BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[redacted] by and through his parents, [redacted] and [redacted] and [redacted] and [redacted] individually,	:	
Plaintiffs,	:	**Docket No.**
	:	**OSAH-DOE-SE-[redacted]-33-Howells**
v.	:	15-300428
	:	
COBB COUNTY SCHOOL DISTRICT,	:	
Defendant.	:	

FILED
OSAH
FEB 2 3 2015
Kevin Westray, Legal Assistant

FINAL DECISION

For Plaintiffs:

Jonathan A. Zimring, Esq.
Janet Haury, Esq.

For Defendant:

Aric M. Kline, Esq.
Patrick H. Ouzts, Esq.
Gregory, Doyle, Calhoun & Rogers, LLC.

I. INTRODUCTION AND PROCEDURAL BACKGROUND

This matter is before the court pursuant to a due process hearing request filed by Plaintiffs: [redacted] a child ("Student" or "[redacted]") who is [redacted]'s mother ("Mrs. [redacted]"); and [redacted] who is [redacted]'s father ("Mr. [redacted]") (Student or [redacted] Mrs. [redacted], and Mr. [redacted], collectively "Plaintiffs"). *See* Plaintiffs' Complaint, dated July 30, 2014, ("Complaint"). Plaintiffs' Complaint was initiated against the Cobb County School District ("District"). *See* Complaint. Plaintiffs allegations arose under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1482 ("IDEA"). *Id.*[1]

[1] Plaintiffs' Complaint reserves non-IDEA claims under the Americans with Disabilities Act (42 U.S.C. §§ 12101-12213) ("ADA"), the Rehabilitation Act (29 U.S.C. §§ 700 to718) ("§504"), and 42 U.S.C. §1983 ("§1983"). (*See* Complaint p. 46).

Specifically, Plaintiffs make four general allegations: (1) substantive denial of a Free and Appropriate Public Education ("FAPE"); (2) procedural violations; (3) Least Restrictive Environment ("LRE") violations; and (4) maintenance of placement. (Complaint pp. 38, 39, 41 and 42). Plaintiffs base these allegations on the events of an Individual Education Program ("IEP") team meeting held on March 20, 2014, after which the District told the Plaintiffs that [redacted] would have to attend D[redacted] Middle School, a non-neighborhood school, in order to receive daily Visual Impairment ("VI") instruction in the Expanded Core Curriculum ("ECC").

On August 7, 2014, Plaintiffs filed a Motion for Summary Determination. Then on August 11, 2014, they filed an emergency motion to enforce the "Maintenance of Placement" or "Stay Put" provision of IDEA. During an in-person prehearing conference with the parties, on August 22, 2014, the undersigned encouraged the parties to identify a mutually-agreeable alternative placement.[2] The parties failed to do so.[3] Accordingly, the undersigned scheduled an evidentiary hearing on the limited issue of stay put for September 2-4, 2014; giving the parties only ten days to prepare.[4] Upon further consideration and reflection, the undersigned decided, out of an abundance of caution, and in keeping with the spirit of the stay put provisions to maintain the status quo, [redacted]s stay put placement would be the alternative placement of P[redacted] Middle School, C.A.'s neighborhood school, with the level of vision impairment services that the District could reasonably accomplish with the available vision impairment teachers and

[2] The stay put provisions acknowledge that the school district and the parents may agree to an alternative placement during the pendency of proceedings regarding a due process hearing. 20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a).

[3] During the conference, Plaintiffs appeared willing to agree to an "alternative" placement wherein [redacted] would attend his home school with less than the full complement of services in the last agreed upon IEP. The District was not willing to agree to this alternative placement. Further, during the in-person pre-hearing conference and subsequently in a telephone conference, Plaintiffs agreed to waive any future claims that [redacted] did not receive a free appropriate public education due to a reduction in services during the pendency of this matter.

[4] Some of the haste was due, in part, to the fact that [redacted]'s parents refused to send him to D[redacted] Middle School (i.e., the school where the District proposed to provide [redacted]'s visual impairment services) and the District refused to allow [redacted] to attend his home school (i.e., P[redacted] Middle School). Thus, during the time the stay put issue was being decided, [redacted] was not attending school.

equipment. The parties were notified of this decision orally during a telephone conference on August 29, 2014, and the written Stay Put Order reflecting this decision was issued on September 2, 2014.

On September 9, 2014, the District filed a cross-motion for summary determination and a response to Plaintiffs motion for summary determination. On September 23, 2014, the undersigned denied both the Plaintiffs' motion for summary determination and the District's cross-motion for summary determination, concluding that summary adjudication was improper as there were material issues of fact remaining.

The hearing was conducted over nine days on October 29, 2014; October 30, 2014; October 31, 2014; November 3, 2014; November 4, 2014; November 10, 2014; November 13, 2014; November 24, 2014; and December 10, 2014.[5]

II. FINDINGS OF FACT

[redacted]'s Disability and Eligibility for Services

1.

[redacted] is an [redacted] year-old student, who is currently in sixth grade. (T. Vol. I p. 41).

2.

[redacted] was born with Goldenhar's Syndrome, resulting in complete vision loss and partial hearing loss. (T. Vol. III pp. 500-501).[6]

[5] The record remained open following the conclusion of the hearing in order for the parties to review the transcript and file post-hearing proposed Findings of Fact and Conclusions of Law. The deadline for the issuance of this decision was extended pursuant to 34 C.F.R. § 300.515(c). Defendant's Exhibits are designated "D-" in accordance with their exhibit number, as well as the Bates number(s) of the page(s) referenced. For instance, the first page of Defendant's Exhibit 1 would be designated "D-1 Bates 00001." Plaintiffs' exhibits are designated as "P-" in accordance with their exhibit number, as well as the Bates number(s) on each page(s) referenced (where Bates labeled). Joint Exhibits are designated "J-" in accordance with their exhibit number, as well as the Bates number(s) on each page(s) referenced (where Bates labeled). Citations to the transcript of the hearing are designated as "T.," followed by the Volume and page number(s).

[6] [redacted]'s combined vision and hearing loss results in increased difficulty with spatial awareness. (T. Vol. I pp. 225-26).

3.

[redacted] was described as a bright student, who accepts a challenge well, and who is driven by academic success. (T. Vol. I p. 223; T. Vol. VII p. 1652). He has an "I-can-do-it" attitude. (T. Vol. VII p. 1690). He is a five-time National Braille Challenge winner, which is a competition, similar to the national spelling bee, held in Los Angeles, California. (T. Vol. I pp. 130-132). He competes against sighted peers in jiu-jitsu, karate, and chess. (T. Vol. III pp. 511-512). [redacted] has aspirations of attending Georgia Tech and becoming an astronaut. (T. Vol. II pp. 397-398; P-122 Bates 00840). [redacted] was voted "most likely to succeed" by his fifth grade peers. (T. Vol. VIII p. 2071).

4.

[redacted] was initially determined to be eligible for special education services on October 24, 2007. (J-4 Bates 00083). His primary eligibility category is VI, relating to his complete vision loss. (J-4 Bates 00083). [redacted] is also eligible for special education services under the category Deaf/Heard of Hearing ("D/HH"), based on his partial hearing loss. (J-4 Bates 00083).

5.

[redacted] attended C[redacted] Elementary School from kindergarten through fifth grade with his [redacted]sister [redacted] (T. Vol. III p. 499). C[redacted] Elementary School was [redacted]s neighborhood school. (T. Vol. III pp. 668-70).

6.

C[redacted] Elementary School was one of the District's elementary schools with a Site-Based VI program.[7] (T. Vol. V p. 1005-06; D-78 Bates 0737). There were [redacted] VI students,

[7] Though described more fully below, a Site-Based VI program is, in short, a resource center where the District has chosen to provide VI instruction for students who require it on a daily basis. (D-78 Bates 0737).

including [redacted] who attended C[redacted] Elementary School and were assigned to the Site-Based VI program there. (T. Vol. VII p. 1658; D-80 Bates 0743).

7.

Ms. [redacted] M[redacted]s ("Ms. M[redacted]") is a VI teacher in the District; specifically, in the 2013-2014 school year, Ms. M[redacted] was the teacher assigned to the Site-Based VI program at C[redacted] Elementary School.[8] (T. Vol. VII p. 1634; T. Vol. V p. 1060). Ms. M[redacted] first began providing VI instruction to [redacted] when he was four years old and receiving VI services in preschool. (T. Vol. VII p. 1651). She has been [redacted]s vision instructor for [redacted]s entire elementary school career and has provided over 1,000 hours of direct VI instruction to [redacted] (T. Vol. VII p. 1652). She has thirty (30) years of experience as a VI teacher. (T. Vol. VII p. 1635).

8.

Ms. [redacted] A[redacted] ("Ms. A[redacted]") has been [redacted]s Orientation and Mobility ("O&M") instructor for the past six (6) years. (T. Vol. I p. 219). She has worked with [redacted] for approximately 180 to 200 hours. (T. Vol. II p. 284). O&M instructors are responsible for teaching VI students to travel safely. (T. Vol. IV p. 977).

9.

[redacted]s third grade IEP reflects his Expanded Core Curriculum Needs Summary.[9] (T. VII pp. 1669-1670; D-34 Bates 0359). The ECC Needs Summary states that he is a strong Braille reader, has age-appropriate independent living skills, and enjoys interacting with peers. (D-34 Bates 0359). It also states that he needs to increase his technology skills, including using screen

[8] Although Ms. M[redacted] was assigned to C[redacted] Elementary, her caseload was described as itinerant, and during the 2013-2014 school year she travelled between C[redacted] Elementary and E[redacted] Elementary. (T. Vol. VII p. 1759; D-80).

[9] The Expanded Core Curriculum ("ECC") is a body of knowledge and skills for VI students to enable them to be independent. (T. Vol. IV p. 963-64). The ECC is not part of the general education curriculum but is unique and different. (T. Vol. VII p. 1654; T. Vol. IX p. 2411). It is endorsed by the American Foundation for the Blind and is generally known to be necessary for VI students. (T. Vol. IV p. 963-965; D-40 Bates 0461-0465).

readers, internet research and word processing, and that he has a harder time interacting with peers with whom he is not familiar. (*Id.*)

10.

[redacted]s third grade IEP established goals and objectives related to the ECC, including O&M. (D-34 Bates 0364-0365).

11.

Based upon [redacted]'s third grade current functioning, current goals and objectives, long-range goals, access to the Georgia Performance Standards, and accommodations, the IEP team decided [redacted]'s placement for the remainder of third grade and for fourth grade. (D-34 Bates 0368-0369). [redacted] was to be in the general education setting without support for Language Arts, Math, Science, Social Studies, Music and Art classes with the provision of Braille and tactual materials to access the general education curriculum. (T. VII pp. 1669-1670; D-34 Bates 0368). In addition, [redacted] would receive one (1) hour of daily support from a paraprofessional. (*Id.*) Finally, [redacted] would receive 90 minutes of small group instruction relating to the ECC. (D-34 Bates 369).

12.

Ms. M[redacted] opined that [redacted] was able to learn the third grade curriculum based on his exceptional test scores. (T. Vol. VII p. 1670).

13.

[redacted] began receiving Gifted Education services,[10] based on his results on the Wechsler Intelligence Scale for Children IV and the Renzulli Ratings, on January 27, 2012, while in third grade at C[redacted] Elementary School. (D-34 Bates 0355-0356).

[10] The District's gifted program is known as "Target." (T. Vol. VII p. 1691).

14.

[redacted]s fourth grade IEP reflects his ECC Needs Summary. (T. VII pp. 1688-1692; J-2 Bates 0026-0027). The ECC Needs Summary states that he is a strong Braille reader, with above grade level skills in reading comprehension, spelling and proofreading.[11] (*Id.*) It also states that [redacted] has made progress interacting with his peers and that he has age-appropriate independent living skills. (*Id.*) The ECC Needs Summary further states that [redacted] needs to perfect his system of printing assignments, that he needs to continue working on interacting with peers, that he needs to develop age-appropriate self-advocacy skills, and that he needs to increase his technology skills. (*Id.*)

15.

[redacted]s fourth grade IEP established goals and objectives related to the ECC, including O&M. (J-2 Bates 0031-0033).

16.

Based upon [redacted]s fourth grade current functioning, current goals and objectives, long-range goals, access to the Georgia Performance Standards, and accommodations, the IEP team decided [redacted]s placement for the remainder of fourth grade and for fifth grade. (J-2 Bates 0037-0038). [redacted] was to be in the general education setting without support for Language Arts, Math, Science, Social Studies, Music and Art classes with the provision of Braille and tactual materials to access the general education Curriculum. (J-2 Bates 0037-0038). In addition, [redacted] would receive one (1) hour of daily support from a paraprofessional. (*Id.*) Finally, [redacted] would receive 90 minutes of small group instruction relating to the ECC. (J-2 Bates 0037-0038).

[11] By fourth grade [redacted] had learned the entire Braille code for reading. (T. Vol. VII p. 1695).

17.

[redacted] was able to make academic progress in fourth grade based on his test results. (T. Vol. VII p. 1709). [redacted]s fourth grade Georgia Criterion-Referenced Competency Test ("CRCT") scores reflect "exceeding expectations" in each content area. (D-133 Bates 1135-1138). Mrs. [redacted] testified that [redacted] satisfactorily achieved academic progress in fourth grade at C[redacted] Elementary School. (T. Vol. III p. 537).

18.

Based on the above-described IEP, [redacted] was to receive 90 minutes per day of direct, small-group instruction relating to VI services in fifth grade. (T. Vol. VII pp. 1659-1660, 1664; J-2). All of [redacted]s elementary school IEPs included daily VI instruction, relating to the ECC. (*See e.g.* D-34; J-2; J-4).

19.

Ms. M[redacted] described the manner in which she provided VI instruction to [redacted] in fifth grade. (T. Vol. VII pp.1657-1664, 1666). In the mornings, between 7:15 a.m. and 8:00 a.m., Ms. M[redacted] assisted [redacted] in getting off the bus, printing homework assignments, writing down information in his agenda, and other general housekeeping matters. (T. Vol. VII p. 1658). [redacted] had math class from 9:00 a.m. to 10:30 a.m., during which time Ms. M[redacted] provided both push-in and pull-out services.[12] (T. Vol. VII p. 1659). Ms. M[redacted] would decide if push-in or pull-out

[12] [redacted] had Target classes on Monday and general education classes Tuesday through Friday. (T. Vol. 1 p. 64). Sometimes Ms. M[redacted] would provide instruction to [redacted] while remaining in the general education math classroom, which has been referred to as "push-in." (T. Vol. VII pp. 1659-1660). Ms. M[redacted] pushed into [redacted]'s Target math class on Mondays and his general education math class on Tuesdays through Fridays. When assignments were lengthier, Ms. M[redacted] would remove [redacted] from the general education classroom and work in her smaller classroom, which has been referred to as "pull-out." (T. Vol. VII pp. 1659-1660). She usually only pulled [redacted] out of his math class once per week, for anywhere from 10 minutes to something less than the entire 90 minute period. (T. Vol. VII pp. 1661, 1731, 1747). It would have been highly unlikely that she would pull him out of his math class for the entire 90 minutes. (T. Vol. VII p. 1731). When she did not pull him out of his math class, she would provide some direct instruction in the math class, if he needed it. (T. Vol. VII pp. 1659-61). However, there were many days that [redacted] did not need help and Ms. M[redacted] just sat in the math class with him. (Tr. Vol. I pp. 64-66). There were some days that they did not speak at all. (*Id.*) Although Ms. M[redacted] testified that she was providing direct instruction to

would be appropriate on a daily basis depending on the type of instruction happening in the classroom. (T. Vol. VII p. 1659). Between 11:40 a.m. and 11:55 a.m., which was a transition period, Ms. M[redacted] would take [redacted] to a separate classroom to provide specific VI instruction in technology or other ECC curriculum. (T. Vol. VII p. 1662).

20.

Ms. M[redacted] considered all the services she provided to [redacted] as "small group." (T. Vol. VII p. 1660). Ms. M[redacted] provided [redacted] with specific VI services, which were distinct and different from the curriculum being taught in the general education classroom. (T. Vol. I pp. 66-67; T. Vol. VII p. 1660).

21.

In addition, Ms. M[redacted] communicated on a daily basis with [redacted]'s general education teachers regarding preparing materials, concepts, and curriculum. (T. Vol. VII p. 1665).

22.

Ms. M[redacted] believes she probably discussed with Plaintiffs the general manner in which she taught [redacted]s vision services prior to the March 2014 IEP team meeting. (T. Vol. VII p. 1667). However, she does not think she ever discussed her whole weekly schedule with them. (*Id.*)

23.

Ms. A[redacted] provided [redacted]s O&M instruction at C[redacted] Elementary School either before or after school. (T. Vol. I p. 227). O&M services were scheduled in collaboration with the school's schedule, the teachers, and [redacted]s parents by the O&M instructor. (T. Vol. II p. 284).

[redacted] "close to the 90 minutes" per day, the record and the times recounted by her do not support such a finding. (T. Vol. I pp. 62-66; T. Vol. VII pp. 1658-66, 1730-32, 1747). The record does support a finding that she was *available to* [redacted] for more than 90 minutes per day, but it does not support that she was providing or that he required *direct instruction* for 90 minutes every day. (*Id.*)

24.

[redacted] was able to make academic progress in fifth grade as demonstrated by his test results. (T. Vol. VII p. 1709). [redacted]s fifth grade CRCT scores reflect "exceeding expectations" in each content area. (D-134 Bates 1173-1176).

25.

[redacted]s transcript reflects the following achievements in fifth grade:

- Reading: 93
- Language Arts: 97
- Mathematics 5: 97
- Science 5: 94
- Social Studies 5: 97
- Health 5: 94

- Days Absent: 0
- Days Tardy: 1

(D-126 Bates 0979-0980).

26.

In fifth grade, [redacted] participated in various extracurricular activities, such as chess club, jiu-jitsu, karate, and beep kickball. (T. Vol. I pp. 109-110, 54-56). Beep kickball is a sport similar to kickball for VI students in which the ball beeps.[13] (T. Vol. I pp. 55-56). Chess club and beep kickball were school-sponsored activities. (*See* T. Vol. I pp. 109-110; T. Vol. IV p. 987). The chess club met after school at C[redacted] Elementary School. (T. Vol. I pp. 109-110).[14]

[13] Elementary, middle, and high school students participate in beep kickball. (T. Vol. II p. 269). For the 2014-2015 school year, beep kickball is scheduled to start in the spring at C[redacted] Elementary School. (T. Vol. I p. 56; T. Vol. IV p. 989). Beep kickball was not part of [redacted]'s IEP. (J-4). At the hearing, the District presented testimony that it could consider starting beep kickball later, in order to allow [redacted] time to arrive, or streamlining transportation, by departing earlier or transporting [redacted] directly to C[redacted] Elementary School in order to enable [redacted] to arrive on time. However, the logistical issues of allowing [redacted] to participate in extracurricular activities were not discussed in the March IEP meeting, despite Mrs. [redacted] raising a concern about [redacted] being able to participate in certain extracurricular activities. (T. Vol. IV p. 988; 991, 993-994; J-4 Bates 83-118; T. Vol. VI pp. 1239-40).

[14] Ms. M[redacted] opined that [redacted] would not need to participate in chess club in order for [redacted] to receive a FAPE because it is an extra-curricular activity which does not directly impact the classroom. (T. Vol. VII pp. 1681-1682).

In the 2013-2014 school year, approximately 12 students from across the county participated in beep kickball, which was hosted at C[redacted] Elementary School. (T. Vol. IV. p. 987).[15]

27.

[redacted] has been participating in karate since age five and jiu-jitsu since the third grade. (T. Vol. I pp. 54-56; T. Vol. II p. 509). Currently, those classes are on Mondays, Wednesdays, and Fridays.[16] Jiu-jitsu is from 5:00 p.m. to 6:00 p.m., and karate is from 6:00 p.m. to 7:15 p.m.[17] (T. Vol. I pp. 54-56). In jiu-jitsu and karate, [redacted] has been able to develop a peer group, separate and distinct from his C[redacted] Elementary School peers. (T. Vol. I p. 128).

28.

[redacted] also participates in the M[redacted] Chess Club, which meets Wednesday nights at a local McDonalds. (T. Vol. I p. 54). In the M[redacted] Chess Club, [redacted] competes against adults in the community. [redacted] is able to participate in the M[redacted] Chess Club without his C[redacted] Elementary School peers. (T. Vol. I pp. 119-120). He has been able to comfortably interact with the adults in this chess club. (T. Vol. I p. 120). Plaintiffs produced no evidence that assignment to D[redacted] Middle School would prevent [redacted] from participating in the M[redacted] Chess Club.

[redacted] explained that he did not need to participate in chess club, per se, in order to be successful in school because another club, such as the Mindbenders club, which he is participating in at P[redacted] Middle School, will suffice.[14] (T. Vol. I pp. 112-119). Even then, [redacted] testified that he could be successful in school without an extra-curricular club, such as the Mindbenders club at P[redacted] Middle School. (T. Vol. I p. 113).

[15] Ms. A[redacted], who was one of the team sponsors for beep kickball, opined that beep kickball was not necessary for [redacted] to access his education. (T. Vol. II p. 295).

[16] [redacted] testified that he did not have a problem missing jiu-jitsu and karate on the days that he played beep kickball. (T. Vol. I p. 56).

[17] Jiu-jitsu and karate are not school sponsored activities. (T. Vol. II pp. 509-10). Ms. M[redacted] opined that [redacted] would not need to participate in jiu-jitsu or karate in order for [redacted] to receive a FAPE because it is an extra-curricular activity which does not directly impact the classroom. (T. Vol. VII pp. 1681-1682). [redacted] testified that he could be successful without jiu-jitsu and karate, but that he would not be "as successful." (T. Vol. I p. 94). Plaintiffs provided no evidence that assignment to D[redacted] Middle School would have any impact on or interfere in any way with the karate class from 6:00 p.m. to 7:00 p.m.

The District's VI Program

29.

Dr. [redacted] E[redacted] ("Dr. E[redacted]") is the District's special education supervisor, responsible for the District's D/HH program, VI program, assistive technology ("AT") services, and adaptive physical education ("AdPE") services. (T. Vol. IV p. 940).

30.

The District offers travelling ("itinerant") teachers for students who require less than daily services and also offers dedicated Site-Based programs for some students who require daily services from a certified VI instructor. (T. Vol. V p. 1005; D-78 Bates 0737-0734). Specifically, relevant to this matter, the District offers the following:

- Itinerant Services – for students whose goals can be met in their neighborhood school with minimal support for needs related to their vision loss. Itinerant VI services are also available for eligible students who are serviced primarily by other disability areas.

- Site-Based Services – for students who need daily service/specialized instruction.

(T. Vol. V p. 1005; D-78 Bates 0737-0734).

31.

To determine appropriate VI services, the IEP team examines a student's strengths and weakness, as well as current functioning in order to establish goals and objectives. (T. Vol. V p. 1008). The IEP team, then, determines how much time of direct instruction is necessary for the student to meet those goals and objectives. (*Id.*) If the student requires everyday instruction from a certified VI instructor to address those individualized goals and objectives, then the student is generally assigned to a location with a Site-Based VI program. (*Id.*)

32.

A student may receive daily VI instruction from an itinerant teacher at his/her neighborhood school when the child's primary eligibility requires direct specialized instruction, which is not offered at one of the schools with a Site-Based VI program. (T. Vol. p. 1009). For example, a student whose primary eligibility category relates to autism might receive daily VI instruction in lieu of attending a Site-Based VI program, where services for the student's primary eligibility are not available. (T. Vol. V p. 1009).

33.

The District has used this model for VI services for over 20 years. (T. Vol. V p. 1007).

34.

Whether a student receives instruction from a site-based instructor or an itinerant instructor, the District considers the student's placement to be small group when receiving such service. This is true even if the instruction is provided by the teacher to one student. (T. Vol. IV p. 981; T. Vol. VII p. 1663).

35.

In order for the VI program to produce materials in Braille, a specialized printer, called a thermoform machine or embosser, and other equipment are necessary to create both literary texts and tactile graphics (such as maps and calendars) in Braille. The cost of one of these printers is approximately $5,000.00, and the cost of a box of paper is approximately $50.00. Such a printer is necessary for VI students with [redacted]s needs to access all of the educational materials. (T. Vol. IV p. 971-973).

36.

Braille Clerk is a dedicated position within the VI program. Braille clerks are responsible for converting educational materials into Braille with specialized computers and printers. (T. Vol. VI p. 973-974).

37.

Dr. E[redacted] opined that it would not be efficient for a Braille Clerk to be located off-site from a VI student who requires daily VI services because teachers' lesson plans may change, necessitating a same-day turnaround on creating assignments and materials in Braille. (T. Vol. V pp. 1140-1141). Furthermore, when the Braille Clerk is located off-site from the student who requires daily VI services, and that student's teachers, there could be difficulties establishing appropriate communications in order to ensure that the student receives the appropriate Braille materials.[18] (T. Vol. VII pp. 1597-1598).

38.

A BrailleNote is an electronic device that converts print to Braille and Braille to print. (T. Vol. I pp. 43, 45, 47-48). Use of a BrailleNote does not completely replace the need for a Braille Clerk for a student requiring daily VI services because the device does not always create an easy to read document. (T. Vol. VII p. 1598). However, it is clear that [redacted] is extremely proficient with his BrailleNote and that he can obtain many of his assignments and lessons from his teachers via his BrailleNote. (T. Vol. I pp. 45, 47-48). Notwithstanding, a BrailleNote

[18] While *access* to Braille materials created by a Braille clerk is necessary for [redacted] an on-site Braille clerk or Braille embosser is not necessary for [redacted] to obtain educational benefit. (*See* T. Vol. IX pp. 2307-09). Mr. A[redacted], the VI teacher at D[redacted], acknowledged that since [redacted] has been at P[redacted] Middle School, pursuant to the Stay Put Order, [redacted]'s Braille materials have been created at D[redacted] and sent to him at P[redacted]. Mr. A[redacted] further acknowledged that he had not heard from any teachers at P[redacted] that there have been any problems receiving the Braille materials. Additionally, as of the hearing, [redacted] had all "A"s in his classes at P[redacted], without having a Braille clerk or Braille embosser on the premises. (T. Vol. VII p. 1611; T. Vol. I p. 69). Thus, having a Braille clerk and Braille embosser on-site can be beneficial to the VI student and convenient for the District because it does not have to plan far in advance or transport the materials to the student. However, it is not necessary to have the Braille Clerk or Braille embosser on-site for the student to obtain educational benefit.

cannot make all Braille math problems accessible; thus, access to a Braille Clerk is still necessary even when a student is proficient with a BrailleNote. (T. Vol. VII p. 1672). As demonstrated in the hearing, [redacted] used the Perkins Brailler, the larger device resembling a type-writer, to show his work for complicated math problems. (P-132).

39.

A VI paraprofessional is a dedicated position within the VI program. The VI paraprofessional is responsible for providing general, flexible support to a VI student that requires daily VI services, as needed. (T. Vol. IV p. 976).

40.

As stated previously, an Orientation and Mobility ("O&M") instructor is responsible for teaching a VI student to travel safely. (T. Vol. IV p. 977).

41.

A VI Instructor is responsible for teaching the other components of the ECC. (T. Vol. IV pp. 965-66).

42.

A Site-Based VI program typically includes a Braille Clerk, VI paraprofessional(s), a VI instructor, and an O&M instructor. (T. Vol. IV pp. 976-77).

43.

The District currently serves 28 students through Site-Based VI programs. Those children are served by seven (7) VI teachers, six (6) Braille Clerks, and five (5) paraprofessionals. In order to serve all those students through itinerant services in their neighborhood schools, the District would need to hire an additional six (6) VI teachers and some paraprofessionals and Braille Clerks. (T. Vol. V p. 1096; T. Vol. VIII p. 1867). The cost of

serving all VI students at their neighborhood school would be approximately $1.1 million, which is cost prohibitive. (T. Vol. VIII pp. 1873-1874).

44.

The District currently has allocated funding for an additional two VI instructors but has been unable to find qualified candidates despite a national search. (T. Vol. VIII pp. 1871-72).[19]

45.

Whereas a VI resource teacher is based at a school with a Site-Based VI program, an itinerant VI teacher may travel to various schools to serve children at those schools; however, both the resource teacher and the itinerant teacher hold the same certification and are considered the same position by the District. (T. Vol. V pp. 1069-1070).

46.

The benefits of attending a school with a VI Site-Based program include having the VI teacher available to collaborate with the general education teachers on an as-needed basis, assurance that all classroom materials are produced in Braille on-time as needed, and the benefit of having the VI instructor on-site to troubleshoot any problems that may arise. (T. Vol. VI p. 1449).

The ECC is Not Part of the General Education Curriculum

47.

The ECC is a body of knowledge and skills for VI students to enable them to become independent. (T. Vol. IV p. 964). To that end, Ms. M[redacted] explained that the ECC standards

[19] The District has contacted every university with a VI certification program and contacted other school districts in search of candidates to fill these positions; however, the District has been unable to fill the vacancies. Notably, the State of Georgia does not have a college or university which offers teacher certification in VI. (T. Vol. V pp. 1099-1101; D-99 Bates 0806).

are not part of the general education curriculum but are "very important" for VI students.[20] (T. Vol. VII pp. 1654-1655). Mr. [redacted] A[redacted] ("Mr. A[redacted]") is a VI teacher with the District. (T. Vol. VI p. 1388). Mr. A[redacted] explained that the ECC is "the language that we use to talk about the disability specific needs that students who are blind and visually impaired have." (T. Vol. VI p. 1390). It provides "the skills that give students access to the general curriculum." (*Id.*)

48.

The ECC covers nine (9) unique educational needs for VI students:

- Compensatory or Functional Academic Skills, which is the manner in which a student adapts for vision loss, such as Braille;
- Orientation and Mobility, which is learning how to find items and travel;
- Social Interaction Skills, which is learning how to develop appropriate social skills, such as facing a peer when conversing;[21]
- Independent Living Skills, which includes being able to function outside of school, such as shopping, cooking, and using the restroom;
- Recreation and Leisure Skills, which includes being able to access sports, games, and hobbies;
- Career Education, which is designed to identify careers or college plans;
- Technology, which is a tool to be mastered in order to enable VI students to access and share information and is essential to the ECC;
- Sensory Efficiency Skills which is instruction in the use of residual vision and other senses; and.
- Self-Determination, which is empowering a student to advocate for his or her own needs.

(T. Vol. IV p. 967; 975; 982; 985; 986; 989; 995-996; and D-40 Bates 0461-0465).

[20] Plaintiffs' expert witness, Dr. [redacted] S[redacted] ("Dr. S[redacted]") also testified that the ECC curriculum is not taught in the general education curriculum. (T. Vol. IX p. 2411).

[21] For VI students, social skills must be carefully, consciously, and sequentially taught because nothing in the existing core curriculum addresses the need in a sufficient manner. (T. Vol. IV p. 983; D-40 Bates 462)

49.

Instruction in the ECC is essential as it gives students the skills necessary to be independent. (T. Vol. VII p. 1655).

50.

The ECC skills build year-to-year, so that there is a progression of development in ECC skills, like building blocks. (T. Vol. VII pp. 1677-1678).

The Locations for the Middle School Site-Based VI Program

51.

For the 2014-2015 school year, the District created two feeder patterns for its Site-Based VI program: one on the west side of the county and one on the east side. (T. Vol. V p. 1006).

52.

For the 2014-2015 school year, the District offered middle school Site-Based VI programs at L[redacted] M[redacted] Middle School and D[redacted] Middle School under the new east/west plan. Previously, the only Site-Based VI program offered for middle school was located at S[redacted] Middle School. (T. Vol. V pp. 1005-1007).

53.

On October 7, 2013, Dr. E[redacted] submitted a memorandum to District leadership proposing the new locations for Site-Based VI programs. (T. Vol. V pp. 1012-1015; P-25). Dr. E[redacted] previously received complaints from parents of VI students about consistency in locations and school performance at some of the previous locations. (*Id.*) Dr. E[redacted] recommended continuing the Site-Based VI program because it offered a sensible, cost-efficient delivery model, which allows VI students to access their VI staff on a daily basis; however, she recommended new locations that would offer advanced programs, advanced courses, and after-

school activities that were not currently available at the schools with VI Site-Based programs. (*Id.*)

54.

Dr. E[redacted] received approval to proceed with the proposal to create Site-Based VI programs at the new locations in February 2014. (T. Vol. V p. 1018).

55.

In March 2014, Dr. E[redacted] asked the VI teachers to provide her with the names of students who may need the Site-Based VI program so that she could begin logistically planning for the 2014-2015 school year. (T. Vol. V pp. 1022-1025; D-91 Bates 791). This information was purely preliminary because it could not be finalized until the students' IEPs were completed. (*Id.*) Nonetheless, the preliminary information was necessary to ensure that new locations had appropriate personnel and equipment to start the 2014-2015 school year. (*Id.*)

56.

[redacted] was not assigned to D[redacted] Middle School until after the IEP team decided that he required daily services from a VI teacher. (T. Vol. V p. 1020).

57.

It is 13.22 miles from [redacted]s home to L[redacted] M[redacted] Middle School. (T. Vol. V p. 1020). It is 10.78 miles from [redacted]s home to D[redacted] Middle School. As such, D[redacted] Middle School is the closest school to Plaintiffs' home that offers a Site-Based VI program. (*Id.*)

58.

Dr. E[redacted] denied that [redacted] was assigned to D[redacted] Middle School in order to populate the program or increase funding for the program.[22] (T. Vol. V p. 1021).

[22] However, in a memo to her supervisors, Dr. E[redacted] wrote: "If we provide alternative location options for the three students (that I know of now) who would definitely want them, then our projected locations at V[redacted], L[redacted]

59.

D[redacted] Middle School employs a full-time VI instructor, a full-time Braille Clerk, a full-time VI paraprofessional, and an itinerant O&M instructor. (T. Vol. IV p. 977; T. Vol. VI p. 1426).

60.

P[redacted] Middle School is [redacted]'s neighborhood school. (T. Vol. VII p. 1787).

61.

P[redacted] Middle School has an itinerant VI instructor, who provides services 1-2 days per week. (T. Vol. IV, p. 978). P[redacted] Middle School does not employ a Braille Clerk or VI paraprofessional(s), nor does P[redacted] Middle School possess the printers necessary to create materials in Braille. (T. Vol. IV p. 978-980).

62.

Currently, the District does not have an itinerant VI that could serve [redacted] with daily services at P[redacted] Middle School without doing detriment to other students. (T. Vol. V pp. 1097-1098). In other words, if Dr. E[redacted] assigned an itinerant VI teacher to provide [redacted] with daily services at P[redacted] Middle School, some other student would have to do without.[23] (*Id.*)

63.

D[redacted] Middle School has approximately 200 total more students than P[redacted] Middle School. (T. Vol. VIII p. 1885). D[redacted] Middle School has a lower transient rate, which is the number of students who move in and out of the school. (*Id.* at 1886). D[redacted] Middle School has higher test scores than P[redacted] Middle School. (*Id.* at 1889-90).

M[redacted] and D[redacted]] would not have sufficient students to be viable, and the plan falls apart." (P-32; T. Vol. IV 1091).

[23] As stated above, the District has openings for two VI teachers that it has not been able to fill. (T. Vol. V pp. 1097-98).

The March 20, 2014, IEP Team Meeting

64.

The District held an IEP team meeting for [redacted] on March 20, 2014, in order to determine placement for the remainder of 5th grade and for the 6th grade transition to middle school in the 2014-2015 school year. (J-4 Bates 83-118).

65.

In attendance at the March 20th IEP team meeting were the following:

- Dr. E[redacted] as the local educational agency representative;
- Ms. M[redacted] as [redacted]'s VI instructor;
- Ms. D[redacted] as a middle school VI instructor;
- Ms. A[redacted] as [redacted]s O&M instructor;
- Ms. [redacted] ("Ms. Mar[redacted]) as [redacted]'s Deaf/Hard of Hearing teacher;
- Ms. [redacted] ("Ms. S[redacted]") as [redacted]s 5th grade teacher;
- Ms. [redacted] ("Sch[redacted]") as [redacted]'s 5th grade Target (gifted) teacher; and
- Plaintiffs, including [redacted]

(T. Vol. V p. 1035, 1038-1039; J-4 Bates 83-84).

Prior to the March 20, 2014 IEP Team Meeting, Dr. E[redacted] Notified Parents of the New Site-Based VI Program Locations

66.

On March 10, 2014, Dr. E[redacted] spoke at a meeting for parents of students receiving VI services in order to announce the new locations for Site-Based VI programs in the 2014-2015 school year. (T. Vol. V pp. 1035-1036). Dr. E[redacted] offered, and did in fact have, individual sit-

down meetings with parents who had questions about the locations. (*Id.*) Plaintiffs did not attend this meeting.[24] (*Id.*)

67.

On March 11th or 12th, 2014, Dr. E[redacted] had a phone call with Mrs. [redacted] to discuss the new locations. (T. Vol. V pp. 1035-1036). Dr. E[redacted] called all of the parents who were unable to (or did not attend) the March 10th meeting, when the new locations were announced. (*Id.*) In the phone call between Dr. E[redacted] and Mrs. [redacted], Dr. E[redacted] explained that the District was responding to parent concerns by changing the locations for Site-Based VI services and that if [redacted] continued to require daily services, he would be assigned to D[redacted] Middle School. (T. Vol. V p. 1036). Mrs. [redacted] responded that she wanted [redacted] to remain at his neighborhood school.[25] (T. Vol. V p. 1035-1037).

Ms. [redacted] M[redacted] Sent Plaintiffs a Draft IEP

68.

Ms. M[redacted] created a draft IEP which was sent to the Plaintiffs. (T. Vol. V p. 1043; T. Vol. VI p. 1350; D-64 Bates 586). To create a draft IEP, Ms. M[redacted] would set up the date for the meeting, collect current functioning from teachers, gather testing information, and review the goals and objectives from the previous year. Then, Ms. M[redacted] would draft sections if the IEP, which would be revised during the meeting. (T. Vol. VII pp. 1685-1686).

69.

Ms. M[redacted] also included the Parental Rights with her email to the Plaintiffs. (T. Vol. VI p. 1350; D-64 Bates 586). Mrs. [redacted] received the Parental Rights on March 18, 2014. (T. Vol. III p. 686)

[24] Mrs. [redacted] received the invitation to the meeting. (T. Vol. III p. 544)
[25] Mrs. [redacted] testified that before the IEP meeting her mind was made up that [redacted] would attend P[redacted] Middle School. (T. Vol. III pp. 694-695).

70.

The draft IEP did not include definitive information regarding [redacted]'s placement. (T. Vol. VI p. 1351; D-64 Bates 601). However, it did contain proposed goals and objectives, which were slightly modified during the March 20, 2014 IEP team meeting and which Ms. M[redacted] opined required daily VI services. (D-64 Bates 0597-0598; J-4 Bates 00095-00096; T. Vol. VII pp. 1721-22).

71.

During the IEP team meeting, Dr. E[redacted] typed notes directly into the IEP as the meeting transpired. (T. Vol. V p. 1043).

72.

After the March 20, 2014, IEP team meeting, Ms. M[redacted] was responsible for finalizing the IEP by ensuring that it was thorough and accurate. (T. Vol. V p. 1044).

During the March 20, 2014, IEP Team Meeting
[redacted]'s Current Functioning was Discussed

73.

[redacted]s current functioning and present levels of performance were thoroughly discussed during the IEP team meeting. (T. Vol. V p. 1039; J-4 Bates 85-86).

74.

The discussion of [redacted]s current functioning and present levels of performance included discussion regarding his performance on standardized tests, his progress in each content area, and an overview of his progress towards his ECC goals and objectives. (T. Vol. VI p. 1360).

75.

In the Fall of 2013 (5th grade), [redacted] scored in the 96th percentile as a composite score on the Iowa Test of Basic Skills ("ITBS"). (T. Vol. V p. 1040; J-4 Bates 85). [redacted] scored in the

99th percentile on the ELA portion of the ITBS; [redacted] scored in the 98th percentile on the Reading portion of the ITBS; [redacted] scored in the 87th percentile on the Math portion of the ITBS; [redacted] scored in the 95th percentile on the Social Studies portion of the ITBS; [redacted] scored in the 92nd percentile on the Science portion of the ITBS. (*Id.*) The ITBS is a comprehensive assessment designed to measure student progress in major content areas. (*Id.*) These tests scores were discussed during the IEP team meeting. (*Id.*)

76.

In the spring of 2013 (4th grade), [redacted] exceeded expectations in every area of the CRCT, which is designed to measure how well students acquire the skills and knowledge covered by the curriculum for their grade level as described in the Georgia Performance Standards. (T. Vol. V p. 1041; J-4 Bates 85). These tests scores were discussed during the IEP team meeting. (*Id.*)

77.

Dr. E[redacted] opined that [redacted] must have been able to access his education in 4th and 5th grade based on the standardized test scores because he was performing exceedingly well. (T. Vol. V p. 1041).

78.

In addition to standardized test scores, all the meeting participants discussed his strengths, weaknesses, and learning preferences. (T. Vol. V p. 1042).

79.

Ms. S[redacted] stated, in the IEP team meeting, that [redacted]'s strengths included self-confidence, self-control, taking initiative, curiosity, organization, willingness to volunteer, following multi-step directions, and cooperativeness. (T. Vol. V p. 1042; J-4 Bates 85).

80.

Ms. S[redacted] characterized [redacted]s weaknesses, as follows: "[redacted] needs reminders to keep head up or face the direction of person whom he is speaking with, self-confidence sometimes can be perceived as arrogance by peers, likes to be the leader, and sometimes has difficulty listening/accepting others' ideas as valid." (J-4 Bates 86).

81.

Ms. Sch[redacted] stated, in the IEP team meeting, that [redacted]s strengths included critical thinking, evaluative thinking, and algebraic reasoning. (T. Vol. V p. 1042; J-4 Bates 86).

82.

Ms. Sch[redacted] stated, in the IEP team meeting, that [redacted]'s weaknesses included difficulty accepting other's opinions and difficulty remembering the layout of the classroom and its relationship to the C[redacted] Elementary School building. (T. Vol. V p. 1042; J-4 Bates 86).

83.

During the current functioning discussion, Ms. M[redacted] provided the IEP team with information regarding [redacted]'s understanding of the ECC based on her assessments of [redacted] (T. Vol. VII pp. 1717-1718; D-111 Bates 858-859; J-4 Bates 89-90).

Mrs. [redacted] Presented Parental Concerns

84.

During the parental concerns section of the IEP team meeting, Mrs. [redacted] presented a handwritten list of specific concerns based on the phone call between Dr. E[redacted] and Mrs. [redacted] about the possibility that [redacted] would be assigned to D[redacted] Middle School. (T. Vol. V pp. 1044-1045; T. Vol. III pp. 546-547; P-27; J-4).

85.

Mrs. [redacted] presented the following eight (8) enumerated concerns during the parental concerns section of the IEP team meeting about the possibility that [redacted] may attend the Site-Based VI program at D[redacted] Middle School:

1. Change in Peer Groups[26] – Mrs. [redacted] stated that [redacted] has neighborhood friends with whom he goes to class and rides the bus, and that middle school is not an appropriate time to change peer groups because [redacted] may be "exposed to drugs or other negative behaviors."
2. Academic Rigor – Mrs. [redacted] stated that they were pleased with the academic rigor at C[redacted] Elementary School because he was "surrounded by very intelligent students."
3. Past Success – Mrs. [redacted] stated that the Board of Education had recognized [redacted] for his past success.
4. [redacted] Sister – Mrs. [redacted] stated that [redacted]'s [redacted] sister will attend P[redacted] Middle School in the fall.[27]
5. Cobb County Taxpayer and Teacher – Mrs. [redacted] stated that she currently teaches and nine (9) of her students do not live in the county. In addition, Mrs. [redacted] stated that "I have not taken health benefits from CCSD for 20 years, saving CCSD thousands of dollars."
6. Travel – Mrs. [redacted] stated that [redacted] participates in jiu-jitsu and karate three days a week, and she expressed concerns that on a snow day, [redacted] may not be able to get home and play in the snow with friends.[28]
7. Attorney Fees – Mrs. [redacted] stated that the District should not have to spend money on attorneys to defend this case because that money could be better spent on [redacted]s Braille materials.

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[26] Despite Plaintiffs' assertion that [redacted] would be unable to make new friends if assigned to D[redacted] Middle School, [redacted]'s past experience shows that he was able to make new friends when placed in a class with peers he did not know. (T. Vol. IV pp. 819-823; D-54 Bates 513-514; D-81 Bates 746). The evidence also shows that [redacted] was able to create a new peer group in jiu-jitsu and karate as well as being comfortable with a group of non-C[redacted] peers in the M[redacted] Chess Club. (T. Vol. I pp. 128, 119-120). Ultimately, Ms. M[redacted] opined that [redacted] would not need to be educated with his peers from C[redacted] Elementary School to access his education because [redacted] is able to independently learn in the classroom. (T. Vol. VII pp. 1674-1675).

[27] [redacted] was not in academic classes with his sister during the 5th grade year, but they were in physical education together. (T. Vol. I p. 122; T. Vol. III p 530). Ms. M[redacted] opined that he would not need to be in the same class as his sister in order to access his education because he was not in the same class as her in fifth grade. (T. Vol. VII p. 1674).

[28] Ms. M[redacted] opined that [redacted] would not need to participate in karate or chess club in order to access his education because those are extra-curricular activities which do not directly impact the classroom. (T. Vol. VII pp. 1681-1682). When Mrs. [redacted] read her concerns to the IEP team, she did not raise specific concerns about [redacted] being able to participate in middle school clubs. (T. Vol. VI p. 1334). Nor did she mention chess club or beep kickball.

8. Neighborhood Friends – Mrs. [redacted] again reiterated that [redacted] should be able to go to school with "his friends in the neighborhood and his twin sister."

Mrs. [redacted] also stated in her note that [redacted] should "attend the same school he would attend if he were not handicapped" under the heading "Least Restrictive Environment." (T. Vol. V pp. 1045-1046; P-27).[29]

86.

After Mrs. [redacted] read her concerns to the team, Dr. E[redacted] stated that these concerns related to location and that the team did not decide location. She told Mrs. [redacted] that she would speak to the family about any concerns they had with the location after the meeting. (T. Vol. V pp. 1046-47).

87.

Dr. E[redacted]' statement was interpreted by at least one member of the IEP team as follows:

Q. Was there – what was said in response to the A's?

A. We were told as a committee that we were not talking about location in the IEP, so we were told that we could not or would not discuss the concerns that she – so we didn't.

Q. When you say that you were told that location wasn't up for discussion, did that happen during the meeting?

A. Yes.

Q. And who said that?

A. Dr. E[redacted].

(T. Vol. VII p. 1715).

[29] Dr. [redacted] S[redacted] ("Dr. S[redacted]"), Assistant Superintendent Special Student Services, testified that the District would discuss location in an IEP meeting if it appeared that location could affect a student's ability to receive a FAPE. In reviewing Mrs. [redacted]'s parental concerns, Dr. S[redacted] did not believe FAPE was implicated because these concerns did not show that [redacted] would be unable to receive a FAPE at D[redacted] Middle School. (T. Vol. VIII p. 2005). However, she did not provide any testimony about whether the District would discuss location in an IEP team meeting if LRE concerns were raised.

88.

At the hearing, Dr. E[redacted] acknowledged that there are aspects of location that can affect whether a student will receive a FAPE or that could affect whether the student will receive a FAPE in the least restrictive environment. (T. Vol. V pp. 1123-24). However, she did not allow the team to discuss location during the March 20, 2014 IEP meeting.[30]

89.

In a memo entitled "Proposal to Leadership Concerning Location of VI Program Resource Sites," Dr. E[redacted] discussed a parental concern that had been relayed to her. (P-25). Specifically, she wrote, as follows:

> Parental concerns include the fact that blindness can lead to significant challenges with the students' ability to build and maintain friendships. Our current VI Resource locations require that the students 'start over' with entirely new peer groups when they move from elementary to middle, and again when they move from middle to high school. This is, in my view, a very valid concern, and one that we, the district, should address. In considering the whole child, it is detrimental to the students' social/emotional well-being to have separate peer groups each time they change levels.

(*Id.*) Notwithstanding, Dr. E[redacted]' previously expressed opinion, she did not allow the IEP team to discuss Mrs. [redacted]'s concern regarding [redacted] losing his peer group if he were to go to D[redacted] Middle School.

90.

During the March 20, 2014 IEP team meeting there was no discussion about any of the following:

- The parents' specific concerns[31]

[30] It is clear that the District has decided that the particular school where the student's services will be provided is not to be discussed by the IEP team. (T. Vol. VIII p. 1942).

[31] (T. Vol. III pp. 547-48; T. Vol. VII p. 1715). At the hearing, Ms. M[redacted] testified that the parental concerns should be discussed by the IEP team. (T. Vol. VI p. 1294).

- The specifics of how his VI services were actually being delivered (i.e., the amounts of time that he was actually pulled out of class or the amount of time the VI teacher spent providing direct services in his math class) and that the placement at D[redacted] was potentially more restrictive[32]

- The possibility of providing VI services by an itinerant teacher at his home school[33]

- Transportation to/from D[redacted][34]

- The practical effects that the 52-minute bus ride would have on the provision of his O&M services, which had been provided before school, or on his extracurricular activities which had occurred after school[35]

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[32] (T. Vol. IV pp. 837-838). If Ms. M[redacted] was pulling [redacted] out during the 11:40 – 11:55 a.m. transition period for 15 minutes four days per week that would be 60 minutes. She also testified that she pulled [redacted] out for part of his math class once per week. Assuming she pulled him out for an entire class, which was not likely, that would be an additional 90 minutes. Finally, if she worked with [redacted] one-on-one in his math class, such that he was not participating with the rest of the class, 10 minutes per day for four days a week, that would be an additional 40 minutes. Adding all of those times together equals a total of 190 minutes per week. The current proposed placement is 45 minutes per day, five days per week for a total of 225 minutes per week. Additionally, [redacted] was not previously required to miss an elective (i.e., a connections class). Ms. M[redacted] acknowledged that there is no evidence that it is necessary to remove [redacted] from the general education curriculum more in 6th grade than was required in 5th grade. (T. Vol. VII p. 1751). It is true that the elementary school schedule has more flexibility than the middle school schedule. It is also true that Ms. M[redacted] testified that she was providing approximately 90 minutes of direct VI instruction per day. (T. Vol. VII p. 1664). However, she could not give accurate or specific amounts of time regarding when she provided direct instruction. For that reason, the actual amounts of time that he was being pulled from the general education curriculum should have been discussed and the fact that the placement at D[redacted] was potentially more restrictive should have been discussed.

[33] (T. Vol. III p. 563; T. Vol. IV pp. 852-53; T. Vol. VI p. 1250; T. Vol. VII p. 1757).

[34] (T. Vol. I p. 252; T. Vol. III p. 605). The proposed bus route and schedule were developed after the IEP team meeting. The proposed schedule shows the bus arriving at D[redacted] at 9:00 a.m., which is 15 minutes after homeroom starts. It also shows him leaving before the end of the school day. (P-58; T. Vol. I pp. 181).

[35] (T. Vol. I 252; T. Vol. VI pp. 1239-40). There was no discussion of how the O&M services would actually be provided. (T. Vol. II p. 291). Rather there was the suggestion that the O&M services could be provided during the study skills class. (T. Vol. II pp. 288, 303). As a practical matter, the O&M services could not be provided during the 52 minute study skills class. (T. Vol. VI p. 1446). In the proposed IEP [redacted] is to receive 45 minutes per day of VI services during the study skills class. (*Id.*; J-4). That would leave seven minutes per day for O&M services. The IEP specifies 45 minutes of O&M services per week, which would be 9 minutes per day if O&M were provided every day. (J-4). However, Ms. A[redacted] testified that she is actually providing 60 minutes of O&M services per week. Ms. A[redacted] acknowledged that if [redacted] went to D[redacted], she would not be able to provide his O&M services in the morning before school because of the long bus ride. (T. Vol. II p. 309). At the hearing, she testified that she could coordinate with the parents to provide services after school and drive [redacted] home. (T. Vol. II p. 291). However, this was not discussed during the IEP team meeting. (Id.) Similarly, because there was no discussion about the practical effects of the 5- minute bus ride, there was no discussion concerning [redacted]'s after school extracurricular activities. [redacted] had previously participated in some after school events sponsored by the school or the District (i.e., chess club and beep kickball). The majority of the extracurricular clubs at D[redacted] meet at 8:15 a.m. (T. Vol. VI pp. 1462). While it is true that Mrs. [redacted] only raised extracurricular activities that were not sponsored by the school (i.e., karate and jiu-jitsu), had the parties engaged in a discussion about the practical effects of the bus ride, these other activities could have been addressed. At the hearing, Mr. A[redacted] testified that he believed he would be able to coordinate

- The potential harm to [redacted] that the change in location may cause[36]

91.

At the hearing, Dr. E[redacted] testified that she considered Mrs. [redacted]'s parental concerns but she did not believe that they reflected any indication that [redacted] would not learn or receive educational benefit from his IEP. (T. Vol. V p. 1047). Dr. E[redacted], at the March 20, 2014, IEP team meeting, did not believe that Mrs. [redacted]'s comments regarding her parental concerns showed that [redacted] would be unable to access his education at D[redacted] Middle School, if he were to be assigned there, because her concerns did not relate to [redacted]s ability to make academic progress. (*Id.*) It appears that Dr. E[redacted] did not consider whether Mrs. [redacted]'s parental concerns reflected any potential LRE issues. At least, she did not provide any testimony that she considered any such issues.[37]

92.

Dr. E[redacted] concluded the parental concerns section of the meeting by offering to speak with Plaintiffs after the meeting if they had continued concerns regarding the location of [redacted]'s services. (T. Vol. III p. 548; T. Vol. V p. 1048; J-4 Bates 00087).

93.

The IEP team meeting continued after Mrs. [redacted] read her concerns, and the team talked about the impact of [redacted]s disability, the middle school study skills class, and the remainder of the IEP process. (T. Vol. V p. 1048).

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with transportation to allow [redacted] to attend extracurricular activities. (T. Vol. VI pp. 1464-66). However, that possibility was not discussed during the IEP meeting.

[36] (T. Vol. VI pp. 1238, 1305). G[redacted] S[redacted], supervisor of the District's school counseling program, opined that the IEP team should discuss the potential harm or impact of the transition to middle school. (T. Vol. VIII pp. 2123-24). Thus, it stands to reason that the IEP team should have discussed the potential harm or impact of a transition to D[redacted].

[37] To be clear, Dr. E[redacted] did offer an opinion during the hearing that she believed that the March 20, 2014 IEP placed [redacted] in the LRE. (*See* T. Vol. VI p. 1348). She did not, however, offer testimony that she considered this issue at the time of the IEP team meeting.

The VI Study Skills Class

94.

Ms. M[redacted] invited Ms. D[redacted] to the IEP team meeting to represent the middle school services. (T. Vol. VII p. 1710; T. Vol. IX p. 2202).

95.

Ms. D[redacted], the then-current middle school VI instructor, explained to the IEP team about the VI Study Skills class.[38] Ms. D[redacted] explained that many students take a VI Study Skills class instead of one of the connections classes. (T. Vol. I p. 243; T. Vol. V p. 1068). She further explained that in the VI Study Skills class students receive direct instruction on all the things that are listed in their IEP goals and objectives, which fall under the umbrella of the ECC. (*Id.*)[39]

96.

Ms. D[redacted] explained, in the IEP team meeting, that if [redacted] were to be placed in a VI Study Skills class, it would replace one of the connections classes. (T. Vol. VII pp. 1711-12; T. Vol. IX pp. 2202-2204). Ms. D[redacted] explained that connections classes are not academic classes; therefore, the student does not miss academic instruction by taking the VI Study Skills class in lieu of a connections class. (T. Vol. IX p. 2199).

97.

In the IEP team meeting, Ms. D[redacted] described the differences between the way middle school and elementary school work. (T. Vol. IX p. 2203). It is her opinion that it is easier to be

[38] Ms. D[redacted] opined that "push-in" services alone are inadequate for providing ECC instruction because it created confusion with the VI instructor and the general education instructor talking over each other while providing completely separate curriculum. (T. Vol. IX pp. 2194-2195, 2201). However, this opinion appears to be premised on the assumption that the VI teacher is providing direct services during the entire class period, which was not what Ms. M[redacted] was doing for [redacted]

[39] Mrs. [redacted] testified that Ms. D[redacted] presented information regarding the middle school VI Study Skills class at the March 20, 2014 IEP team meeting. (T. Vol. III. p. 552).

flexible in elementary school with scheduling services, because middle school has more students with greater responsibilities such that more structure is necessary. (*Id.*) She further testified that the middle school general education classroom includes more independent work, as opposed to direct teacher instruction like elementary school; therefore, the student cannot miss the time for independent work without the risk of missing essential academic work in the general curriculum.[40] (*Id.*)

98.

There was discussion in the IEP team meeting about the VI Study Skills class as an option and that the middle school VI Study Skills class would "mimic" the VI services [redacted] received in elementary school. (T. Vol. I pp. 243-244).

99.

During the IEP team meeting, Ms. A[redacted] said that one option would be to provide O&M services during the Study Skills class.[41] (T. Vol. II pp. 288, 303).

The IEP Team Creates Goals/Objectives and Determines Placement

100.

Ms. M[redacted] led the discussion regarding what [redacted] would need to work on in order to be successful as he moved forward in his academic career. (T. Vol. V p. 1056).

101.

Ms. M[redacted] based the goals and objectives on an ECC Needs Assessment she completed in March 2014. (T. Vol. VII pp. 1716-1718; D-111 Bates 0858-0859). Ms. M[redacted] discussed

[40] Ms. D[redacted]'s opinion appears to be internally inconsistent with her opinion that push-in services create confusion because the VI instructor would be talking over the regular education teacher. If there is less direct teacher instruction and more independent work by the students, then it would seem that there is less opportunity for the teachers to be talking over one another.

[41] However, as noted above, this idea was not really thought through because there is not enough time for that to occur.

the content of the ECC Needs Assessment during the current functioning section of the IEP team meeting. (T. Vol. VII p. 1718). The ECC Needs Assessment, as completed in March 2014, notes weaknesses in use of a live reader, scientific notation, and music notation. (D-111 Bates 0858-0859).

102.

In the March 20, 2014 IEP, [redacted] had eight (8) separate goals with eighteen (18) separate objectives. In short, those goals and objectives state that [redacted] will accomplish the following:

- Maintain Braille literacy skills by adjusting reading speed relative to the content;
- Read and write Nemeth code by learning the eight (8) Nemeth codes and six (6) types of tactile graphics necessary for sixth grade math;
- Use an abacus to perform fifth and sixth grade level math;
- Use an electronic notetaker to complete, print, and hand in documents in the general education classroom;
- Improve use of appropriate technology to assist in classwork, such as a screen reader to perform internet research and word processing;
- Improve self-advocacy and social interaction skills by keeping a personal portfolio;
- Improve orientation and mobility skills; and
- Increase auditory skills by learning to better localize sounds.

(T. Vol. V pp. 1056, 1073-1074; J-4 Bates 95-96).

103.

The goals and objectives were discussed during the IEP team meeting, and Mrs. [redacted] did not object to any of the goals or objectives during the meeting. (T. Vol. III p. 676).

104.

Ms. M[redacted] opined that [redacted]s goals and objectives were appropriate because they were based on his current functioning and the skills that [redacted] needed to develop. (T. Vol. VII p.

1719). Mr. A[redacted] opined that the goals and objectives for [redacted] would be appropriate based on [redacted]s current functioning. (T. Vol. VI pp. 1457-1458). Ms. A[redacted] opined that the O&M goals and objectives were appropriate because they were a continuation of his previous goals and objectives as relative to a new middle school environment. (T. Vol. II pp. 285-286).

105.

There was discussion about the O&M goals and objectives in the IEP team meeting, and there was no objection to the O&M goals and objectives. (T. Vol. II pp. 285-286).

106.

Mrs. [redacted] testified that the goals and objectives were "fine." (T. Vol. III p. 675). Mrs. [redacted] further testified that these goals and objectives would provide [redacted] with FAPE. (T. Vol. III p. 676). Plaintiffs' counsel acknowledged that there was no dispute as to the appropriateness of the goals and objectives. (T. Vol. V pp. 1058-1059).[42]

107.

The placement consideration portion of the IEP team meeting is designed to see what level of support the student needs in order to make appropriate progress and is driven by the goals and objectives and the amount of support necessary to implement the goals and objectives. (T. Vol. V pp. 1062-63).

108.

At the March 20, 2014 IEP team meeting, the IEP team decided placement for both the remainder of fifth grade and for sixth grade. (T. Vol. V p. 1062).

[42] Having acknowledged the appropriateness of [redacted]'s goals and objectives, Plaintiffs' counsel, then, explained that there may be questions regarding how and where the goals and objectives are implemented. (T. Vol. V p. 1058).

109.

For the remainder of fifth grade, the IEP team discussed and decided that [redacted] could be successful in general education without support for Language Arts, Math, Science, Social Studies, Music and Art with the provision of Braille and tactual materials to access the general education curriculum. (T. Vol. V pp. 1064-1065; J-4 Bates 00099-00100). It was also determined that [redacted] would require 90 minutes a day in ECC instruction and 60 minutes a week in O&M because "[t]he severity of [[redacted]'s] disability requires very specialized instruction for blind students in order to learn Braille and Nemeth code and to get specialized instruction to address learning to use VI technology solutions to access the computer and internet." (J-4 Bates 00099-00100).

110.

For the sixth grade school year, the team recommended that [redacted] be placed in general education classes with no support in all academic areas with the provision of Braille and tactual materials to access the general education curriculum. (*Id.* at 00100) [redacted] would also receive 45 minutes a day in ECC instruction and 45 minutes a week in O&M services.[43] (T. Vol. V pp. 1070-1071; J-4 Bates 00100-00101).

111.

The IEP includes five segments per week (or one segment per day) of small group special education in vision services – ECC. (J-4 Bates 00104). Thus, [redacted]s middle school program summary, in the IEP created on March 20, 2014, includes the following:

- Language Arts – 5 segments per week in general education;
- Math – 5 segments per week in general education;
- Science – 5 segments per week in general education;
- Social Studies – 5 segments per week in general education;

[43] As stated previously, Ms. A[redacted] testified that she has been providing 60 minutes a week of O&M instruction during [redacted]'s 6th grade despite the recommendation for 45 minutes a day. (T. Vol. I pp. 231).

- Specials other than PE – 5 segments per week in general education (When/IF [redacted] took P.E. it would include the additional supportive service of a sighted guide);
- Vision Services – 5 segments per week in small group special education;
- Impaired Hearing Services – 1 segment per month in small group special education; and
- Related Service O&M – 45 minutes per week in small group setting.

(J-4 Bates 0100-00104).

112.

The IEP states that [redacted] "requires small group[44] and direct individual instruction for literary Braille and math Nemeth code." (T. Vol. V p. 1083; J-4 Bates 00101). "[redacted] requires pre-instruction in Nemeth Braille code and the opportunity to preview and learn the braille format of both the direction and presentation of the math problems in order to understand the material presented in the 5th/6th grade braille math textbook and on classroom handouts so that he can work independently in the general education curriculum. . . . [redacted] will receive educational programming in small group for the [ECC], the body of knowledge and skills that are needed by students with visual impairments due to their unique disability-specific needs. Literary Braille, Nemeth Code, abacus, VI technology, and Orientation and Mobility are these specific skills that are not part of the regular 5th or 6th grade curriculum." (*Id.*)

113.

There was discussion during the IEP team meeting regarding the Explanation of Extent, which explains the facts specific to [redacted]'s vision needs that require direct, specialized instruction which is different from the general education curriculum. (T. Vol. VI p. 1350).

114.

As used by the District "small group" instruction may consist of one-to-one instruction or up to twelve (12) students in a class. The special education teacher schedules the instruction

[44] Mrs. [redacted] testified that she, at no time prior to filing the complaint, objected to [redacted]s placement in small group. (T Vol. III p. 684).

with other students if there are other students who may need similar instruction in order to create the small group. (T. Vol. V pp. 1115-1116).[45]

115.

There was no debate amongst any members of the IEP team that one segment (45 minutes) per day would either be too little or too much VI instruction. (T. Vol. V pp. 1072-1075).

116.

Ms. M[redacted] opined that the recommended 6th grade services were similar to the services [redacted] received in fourth and fifth grade because it would be small group instruction focused on vision services. (T. Vol. VII pp. 1725-1726, 1800).

117.

Ms. M[redacted] also opined that [redacted] needed one segment per day of small group instruction in literary Braille, Nemeth code, and VI technology in sixth grade in order to address his goals and objectives. (T. Vol. VII p. 1721). Ms. M[redacted] further opined that [redacted] would not be able to access his education without daily small group instruction because learning the ECC is essential for VI students. (T. Vol. VII pp. 1721-1722). However, as a result of this tribunal's Stay Put Order, [redacted] is attending P[redacted] Middle School where he is only receiving VI services once per week. He is pulled out of his chorus class, and he is clearly accessing his education, as he has "A"s in all of his classes. (T. Vol. I pp. 62, 69).

[45] Small group instruction is anytime a child receives specialized instruction which is different from the instruction happening in the rest of the classroom. The key characteristic is that the student requires instruction that is different from the general education curriculum. Small group instruction may be provided within the general education classroom, but even then, the child receiving small group instruction is completely distinct from the general education classroom. (T. Vol. VII pp. 1527-1528).

118.

Mrs. [redacted] testified that, *now*, [redacted] would not need a VI Study Skills class to meet his goals and objectives. (T. Vol. III pp. 577-579). However, she did not tell the IEP team that the VI Study Skills class was unnecessary. Nor did she express disagreement with [redacted]s goals and objectives, or supplemental aids and services during the IEP team meeting. (T. Vol. V p. 1049).

119.

However, Mrs. [redacted] did express her concern regarding the length of the bus ride to D[redacted] Middle School at the IEP team meeting. (T. Vol. VI pp. 1216-1217). Mrs. [redacted] testified she knew, during the IEP team meeting, that if [redacted] were to have his placement implemented at D[redacted] Middle School, he would require special education transportation to attend D[redacted] Middle School.[46] (T. Vol. III p. 697).

Location is Discussed after the IEP Team Meeting

120.

The first time that Plaintiffs disagreed with [redacted]s recommended services was after the IEP team meeting, in the discussion with Dr. E[redacted], where it was stated that [redacted] would need to attend the Site-Based VI program at D[redacted] Middle School. (T. Vol. III p. 713).

121.

After the IEP meeting, Mrs. [redacted] had a one-on-one conversation with Dr. E[redacted]. (T. Vol. V p. 1048). The conversation lasted approximately ten minutes. (*Id.*) Mrs. [redacted] admitted that this conversation was one-sided and that she was angry with Dr. E[redacted]. (T. Vol. III p. 723).

[46] As noted above, the provision of special education transportation was not discussed during the IEP team meeting. Instead, two months later, Dr. E[redacted] emailed Ms. M[redacted] and asked her to complete the transportation request form. Subsequently, it appears that someone determined that a monitor would be on the bus to assist with the transportation needs of [redacted] and the other student. (T. Vol. VI pp. 1206-07). Because transportation was not discussed during the March 20, 2014 IEP team meeting, the need for a monitor on the bus was also not discussed. (T. Vol. I p. 252; T. Vol. III pp. 605-06).

The Finalized IEP

122.

After the March 20, 2014, IEP meeting, Ms. M[redacted] finalized the IEP document. (T. Vol. VII p. 1708).

123.

The IEP team recommended that [redacted] receive Extended School Year ("ESY") during the summer of 2014 in order for [redacted] to receive ongoing instruction in VI-specific technology. (T. Vol. V p. 1055; J-4 Bates 92). The IEP team recommended that [redacted] work on using a screen reader for internet research and word processing during ESY. (T. Vol. V pp. 1055-56). Ms. Jackie Anderson provided those services. (*Id.*)

124.

The finalized March 20, 2014, IEP shows that the impact of [redacted]s disability is that [redacted] is functionally blind, which will impact his ability to progress in the general education curriculum without accommodations, instruction, materials, and learning strategies specific to blind children which are included in the ECC skill set for VI children. (J-4 Bates 87).

125.

Regarding [redacted]s academic performance, the finalized IEP shows that [redacted] has an outstanding knowledge base and study skills ability with reading for pleasure at a 5.2 grade level; an ability to access new vocabulary words at a 9-10th grade level; an 11-12th grade reading ability according to the John's Basic Reading Inventory; an ability to write for a variety of purposes (inform, persuade, opinion, entertain) on a variety of topics with great proofreading and editing skills; on-grade level math skills, providing that he receives pre-instruction in new concepts; and age-appropriate communication and social skills. (J-4 Bates 88-89).

126.

Regarding the ECC, the finalized IEP shows that [redacted] had strong academic/compensatory skills but needs assistance with the following:

- using a screen reading program;
- learning to troubleshoot with a computer;
- getting to file menus on a computer;
- printing and turning in assignments;
- writing with a slate and stylus;
- developing age-appropriate self-advocacy skills;
- travelling within the classroom and school; and
- increasing his independent mobility skills.

(J-4 Bates 89-90).[47]

127.

The finalized March 20, 2014, IEP shows that [redacted] required assistive technology, such as the use of a Perkins Braille Writer, electronic Braille notetaker (both in the classroom and at home), printer and Braille embosser in the school, tactile instructional materials (including Braille textbooks, Braille protractor, Braille rulers, abacus, Braille number lines, tactile maps and graphics), and a screen reading computer program. (J-4 Bates 93).

128.

The finalized IEP shows that [redacted] required Supportive Aids and Services of preferential seating, screen reading software, Braille and tactile graphics, small group instruction, extended time, electronic Braille writer with printer, and Braille embosser. (J-4 Bates 96-97).

129.

The finalized IEP shows that [redacted] would receive Testing Participation accommodations of small group, Braille version, technology applications, word processor or other communication

[47] Ms. M[redacted]' 2014 Functional Vision/Learning Media Assessment supports this IEP information by explaining that [redacted] has no functional or usable vision, is a Braille reader, who required classroom materials to be prepared in advance in Braille, and who has improving (but not mastered) skills with a screen reader (JAWS). (P-1124). As stated above, the information from these assessments was shared with the IEP team.

device with grammar and spell checker disabled, mark answer in test booklet, Braille writer, and extended time. (J-4 Bates 98).

130.

The finalized IEP shows that [redacted]s fifth grade placement would be general education for Language Arts, Math, Science, Social Studies, Music and Art with the provision of Braille and tactual materials and 90 minutes a day of Braille in small group setting. (J-4 Bates 99-104).

131.

The finalized IEP shows that [redacted]'s sixth grade placement would be general education in all academic areas with the provision of Braille and tactual materials and one segment of ECC instruction in the small group setting. (J-4 Bates 99-104).

132.

The finalized IEP included Ms. M[redacted] ECC Needs Summary, which details [redacted] progress towards learning the ECC. (J-4 Bates 0089-0090).[48]

133.

The finalized IEP Team Meeting Notes states that Parents Rights were emailed to the parents and they requested that they not be reviewed.[49] (J-4 Bates 105). The IEP Team Meeting Notes also state that the IEP team agreed on placement based on [redacted]s current functioning learning needs, and goals and objectives with no additional questions, comments or concerns offered. Plaintiffs agreed that the IEP will be finalized and sent home via email.[50] (*Id.*)

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[48] The written ECC assessment was not provided to the family, but the content of the assessment was shared during the IEP team meeting. (T. Vol. VII pp. 1718-19).

[49] Plaintiffs do not dispute that they timely received the document entitled "Parental Rights." (T. Vol. III pp. 688-91).

[50] Mrs. [redacted] testified that she was misled by the IEP team because she did not understand how the elementary school services were specifically implemented. (T. Vol. III pp. 715-717).

134.

Mrs. [redacted] received the finalized IEP on the evening of March 20, 2014, the same day as the IEP team meeting.[51] (T. Vol. III pp. 678-79). Mrs. [redacted] testified that she reviewed the finalized IEP and that if there were errors in it, she would have presented those to the District, but she did not present any complaints regarding the minutes from the finalized IEP . (T. Vol. III pp. 679-680).

The Parties Become Entrenched

135.

In the document entitled "Thoughts to ponder re: VI Locations," Dr. E[redacted] drafted her thoughts in response to Mrs. [redacted]'s parental concerns in order to share with her supervisors so they would know what Dr. E[redacted] thought when she heard Mrs. [redacted]'s parental concerns and that she did not hear a FAPE issue being raised in those concerns. (T. Vol. V pp. 1091-1092; P-32). Dr. E[redacted] did not provide a copy of this document to Mrs. [redacted]. (T. Vol. IV pp. 764-65; T. Vol. p. 1091).

136.

At the hearing, Dr. E[redacted] explained her thoughts concerning Mrs. [redacted]'s parental concerns. Specifically, she testified that she did not have a concern that [redacted] would be unable to access his education if he changed peer groups because she believed him to be a very self-confident, social, outgoing young man based on the fact that he participates in after-school activities. (T. Vol. V p. 1085).

[51] Plaintiffs' Complaint alleged that Dr. E[redacted] had unilaterally altered portions of the IEP outside of the IEP process; however, Mrs. [redacted] testified that she had no evidence of the allegation and withdrew that portion of her Complaint. (T. Vol. III p. 674).

137.

Dr. E[redacted] believed that P[redacted] Middle School and D[redacted] Middle School offered comparable academic rigor because both have strong academic programs and are strong schools. (T. Vol. V pp. 1085-86).

138.

Dr. E[redacted]' understanding of Mrs. [redacted]'s concerns regarding [redacted]s past success were that [redacted] would continue to be successful at D[redacted] Middle School because he would be receiving similar levels of the individualized support that enabled him to be successful at C[redacted] Elementary School. (T. Vol. V p. 1086).

139.

Dr. E[redacted] did not believe that [redacted] needed to be at the same school as his twin sister because they had not been in academic classes together at C[redacted] Elementary School. (T. Vol. V pp. 1086-87).

140.

In response to Mrs. [redacted]'s concern about not taking health benefits, Dr. E[redacted] examined the Board's policy manual to decide if that concern needed to be considered. (T. Vol. V pl. 1087).

141.

Dr. E[redacted] did not believe that the proposed bus ride would impact [redacted]'s ability to access his education. (T. Vol. V pp. 1087-1088).

142.

Mrs. [redacted] never presented to Dr. E[redacted] any information about the bus ride being too loud for [redacted] nor did she present any information about anxiety or depression. (T. Vol. V p. 1088).

143.

Dr. E[redacted] understood that Mrs. [redacted] had previously hired a lawyer to advocate for her son, but Dr. E[redacted] did not think that Mrs. [redacted] would be required to do so. (T. Vol. V pp. 1088-1089).

144.

Regarding Mrs. [redacted]'s desire to have [redacted] educated with the neighborhood friends, Dr. E[redacted] believed that many students in the District are not educated at their neighborhood school and those children are able to nurture relationships with neighborhood friends after school. (T. Vol. V pp. 1089-1090). Dr. E[redacted] did not believe that [redacted] required the specific neighborhood friends in class in order for [redacted] to make academic progress. (*Id.*)

145.

Dr. E[redacted] believed that Mrs. [redacted] misconstrued the concept of LRE because LRE also includes attending the school closest to the child's home where services are available, not just the neighborhood school. (T. Vol. V pp. 1090-1091).

146.

Ultimately, Dr. E[redacted] did not believe that anything in Mrs. [redacted]'s parental concerns showed that [redacted] would not be successful at D[redacted] Middle School because her concerns did not relate to his ability to learn but focused on primarily staying with his neighborhood friends. (T. Vol. V p. 1091).

147.

In the Thoughts to Ponder document, Dr. E[redacted] also noted that if the District did not implement the Site-Based model and, instead, served all students through an itinerant instructor

at the neighborhood school, the District would not have enough staff or resources to educate those VI students.[52] (T. Vol. V p. 1093).

District Administrators Meet with Mrs. [redacted] and Mr. [redacted] to Discuss Their Concerns

148.

Mrs. [redacted] and Mr. [redacted] met with Dr. Carol Seay, and Ms. Susan Christensen, Director of Special Education, ("Ms. Christensen") on April 15, 2014 at C[redacted] Elementary School. (T. Vol. III pp. 590, 730; T. Vol. VIII p. 1849; D-125 Bates 976-977).

149.

During that meeting, Mrs. [redacted] did not express that [redacted] was experiencing anxiety or depression. (T. Vol. III p. 731).

150.

Mrs. [redacted] did demand that [redacted] would attend P[redacted] Middle School and no other middle school. (T. Vol. VIII p. 1851).

151.

During that meeting, Mrs. [redacted] stated that she was concerned about sending [redacted] to D[redacted] Middle School because other students may put drugs in his food.[53] (T. Vol. III p. 731; T. Vol. VIII p. 1851).

152.

Mrs. [redacted] also reiterated that the District should have funds for [redacted]s education because Mrs. [redacted] has not taken health benefits from the District. (T. Vol. III p. 732).

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[52] Specifically, as stated above, the District has had an extremely difficult time hiring additional VI instructors, as there are not qualified candidates available despite the District's nation-wide recruiting effort.

[53] Mr. A[redacted], the VI instructor at D[redacted] Middle School, testified that he did not know of any complaints regarding anything being put in the food, such as drugs, for VI students at D[redacted] Middle School. (T. Vol. VI p. 1411).

153.

Dr. Seay informed Mrs. [redacted] that the District would need to reconvene an IEP meeting if [redacted]s services were to be changed. (T. Vol. VIII p. 1855).

154.

At the conclusion of the meeting, Dr. Seay stated that she would discuss the situation with Ms. M[redacted] to get more information and follow up.[54] (T. Vol. III p. 592; T. Vol. VIII p. 1856).

155.

On April 21, 2014, Dr. Seay emailed Mrs. [redacted], stating that the District was looking into the request for a location change. (T. Vol. III pp. 734-35; D-115 Bates 866). Mrs. [redacted] responded, "[redacted] will be excited to hear the good news." (T. Vol. III p. 735; D-115 Bates 866). Dr. Seay responded that a decision regarding the location of services had not yet been made. (T. Vol. III pp. 735-36; D-115 Bates 866).

156.

Shortly after the email exchange, Dr. Seay phoned Mrs. [redacted] to inform her that D[redacted] Middle School would be [redacted]s assigned location. (T. Vol. III pp. 737-738).[55]

Mrs. [redacted]'s Letter to the Superintendent

157.

On or about June 12, 2014, Mrs. [redacted] sent a letter regarding the D[redacted] Middle School location to interim superintendent Mr. Chris Ragsdale. (T. Vol. III p. 599; P-81 Bates 0545-0546).[56]

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[54] Dr. Seay also had an internal meeting with Dr. [redacted] E[redacted], Ms. Christensen, and Ms. Cathy Jordan, an Assistant Director, as to whether or not [redacted]s services could be provided at P[redacted] Middle School. (T Vol. VIII p. 1990).

[55] During that phone call, Mrs. [redacted] did not inform Dr. Seay that [redacted] was experiencing anxiety, depression or adjustment disorder. (T. Vol. III p. 738).

158.

Mrs. [redacted] testified that she immediately received a response to her letter, which stated that the District would look into her complaint. (T. Vol. III p. 608).

159.

In response to Mrs. [redacted]'s letter to the superintendent, the District arranged a phone call between Mrs. [redacted] and District leadership to discuss the letter. (T. Vol. III pp. 613-14; D-74 Bates 713).

160.

As a result of that letter, Dr. Seay was asked to participate in a follow-up phone conference with Mrs. [redacted]. (T. Vol. VIII pp. 1859-60).

Phone Call with Ms. D[redacted], Dr. Seay, and Dr. E[redacted]

161.

On June 19, 2014, there was a telephone conference with Mrs. [redacted], Dr. E[redacted], Dr. S[redacted], and Ms. [redacted] [redacted] D[redacted] ("Mrs. D[redacted]"), Chief Academic Officer. (T. Vol. V p. 1102).

162.

In the phone call, Ms. D[redacted] asked Mrs. [redacted] to explain her letter, and Mrs. [redacted] testified that her response was "my letter was pretty self-explanatory." (T. Vol. III p. 615).

163.

During that phone call, Mrs. [redacted] reiterated her concern that [redacted] would have a lengthy bus ride to D[redacted] Middle School and that [redacted] should not have to attend that school. Mrs. [redacted] did not mention adjustment disorder, anxiety, or depression. (T. Vol. V p. 1103; T. Vol. III p. 752).

[56] The primary overtone of Mrs. [redacted]'s letter was that [redacted] should remain with his neighborhood peers and length of the bus ride. (P-81 Bates 0545-0546).

164.

To conclude the phone call, the District offered to hold another IEP team meeting to discuss Plaintiffs' concerns regarding D[redacted] Middle School. (T. Vol. V. pp. 1104-05).

165.

Plaintiffs describe this phone call in their Complaint as follows:

> P.A. received a call from Ms. [redacted] [redacted] D[redacted], CCSD Chief Academic Officer, Dr. Carol Seay, and Dr. [redacted] E[redacted] on June 19, 2014. They offered to reduce [redacted]'s services to keep him at P[redacted]. [redacted] told them that she wanted to "think outside the box." After [redacted] and [redacted] discussed CCSD's proposal, the Parents found the suggestion to further reduce [redacted]s services to be improper and offensive and potentially harmful. They do not believe this would provide [redacted] FAPE."

(Complaint ¶ 70 (emphasis in original)).

Plaintiffs Reject the District's Offer to Reconvene an IEP Team Meeting

166.

On July 15, 2014, Dr. E[redacted] left a voicemail for Mrs. [redacted] to suggest the date of July 31, 2014, on which to reconvene an IEP team meeting to discuss [redacted]s attendance at D[redacted] Middle School. (T. Vol. V p. 1104; D-110 Bates 0856-0857).

167.

Dr. E[redacted] explained that she was not able to schedule the IEP team meeting earlier than July 15, 2014, despite originally discussing the follow-up IEP team meeting on June 19, 2014, because it was summer break and many people were on vacation. (T. Vol. V p. 1105).

168.

Also on July 15, 2014, an attorney for the District responded to a letter from one of Plaintiffs' attorneys. The District's attorney concluded the letter by stating that "the District

respectfully declines your clients' request to change the location of [redacted]s services for the 2014-2015 school year." (T. Vol. III 617-18; P-80).[57]

169.

On July 17, 2014, the District provided Plaintiffs with a copy of [redacted]s educational records, pursuant to their request. (T. Vol. VIII p. 1817.)

170.

On July 23, 2014, Mrs. [redacted] responded to Dr. E[redacted] via email, stating, "We got your voicemail and don't understand. We were told that there would be no changes by your lawyer. Please tell me who said I asked for another IEP meeting?" (T. Vol. V p. 1104; D-110 Bates 0856-0857).

171.

On July 28, 2014, Dr. E[redacted] responded to Mrs. [redacted]'s email, stating that the District believed, based on the phone call of June 19, 2014, that Mrs. [redacted] wished to reconvene the IEP team. (T. Vol. V p. 1106; D-110 Bates 0856-0857).

172.

Mrs. [redacted] did not respond to Dr. E[redacted] July 28, 2014 email. (T. Vol. V p. 1106; D-110 Bates 0856-0857).

173.

Had Mrs. [redacted] agreed to the July 31st date, the District would have reconvened the IEP team. (T. Vol. V p. 1105-1106; D-110 Bates 0856-0857).

[57] Although the first page of the letter bears the date of January 9, 2014, it was clarified at the hearing that the letter was, in fact, dated July 15, 2014.

174.

[redacted] began seeing a therapist, Ms. [redacted] N[redacted] ("Ms. N[redacted]"), on approximately July 18, 2014. (T. Vol. II p. 448; P-122 Bates 00853). A history of [redacted]s therapy with Ms. N[redacted] is discussed in the next section. However, one of Ms. N[redacted]'s therapy notes documents a conversation between Ms. N[redacted] and Plaintiffs, which supports a finding that Plaintiffs rejected the District's offer to reconvene an IEP team meeting. Specifically, the note states, "IEP on July 31 or go to judge." (P-122 Bates 00852).

175.

[redacted]s therapist testified that even if the District had repeatedly rejected Plaintiffs request to change [redacted]'s location back to the neighborhood school, she may still have advised them to go to an IEP team meeting anyway because it could "provide perhaps another opportunity to come to terms with placement or how to best educate [redacted] (T. Vol. II p. 468).

176.

Mrs. [redacted] asserted that she never rejected an opportunity to discuss [redacted]s educational needs with the District or rejected an IEP team meeting. (T. Vol. III p. 533). Mrs. [redacted] further testified that she would have attended an IEP team meeting had one been held. (T. Vol. III p. 592). However, this testimony is contradicted by both the email exchange between Dr. E[redacted] and Mrs. [redacted] and the therapy notes indicating that Plaintiffs were choosing between an "IEP on July 31 or go to judge." (D-110; P-122 Bates 00852). The conclusion that Plaintiffs rejected the IEP team meeting offered by Dr. E[redacted] in the July 15, 2014 voicemail is further supported by Mrs. [redacted].'s testimony regarding the July 15, 2014 letter from the District's attorney. Specifically, Mrs. [redacted]. understood the District's July 15 letter to mean that there was nothing to discuss in an IEP meeting.

177.

Because Plaintiffs rejected Dr. E[redacted] offer to reconvene an IEP team meeting, no IEP team meeting was convened to discuss Plaintiffs' concerns as Plaintiffs refused to participate. (T. Vol. VIII p. 1921).

178.

Plaintiffs filed their Complaint on July 30, 2014. On August 9, 2014, the District sent Plaintiffs a document entitled Prior Written Notice. (T. Vol. VII pp. 1834-35; D-119).

[redacted] Begins Sessions with a Therapist for Anxiety and Depression

179.

As stated earlier, [redacted] began seeing a therapist on approximately July 18, 2014. (T. Vol. II p. 448; P-122 Bates 00853).

180.

Mrs. [redacted] testified that [redacted] began therapy sessions because he "broke down" when he was told about attending D[redacted] Middle School. (T. Vol. III pp. 619-620). Mrs. [redacted] further testified that she believed just saying the word "D[redacted]" would be devastating to [redacted] (*Id.*) Indeed, she stated that [redacted] would shake violently and cry uncontrollably if he heard the word "D[redacted]." (T. Vol. III p. 623). Notably, this testimony was seemingly contradicted by [redacted]'s own testimony regarding D[redacted] Middle School during the hearing, where the word D[redacted] was used multiple times without [redacted] experiencing any observable, negative physical manifestations. (T. Vol. I p. 124).[58]

[58] Though Mrs. [redacted] testified that [redacted] experienced violent physical reactions to the word "D[redacted]" and that Mrs. [redacted] informed Ms. N[redacted] of those symptoms, there was no reference to such symptoms in the therapy notes. (T. Vol. III pp. 660-61; P-122) Mrs. [redacted] did not include these symptoms when she completed the intake form for Ms. N[redacted]. (T. Vol. III pp. 662-665).

181.

Ms. N[redacted] completed a Child Intake Form based on information provided by the Plaintiffs to start [redacted]'s therapy. (T. Vol. II p. 384; P-122 Bates 00853).

182.

On the Child Intake Form, completed July 18, 2014, [redacted] is described as "happiest kid in the world." (T. Vol. II p. 385; P-122 Bates 00854).

183.

On the Child Intake Form, completed July 18, 2014, "grandmother dying" is listed as a trauma/major event. (J-122 Bates 00854).

184.

[redacted] told Ms. N[redacted] that if assigned to D[redacted] Middle School, he would opt to be home schooled instead. (T. Vol. I. p. 89). [redacted] told Ms. N[redacted] that he "absolutely will not go [to D[redacted] Middle School]". (T. Vol. II p. 348). More specifically, [redacted] said, according to Ms. N[redacted], on more than one occasion, that instead of going to D[redacted] Middle School "[h]e wasn't going to get out of bed, he wasn't going to get dressed, he wasn't going to get on the bus. He was not going to go and nobody could make him go." (T. Vol. II p. 352).[59]

185.

From the very first time Ms. N[redacted] met with Plaintiffs, they said that their bottom line was that [redacted] would go to P[redacted] Middle School and not D[redacted] Middle School. (T. Vol. II p. 408).

186.

Ms. N[redacted] opined that she did not know whether or not [redacted] could successfully transition to D[redacted] Middle School. In other words, she could not state that it would be impossible for

[59] School refusal is a very complex phobia in which a child is afraid of attending school, in general, and not a single specific school. (T. Vol. IX p. 2166). [redacted] did not exhibit signs of school refusal. (T. Vol. IX p. 2168).

[redacted] to attend D[redacted] Middle School. (T. Vol. II p. 400). However, in her correspondence of July 28, 2014, she did note that [redacted] could transition to D[redacted] Middle School if appropriate supports and services were put in place. (D-138 Bates 1207; P-44).

187.

Ms. N[redacted] diagnosed [redacted] with an adjustment disorder with mixed anxiety and depressed mood, acute.[60] (T. Vol. II p. 342). The diagnosis was first documented in Ms. N[redacted]'s August 6, 2014 letter.[61] It was subsequently documented in a treatment note on August 7, 2014. (P-122 Bates 00828).

188.

At no point before filing their Motion for Summary Judgment on August 7, 2014, did Plaintiffs share [redacted]'s diagnosis of adjustment disorder with mixed anxiety and depressed mood, acute with the District. (T. Vol. IV p. 762).

189.

Ms. N[redacted] based her diagnosis on only the information provided to her by the family. She did not consult with the District or visit either middle school. (T. Vol. II pp. 361-362).

190.

Ms. N[redacted] testified that transitioning to D[redacted] Middle School would create a heightened stressor, making it more difficult for [redacted] to focus.[62] (T. Vol. II. P. 358).

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[60] Adjustment Disorder with mixed anxiety and depression, acute is defined as a life stressor creating a significant reaction related to the stressor with additional symptoms of anxiety and depression which are heightened outside of what would be considered the norm. (T. Vol. II pp. 344-345).

[61] Ms. N[redacted] initially diagnosed [redacted] with Anxiety, which she documented on July 31, 2014. (P-122 Bates 008301; T. Vol. II p. 410). Prior to that Ms. N[redacted] had not formulated a diagnostic impression. (T. Vol. II p. 387, 410, 457, 486; P-122 Bates 00830-831).

[62] The District offers numerous supports for students who have difficulty transitioning to a new school, including newcomer groups and one-on-one meetings. (T. Vol. VIII pp. 2062-2064). These supports could have been made available to [redacted] should they be deemed necessary. (T. Vol. VIII p. 2065).

191.

Ms. N[redacted] wrote a letter, dated August 6, 2014, which identified [redacted] as having been diagnosed with an adjustment disorder, with mixed anxiety and depressed mood, acute. (T. Vol. II p. 342; P-44(c). This letter was written for purposes of litigation as it was attached to Ms. N[redacted]'s affidavit, which was attached to Plaintiff's Motion for Summary Judgment. (P-44(c)).

192.

Ms. N[redacted]'s initial draft of the August 6, 2014 letter, was dated July 28, 2014. It was significantly different than the final version; and the changes were prompted by suggested revisions from Plaintiffs and their attorneys. (*Cf.* P-44(c) *and* D-138.; T. Vol. II pp. 371-394; D-136).

193.

Specifically, Mrs. [redacted] asked for the following revisions to Ms. N[redacted]'s initial draft of her opinion letter:

- Focus on the negative impact to [redacted] and how anxious he is;
- That it is a larger school with no peers who know and accept him, and will help;
- DO not focus on friends because "Judges don't care about friends";
- Take out the sentences about services [which may make the transition to D[redacted] Middle School possible];
- This has to be about how inappropriate [D[redacted] Middle School] would be for [redacted] "physically, emotionally, and mentally."

(T. Vol. IV pp. 795-799; D-136 Bates 1203).

194.

Ms. N[redacted] sought clarification and stated, "The friends part is the emotional piece. Not sure how you want that revised." (D-136 Bates 1201). In response to Ms. N[redacted]'s request for

clarification, Mrs. [redacted] wrote, "A case was lost last year because the judge didn't care about the child's friends." (T. Vol. II pp. 374-75; D-136 Bates 1202).

195.

Ultimately, the following revisions were made to Ms. N[redacted]'s opinion letter based on the demands from Plaintiffs and their attorneys:

- In the original letter, [redacted] was described as being a happy, confident child (present tense); whereas, in the revised letter he was described as having been a happy, confident child (past tense).
- In the original letter, [redacted] began seeing Ms. N[redacted] because of the parents' concern regarding attending the non-neighborhood school; whereas, in the revised letter [redacted] began seeing Ms. N[redacted] because of his anxiety and depression.
- In the original letter, Ms. N[redacted] explained that the non-neighborhood school is necessary for [redacted] to receive his vision services because his connections classes will be dedicated to band and Braille; however, that was removed from the final letter.
- In the original letter, Ms. N[redacted] stated that [redacted] believed a bus ride without his friends and sister would be "scary"; however, in the revised letter the proposed bus ride and school change is labeled as the identifiable stressor triggering his adjustment disorder.
- In the original letter, Ms. N[redacted] stated that [redacted] wanted to be able to "play with his friends after school and go to birthday parties" but would be prevented from doing so by attending his non-neighborhood school; however, the revised letter makes no mention of playing with friends or birthday parties.[63]
- In the original letter, Ms. N[redacted] stated that "Cobb County Schools have helped [redacted] became the success he is today"; however, this statement was removed from the revised letter.
- In the original letter, Ms. N[redacted] stated that a longer bus ride and a school with unfamiliar people would put [redacted] *at risk* for developing an anxiety disorder and depression; however, in the revised letter, Ms. N[redacted] states that he *has been diagnosed* with an adjustment disorder with anxiety and depression. (Emphasis added).
- In the original letter, Ms. N[redacted] stated that [redacted]s pediatrician Dr. K[redacted] wrote a letter stating that overstimulation from the longer bus ride could have a negative academic

[63] The Child Intake Form completed by Ms. N[redacted] based on her initial session with Plaintiffs references great social skills and slumber parties. (T. Vol. II p. 384; P-122 Bates 00853).

impact.[64] In the revised letter, Ms. N[redacted] elaborated on Dr. K[redacted]'s unsubstantiated opinion to speculate that the bus ride to D[redacted] Middle School could result in post-traumatic stress disorder.

- In the original letter, Ms. N[redacted] stated that [redacted] would need an aide on the bus and mental health counseling for the period of adjustment if he were to change schools; however, in the revised letter, she opined that "[t]he impact of changing schools puts [redacted] in grave danger of psychological distress."

(Cf. P-44(c) and D-138.; T. Vol. II pp. 371-394; T. Vol. IV pp. 804-811).

196.

In sending the revised letter for submission with her affidavit, Ms. N[redacted] wrote, "I got all the items complete that your lawyer requested." (T. Vol. II pp. 378-379; D-137 Bates 1204).

197.

Ms. N[redacted] also treated [redacted] regarding the death of his grandmother; Ms. N[redacted] believed that [redacted] was able to process and prepare for that death in a healthy manner. (T. Vol. II pp. 353-354).

198.

Contrary to Plaintiffs' allegations that [redacted]s anxiety disorder would prevent him from transitioning to D[redacted] Middle School, the testimony of [redacted] and Mrs. [redacted] showed the [redacted] was capable of befriending new people. Specifically, Mrs. [redacted] testified as follows: "The children fight to be with [redacted] you know. He's a magnet, everyone wants to be his friend." (T. Vol. III p. 520). Additionally, [redacted] was able to make friends with a new peer group through jiu-jitsu and

[64] Dr. K[redacted] proffered this opinion without actually conducting an assessment of [redacted] or even talking to [redacted] about the bus ride. (T. Vol. I p. 97). Dr. K[redacted]'s letter of June 6, 2014, where she discusses potential physical repercussions related to a sustained bus ride mirrors, almost verbatim, a similar letter she drafted on July 3, 2008, which was submitted to the District by this family in an effort to keep their son at his neighborhood school. (D-7, Bates 157; D-141 Bates 1212).

karate.[65] (T. Vol. I p. 128). [redacted] was also comfortable with unknown adults in the M[redacted] Chess Club. (T. Vol. I pp. 119-120).

199.

Plaintiffs never communicated either verbally or in writing to Dr. E[redacted] that [redacted] had an adjustment disorder, anxiety, or depression. (T. Vol. V pp. 1107-1108).

200.

Ms. [redacted] S[redacted] ("Ms. S[redacted]") testified as the supervisor overseeing the District's school counseling program. (T. Vol. VIII p. 2014). She supervises over 290 school counselors across the District. (T. Vol. VIII p. 2015). She has personally worked with hundreds of children who were depressed. (T. Vol. VIII p. 2021). Ms. S[redacted] has a specialist degree in school counseling and is a certified school counselor. (T. Vol. VIII p. 2026). Ms. S[redacted] is also a licensed professional counselor, authorized by the State of Georgia to conduct therapy, make diagnoses, and create therapy plans. (T. Vol. VIII p. 2027). She is authorized to diagnose adjustment disorder, anxiety, depression, and adjustment disorder with mixed anxiety and depressed mode, acute. (T. Vol. VIII p. 2027).

201.

Ms. S[redacted] based her testimony on the review of the three previous IEPs, the case notes from his therapist, and emails exchanged between Plaintiffs and teachers. (T. Vol. VIII p. 2038).

202.

Based on the therapy notes, Ms. S[redacted] opined that [redacted] is a bright young man, who is very competitive, resilient, and athletic. (T. Vol. VIII p. 2041).

[65] Any new Black Belt coming into [redacted]'s karate class would have to spar with [redacted] (T. Vol. III p. 511).

203.

Ms. S[redacted] noted that the transition to middle school is difficult for many children because the unknown nature of a new school, new friends, and new schedule can be stressful and challenging for anyone. (T. Vol. VIII pp. 2050-51). Ms. S[redacted], specifically, opined that [redacted]s therapy notes are typical of most students transitioning into middle school. (T. Vol. VIII pp. 2061-2062).

204.

Ms. S[redacted] noted that [redacted] was able to independently work on school assignments, during the period of time that Plaintiffs kept [redacted] out of school, pending the Stay Put Order. (T. Vol. VIII p. 2051). Further, she noted that Mrs. [redacted] stated [redacted] was excited about these projects. She believed that such work ethic demonstrated discipline, focus, and commitment. (T. Vol. VIII pp. 2051-2052). She further noted that [redacted] continued to participate in jiu-jitsu and karate during this period, which is indicative of functioning well and having energy.[66] (T. Vol. VIII pp. 2052-53). Notably, these behaviors and activities are not, in Ms. S[redacted]'s opinion, consistent with the symptoms of adjustment disorder with mixed anxiety and depression, acute. (T. Vol. VIII pp. 2054-2055). Individuals with adjustment disorder with mixed anxiety and depression, acute do not have the energy or interest to participate in such demanding activities. (T. Vol. VIII p. 2055).

205.

Ms. S[redacted] also opined that [redacted]s ability to transition to P[redacted] Middle School, after the Stay Put Order, was inconsistent with the diagnosis because the symptoms would be too pervasive, preventing the transition to a new school. (T. Vol. VIII p. 2056).

[66] Ms. S[redacted] did not believe that missing one Karate class would be consistent with the adjustment disorder diagnosis because there should be more of a pattern in order to support the diagnosis. (T. Vol. VIII p. 2073).

206.

Ms. S[redacted] also found other triggers in the therapy notes which could cause anxiety, such as the cost of litigation, Mrs. [redacted]'s level of anxiety,[67] and the death of [redacted]'s grandmother. (T. Vol. VIII pp. 2058-60, 2101-2102).

207.

Ultimately, Ms. S[redacted] opined that she believed [redacted] could transition to D[redacted] Middle School because his IEP showed that he is resilient, courageous, healthy, and competitive. (T. Vol. VIII p. 2067). Ms. S[redacted] believed that this transition could happen without support. (T. Vol. VIII p. 2068). However, should [redacted] experience difficulties with the transition, the District has supports that could facilitate the transition that are provided to regular education and special education students. (T. Vol. VIII p. 2070).

First Day of 2014-2015 School Year

208.

On the first day of school for the 2014-2015 school year, [redacted] attended P[redacted] Middle School instead of his assigned school. (T. Vol. I p. 126).[68]

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[67] Notably, Ms. S[redacted] explained that many children "internalize" the emotions of their parents because the part of the child's brain which identifies feelings has not fully developed, so they rely on individuals around them to understand how they should be feeling. (T. Vol. VIII p. 2061).

[68] At the time of deciding to send [redacted] to P[redacted] Middle School, Plaintiffs had been informed at least seven (7) times that D[redacted] Middle School was the assigned location:

- On March 20, 2014, after the IEP team meeting, Dr. E[redacted] told Mrs. [redacted] that D[redacted] Middle School would be the assigned location (T. Vol. III p. 584);
- In late April 2014, Mrs. [redacted] received a phone call from District administrators to inform her that D[redacted] Middle School would be [redacted]s assigned location. (T. Vol. III pp. 737-738).
- In late April/early May, 2014, Dr. E[redacted] sent the D[redacted] Middle School registration packet to the Plaintiffs (T. Vol. III p. 603; T. Vol. T. Vol. IV. P. 776; D-149);
- In late July 2014, the bus driver left a voicemail for Plaintiffs regarding transportation to D[redacted] Middle School (T. Vol. III p. 606);

209.

Mr. and Mrs. [redacted] made the decision to send [redacted] to P[redacted] on the first day of school. (T. Vol. I p. 126).[69]

210.

In support of that decision, Plaintiffs pointed to the fact that D[redacted] Middle School did not have [redacted]s IEP on the first day of school; however, D[redacted] Middle School did have [redacted]'s individual learning plan, which is based on the IEP. (T. Vol. VII pp. 1487-1489). The actual IEP was not available because [redacted] had not been enrolled at D[redacted] Middle School by the Plaintiffs, as the District had requested. (T. Vol. VII pp. 1487-1488).

211.

In a phone session with Ms. N[redacted] regarding the first day of school, [redacted] stated that his fears of D[redacted] Middle School stemmed from not knowing anyone, being bullied, finding someone to talk to at lunch, being bored on the bus, and the bus driver being mean. (T. Vol. II p. 403; P-122 Bates 00837).[70]

- On July 15, 2014, the District's counsel informed Plaintiffs' counsel that [redacted]s assigned school would remain D[redacted] Middle School in order for his IEP to be implemented. (T. Vol. III p. 618; P-80 Bates 0543-0544);
- On August 1, 2014, Dr. [redacted] T[redacted], the District's Director of Legal and Policy Issues for its Special Student Services Department, emailed Plaintiffs with instructions regarding transportation to D[redacted] Middle School (T. Vol. III p. 633; P-36, Letter from Haury to Kline dated August 1, 2014) and
- On August 2, 2014, District counsel again informed Plaintiffs' counsel that [redacted] should be registered at the location of D[redacted] Middle School. (T. Vol. IV p. 788; D-127 Bates 1001).

[69] Ms. N[redacted] testified that had she known that [redacted] was not assigned to P[redacted] Middle School, she would not have recommended that he go to the unassigned school on the first day of class because that could cause anxiety. (T. Vol. II Pp. 415-417). Nonetheless, Plaintiffs' attorneys advised that [redacted] should go to P[redacted] Middle School on the first day of school, despite the District's explanation that D[redacted] Middle School was the assigned location. (T. Vol. II pp. 410-411; P-80 Bates 00543-00544; P-122 Bates 00830).

[70] Ms. S[redacted] opined that these are normal fears of students transitioning into middle school.

212.

When the District learned that [redacted] had attended P[redacted] Middle School on the first day of school, the District contacted Mr. [redacted] and asked that he retrieve [redacted] from the school. (P-34; T. Vol. IV p. 792). Thereafter, [redacted]s parents refused to send [redacted] to D[redacted] and kept him out of school until this tribunal's Stay Put Order directed that his stay put placement would be P[redacted] Middle School the pendency of this matter. (T. Vol. II p. 408).

Plaintiffs VI Expert

213.

Dr. [redacted] S[redacted] ("Dr. S[redacted]") is a VI consultant hired by the Plaintiffs as an expert witness. (T. Vol. IX p. 2249). Dr. S[redacted] has a Ph.D. from Vanderbilt University in special education with an emphasis in visual impairments. (P-100; T. Vol. IX p. 2250). She has authored and co-authored numerous articles in the field of visual impairments, including on the subject of the ECC. (P-100).

214.

Dr. S[redacted] had met [redacted] twice before testifying; once in Plaintiffs' counsel's office and once on December 4th (less than one week before testifying), when she observed him at P[redacted] Middle School. (T. Vol. IX pp. 2275-2277). Dr. S[redacted]'s observations of [redacted] in an educational setting only consisted of one day (eight (8) hours). (T. Vol. IX p. 2390). Dr. S[redacted] only observed [redacted] for fifteen (15) minutes in the context of VI instruction. (T. Vol. IX p. 2393). Dr. S[redacted] has never provided direct services to [redacted] (T. Vol. IX p. 2391). However, she reviewed [redacted]s educational records, including his IEPs, assessments, progress reports, and some email correspondence. (T. Vol. IX p. 2287).

215.

In completing the paperwork to authorize Dr. S[redacted] to observe [redacted] at P[redacted] Middle School, she signed a confidentiality agreement, which stated "I, [redacted] S[redacted], Ph.D. CLMS currently provide educational services for [redacted] (T. Vol. IX p. 2374).

216.

Dr. S[redacted], when questioned on cross-examination regarding the veracity of her representation to the District in completing the form, explained that the educational services which she provided to Plaintiffs was testifying as an expert witness. (T. Vol. IX pp. 2374-75). Further, the agreement did not state anything about disclosing information to the Court regarding her observations. (T. Vol. IX p. 2379).

217.

Dr. S[redacted] testified that she based her testimony, in part, on a recent article which stated there was no current research as to whether itinerant or resource was more appropriate. (T. Vol. IX p. 2289). In other words, she could not say that itinerant services are better than a resource setting.

218.

Dr. S[redacted] testified that [redacted] would need services "a couple of times a week" for 45 minute sessions to meet his goals and objectives. (T. Vol. IX pp. 2307, 2393).

219.

Dr. S[redacted] testified that [redacted] progressed on his IEP and ECCs in fourth and fifth grade. Based on that progression, she would recommend comparable services for sixth grade as to what he received in fourth and fifth grade. (T. Vol. IX p. 2353).

220.

Dr. S[redacted] testified that she did not know whether or not [redacted] could perform the skills necessary to meet his goals and objectives on March 20, 2014, when the IEP was created. (T. Vol. IX p. 2415). Dr. S[redacted] explained that the fact he is currently meeting his goals and objectives does not mean that they were improper when they were created. (T. Vol. IX p. 2415). Dr. S[redacted] could not opine as to whether or not the goals and objectives were inappropriate when they were created. (T. Vol. IX p. 2416).

221.

Dr. S[redacted] opined that in her experience some parents do not accept that their child's VI needs cannot be met entirely in a regular education setting. (T. Vol. IX pp. 2434-2435; D-154). However, it is also her opinion that teachers should consider "alternative methods of providing instruction of the ECC, such as summer programs, after-school programs and short-term placements." (T. Vol. IX p. 2446).

222.

Dr. S[redacted] opined that, at this point in time, [redacted] could meet his goals and objectives with 45 minutes of pull-out services one to two times per week.[71] (T. Vol. IX pp. 2307, 2453-54).

The Proposed Bus Ride to D[redacted]

223.

From [redacted]s home to D[redacted] Middle School is 10.78 miles. D[redacted] Middle School is the closest school to Plaintiffs' home, which offers a Site-Based VI program. (T. Vol. V p. 1020).

[71] Currently, [redacted] is receiving one segment of direct instruction from an itinerant VI teacher at P[redacted] Middle School and has all "A"s. (T. Vol. I p. 69; T. Vol. III p. 650).

224.

Mr. [redacted] Gr[redacted] ("Mr. Gr[redacted]"), Executive Director of Transportation Services, testified regarding the proposed bus route for [redacted] to and from D[redacted] Middle School. (T. Vol. I pp. 148, 196-209).

225.

Mr. Gr[redacted], as an expert in transportation and bus routes, testified that it is a best practice for students to have a one-way trip of less than one (1) hour. (T. Vol. I p. 204).[72]

226.

Mr. Gr[redacted] opined that the proposed bus route for [redacted] is a "best scenario" because the route is less than one-hour each way, with minimal stops (only 2) and the additional support of a bus monitor. (T. Vol. I p. 209).

227.

The form requesting [redacted]s transportation to D[redacted] Middle School did not include a request for a bus monitor specifically for [redacted] (T. Vol. I p. 199; P-138).

228.

Though the initial afternoon bus-route from D[redacted] Middle School listed the time of pick-up at 4:05, before the official end of school, the time could be adjusted. (T. Vol. I pp. 181, 200). To that end, Mr. A[redacted] testified that at D[redacted] Middle School, he could make adjustments with transportation to ensure that [redacted] would miss little or no class in order to ride the bus. (T. Vol. VI p. 1447).

[72] Plaintiffs stipulated that the proposed bus ride to D[redacted] Middle School is 52 minutes, one-way. (T. Vol. I p. 205).

229.

There is not a rule which would prevent a student from getting home after 5:00 p.m., should the afternoon pick-up time at D[redacted] Middle School be changed. (T. Vol. I p. 213).

230.

Nothing in the transportation form for [redacted] mandated that he leave class early.[73] (T. Vol. I p. 200; P-138).

231.

[redacted]s pediatrician submitted a letter stating that a 20 to 60 minute bus ride to D[redacted] Middle School would be noisy and chaotic; however, she made this opinion without actually conducting an assessment of [redacted] or even talking to [redacted] about the bus ride. (T. Vol. I p. 97).

232.

Despite Plaintiffs' allegations about [redacted]s inability to manage a longer bus ride, [redacted] testified that in elementary school he took multiple field trips with extended bus rides, including trips to Chattanooga, the symphony, and Medieval Times. (T. Vol. I pp. 99-100). He testified that he was not over stimulated during those bus rides. (*Id.*)

233.

Dr. [redacted] Mc[redacted]'s ("Dr. Mc[redacted]") is an Educational Audiologist, employed by the District. (T. Vol. IV pp. 892-894; D-27 Bates 0343).

234.

Dr. Mc[redacted] conducted a Sound Level Measurement Report of the bus ride to and from [redacted]s home and D[redacted] Middle School and of the bus ride to and from [redacted]s home to P[redacted]

[73] However, as noted above, the currently proposed route and schedule show [redacted] arriving at school after homeroom and leaving before the end of the school day.

Middle School.[74] (T. Vol. IV p. 902; D-101; Bates 813-823). To complete this report, she used a sound level meter, which was designed in accordance with the Acoustic National Standards Institute. (T. Vol. IV p. 902). To gather her data, she was physically on both bus rides. (T. Vol. IV p. 903).

235.

The bus ride from [redacted]s home to P[redacted] Middle School was twenty (20) minutes. The sound measurements indicated a safe range. There were 30 students on the bus. (T. Vol. IV pp. 904-906; D-101 Bates 813-823).

236.

The bus ride from P[redacted] Middle School to [redacted]'s home was sixteen (16) minutes. The sound measurements indicated a safe range. There were 33 students on the bus. (T. Vol. IV pp. 905-906; D-101 Bates 813-823).

237.

The bus ride from [redacted]s home to D[redacted] Middle School was forty-three (43) minutes. The sound measurements indicated a safe range. Dr. Mc[redacted] did not notice any odors of exhaust fumes or other smells.[75] There was one (1) other student, a bus driver, and a bus monitor on that route. During the morning route, Dr. Mc[redacted] was able to have a conversation about science, specifically butterflies, with the other student. (T. Vol. IV pp. 906-911; D-101 Bates 813-823).

238.

The bus ride from D[redacted] Middle School to [redacted]s home was forty-nine (49) minutes. The sound measurements indicated a safe range. Dr. Mc[redacted] did not notice any problems with

[74] Dr. Mc[redacted] was also the audiologist who completed [redacted]s 2014 audiological evaluation. (T. Vol. IV pp. 898-890; D-48 Bates 0493-0495). In that evaluation, Dr. Mc[redacted] found [redacted] to be socially appropriate and engaging. (T. Vol. IV p. 898).

[75] Mrs. [redacted] testified about her experience riding the bus. In her testimony, and for the first time in this litigation, she noted that the bus would also be too hot and too odorous for [redacted] (T. Vol. III p. 643).

exhaust or heat. There was one (1) other student, a bus driver, and a bus monitor on that route. During the afternoon route, Dr. Mo[redacted] was able to have a conversation about motorcycles with the other student, who remembered Dr. Mo[redacted]'s name. (T. Vol. IV pp. 906-911; D-101 Bates 813-823).

III. CONCLUSIONS OF LAW

1.

The pertinent laws and regulations governing this matter include the Individuals with Disabilities Education Act ("IDEA") (20 U.S.C. §§ 1400-1482), 34 C.F.R. Part 300. (2014), the Family Educational Rights Privacy Act (FERPA) (20 U.S.C. § 1232g), O.C.G.A. § 20-2-152, and Ga. Comp. R. & Regs. 160-4-7-.01 to -.21 (DOE Rules). Other statutes and rules that may apply include, but are not limited to, the Americans with Disabilities Act (42 U.S.C. §§ 12101-12213), the Rehabilitation Act (29 U.S.C. §§ 700 to 718), and the Georgia Quality Basic Education Act (O.C.G.A. §§ 20-2-130 to -329.8).

2.

Hearings before this Tribunal are *de novo* proceedings. Ga. Comp. R. & Regs. 616-1-2-.21(3). As the parties bringing this hearing request and seeking relief, Plaintiffs bear the burden of proof as to all issues for resolution. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); Ga. Comp. R & Regs. 160-4-7-.12(3)(n). The standard of proof is a preponderance of the evidence. Ga. Comp. R. & Regs. 616-1-2-.21(4).

3.

Under IDEA, states are required to ensure that "[a] free appropriate public education is available to all children with disabilities." 20 U.S.C. § 1412(a)(1)(A). "The purpose of the IDEA generally is 'to ensure that all children with disabilities have available to them a free

appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living . . . .'" *C.P. v. Leon County Sch. Bd.*, 483 F.3d 1151, 1152 (11th Cir. 2007) (*quoting* 20 U.S.C. § 1400(d)(1)(A)). In order to achieve this goal, a written individualized educational program ("IEP") specifically tailored to each disabled student delineates the special education services that the student must receive in order to obtain a FAPE. *See* 20 U.S.C. § 1414(d)(1)(A). "[I]n the case of a child who is blind or visually impaired, [an IEP must] provide for instruction in Braille and the use of Braille unless the IEP Team determines . . . that instruction in Braille or the use of Braille is not appropriate for the child." 20 U.S.C. § 1414 (d)(3)(B)(iii). The school district must implement the student's IEP in the least restrictive environment possible by educating the student "to the maximum extent appropriate" with non-disabled students. 20 U.S.C. § 1412(a)(5)(A).

4.

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), (c)(2)(A). On July 30, 2014, Plaintiffs filed their Complaint, alleging the following IDEA violations: Violation of Substantive FAPE, Procedural Violations; Least Restrictive Environment; and Maintenance of Placement.

5.

In order to prevail, Plaintiffs must show by a preponderance of the evidence that the District failed to offer FAPE in the LRE. Alternatively, Plaintiffs must show actual harm as a result of a procedural violation. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); Ga. Comp. R & Regs. 160-4-7-.12(3)(n).

6.

The United States Supreme Court developed a two-part inquiry to determine whether a school district has provided FAPE: "First, has the State complied with the procedures set forth in the Act? And second, is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206-07 (1982). "This standard ... has become known as the *Rowley* 'basic floor of opportunity' standard." *C.P.*, 483 F.3d at 1153, *citing JSK v. Hendry County Sch. Bd.*, 941 F.2d 1563, 1572-73 (11th Cir. 1991). *See also Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275, 1280 (2008).

7.

Plaintiffs claim that the School District has violated the IDEA's procedural safeguards and thereby denied parental participation in the decision-making process concerning the education of [redacted] which amounted to a denial of a FAPE. *See Honig v. Doe*, 484 U.S. 305, 308 (1988) (IDEA's "comprehensive system of procedural safeguards [is] designed to ensure parental participation in decisions concerning the education of their disabled children"). However, "'[v]iolation of any of the procedures of the IDEA is not a per se violation of the Act.'" *K.A. v. Fulton County Sch. Dist.*, 741 F.3d. 1195, 1205 (11th Cir. 2013), *quoting Weiss v. Sch. Bd.*, 141 F.3d 990, 996 (11th Cir. 1998). Under IDEA, in order to prove a denial of FAPE based on a procedural violation, Plaintiffs must show that the procedural inadequacies "(i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit." *See* 34 C.F.R. § 300.513(2); 20 U.S.C. § 1415(f)(3)(E). In *Weiss*, the Eleventh Circuit held that where a family has "full and

effective participation in the IEP process . . . the purpose of the procedural requirements are not thwarted." 141 F.3d at 996. *See also K.A. v. Fulton County Sch. Dist.*, 741 F.3d at 1205 (relief not warranted where no evidence of prejudice to student or parents from defects in notice or delay in furnishing records). However, parent "'[p]articipation must be more than a mere form; it must be meaningful.'" *R.L. v. Miami-Dade Cnty. Sch. Bd.*, 757 F.3d 1173, 1188 (11th Cir. 2014), quoting *Deal v. Hamilton Cnty. Bd. of Educ.*, 392 F.3d 840, 858 (6th Cir. 2004).

A. Plaintiffs Alleged Procedural Violations

8.

Plaintiffs have alleged the following procedural violations:

- The IEP team failed to discuss the full continuum of alternative placements, including supplementary aids and services such as instruction from an itinerant teacher and thus failed to determine the LRE;
- The IEP team failed to discuss the negative impact or potential harm that the proposed placement may have on [redacted] or on the quality of services he needs;
- The IEP team failed to discuss transportation;
- The District predetermined [redacted]'s placement; and
- The District failed to provide timely and adequate Prior Written Notice.

9.

As noted above, IDEA requires school districts to develop an IEP for each child with a disability. *See* 20 U.S.C. §§ 1412(a)(4), 1414(d). The IEP team is the group of people who are responsible for developing, reviewing and revising the IEP. 34 C.F.R. § 300.23. There are five required members of an IEP team, and the School District must ensure that they attend the IEP team meetings unless they are excused by the parties. 34 C.F.R. 300.321. Those five individuals are the parent, a special education teacher of the child, a general education teacher of the child, a

representative from the school district,[76] and an individual who can interpret results of evaluations. 34 C.F.R. 300.321(a). "At the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate," may attend the IEP meeting. 34 C.F.R. 300.321(a)(6).

10.

A student's educational placement is determined by the IEP team. *R.L. v. Miami-Dade Cnty.* Sch. Bd., 757 F.3d 1173, 1177 (11th Cir. 2014); *see* 34 C.F.R. § 300.116(a)(1) (placement decision "[i]s made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options"). In making that determination, the IEP team must ensure that the placement is in the least restrictive environment ("LRE"). 34 C.F.R. §§ 300.114, 300.116(a)(2). Specifically, the District, through the IEP team, must ensure that "(i) To the maximum extent appropriate, children with disabilities . . . are educated with children who are nondisabled; and (ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 34 C.F.R. § 300.114(a)(2). To meet this requirement, the District must make available a continuum of alternative placements, including regular education classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. 34 C.F.R.

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[76] The school district representative must be someone who –

(i) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
(ii) Is knowledgeable about the general education curriculum; and
(iii) Is knowledgeable about the availability of resources of the public agency.

34 C.F.R. 300.321(a)(4).

§ 300.115(b)(1). Additionally, the District must have available and "consider the whole range of supplemental aids and services, including resource rooms and itinerant instruction," when determining whether the student could be educated in the regular education classroom. *Greer v. Rome City Sch. Dist.*, 950 F.2d 688, 696 (1991); *see also* 34 C.F.R. § 300.115(b)(2). Such consideration must occur during the development of the IEP and the District "should share these considerations with the child's parents at the IEP meeting." *Greer*, 950 F.2d at 696.

11.

The disabled child's placement should be "as close as possible to the child's home" and "[u]nless the IEP . . . requires some other arrangement, the child [should be] educated in the school that he or she would attend if nondisabled." 34 C.F.R. §§ 300.116(b)(3), (c). IDEA "presumes that the first placement option considered for each child with a disability is the regular classroom in the school that the child would attend if not disabled, with appropriate supplementary aids and services to facilitate such placement." 71 Fed. Reg. 46540, 46588 (Aug. 14, 2006).

12.

When determining the placement that meets the LRE requirements, the IEP team must consider "any potential harmful effect on the child or on the quality of the services he or she needs." 34 C.F.R. § 300.116(d). Additionally, the team must consider the concerns that parents have for enhancing the education of their child. *Winkleman v. Parma City Sch. Dist.*, 550 U.S. 516, 524 (2007).

13.

Throughout the hearing in this matter the Plaintiffs argued that the change from receiving push-in and pull-out VI services from [redacted] M[redacted], an itinerant teacher, at [redacted]'s home schoo

to the proposed placement of receiving VI services in a resource room at D[redacted] Middle School was a change in "placement." The District, on the other hand, argued that the services in the March 20, 2014 IEP were substantially the same as [redacted] had been receiving and providing those services at D[redacted] Middle School was not a change in placement, but rather a change in "location," which is within the District's discretion. Although not clear from the District's Proposed Findings of Fact and Conclusions of Law, the District presumably argues that because the location where the services will be provided is within the District's discretion, the IEP team is not required to discuss the location of the services or any potential effects related to that location.

14.

It is true that the majority of courts have held that placement refers to the educational program, not the particular school or building where the services will be provided. *See Veazey v. Ascension Parish Sch. Bd.*, 121 Fed. Appx. 552, 553 (2005), *citing White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 379 (5th Cir. 2003); *Hill v. School Bd for Pinellas County*, 954 F. Supp. 251, 253-54 (M.D. Fla. 1997), *aff'd*, 137 F.3d 1355 (11th Cir. 1998); *A.W. v. Fairfax County Sch. Bd.*, 372 F.3d 674, 681-83 (4th Cir. 2004); *White v. Ascension Parish Sch. Bd.*, 343 F.3d 373 (5th Cir. 2003); *Board of Educ. v. Illinois State Bd. of Educ.*, 103 F.3d 545, 549 (7th Cir. 1996)(explaining that the meaning of "educational placement" refers to general educational placement, not to the specific school location); *Sherri A.D. v. Kirby*, 975 F.2d 193, 206 (5th Cir. 1992)("educational placement" not a place, but a program of services); *Tilton v. Jefferson County Bd. of Educ.*, 705 F.2d 800, 804 (6th Cir. 1983), *cert. denied*, 465 U.S. 1006, 104 S. Ct. 998, 104 S. Ct. 999, 79 L. Ed. 2d 231 (1984) (transfer from one school to another with comparable program not a change in educational placement); *N.D. v. Hawaii Dep't of Educ.*, 600 F.3d 1104,

1115-16 (9th Cir. 2010) (discussing the various circuits' interpretation of the meaning of "current educational placement" and holding [*4] that "educational placement" means the general educational program of the student). Therefore, a change in location alone, in most instances, will not amount to a change in placement. *Id.*

15.

However, if there is a fundamental change in, or elimination of, a basic element of the educational program, then a change in location can amount to a change in placement. *Sherri A.D. v. Kirby*, 975 F.2d 193, 206 (5th Cir. 1992); *see also L.M. v. Pinellas Cnty. Sch. Bd.*, No. 8:10-cv-539-T-33TGW, 2010 U.S. Dist. LEXIS 46796, at *4 (M.D. Fla. Apr. 11, 2010) (acknowledging that "moving the location of the student's services may in some circumstances be a change in the educational placement," but concluding that those circumstances were not present in the case before the court); *R.L. v Miami-Dade Cnty. Sch. Bd.*, 757 F.3d at 1190-91 (finding that the large size of the proposed new school would impact the student's ability to benefit from his education); *P.V. v. Sch. Dist. of Philadelphia*, No. 2:11-cv-04027, 2013 U.S. Dist. LEXIS 21913, at *22 (E.D. Pa. Feb. 19, 2013) (concluding in a class action that the routine practice of transferring autistic students to a new school when the student completed the highest grade in his current school constitutes a change in placement and doing so without parental participation violated the procedural safeguards in IDEA).

16.

The determination of whether a change in location amounts to a change in placement is fact specific. *P.V.*, 2013 U.S. Dist. LEXIS 21913, at *19, citing *DeLeon v. Susquehanna Community. Sch. Dist.*, 747 F.2d 149, 153 (3rd Cir. 1984).

17.

At the hearing, Dr. [redacted] E[redacted] acknowledged that there were aspects of a location that could impact whether a student will receive a FAPE or whether the student will receive a FAPE in the LRE. Nevertheless, she did not allow the team to discuss the location where services would be provided during the meeting. Dr. E[redacted]' preemption of the discussion prevented the team from discussing the practical effects of the 52-minute bus ride, the parents' concerns, any potential harmful effects that the location may have on [redacted] or his services, and other aspects of LRE. For example, IDEA presumes that the first placement option considered for each child with a disability is the regular education classroom in the child's home school with the addition of appropriate supplementary aids and services. 71 Fed. Reg. 46540, 46588 (Aug. 14, 2006); 34 C.F.R. §§ 300.116(b)(3), (c). The regulations identify itinerant services as an example of a supplementary service. 34 C.F.R. § 300.115(2). [redacted] had been receiving VI instruction from an itinerant teacher at his home school; however, the possibility of going to P[redacted] Middle School, his home school, with the supplementary service of itinerant instruction was not discussed or considered during the IEP team meeting.

18.

Further, as noted above, the IEP team must ensure that the placement is in the LRE. During the IEP team meeting there was no discussion about the specific amounts of time that Ms. M[redacted] pulled [redacted] out of class for direct instruction or the amounts of time that she actually provided direct instruction when pushing into his math class.[77] Thus, it is unclear how

[77] The District argued that the parents knew, prior to the meeting that [redacted] received push-in and pull-out services. However, as noted above it is unclear exactly how much time [redacted] was removed from the regular education environment. Both parties appear to be incorrect in their assessments of how much time [redacted] was removed from the regular education environment, either during the time that Ms. M[redacted] pushed into his math class or during the time he was pulled out of the class. The biggest discrepancy appears to be with respect to the time when Ms. M[redacted] assisted [redacted] in the math class. The District appears to presume that the entire time Ms. M[redacted] was present in the math class [redacted] did not have access to his regular education peers. However, the testimony does not support that

the IEP team could have determined that the placement to be implemented at D[redacted] Middle School was the LRE. Rather, the team simply indicated that the services were similar and that they mimicked what he had been receiving. However, no one appeared to consider that the lengthy bus ride in the morning would prevent him from receiving his O&M services in the morning and that the time constraints of the 52-minute study skills class would not allow him to receive 45 minutes of his VI services and his O&M services during that class. Thus, he would have to be pulled out of another class or he would have to receive his O&M services after school. While these issues may not have resulted in a fundamental change to his education program, the IEP team did not discuss these matters and thus made no such determination.

19.

Given the requirements of the IEP team to consider educating [redacted] in his home school with supplementary services, to consider any potential harmful effect on the child or on the quality of the services, and to consider the parents' concerns, the undersigned concludes that the failure to discuss these matters during the IEP team meeting were procedural violations that significantly impeded the opportunity of [redacted]s parents to participate in the decision-making process regarding the provision of a FAPE to [redacted] *See* 34 C.F.R. § 300.513(2); 20 U.S.C. § 1415(f)(3)(E). This conclusion does not mean that the parents of a disabled child are entitled to any "veto power" over the final location decision. *P.V.*, at *25. School districts have significant authority to determine the location where services will be provided. *White v. Ascension Parish Sch. Bd.*, 343 F.3d at 380. Rather, the undersigned simply concludes that, under the facts of this

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assumption. Rather, there were only portions of the time that Ms. M[redacted] was engaged in direct instruction which would have prevented [redacted] from participating with his regular education peers. Similarly, Plaintiffs appear to presume that the entire time [redacted] was present in his math class he had access to his regular education peers. The testimony does not support that assumption either. It is clear that when a special education teacher is providing direct instruction to a student within the confines of a regular education class that student is not participating in the regular education curriculum.

case, the District's refusal to allow a discussion of the parents' concerns or any aspect of the location for services denied the parents the opportunity to provide input.[78] *P.V.*, at *25.

Predetermination

20.

Plaintiffs also alleged that the District predetermined [redacted]s placement when Dr. [redacted] E[redacted] told Mrs. [redacted] prior to the March 20, 2014 IEP team meeting that [redacted] would go to D[redacted] Middle School if he continued to need daily VI services.

21.

"Predetermination occurs when the [District] makes educational decisions too early in the planning process, in a way that deprives the parents of a meaningful opportunity to fully participate as equal members of the IEP team." *R.L*, at 1188, citing *Deal*, 392 F.3d at 857-59. The District must not have, prior to the IEP team meeting, already decided material aspects of the child's educational program. *Id.* Nor can it come to the meeting with a closed mind. *Id.* While the District may have pre-formed opinions about what is appropriate for the child's education, it must come to the meeting with an open mind and be receptive to parents' suggestions. *Id.* Allowing parents to attend and speak at the IEP team meeting is not enough. *Id.* A school district can avoid a finding of predetermination if shows that it "'was receptive and responsive at all stages' to the parents' position, even if it was ultimately rejected." *Id.* However, those responses must be meaningful and should make it clear that the school district "actually considered the parents' points." *Id.* at 1188-89.

[78] The District argued that because Mrs. [redacted] participated in discussions about the services [redacted] would receive and was allowed to read her concerns to the IEP team, she was not denied parental participation. But parent participation must be more than a mere formality, it should be meaningful. *R.L.*, at 1188. This means that it is not enough that the parent attends the IEP team meeting and is allowed to speak. *Id.*, citing *Deal v. Hamilton Cnty. Bd. of Ed.*, 392 F.3d 840, 858 (6th Cir. 2004).

22.

In this case, the District had decided that if [redacted] needed daily vision services, he would have to attend D[redacted] Middle School. There was no discussion whatsoever about the parents' concerns during the IEP team meeting. Thus, there was no consideration of their points. Rather, Dr. E[redacted] cut off the conversation and told the family that she would discuss their concerns about the location with them after the IEP team meeting.

23.

The District argued that this is a location issue, not a placement issue and because the location is within the District's discretion, there is no predetermination. The District further asserted that the parents agreed with the proposed services, were allowed to present their concerns to the IEP team, and did not present evidence that it was predetermined that [redacted] would attend D[redacted] or that he would receive daily VI services.

24.

It is true that this case does not present the typical type of predetermination. In other words, it was not predetermined that [redacted] would require a particular set of services. However, a draft IEP was sent to the parents indicating daily VI services. Further, Dr. [redacted] E[redacted] told the family that [redacted] would attend D[redacted] if he needed daily services. Finally, Dr. E[redacted] prevented the team from discussing the parents' concerns. While many of the parents' concerns related to the location of the services, some of the concerns were related to the practical effects of the long bus ride to and from D[redacted]. It was not enough to allow Mrs. [redacted] to read her concerns to the IEP team. *R.L.*, 757 F.3d at 1188. The team should have actually considered her points, but that was not allowed.

25.

Had the District allowed the discussion to occur, then perhaps the team could have come up with a different set of services, something less than daily VI services that would still have met [redacted]s needs.[79] For example, perhaps the team could have developed a more extensive ESY program that would have pre-taught [redacted] some of the Nemeth Code Braille or more of the screen reading commands. This perhaps could have lessened the need for daily VI services. It is also possible that if the discussion had been allowed to occur, the team would have made the same recommendations that it made during the March 20, 2014 IEP team meeting, but at least the District would have actually considered the parent's concerns.

26.

Because the District came to the meeting set on a resource study skills class at D[redacted] Middle School [redacted] required daily VI services and was unwilling to consider anything else, the undersigned concludes that the placement decision was to some extent predetermined. *See R.L.*, at 1190. This predetermination significantly impeded [redacted]s parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to [redacted] which amounted to a denial of a FAPE. *See* 34 C.F.R. § 300.513(2); 20 U.S.C. § 1415(f)(3)(E).

Prior Written Notice

27.

Plaintiffs also alleged that the District violated IDEA's Prior Written Notice procedure. Specifically, Plaintiffs allege that the District failed to provide adequate and timely Prior Written Notice. IDEA requires the District to provide written notice which meets certain requirements

[79] If the District had been frank with the Plaintiffs and told them that it did not have an itinerant VI teacher that could provide [redacted] with daily services at P[redacted] Middle School; the undersigned believes that the IEP team could have crafted an IEP to meet [redacted]s need while remaining at his neighborhood school. If that had happened, the parties could have avoided the time, expense, and stress of a nine-day hearing.

before it proposes to change the educational placement of a disabled child. 20 U.S.C. § 1415(b)(3). The notice must include the following:

> (1) A description of the action proposed or refused by the agency;
>
> (2) An explanation of why the agency proposes or refuses to take the action;
>
> (3) A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;
>
> (4) A statement that the parents of a child with a disability have protection under the procedural safeguards of this part and if this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;
>
> (5) Sources for parents to contact to obtain assistance in understanding the provisions of this part;
>
> (6) A description of other options that the IEP Team considered and the reason why those options were rejected; and
>
> (7) A description of other factors that are relevant to the agency's proposal or refusal.

34 C.F.R. § 300.503.

28.

Georgia DOE Rules 160-4-7-.09 (5)(a) and (b), entitled "Notice to Parents/Guardian/Surrogate," track this federal regulation. Subsection (5)(c) of Rule 160-4-7-.09 provides as follows:

> In most cases, the above Notice requirements can be addressed by providing the parent(s) with a copy of documents such as the consent to evaluate, consent for placement, consent for accessing a child's or parent's public benefits or insurance, evaluation report, eligibility report, invitation to a meeting, the full individualized education program (IEP) (with minutes, if taken), and/or other relevant documents, as appropriate.

Georgia DOE Rule 160-4-7-.09(5)(c).

29.

Prior Written Notice may be provided through either a production of educational records, which provides an explanation of the District's actions in accordance with the above referenced rules and regulations, or Prior Written Notice may be provided within ten days after a party files a due process hearing request. *K.A. v. Fulton Cnty. Sch. Dist.* No. 1:11-CV-727-TWT, 2012 U.S. Dist. LEXIS 136327, at *13 (N.D. Ga. Sept. 21, 2012); 20 U.S.C. § 1415(c)(2)(B)(i)(I); 34 C.F.R. § 300.508(e)(1).

30.

The record in this case shows that a complete set of [redacted]s education records were provided by the District to Plaintiffs on July 17, 2014. Furthermore, Plaintiffs were provided with Prior Written Notice August 9, 2014.

31.

Plaintiffs argued that the August 9, 2014 Prior Written Notice "failed to identify alternatives considered and did not meet the requirements at 34 C.F.R. §§ 300.503 or 300.508(e)(1)(i)-(iv)." Plaintiffs do not further elaborate on how else the Prior Written Notice failed to meet the requirements of the regulations. Plaintiffs have failed to establish a procedural violation concerning the Prior Written Notice. The August 9, 2014 Prior Written Notice document does list "alternatives considered."[80]

B. <u>Plaintiffs Alleged Substantive Violations</u>

32.

Plaintiffs alleged the following substantive denials of a FAPE:

[80] While it is questionable whether the District truly considered the listed alternatives, it did in fact list alternatives considered.

- Plaintiffs were denied participation in the IEP team meeting process[81]
- The District provided inadequate and inappropriate supportive aids and services[82]
- The District offered inadequate and inappropriate accommodations in the IEP[83]
- The District enforced unnecessary transportation on [redacted] which will cause harm and adversely impact the instructional day

33.

As noted above, to prove a denial of FAPE based on a procedural violation, Plaintiffs must show that the procedural inadequacies "(i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit." *See* 34 C.F.R. § 300.513(2); 20 U.S.C. § 1415(f)(3)(E). To the extent Plaintiffs assert that procedural violations denied parent participation and therefore there was a denial of a FAPE, those allegations have been addressed above in the previous section.

34.

To determine whether there has a substantive denial of FAPE based on the IEP, this tribunal must determine whether the IEP was "reasonably calculated" to provide [redacted] with educational benefit. *Rowley*, 458 U.S. at 206-07.

[81] The undersigned notes that there is significant overlap and repetition of Plaintiffs' alleged procedural violation and substantive violations, which makes discerning their specific claims somewhat difficult.

[82] Presumably Plaintiffs are referring to VI services from an itinerant teacher.

[83] At the hearing, Plaintiffs presented no evidence to support this allegation.

35.

In determining the appropriateness of an IEP, the federal courts have maintained consistently that the analysis must be prospective rather than retrospective. *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1040 (3d Cir. 1993); *see also Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999); *O'Toole v. Olathe Dist. Schools*, 144 F.3d 692, 701-02 (10th Cir. 1998). In *Fuhrmann*, the court stated,

> The measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date. Neither the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement.

Fuhrmann, 993 F.2d at 1040.

36.

An IEP "is a snapshot, not a retrospective. In striving for 'appropriateness[,]' an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated." *Mandy S. v. Fulton County Sch. Dist.*, 205 F. Supp. 2d 1358, 1367 (N.D. Ga. 2000), *aff'd without opinion*, 273 F.3d 1114 (11th Cir. 2001); *Roland M. v. Concord School Comm.*, 910 F.2d 983, 992 (1st Cir. 1990); *K.E. v. Independent School District No. 15*, 647 F.3d 795, 808 (8th Cir. 2011)(IEPs may not be found to be inappropriate via evidence that they lacked services and adaptations that a parent contends became necessary at a later juncture); *B.M. v. Encinitas Union Sch. Dist.*, No. 08cv412-L, 2013 U.S. Dist. LEXIS 20352, at *15-16 (S.D. Cal., Feb. 14, 2013)("[i]n the present case, the relevant 'snapshot' was of plaintiff's abilities in May 2007, the time of the IEP"); *M.W. v. Clarke Cnty. Sch. Dist.*, No. 3:06-CV-49, 2008 U.S. Dist. LEXIS, at *38 (M.D. Ga., Sept. 29,

2008) Therefore, the appropriateness of an IEP is determined only based on the information available to the IEP team at the time it was developed.

37.

Additionally, the courts specifically recognize that evidence of a child's performance or progress in a subsequent placement is not outcome determinative regarding the appropriateness of an IEP proposed by a school district. *Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999); *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 133 (2d Cir. 1999) (inadequacy of IEP is not established simply because parents show that child made greater progress in a single area in program desired by them); *O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233*, 144 F.3d 692, 708 (10th Cir. 1998)(the fact that student made more progress or was happier in private placement does not indicate either that private placement was appropriate or that district's IEP was inappropriate); *Delaware County Intermediate Unit No. 25 v. Martin K.*, 831 F. Supp. 1206, 1216 (E.D. Pa. 1993) (evaluation of child's progress in alternative placement is not relevant to determination of appropriateness of proposed IEP). *Gwinnett Cnty. Sch. Dist.*, 114 LRP 9195, OSAH-DOE-1404095-67-Howells (December 23, 2013).

38.

Considering subsequent information not only undermines the role of the IEP team and the Congressional deference to educators recognized in *Rowley,* but also creates the danger that the analysis will turn from the appropriate consideration of the challenged IEP's adequacy into the impermissible comparison of possible programs. *Fort Zumwalt School Dist. v. Clynes*, 119 F.3d 607, 613 (8th Cir. 1997)(school district's IEP was appropriate notwithstanding that student may have benefited more from parent's choice of placement). "An IEP may not be the only appropriate choice, or the choice of certain selected experts, or the parents' first choice, or even

the best choice, yet still provide a free appropriate public education." *Amann v. Stow Sch. Sys.*, 982 F.2d 644, 651 (1st Cir. 1992)(*quoting G.D. v. Westmoreland Sch. Dist.*, 930 F.2d 942, 948 (1st Cir. 1991)(internal citations and punctuation omitted)); *see also Heather S. v. State of Wisconsin*, 125 F.3d 1045, 1057 (7th Cir. 1997)(the issue is whether school's IEP is appropriate, "not whether another placement would also be appropriate, or even better for that matter"); *Adam J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 810 (5th Cir. 2003); *A.B. v. Lawson*, 354 F.3d 315, 330 (4th Cir. 2004)(issue was not whether parent's choice of placement was better, but whether school's IEP offered FAPE).

39.

With respect to the "snapshot" rule, courts have also warned against comparing a subsequent IEP to the one at issue in a due process hearing request. In *F.O., et al. v. New York City Dept. of Educ.*, 976 F. Supp. 2d 499 (S.D.N.Y. 2013), the family of a disabled student sought to supplement the administrative record on appeal with evidence regarding an IEP from the 2011-2012 school year to show that the IEP from 2010-2011 was inappropriate. In denying the parents' motion to supplement the administrative record, the court reasoned as follows: "[a]t the time that the 2010–2011 IEP was created, the 2011–2012 IEP did not exist. Accordingly, the Court will not consider the 2011–2012 IEP in determining whether the 2010–2011 IEP was appropriate." *F.O.*, 976 F. Supp. 2d at 513. *See M.H. ex rel. H.H. v. N.Y.C. Dep't of Educ* No. 10 Civ. 1042, 2011 U.S. Dist. LEXIS 17306, at *35-36 n.6 (S.D.N.Y. Feb. 16, 2011) ("[A]n IEP postdating the one at issue in this case is of little probative value for evaluating 'appropriateness' in this case."), *aff'd* 685 F.3d 217 *(2d Cir. 2012)." *F.O.*, 976 F. Supp. 2d at 513.

40.

IDEA provides that an IEP shall include (1) a statement of the child's present levels of academic achievement and functional performance; (2) a statement of measurable annual goals, including academic and functional goals; (3) a description of how the child's progress toward meeting the annual goals will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided; (4) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child and a statement of the program modifications or supports for school personnel that will be provided for the child; (5) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class; (6) a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent; and (7) the projected date for the beginning of the services and modifications, and the anticipated frequency, location, and duration of those services and modifications. 20 U.S.C. § 1414(d)(1)(A)(i).

41.

With regard to the first prong of the FAPE analysis, the evidence of this case shows that the IEP team considered [redacted]s present levels of performance in order to set goals and objectives and then determined a placement which would provide the appropriate amount of ECC instruction to enable [redacted] to meet those goals and objectives. This process complies with 20 U.S.C. § 1414(d)(1)(A)(i).

42.

Regarding the second prong, Plaintiffs' claims fail from the outset. Plaintiffs presented no persuasive evidence demonstrating that [redacted]s proposed placement of one segment of small group ECC instruction to be provided through the Site-Based VI program at D[redacted] Middle School was not reasonably calculated to provide [redacted] with educational benefit.

43.

The special education services to be provided to [redacted] were discussed by the IEP team and were explicitly stated in the IEP, along with their anticipated frequency, location,[84] and duration. The IEP team provides for 45 minutes (one segment) of small group, ECC instruction, resulting in 5 out of 6 classes in the general education setting.

44.

Plaintiffs produced no evidence that the IEP was inappropriate at the time it was created. Instead, Plaintiffs relied on their expert, Dr. S[redacted], to opine that [redacted] does not now require the level of services in the proposed IEP. Dr. S[redacted]'s opinions do not support a finding that the services provided in the IEP were not appropriate at the time. *See e.g. B.M. v. Encinitas Union Sch. Dist.*, 2013 U.S. Dist. LEXIS 20352, at *15-16 (holding that under the "snapshot rule" the only relevant testimony is what was known at the time the IEP was created). Similarly, Mrs. [redacted]'s testimony regarding the services that she believed [redacted] currently requires does not support a finding that the level of service in the IEP was inappropriate. Plaintiffs presented no evidence that would reflect that the March 20, 2014, IEP was inappropriate when created. Evidence of [redacted]s current progress with fewer services at P[redacted] Middle School may not be determinative

[84] The undersigned has previously held that the term "location" pursuant to Ga. Comp. R. & Regs. 160-4-7-.06 refers to "the setting in which the services will be delivered; i.e., general education versus special education." *Gwinnett Cnty. Sch. Dist.*, 114 LRP 9195 at ft. nt. 18, OSAH-DOE-1404095-67-Howells (December 23, 2013).

of the appropriateness of the March 20, 2014 IEP. However, it is relevant to the issue of remedy as discussed below.

45.

The District argued that Plaintiffs were not entitled to allow an expert observe [redacted] after the Complaint was filed because the IDEA does not permit discovery and the school district is not required to allow an expert to observe the student as part of assisting in active litigation. The District cited the administrative decision in *Anne Arundel County Public School,* 113 LRP 14985, MSDE-AARU-OT-12-35466 (December 4, 2012) for the proposition that this tribunal should disregard Dr. S[redacted]'s testimony based on her alleged impermissible observation. The undersigned agrees with the District that the manner in which Dr. S[redacted] obtained permission to observe [redacted] at P[redacted] Middle School appears to have been less than forthright. Nonetheless, the case cited by the District does not stand for the proposition that the testimony based on alleged improper observation should be stricken. Rather, it stands for the proposition that there was no basis to compel the school district to allow the observation. Therefore, the undersigned declines the District's request to strike that portion of Dr. S[redacted]'s testimony.

46.

The District offered evidence of the appropriateness of the placement from several educators. First, Ms. M[redacted], who provided over 1,000 hours of direct VI instruction, opined that the one segment a day of small group VI instruction was an appropriate amount of time to allow [redacted] to work on his goals and objectives and that he required one segment per day of VI services for his goals and objectives to be fully implemented. In addition, Ms. A[redacted], who provided approximately 200 hours of O&M instruction, also opined that the goals and objectives were appropriate. Mr. A[redacted], who would be [redacted]'s middle school VI instructor at D[redacted]

Middle School, opined, based on his review of [redacted]s IEPs opined that he would need approximately one segment per day of dedicated ECC instruction in order to implement [redacted]'s IEP and work on meeting the goals and objectives.

47.

Furthermore, the District concluded that pull-out services would be necessary for ECC instruction because the nature of the ECC curriculum is so drastically different from the general education curriculum. As the testimony reflects, ECC instruction for [redacted] cannot be delivered without some pull-out services. Dr. S[redacted] also opined that [redacted] would continue to need some pull-out ECC instruction. Ultimately, the IEP team recommended one segment per day of pull-out ECC instruction at one of the District's Site-Based VI programs.

48.

The District developed an appropriate IEP that took into account [redacted]'s needs as they were known to the IEP team at the time the IEP was created. While [redacted] had performed well academically and made progress academically, he needed instruction in the ECC in order to learn the necessary skills related to his blindness. Accordingly, on March 20, 2014, the District convened an IEP meeting and offered an IEP that was reasonably calculated to provide [redacted] with educational benefit. Plaintiffs presented no credible evidence to the contrary.

Plaintiffs Failed to Establish a Substantive FAPE Claim Regarding Transportation

49.

In their due process hearing request and at the hearing, Plaintiffs claimed that [redacted]s special education transportation travel time to and from D[redacted] Middle School is excessive and harmful to [redacted]

50.

Transportation is deemed a related service under IDEA and its implementing federal regulations. 34 C.F.R. §300.34. The related service of special education transportation includes "transportation to and from school and between schools" as well as "travel in and around school buildings" and "specialized equipment (such as special or adapted buses, lifts, and ramps) if required to provide special transportation for a child with a disability." 34 C.F.R. §300.34(c)(16). With respect to length of bus trips to and from school, neither IDEA or its federal implementing regulations, nor the Georgia Department of Education set any specific limitations with respect to the maximum amount of travel time for a special education student. As such, this Court must rely upon interpretive case law in which to make such a decision.

51.

When addressing this issue, administrative law judges and district court judges generally have found that a bus ride that does not exceed one hour in each direction is acceptable. *Ramona Unified School District/Santee Sch. Dist.*, 27 IDELR 747 (CSEA 1997); *Bonadonna v. Cooperman*, 557 IDELR 178 (EHLR 557:178)(D.N.J. 1985); *Covington Community Sch. Corp.*, 18 IDELR 180 (SEA IN 1991); *Kanawho Cnty. (WV) Pub. Sch.* 16 IDELR 450 (16 EHLR 450) (OCR 1987); *Palm Beach Cnty. (FL) Sch. Dist.*, 31 IDELR 37 (OCR 1998). Importantly, a district court in Pennsylvania recently held that a bus trip for a special education student that lasted three hours in duration roundtrip was appropriate. *Tyler W., et al. v. Upper Perkiomen Sch. Dist.*, 963 F. Supp. 2d 427, 431, 437 (E.D. Pa. 2013). In doing so, that court analyzed whether there was evidence linking the bus ride to a denial of FAPE. *Id.* at 437. Indeed, when assessing the appropriateness of bus routes regarding special education transportation, the relevant inquiry is whether or not a student is denied FAPE. *See, Brett K., et al. v. Momence*

Community Unit Sch. Dist. No. 1, No. 06 C 3353, 2007 U.S. Dist. LEXIS 23880, at *15 (N.D. Ill., Mar. 30, 2007).

52.

At the hearing and in their due process hearing request, Plaintiffs raised several allegations regarding the impact that a fifty-two (52) minute bus ride to and from D[redacted] Middle School (each way) would have on [redacted] and his ability to receive FAPE. These allegations include: (1) anxiety [redacted] would experience; (2) sensory issues [redacted] would experience; (3) his inability to participate in school-based and non-school based extra-curricular activities before and after school; (4) difficulty he would have in completing homework assignments; and (5) a bus schedule that may require him to leave school before the conclusion of the school day.

53.

In support of their anxiety argument, Plaintiffs presented a letter from [redacted]s pediatrician as well as testimony from Mrs. [redacted] and, [redacted]s therapist, Ms. N[redacted]. As an initial matter, the letter from [redacted]'s pediatrician, which mirrored a letter authored by the pediatrician seven years earlier, was offered by the pediatrician without meeting with [redacted] or assessing him. For that reason, the undersigned did not find this opinion to be credible. Ms. N[redacted] testified that the bus ride could serve as a heightened stressor for [redacted] making it more difficult for [redacted] to focus. Ms. N[redacted]'s testimony is also not credible as her original letter states that [redacted] could transition to D[redacted] Middle School with appropriate support. Further, she testified that she did not know whether [redacted] could attend D[redacted] Middle School, leaving the door open that such a transition is possible.

54.

Finally, to the extent that [redacted] expressed any fears regarding the bus ride to D[redacted] Middle School, Ms. S[redacted] noted that such fears are consistent with any child transitioning to middle school. Thus, the undersigned concludes that there was insufficient evidence to prove that any anxiety [redacted] may have regarding riding the bus to D[redacted] Middle School would amount to a denial of a FAPE.

55.

Plaintiffs' Complaint raised issues that the bus trip to D[redacted] Middle School would create sensory issues for [redacted] which could also result in hearing loss. This argument, which was largely abandoned at the hearing, was rebutted by the District's audiologist, who performed sound level assessments on the special education bus on which [redacted] would travel if he attended D[redacted] Middle School as well as the noise levels on the bus on which [redacted] would travel if he attended P[redacted] Middle School. She found the noise levels to be appropriate for [redacted] on the bus to D[redacted] Middle School and found no basis to establish any risk of hearing loss if [redacted] travelled on that bus throughout the school year. Although Plaintiffs had an audiologist on their witness list, they did not present their audiologist and presented no evidence to rebut the District's expert's conclusions. Thus, Plaintiffs failed to prove that the noise level on the bus to D[redacted] Middle School would cause sensory problems (i.e., hearing loss) for [redacted]

56.

Section 300.107(a) of Title 34 of the Code of Federal Regulations states that in order to provide FAPE, "[e]ach public agency must take steps, including the provision of supplementary aids and services determined appropriate and necessary by the child's IEP Team, to provide non-

academic and extra-curricular services and activities in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities." Plaintiffs, essentially, argue that the 52-minute bus ride to and from D[redacted] Middle School would prevent [redacted] from participating in non-academic and/or extra-curricular activities.[85] However, the requirement of the regulation is that the student has an equal opportunity to participate. *Id.*; *Independent School District No. 12 v. Minnesota Dept. of Educ.*, 788 N.W.2d 907 (Minn. 2010); *Santa Fe R-X School District*, 62 IDELR 99, Missouri State Educational Agency (August 29, 2013) (holding that student was not denied equal opportunity to participate in extra-curricular activities when he was too busy to participate in everything he wished). Based on the evidence in the record it is unclear whether [redacted] will have an opportunity to participate in extra-curricular activities.

57.

At the hearing, Plaintiffs pointed out that most of the extracurricular clubs at D[redacted] occur in the morning and that [redacted] would be riding the bus to D[redacted] during the time that the clubs meet. One of the District's witnesses, Mr. A[redacted] testified that he could arrange transportation so [redacted] could participate in extracurricular activities.[86] Nevertheless, Plaintiffs did not identify any specific supplementary aids or services that [redacted] needed, and which the District did not provide, to allow him the opportunity to participate in school sponsored

[85] [redacted] participated in chess club, beep kickball, jiu-jitsu, and karate while at C[redacted] Elementary School. However, only the chess club and beep kickball were school-sponsored activities. The undersigned does not read 34 C.F.R. § 300.107 to require the District to take steps to give disabled students an opportunity to participate in extracurricular activities that are not school-sponsored. The regulation states that the agency must take steps to provide supplementary aids and services "to *provide* nonacademic and extracurricular . . . activities in the manner necessary to afford children with disabilities an equal opportunity to participate." 34 C.F.R. § 300.107(a) (emphasis added). As written, the regulation implies that the District must provide supplementary aids and services to assist the disabled student to participate in the activities that the *school provides* to other students.

[86] Plaintiffs' counsel objected to this and other similar testimony as an after-the-fact "we'll fix it" defense, which the Plaintiffs argued is improper evidence. Plaintiffs cite *Knable v. Bexley*, 238 F.3d 755, 769-770 (6th Cir. 2000) in support of their argument.

extracurricular activities. Accordingly, Plaintiffs have failed to prove a substantive denial of a FAPE as it relates to school-sponsored extracurricular activities.

58.

To the extent that the proposed transportation would prevent [redacted] from participating in extracurricular activities, there is no evidence to support that his inability this would deny him educational benefit. Although [redacted] testified that the District extracurricular activities helped him focus, he did not testify that he would be precluded from accessing his education without them. Ms. M[redacted] also testified that [redacted] did not require chess club or jiu-jitsu/karate in order to receive FAPE.

59.

Mrs. [redacted] presented testimony at the hearing that the length of transportation to D[redacted] Middle School would make it such that [redacted] could not complete his homework unless the District essentially provided a classroom on the bus. Other than Mrs. [redacted]'s conclusory testimony, there is no other evidence supporting a finding that [redacted] would not be able to complete his homework assignments if he attended D[redacted] Middle School. Based on the evidence in the record, Plaintiffs have failed to prove that the length of the bus ride would prevent [redacted] from completing his homework and amount to a substantive denial of a FAPE.

60.

Plaintiffs also argued at the hearing that [redacted]s bus schedule to D[redacted] Middle School, as prepared by the transportation department, would require [redacted] to miss up to eight minutes of the last part of his school day. As an initial matter, and assuming this is true, Plaintiffs did not present any evidence that this would deny [redacted] a FAPE.

C. Plaintiffs LRE Claim

61.

The IDEA states, "[t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs 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." 20 U.S.C. § 1412(a)(5)(A). Congress created an IDEA preference for educating students with disabilities with their typical peers. 20 U.S.C. § 1412(a)(5)(A); *see also* 34 C.F.R. §§ 300.114-300.116; Ga. Comp. R. & Regs. 160-4-7-.07. There is a tension between IDEA's goals of mainstreaming and meeting each child's unique needs. As the Eleventh Circuit has said:

> In short, the Act's mandate for a free appropriate public education qualifies and limits its mandate for education in the regular classroom. Schools must provide a free appropriate public education and must do so, to the maximum extent appropriate, in regular education classrooms. But when education in a regular classroom cannot meet the handicapped child's unique needs, the presumption in favor of mainstreaming is overcome and the school need not place the child in regular education.

Greer v. Rome City Sch. Dist., 950 F.2d 688, 695 (11th Cir. 1991) *opinion withdrawn*, 956 F.2d 1025 (11th Cir. 1992), and *opinion reinstated in part*, 967 F.2d 470 (11th Cir. 1992) (citing *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1045 (5th Cir. 1989)).

62.

The Eleventh Circuit adopted a two-part test for analyzing LRE claims:

> First we ask whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily. If it cannot and the school intends to provide special education or to remove the child from regular education, we ask, second, whether the school has mainstreamed the child to the maximum extent appropriate.

Greer, 950 F.2d at 696 (citations omitted). The 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 school's response to the child's needs." *Id.*

63.

The Eleventh Circuit has provided three factors for analyzing if the student can be educated in a general education placement: (1) The school district may compare the educational benefits the student will receive in the general setting with the benefits she will receive in the special education setting; (2) The school district may consider what effect the presence of the student in a general education setting would have on the education of other students in that setting, and (3) The school district may consider the cost of the supplemental aids and services necessary to achieve a satisfactory education in general education setting. *Greer*, 950 F.2d at 697.

64.

In considering the least restrictive environment appropriate for a student, the IEP team must consider the continuum of placement options. 34 C.F.R. § 300.115; Ga. Comp. R. & Regs. 160-4-7-.07. Beginning with the least restrictive placement, the options for school-age children are: (1) the general classroom; (2) instruction outside the general classroom; (3) a separate day school or program; (4) home-based instruction; (5) residential placement; and (6) hospital/homebound instruction. *Id.* Additionally, the District must have available supplementary services "such as resource room[s] or itinerant instruction" to be provided with a regular education class placement. 34 C.F.R. § 300.115(b)(2).

65.

Plaintiffs, essentially, argue that the District violated IDEA's LRE in three distinct ways: (1) assigning [redacted] to small group special education for ECC instruction; (2) assigning [redacted] to the Site-Based VI program at D[redacted] Middle School; and (3) assigning [redacted] to a special education bus for transportation to D[redacted] Middle School.

Could [redacted] Have Been Educated Solely in the Regular Education Classroom with Supplementary Aids and Services?

66.

Despite the obvious benefits [redacted] receives from participating in the general education curriculum, the evidence indicated that due to the differences in the ECC and the general education curriculum, [redacted] would require some amount of pull-out instruction.[87] Further, there was ample testimony that benefits [redacted] would receive from the direct instruction in the ECC would promote his future independence. With regard to the second factor identified by the Greer court, there was no evidence that [redacted]'s presence in the general education classes was, *in fact*, disruptive. Finally, there was some testimony regarding the cost to provide the supplementary aids and services to educate [redacted] in the general education curriculum setting at P[redacted] Middle School.[88] It is clear that [redacted] can and should be educated to a large extent in the general education curriculum. But it is also clear that [redacted] does require some amount of direct instruction outside of the general education curriculum. Thus, the pertinent question is whether the March 20, 2014 IEP mainstreamed [redacted] to the maximum extent appropriate.

[87] There were, however, differences of opinion between the District's witnesses and Plaintiffs' witness as to how much pull-out instruction [redacted] would require.

[88] Throughout the hearing, the District asserted that it would be necessary to provide a Braille embosser, a Braille clerk, and a Braille paraprofessional on-site at P[redacted] Middle School if [redacted] was to be educated there. As noted above, the undersigned did not find the on-site presence of a Braille clerk to be necessary to provide [redacted] with an appropriate education. Thus, the testimony regarding the cost of providing these items at P[redacted] Middle School does not impact the determination of whether [redacted] could be educated solely in the general education curriculum.

Was [redacted] Mainstreamed to the Maximum Extent Appropriate?

67.

The March 20, 2014 IEP provided for 45 minutes a day in ECC instruction in a small group (i.e., in a resource study skills class).[89] This class takes the place of one of [redacted]'s electives. The District witnesses testified that [redacted] required one segment per day of direct ECC instruction to meet his objectives. Dr. E[redacted] testified that currently the District does not have an itinerant VI teacher that she could send to P[redacted] Middle School every day of the week to provide the services in [redacted]s IEP. Despite a nation-wide recruiting effort, the District has not been able to fill the current two openings for VI instructors. As Dr. E[redacted] testified, if the District were to reassign current personnel to P[redacted] Middle School, it would do detriment to other students.

68.

As part of their LRE argument, Plaintiffs contend that if [redacted]'s IEP were to be implemented at D[redacted] Middle School rather than his home school, he would not be in his least restrictive environment.

69.

IDEA and its implementing federal regulations provide that "[u]nless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if not disabled." 34 C.F.R. 300.116(c). This, however, is not a requirement that students' placement locations be at their home schools in order to satisfy IDEA's LRE requirements. Indeed, *Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 727 (10th Cir. 1996), clearly states that IDEA "does not give [the plaintiff] a right to a placement in a

[89] For the remainder of the school day, other than [redacted]'s O&M services and his once per month DHH services, the IEP provides that [redacted] will be in regular education classes without support.

neighborhood school." *Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 727 (10th Cir. 1996). In support of its position, the Tenth Circuit relied upon one of its earlier opinions, *Murray v. Montrose County School Dist.*, 51 F.3d 921, 927 (10th Cir. 1995). Importantly, in *Murray*, the Tenth Circuit entertained arguments regarding the legislative intent and history of IDEA regarding local school placement locations. More specifically, that court rejected the notion that statements from the legislative history of IDEA support a presumption of placements being located at a home school. *Murray*, 51 F.3d at 928-930. The court further stated that "[t]here is at most a preference for education in the neighborhood school." *Id.* It further correctly found that students "should be educated in the school he or she would attend if not disabled (i.e., the neighborhood school), *unless* the child's IEP requires placement elsewhere. If the IEP requires placement elsewhere, then, in deciding where the appropriate placement is, geographical proximity to home is relevant, and the child should be placed as close to home as possible." *Id.* at 929 (emphasis in original).

70.

With respect to this issue and according to the Fifth Circuit,

> All of our sister circuits that have addressed the issue agree that, for provision of services to an IDEA student, a school system may designate a school other than a neighborhood school. Restated, no federal appellate court has recognized a right to a neighborhood school assignment under the IDEA. *See, e.g., McLaughlin v. Holt Public Sch. Bd. of Educ.*, 320 F.3d 663, 672 (6th Cir.2003) (LRE provisions and regulations do not mandate placement in neighborhood school); *Kevin G. by Robert G. v. Cranston Sch. Comm.*, 130 F.3d 481, 482 (1st Cir.1997) ("[W]hile it may be preferable for Kevin G. to attend a school located minutes from his home, placement [where full-time nurse located] satisfies [the IDEA].... The school district has an obligation to provide a school placement which includes a nurse on duty full time, but it is not required to change the district's placement of nurses when, as in this case, care is readily available at another easily accessible school".); *Hudson v. Bloomfield Hills Public Sch.*, 108 F.3d 112 (6th Cir.1997) (IDEA does not require placement in neighborhood school); *Urban v. Jefferson County Sch. Dist. R–1*, 89 F.3d 720, 727 (10th Cir.1996) (IDEA does not give student a right to placement at a neighborhood school); *Murray v. Montrose*

> *County Sch. Dist.*, 51 F.3d 921, 928–29 (10th Cir. 1995) (no presumption in IDEA that child must attend neighborhood school—proximity to home only one factor), *cert. denied,* 516 U.S. 909, 116 S. Ct. 278, 133 L.Ed.2d 198 (1995); *Schuldt ex rel. Schuldt v. Mankato Indep. Sch. Dist. No. 77,* 937 F.2d 1357, 1361–63 (8th Cir. 1991) (school may place student in non-neighborhood school rather than require physical modification of the neighborhood school to accommodate the child's disability); *Barnett v. Fairfax County Sch. Bd.,* 927 F.2d 146 (4th Cir.) (school district complied with IDEA by providing deaf student with "cued speech" program in a centralized school approximately five miles farther than neighborhood school), *cert. denied,* 502 U.S. 859, 112 S. Ct. 175, 116 L.Ed.2d 138 (1991); *Wilson v. Marana Unified Sch. Dist. No. 6 of Pima County,* 735 F.2d 1178 (9th Cir.1984) (school district may assign child to school 30 minutes away because teacher certified in child's disability was assigned there, rather than move the service to the neighborhood school).

White v. Ascension Parish School Bd., 343 F.3d 373, 381 (5th Cir. 2003). Thus, it is clear that students need not be placed in their neighborhood schools to satisfy IDEA's LRE requirement in the event that a student's IEP cannot be implemented at the home school.

71.

Importantly, and as cited above, the First Circuit has stated that school districts need not move resources located at another school to a student's neighborhood school to ensure that the student receives special education services at the his/her neighborhood school. *Kevin G.*, 130 F.3d at 481-482. In *Kevin G.*, the student required a full-time nurse onsite at the school where he was to be educated. *Id.* at 481. His neighborhood school, however, did not maintain a full-time nurse onsite. *Id.* Plaintiffs, in *Kevin G.*, acknowledged this and acknowledged that Gladstone Elementary School was the only school in the school district that maintained a full-time nurse. *Id.* at 481-82. Nevertheless, plaintiffs brought suit, demanding that his school district had the responsibility to move a nurse to his neighborhood school, Waterman Elementary School. *Id.* at 481. The First Circuit rejected this notion. Indeed, that court held that "[t]he school district has an obligation to provide a school placement which includes a nurse on duty full-time, but it is not

required to change the district's placement of nurses when, as in this case, care is readily available at another easily accessible school." *Id.* at 482.

72.

In this matter, the undisputed testimony shows that [redacted]s March 20, 2014, IEP cannot be implemented at P[redacted] Middle School, [redacted]'s home school. The District does not have an itinerant teacher that can provide daily VI services to [redacted] at P[redacted] Middle School. Instead, the closest location where his IEP may be implemented is D[redacted] Middle School. Further, the District, in accordance with *Kevin G.*, is not required to move resources, in this case a VI teacher providing VI services, in order to ensure that [redacted]'s placement is implemented at P[redacted] Middle School. These services are available at D[redacted] Middle School. As such, by selecting D[redacted] Middle School as the location where [redacted]'s placement can be implemented, the District did not violate LRE.[90]

73.

Furthermore, while there was testimony from Plaintiffs' expert that [redacted] does not *now* require 45 minutes per day of direct instruction in VI services, Plaintiffs presented insufficient evidence that at the time the March 20, 2014 IEP was created that he required less than 45 minutes per day of direct instruction in VI services. Thus, Plaintiffs failed to prove by a preponderance of the evidence that the March 20, 2014 IEP was not [redacted]s LRE.[91]

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[90] This conclusion does not mean that the IEP team should not have considered whether it could have provided sufficient services at his home school to meet his goals and objectives.

[91] As noted above, there was a question as to exactly how much time [redacted] was removed from the general education curriculum, whether physically removed from the class or involved in direct instruction for VI services during his math class. Thus, the undersigned concluded that the specifics of how his IEP was implemented should have been discussed during the IEP meeting. Nonetheless, based on the evidence in the record, Plaintiffs failed to prove that the amount of time away from the general education curriculum in the March 20, 2014 IEP was more than he required at the time.

Special Education Transportation Did Not Violate LRE

74.

Plaintiffs, via their due process hearing request, also seek to establish that transportation on a special education bus would affect a change in [redacted]'s placement as he previously travelled to school on a regular education bus. In a case with a similar fact pattern, *Veazey v. Ascension Parish Sch. Bd.*, 121 Fed. Appx. 552 (5th Cir. 2005), a deaf/hard of hearing student was transferred from his home school to a cluster school where he would be able to receive his special education services. *Id.* at 553. This student, when attending his home school, received transportation on a regular education bus; however, when the student was transferred to the cluster school, he was required to travel on a special education bus. *Id.* In making its determination regarding whether this constituted a change in the student's educational placement, the Fifth Circuit held that "requiring Buddy to ride the special bus for disabled children instead of the regular bus did not effect a fundamental change in his IEP." *Id.* at 553. As such, that court found no change in the student's educational placement. *Id.* Thus, Plaintiffs' argument that riding a special education bus made his placement more restrictive is without merit.

D. <u>Plaintiffs Maintenance of Placement Claim</u>

75.

Out of an abundance of caution, the undersigned will address Plaintiffs' "Maintenance of Placement" claim, as stated in their Complaint. More specifically, in the Complaint, Plaintiffs sought to have his prior placement implemented at P[redacted] Middle School. This issue, however, is now mooted by this tribunal's Stay Put Order of August 29, 2014. *Stay Put Order*. In that Order, the undersigned decided that through the pendency of the instant proceedings, [redacted]s IEP

would be implemented at P[redacted] Middle School. *Id.* at p. 2. The undersigned further ordered the District to provide [redacted] "with the level of vision impairment services that the District can reasonably accomplish with the available vision impairment services and equipment. ...the District must do its best to provide [redacted] with vision impairment services during this interim period. *Id.* As such, this issue is now moot. Further, and to the extent that Plaintiffs, through their counsel's proffer, argue that [redacted] was not receiving the level of service required under the Stay Put order while at P[redacted] Middle School, it is clear that, to the extent that such claims actually have merit, these claims are barred as "Plaintiffs agreed to waive any future claims that [redacted] did not receive a free appropriate public education due to a reduction in services during the pendency of this matter." *Id.* at n.2. As such, any claims regarding maintenance of placement are no longer actionable.

E. <u>Remedy</u>

76.

As set forth above, Plaintiffs proved, by a preponderance of the evidence, that the District violated IDEA's procedural safeguards by failing to discuss the parents' concerns, whether there would be any potential harm or impact to [redacted]s services, or various LRE considerations. These violations denied [redacted]s parents the opportunity to participate in the decision-making process concerning [redacted]s education and therefore amounted to a substantive denial of a FAPE. Plaintiffs did not prove any of their other alleged substantive FAPE violations.

77.

The IDEA provides that when a court finds a statutory violation, it "shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C)(iii). *See Cobb County Sch. Dist. v. A.V.*, 961 F. Supp. 2d 1252, (N.D. Ga. 2013). The courts have interpreted this to mean that a court has "broad discretion" to "fashion discretionary equitable relief." *Florence Cnty Sch.*

Dist. Four v. Carter ex rel. Carter, 510 U.S. 7, 15-16 (1993) (internal quotations and citations omitted); *Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275, 1285 (11th Cir. 2008), *quoting Sch. Comm. Of the Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 374 (1985). 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. v. Fort Bragg Dependent Schs.*, 343 F.3d 295, 309 (4th Cir. 2003).

78.

The amount of reimbursement and prospective relief to be awarded are questions "determined by balancing the equities. Factors that should be taken into account include the parties' compliance or noncompliance with state and federal regulations pending review, the reasonableness of the parties' positions, and like matters." *Burlington v. Department of Educ.*, 736 F.2d 773, 801-801 (1st Cir. 1984), *aff'd Burlington*, 471 U.S. 359. *See also B.G. v. Cranford Bd. of Educ.*, 702 F. Supp. 1158 (D.N.J. 1988) (whether reimbursement is appropriate and in what amount should be determined by balancing the equities, including the general cooperative or uncooperative position of the parties), *aff'd*, 882 F.2d 510 (3d Cir. 1989), *citing Jenkins v. Fla.*, 815 F.2d 629 (11th Cir. 1987). In *B.G.*, the district court held that the conduct of the parties is extremely relevant when a court is authorized to apply equitable considerations. *Id.* at 1166. The *B.G.* court denied reimbursement to the parent who refused to participate in the IEP process.

Id. See also C.G. v. Five Town Community Sch. Dist., 513 F.3d 279 (1st Cir. 2008) (where parents' actions disrupted the IEP process, stalled its consummation and prevented the development of a final IEP, parents were denied reimbursement completely). In a recent case in Georgia, the district court held that the where there was equal fault on both sides leading up to a final, "IDEA-infirm" IEP, a fifty-percent reduction in the amount of reimbursement was the appropriate equitable remedy. *Cobb County Sch. Dist. v. A.V.*, 961 F. Supp. 2d at 1271-72.

79.

In this case, the undersigned concludes that both parties acted, to some extent, unreasonably. The District was unreasonable when it refused to discuss the impact of the change in location on [redacted] Plaintiffs were unreasonable in refusing to participate in another IEP team meeting, when Dr. [redacted] E[redacted] left a voicemail on July 15, 2014 offering a meeting date of July 31, 2014. Plaintiffs assert that they felt such a meeting would be futile as the District's lawyer said that the location of [redacted]'s services would not change. While the District may not have been able or willing to offer daily VI services at P[redacted] Middle School, this did not preclude the parties from trying to determine some amount of services at P[redacted] Middle School that would be appropriate to meet [redacted]'s needs. Thus, the undersigned takes Plaintiffs' unreasonableness into consideration when determining the appropriate relief for the violations of IDEA by the District.

80.

In the instant case, both parties acted unreasonably and share the blame for derailing the cooperative IEP process. The undersigned has weighed the District's role in denying Plaintiffs the right to fully participate in the decision-making process against the Plaintiffs refusal to participate in another IEP team meeting. Plaintiffs seek reimbursement for the counseling services that Ms. N[redacted] provided, which Plaintiffs assert were attributable to the District's actions.

However, the undersigned notes that the counseling sessions did not begin until July 18, 2014, three days after the voicemail from Dr. E[redacted] offering an IEP team meeting. If Plaintiffs had agreed to the IEP team meeting, counseling services may not have been necessary.[92] Further, given her willingness to alter her opinion, the lack of consistency of [redacted]s symptoms, and in light of the testimony of G[redacted] S[redacted], the undersigned did not find Ms. N[redacted]'s diagnosis of adjustment disorder to be credible. The undersigned does not doubt that [redacted] had some anxiety and sadness due to the prospect of having to change schools and go to school without his [redacted] sister. However, the undersigned concludes the symptoms detailed in [redacted]s therapy notes were typical of most students transitioning into a new school and did not amount to an adjustment disorder. For these reasons, Plaintiffs' request for reimbursement for the counseling sessions is **DENIED**.

81.

In terms of prospective relief, the Court concludes that [redacted] is entitled to an amended IEP, which provides for one (1) segment of *up to* 52 minutes of pull-out direct VI instruction from an itinerant VI teacher at P[redacted] Middle School, and up to one (1) additional segment for the VI teacher to consult with [redacted]s regular education teacher or [redacted] to determine any other needs. The amended IEP shall also provide that [redacted]'s Braille materials will be created and planned in advance of instruction and transported to P[redacted] Middle School. [redacted]s O&M and DHH services shall remain the same. The District is hereby **ORDERED** to convene an IEP team meeting of all required members within two weeks of the date of this Final Decision to amend the IEP consistent with the Court's orders.

[92] As noted above, Ms. N[redacted] did not document a diagnosis of Anxiety Disorder until July 31, 2014, a day after Plaintiffs filed their Complaint. She did not document a diagnosis of Adjustment Disorder until her amended August 6, 2014 letter.

82.

Plaintiffs seek compensatory services for the three weeks that [redacted] did not attend school prior to the Stay Put Order. Plaintiffs chose to keep [redacted] out of school rather than sending him to D[redacted] as the District had directed. While Plaintiffs may assert that they did not send [redacted] to D[redacted] because they believed he would suffer harm as a result, there is no credible evidence in the record that attending D[redacted] Middle School would have resulted in harm to [redacted] Further, the undersigned's determination that the stay put placement was at P[redacted] does not mean that Plaintiffs were correct to keep [redacted] home from school. There was sufficient case law to support the District's position on stay put, such that the decision could have gone either way. Accordingly, because the Plaintiffs chose to keep [redacted] home from school, the undersigned concludes that Plaintiffs are not entitled to compensatory education for those three weeks.

83.

All other requested relief not specifically granted above, is hereby denied.

IV. DECISION

For the reasons stated above, the Court finds that the Cobb County School District violated Plaintiffs' procedural rights under IDEA, which denied [redacted]s parents the opportunity to participate in the decision-making process concerning [redacted]'s education. Plaintiffs are entitled to the relief set forth above.

SO ORDERED, this 23rd day of February, 2015.

STEPHANIE M. HOWELLS
Administrative Law Judge