The District notified Petitioner's mother about concerns regarding [redacted]s behavior in the initial weeks of the 2016-2017 school year. Based upon [redacted]s reported behavior, Petitioner initially requested the District's behavioral specialist to evaluate [redacted]s behavior in August 2016. Pamela Jordan, the District's behavioral specialist, did observe [redacted] on three days in September 2016. However, at that time the behaviors were limited to blurting out and attention seeking behavior. No physical or verbal aggression was observed. Subsequently, [redacted] began engaging in more aggressive behaviors. Upon being notified of the aggressive behaviors in October 2016, Petitioner's mother requested that the District's behavioral specialist evaluate [redacted] again. The District's behavioral specialist did not attempt to evaluate [redacted] until late February 2017. At that time, [redacted] was no longer attending Kendrick.

[11] A behavior intervention plan includes positive interventions, strategies and supports to address target behaviors. The goal of a BIP is to teach or encourage new behaviors to replace target behaviors. Georgia Special Education Rules Implementation Manual, at 152.

[redacted]s behaviors impeded his ability to receive instruction in his core academic subject areas. Accordingly, the Court finds the District deprived [redacted] of a FAPE by failing to perform an FBA to address [redacted]s escalating behaviors.

27.

Denial of FAPE[12]

a. Comprehensive Reading Program

As noted in the Findings of Fact, Petitioner's mother requested a comprehensive reading program. Specifically, she wanted the District to use one of the reading programs mentioned in Dr. [redacted] November 2014 IEE.

28.

IDEA requires that services provided to a student must be "based on peer-reviewed research to the extent practicable." 20 U.S.C. § 1414(d)(I)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4); Ga. Comp. R. & Regs. 160-4-7-.06(1)(d)(e); see also, e.g., *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46540-01, 46665 (Aug. 14, 2006) ("States, school districts, and school personnel must . . . select and use methods that research has shown to be effective to the extent that methods based on peer-reviewed research are available.").

29.

A parent, no matter how well motivated, does not have the right to compel a school district to provide a specific program or employ a specific methodology in providing education for a disabled child. IDEA does not require an IEP team to "adopt the particular recommendation of an expert [or parent]; it only requires those recommendation[s] be considered

[12] The Court dismissed Petitioner's claim regarding denial of FAPE due to enrollment issues in the July 31, 2017 Order Granting Partial Summary Determination.

in developing an IEP. J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., No. 12 Civ. 2896 (CS), 2013 U.S. Dist. LEXIS 110351, 2013 WL 3975942, at *11 (S.D.N.Y. Aug. 5, 2013). Accordingly, courts accord deference to school districts in matters of educational policy. Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 (N.D.N.Y. 2004), *aff'd* 142 Fed. Appx. 9, 10 (2d Cir. 2005) ("The mere fact that a separately hired expert has recommended different programming does nothing to change [the] . . . deference to the district and its trained educators").

30.

In *Ridley Sch. Dist. v. M.R.*, the parents of a child with a disability alleged that a school district violated IDEA by offering a reading program (i.e., Project Read) that was not appropriate for their child's combination of disabilities. 680 F.3d 260, 277 (3d Cir. 2012). The parents argued the school district should have offered an alternative reading program (i.e., the Wilson Reading System), which they deemed more appropriate for their child. Id. at 278. The *Ridley* Court held reading designed instruction in an IEP must be reasonably calculated to enable the child to receive meaningful educational benefits in light of the student's intellectual potential. Id. at 277. "In selecting special education programs, a school district must be able to take into account not only the needs of the disabled student, but also the financial and administrative resources that different programs will require, and the needs of the school's other non-disabled students." Id. at 279 (citations and internal quotations omitted).

31.

Petitioner's mother is entitled to prefer one reading program over another. However, Petitioner's mother is not entitled to select the educational methodology related to implementing [redacted]s reading program. The U.S. Department of Education has clarified that Section 1414's

peer-reviewed research preference is not absolute: "This does not mean that the service with the greatest body of research is necessarily required for a child to receive FAPE . . . the final decision about the special education and related services, and supplementary aids and services . . . must be made by the child's IEP team." 71 Fed. Reg. 46,540, 46,665 (Aug. 14, 2006). The evidence established that the reading component of the ULS curriculum is a comprehensive reading program. Furthermore, the District was entitled to select the program and methodology for [redacted]s reading instruction.

32.

b. Language Live Reading Program

The Complaint alleges Language Live is not a research-based reading program designed for students with disabilities, nor is it a comprehensive reading program as recommended by an independent educational evaluation (IEE) conducted in November 2014. Further, the Complaint alleges Language Live was not utilized with fidelity and consistency for [redacted] to receive the maximum benefit of the program.[13]

33.

Petitioner did not present sufficient evidence showing Language Live was not a research-based reading program suitable for children with disabilities or that [redacted] was entitled to the maximum benefit of Language Live, any such claims lack merit. While Petitioner's mother also alleged that Language Live was not a comprehensive reading program, that allegation is immaterial as [redacted] was receiving comprehensive reading instruction through the reading component of the ULS curriculum. Language Live was merely supplemental instruction.

[13] School districts are not required to maximize the educational benefit received by an eligible student under IDEA. See Doe v. Bd. of Educ., 9 F.3d 455, 459-60 (6th Cir. 1993) (holding that the IDEA requires a school district to provide "the educational equivalent of a serviceable Chevrolet ... not ... a Cadillac").

34.

In addition, the Complaint alleges the following procedural violations related to Language Live: [redacted] did not receive the correct amount of time on Language Live; he never received text training from the Language Live instructor; his assigned paraprofessional was not trained in Language Live; while the Language Live instructor was out on extended leave, the substitute teacher assigned to the classroom was not appropriately trained in Language Live; [redacted] did not attend Language Live on some days even though he was at school; and he was denied FAPE when he was unenrolled from Language Live in March 2017.

35.

Special education and related services must be provided in conformity with the individualized education program. 20 U.S.C. § 1409(9). The language of IDEA "counsels against making minor implementation failures actionable given that special education and related services need only be provided in conformity with the IEP. There is no statutory requirement of perfect adherence to the IEP." Van Duyn v. Baker Sch. Dist., 502 F.3d 811, 821 (9th Cir. 2007). As such, a material failure to implement an IEP violates IDEA. Id. at 822 ("A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP."). While the District's implementation of Language Live was lackluster, Language Live was not required by [redacted]'s IEP. Therefore, Petitioner's procedural claims related to the implementation of Language Live fail because the District did not have an obligation to provide Language Live as part of [redacted]'s IEP.

36.

Parental Rights[14]

a. IEP Minutes, Copy of Discussed Data, Timely Production of V.M.'s IEP

The Complaint asserts that the District violated Petitioner's mother's parental rights when school personnel failed to read the minutes at the conclusion of the March 13, 2017 IEP meeting; failed to provide her a copy of the data discussed at the March 13, 2017 IEP meeting; and failed to produce a copy of [redacted]'s March 13, 2017 IEP in a timely manner. IDEA is intended "to ensure that the rights of children with disabilities and *parents* of such children are protected . . . ." 20 U.S.C. § 1400(d)(1)(B). In 2007, the Supreme Court noted that parents play "a significant role" in the development of the IEPs for their disabled children, including serving as essential members of the IEP Team. Winkelman v. Parma City Sch. Dist., 550 U.S. 516 (2007). "The statute also sets up general procedural safeguards that protect the informed involvement of parents in the development of an education for their child," including mandating that States provide an opportunity for parents to examine all relevant records. Id. at 524 (*citing* 20 U.S.C. § 1415(b)(1)).

37.

Parents have the right to be members of "any group that makes decisions on the educational placement of their child." 20 U.S.C. § 1414(e); 34 C.F.R. § 300.322. School districts are responsible for ensuring that parents are afforded an opportunity to participate at each IEP meeting. Id. The Eleventh Circuit has held that "violation of any of the procedures of the IDEA is not a *per se* violation of the Act." Weiss v. Sch. Bd., 141 F.3d 990, 996 (11th Cir. 1998). Therefore, not all procedural breaches are IDEA violations. In Weiss, the Court held that

[14] The Court dismissed Petitioner's claims related to the District providing [redacted]'s complete educational record to Petitioner's mother in a timely manner and the falsification of records in the August 11, 2017 Motion for Involuntary Dismissal. (T-423).

where a family has "full and effective participation in the IEP process . . . the purpose of the procedural requirements are not thwarted." Id. Based upon the record, the Court finds Petitioner's mother's participation in the IEP process was not thwarted by the District's procedural violations related to her parental rights in the IEP process. Petitioner's mother presented no evidence of how the District's failure to read the minutes at the conclusion of the March 13, 2017 IEP meeting, the District's failure to provide a copy of the data discussed at the March 13, 2017 IEP meeting, or the District's failure to timely provide her with a copy of the March 13, 2017 IEP impaired her ability to participate in the decision making process. Id.; see generally Evanston Community Consol. School Dist. No. 65 v. Michael M., 356 F.3d 798, 804 (7th Cir. 2004) (holding "[o]nly procedural inadequacies that result in the loss of educational opportunity" constitute a denial of FAPE).

38.

b. Parental Participation in Staff Training

Petitioner's mother alleges her lack of participation in a February 1, 2017 training session on students with disabilities conducted by the District for Kendrick staff members resulted in a denial of her rights under IDEA. See Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 518 (2007) (holding "parents enjoy rights under IDEA, they are entitled to prosecute IDEA claims on their own behalf). First, the undersigned knows of no authority and Petitioner's mother has cited no authority requiring a parent's participation in staff training. Second, Petitioner's mother failed to present any evidence that the District's refusal to allow her to participate in the February 1, 2017 staff training affected [redacted] in any way. Accordingly, any such claim is without merit.

39.

c. Additional Training for Staff

The Complaint includes abstract allegations that [redacted]s teachers and support staff required additional training to ensure [redacted] received a FAPE. School districts must take reasonable steps to train and prepare a student's teachers and support staff. See Light v. Parkway C-2 Sch. Dist., 41 F.3d 1223, 1230 (8th Cir. 1994). While Petitioner's mother may have alternative theories about what training might have been best, or what additional steps the school might have taken, a school's training regimen does not bend to the whims of any one particular parent. Parrish v. Bentonville Sch. Dist., No. 5:15-CV-05083, 2017 U.S. Dist. LEXIS 41149, at *25 (W.D. Ark. March 22, 2017). The record shows that the District took reasonable steps to train its teachers and support staff, and that is all that is required. Therefore, this Court concludes that the District's training of its teachers and support staff did not result in a denial of a FAPE [redacted].

40.

Safe, Positive, and Conducive Environment

The Complaint alleges the District failed to provide a school environment that was "safe, positive, and conducive to learning." In support of this allegation, the Complaint listed the following alleged inadequacies: the District's failure to provide staff with appropriate training, the failure of the staff at Kendrick Middle School to implement programs and the student's IEP, the school's falsification of [redacted]s record, failure to have appropriate classroom management, failure to provide additional supports and services, and other untoward behavior and attitudes of district personnel toward [redacted] Most of these alleged inadequacies are addressed elsewhere in this decision. The only items that have not previously been addressed are the District's alleged

"failure to have appropriate classroom management" and "other untoward behaviors and attitudes of district personnel toward [redacted]

41.

The Complaint does not mention alleged bullying concerns regarding [redacted]s clothes, eyeglasses, or incidents in the locker room. Thus, any such allegations should not be considered as issues raised in the Complaint and should not be considered here. See 20 U.S.C. § 1415(f)(3)(B); see also 34 C.F.R. § 300.511(d). Notwithstanding, to the extent that the Complaint may have been amended by the evidence presented, those allegations are addressed herein. See O.C.G.A. 9-11-15(b) ("When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.").

42.

Though not substantive law, the United States Department of Education and Department of Justice recently proposed a framework to determine whether bullying resulted in denial of a FAPE. *Brief for United States Department of Education et al. as Amici Curiae Supporting Appellees*, T.K. v. New York City Dept. of Educ., 32 F. Supp. 3d 405 (2014). The framework considers: (1) whether bullying and its effects prevented a disabled student from obtaining a meaningful educational benefit, and (2) whether the school district's response to the bullying ensured or denied access to a FAPE. Id. at 12-13 (arguing "[t]he Court's assessment . . . must determine whether the serious bullying and its effects interfered with L.K.'s special education program, including her academic and nonacademic developments, in a way that prevents the child from obtaining a meaningful educational benefit and thus denies her a FAPE; and whether the school district's response ensured or denied L.K.'s continuing receipt of a FAPE."). Under

this proposed framework, a student may establish denial of a FAPE where a school fails to address bullying that results in a "significantly measurable change" in a student's academic performance, or when a student's behavior is affected in a way that makes it difficult to concentrate, communicate, or participate in academic or social activities. Id. at 21-22.

43.

In *Corvallis School District*, the court held that, in order to create a hostile environment, the offending conduct must be "sufficiently severe, persistent, or pervasive." 115 LRP 61 (OR SEA 2014). The bullying allegations set forth by Petitioner's mother were not "sufficiently severe, persistent, or pervasive" to establish [redacted] was deprived of FAPE. Id.

44.

Other issues raised by Petitioner's mother included claims of other students writing on [redacted]s pants and damaging his glasses. Petitioner's mother never observed [redacted] being bullied, other students writing on [redacted]s pants, or damaging [redacted]s glasses. However, Ms. Dunk testified she observed [redacted] writing on his own pants on two occasions and playing with his own glasses. Finally, when Petitioner's mother brought her concerns about alleged incidents involving [redacted] in the locker room at Kendrick, school personnel implemented policies addressing such concerns. Petitioner's mother did not meet her burden to prove a denial of FAPE due to [redacted]'s school environment.

IV. Remedy

1.

This Court may award appropriate equitable relief when there has been an actionable violation of IDEA. 20 U.S.C. § 1415(f)(3)(E)(ii)(II). See Cobb County Sch. Dist. v. A.V., 961 F. Supp. 2d 1252 (N.D. Ga. 2013). 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). Remedies for a violation of FAPE may include compensatory education, reimbursement, declaratory relief and injunctive relief. See generally Thomas A. Mayes et al., Allocating the Burden of Proof in Administrative and Judicial Proceedings Under the Individuals with Disabilities Education Act, 108 W. Va. L. Rev. 27, 41 (2005). The Eleventh Circuit has held that reimbursement of expenditures for private special education and related services made by parents pending review is also available under IDEA if such services are deemed appropriate. Draper, 480 F. Supp. 2d at 1352-53 (*citing* G ex. Rel. RG v. Fort Bragg Dependent Sch., 343 F.3d 295, 309 (4th Cir. 2003)).

2.

a. Private Placement

The Complaint seeks private placement for [redacted] at the expense of the District. A court may award a disabled student the cost of placement in a private educational program if the court concludes that (1) the public placement violated the IDEA by providing an inappropriate IEP, and (2) the student demonstrates that the private placement was appropriate. 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148(a),(c) (stating that a court may require a school district to reimburse the cost of enrolling a student with disabilities in a private placement if the school district did not make a FAPE available "in a timely manner prior to enrollment [in the private placement]"). Petitioner bears the burden of proof showing that private placement is appropriate. See W.C. v. Cobb County Sch. Dist., 407 F. Supp. 2d 1351, 1362 (N.D. Ga. 2005).

3.

When a court or hearing officer concludes that a school district failed to provide a FAPE and the identified private placement was proper, it must consider all relevant factors, including the notice provided by the parents and the school district's opportunities for evaluating the child, in determining whether reimbursement for some or all of the cost of the child's private placement is warranted. 20 U.S.C. § 1412(a)(10)(C)(iii); 34 C.F.R. § 300.148(d). Additionally, a private placement is proper under IDEA if the education provided in the private placement is reasonably calculated to enable the child to receive educational benefits. Florence Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7, 11 (1993).

4.

It is well-recognized that IDEA does not guarantee reimbursement for private placement to parents who unilaterally move their child to a private placement after disagreeing with the IEP offered by a public school. Such a unilateral move is taken "at [the parents] own financial risk," and reimbursement will only be issued by an order of the court upon finding that the school district failed to offer a FAPE and that the private placement was proper. Id. at 12. Courts have emphasized, however, that retroactive reimbursement—where a court finds that a FAPE was not provided and a private placement proper—is available to vindicate the full rights of students and parents intended under the IDEA. Id. (*citing* Sch. Comm. of Town of Burlington, Mass. v. Dept. of Educ. of Mass., 471 U.S. 359, 370 (1985)).

5.

Moreover, "even [if private placement is appropriate] courts [also] retain discretion to reduce the amount of a reimbursement award if the equities so warrant — for instance, if the parents failed to give the school district adequate notice of their intent to enroll the child in

private school." Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 242 (2009); see 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(aa) & (bb) (allowing reduction or denial if "the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency" or "10 business days . . . prior to the removal . . . the parents did not give written notice to the public agency"). "In considering the equities, courts should generally presume that public-school officials are properly performing their obligations under IDEA." Forest Grove Sch. Dist., at 242 (citation omitted).

6.

Finally, the private placement identified by a petitioner in a due process complaint does not have to meet all of the IDEA's requirements, including the LRE requirement; although a court may consider whether the private placement does not comply with the IDEA's LRE requirement. W.C. ex rel Sue C. v. Cobb Cnty. Sch. Dist., 407 F. Supp. 2d 1351, 132 (N.D. Ga. 2005); see also West-Windsor-Plainsboro Reg'l Sch. Dist. Bd. of Educ. [redacted] F. ex rel. A.F., 2011 U.S. Dist. LEXIS 21827, at *12 (D.N.J., Mar. 4, 2011) ("[T]he standard a [private] placement must meet in order to be 'proper' is less strict than the standard used to evaluate whether a school district's IEP and placement is appropriate.").

7.

Petitioner's mother presented no evidence that [redacted] was in fact enrolled in a private placement after she unilaterally removed him from Kendrick on February 15, 2017. Furthermore, Petitioner's mother presented no evidence of an appropriate private placement for [redacted] 20 U.S.C. § 1412(a)(10)(C)(ii). Therefore, Petitioner's mother is not entitled to retroactive, or proactive, reimbursement based on her unilateral decision to remove [redacted] from the District. Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass., 471 U.S.

373-74 (1985) ("parents who unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk.").

8.

b. Compensatory Education

"[The Eleventh Circuit] has held compensatory education is appropriate relief where responsible authorities have failed to provide a handicapped student with an appropriate education as required by [the Act]." Todd D. ex rel. Robert D. v. Andrews, 933 F.2d 1576, 1584 (11th Cir. 1991) (*citing* Jefferson County Bd. of Educ. v. Breen, 853 F.2d 853, 857 (11th Cir. 1988)). Compensatory education provides services "prospectively to compensate for a past deficient program." G ex. Rel. RG v. Fort Bragg Dependent Sch., 343 F.3d 295, 308 (4th Cir. 2003). Compensatory education is awarded to account for the period of time that a petitioner student was deprived of his right to a FAPE. Mary T. v. Sch. Dist. of Philadelphia, 575, F.3d 235, 249 (3d Cir. 2009). This remedy accrues from the point that the school district knew or should have known that an IEP failed to confer a greater than *de minimis* educational benefit to the student. Id. Thus, if compensatory education is appropriate, the calculation for relief should be for a period equal to the period of deprivation, less the time reasonably required for the school district to rectify the problem. Id.

9.

The Court is mindful of the admonition by some courts not to rely on a strictly quantitative, "cookie-cutter" approach to fashioning equitable remedies in IDEA cases. See Reid v. Dist. of Columbia, 401 F.3d 516 (D.C. Cir. 2005) (Where child was "neglected by the school system charged with affording him free appropriate education," he was entitled to compensatory

instruction in an amount not "predetermined by a cookie-cutter formula, but rather [by] an informed and reasonable exercise of discretion regarding what services he needs to elevate him to the position he would have occupied absent the school district's failure"). "Compensatory education aims to put a student . . . in the position he would be in absent the FAPE denial." B.D. v. Dist. of Columbia, 817 F.3d 792, 799 (D.C. Cir. 2016).

10.

Based on careful consideration of the facts and circumstances resulting in the denial of FAPE found above, the Court concludes that one hundred (100) hours of specialized academic tutoring at a pace determined to be appropriate by Petitioner's mother and the private service provider(s) selected by Petitioner's mother. Seventy-five (75) of the hours shall focus on reading and twenty-five (25) of the hours shall focus on math. The Court bases this award on the District's failure to appropriately implement the ULS curriculum, or consider positive behavioral interventions for [redacted] from August 2016 until Petitioner's mother removed [redacted] from the District on February 15, 2017, which represents approximately twenty-five (25) weeks of the 2016-2017 school year. For each week of the 2016-2017 school that resulted in the denial of FAPE for [redacted] the Court awards four (4) hours of specialized academic tutoring, totaling one hundred (100) hours. This award of hours is to be used within eighteen (18) months in order to ensure that the remedial services that [redacted] needs are obtained without undue delay, along with minimizing any administrative burdens on the District that would result from compensatory education awards stretching over excessively long timeframes.

c. Equitable Remedy

The Court has broad discretion is fashioning relief for actionable violations of IDEA. 20 U.S.C. § 1415(f)(3)(E)(ii)(II). To be clear, IDEA does *not* entitle Petitioner's mother to select the physical location where [redacted] receives appropriate services. Nonetheless, given the history between the parties, the undersigned concludes that a change in location of [redacted]'s educational placement is an appropriate equitable remedy. Therefore, the Court orders the location of [redacted]'s educational placement be changed from Kendrick Middle School to Jonesboro Middle School. The District shall convene an IEP Team meeting within ten (10) business days to review and update [redacted]'s IEP appropriately.

V. ORDER

Petitioner has prevailed as set forth above. Accordingly, **it is hereby ordered that**:

- Compensatory education for the denial of FAPE in this case shall consist of the District funding one hundred (100) hours of independent academic tutoring, divided by academic subject area as described above, to be used within eighteen (18) months from the date of this decision; any unused hours will be forfeited. The District shall authorize such services within ten (10) business days after receiving Petitioner's written selection of the private service provider(s).
- Such instruction shall be paid for by the District upon receipt of periodic invoices for services rendered. The invoices shall be paid promptly by the District; however, the District is not required to pay for services in advance.
- The location of [redacted]s local educational placement is changed to Jonesboro Middle School.
- The District shall convene an IEP Team meeting within ten (10) business days of this Order to review and update [redacted]'s IEP, as needed.

Any other requests for relief not specifically granted above are **denied**.

SO ORDERED, this 27th day of October, 2017.

STEPHANIE M. HOWELLS
Administrative Law Judge