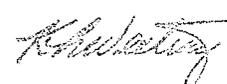


**IN THE OFFICE OF STATE AND ADMINISTRATIVE HEARINGS
STATE OF GEORGIA**

█ by and through █ and █)
Petitioners,)
v.)
BUFORD CITY SCHOOL DISTRICT,)
Respondent.)

DOCKET NUMBER:
OSAH-DOE-SE-1736369-67-Baxter


FILED
OSAH
OCT 02 2017


Kevin Westray, Legal Assistant

FINAL DECISION

█ by and through his mother, █ (“Petitioners”) filed a due process complaint pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (“IDEA” or “Act”), 20 U.S.C. §§ 1400 to 1482, and its implementing regulations, 34 C.F.R. Part 300, against Respondent Buford City School District (“School District”) alleging a denial of a free appropriate public education (“FAPE”). A hearing was held on July 12 and 31, 2017, in which the Parties were represented by counsel. After the hearing, the Parties submitted proposed findings of facts and conclusions of law on September 5, 2017. For the reasons stated below, Petitioners’ request for relief is **DENIED**.

FINDINGS OF FACT

A. Educational Background

1.

█ is a █-year-old boy that has been receiving special education services in the School District pursuant to an Individualized Education Program (“IEP”) due to a specific learning disability since he was in kindergarten. He attended sixth and seventh grade at Buford City Middle School and completed seventh grade in May 2017. █ is described by his case manager, Kevin Peek, as “always willing to do what was asked” and “[v]ery pleasant, very respectful.” (Transcript (“T-”) 460-61, T-597-98.)

2.

█’s cognitive ability has been assessed in the lower-average range with a full-scale score of 92 based on the Wechsler Intelligence Scale for Children IV (“WISC-IV”). During the last

evaluation, ■■■ showed weakness in basic reading skills. ■■■ did not perform as well on the CogAT, which was a group-administered test where his score was borderline approaching the mildly-deficient range. (T-581, T-585.)

3.

The District psychologist, Robin Brandes-Riegelhaupt, stated that ■■■ was able to access the general curriculum with some accommodations and that his academic achievement was commensurate with his IQ with some deficits in reading. (T-583-84.)

4.

During the 2016-17 and 2015-16 school years, ■■■ was absent from school fifteen days and ten days respectively. He also had several tardies. On July 15, 2017, ■■■s family moved from the School District to another nearby school district. (T-461-62; Ex. R-3.)

B. Sixth Grade: 2015 to 2016 School Year

5.

In preparation for sixth grade, ■■■s IEP Team created an IEP with one goal and four objectives (“April 3, 2015 IEP”).¹ The goal provided that ■■■ “will improve language arts skills as measured by the mastery of the following short term objectives.” Among ■■■s objectives were (1) ■■■ “will improve story or topics writing development, including the use of evidence to support his constructed written response,” and (2) ■■■ “will apply correct grammar when constructing a written response (apply correct use of sentence structure, dialogue, introductory phrases and elements).” The method of evaluation was to be grades and “rubrics, classroom assignments, classroom assessments, teacher observation, and work samples.” (Ex. P-3.)

6.

The IEP provided that ■■■s placement was co-taught for Science and Social Studies and resource for English-Language Arts. The IEP provided that staffing for the co-taught classrooms would be general education and special education staffing. The Georgia Department of Education (“GaDOE”) Special Education Rules Implementation Manual defines co-teaching as a special education teacher providing services in a general education classroom by sharing teaching responsibility with the general education teacher. (T-455; Exs. P-7, P-3.)

¹Throughout the hearing, the spring 2015 IEP is referred to as the March 6, 2015 IEP. The IEP meeting occurred on March 6, 2015, but the IEP implementation date is April 3, 2015. Thus, the Court will refer to Exhibit P-3 as the April 3, 2015 IEP.

7.

On January 29, 2016, the IEP Team met and adopted a new IEP for [REDACTED] (“January 29, 2016 IEP”). The new IEP provided that [REDACTED] would have co-taught Math, Science, and Social Studies and a resource class taught solely by a special education teacher in English-Language Arts. (Ex. P-1.)

8.

During his sixth-grade year, [REDACTED] did not have a special education teacher for Math, Science, or Social Studies. So for the April 3, 2015 IEP and the January 29, 2016 IEP, the School District failed to implement the IEP’s staffing requirements. (T-326-27.)

9.

In January 2016, the IEP Team also revised [REDACTED]’s goals. [REDACTED] now had two goals:

- (1) [REDACTED] will improve language arts skills as measured by the mastery of the following short term objectives,²
- (2) [REDACTED] will improve math skills as measured by the following short term objective.

(Ex. P-1.)

10.

The three objectives for goal number one were for [REDACTED] to:

- (1) write a multi-paragraph essay including the use of evidence to support his constructed written response using the writing process,
- (2) apply correct grammar when constructing a written response (apply correct use of sentence structure, dialogue, transitions and punctuation),³
- (3) demonstrate knowledge of vocabulary words across curriculum: a.) Science
b.) Social Studies.

The objective for goal number two was “[g]iven a word problem . . . [REDACTED] will annotate (highlight, underline, circle) pertinent information to solve problems correctly.” (Ex. P-1.)

11.

The method of evaluation was to be grades and “rubrics, classroom assignments, classroom assessments, teacher observation, and work samples.” (Ex. P-1.)

² This was the same goal as in the April 3, 2015 IEP. (Ex. P-3.)

³ This was the same objective as in the April 3, 2015 IEP. (Ex. P-3.)

12.

Prior to attending middle school, the School District had provided [REDACTED] with an iPad to assist in his special education. From [REDACTED]'s perspective, the School District did not provide the appropriate applications necessary for [REDACTED] to successfully use the iPad. At the January 29, 2016 IEP meeting, [REDACTED] again asked for assistance and specifically for text-to-speech software. The School District complied, but [REDACTED] did not believe that [REDACTED] was adequately trained on how to best use the iPad. From the School District's perspective, the iPad was not necessary because [REDACTED] had access to many forms of technology already in his classrooms. (T-118-21, T-163-65, T-411, T-469-71.)

13.

For sixth grade, [REDACTED] received the following yearly averages in core subjects:

<u>Class</u>	<u>Grade</u>
Math 6	73
Science	78
Language Arts	84
Social Studies	85

With these grades, [REDACTED] advanced to seventh grade. (Ex. R-4.)

14.

On the Iowa Test of Basic Skills ("Iowa"), [REDACTED] scored below grade level in all subjects. [REDACTED]'s End-of-Grade Milestone Assessment was as follows:

<u>Class</u>	<u>Grade</u>
English/LA:	Beginning Learner Level 1
Mathematics:	Developing Learner Level 2
Science:	Developing Learner Level 2
Social Studies:	Developing Learner Level 2

(Exs. P-2, R-4.)

15.

Although [REDACTED] characterized these grades as "failing," the percentage of Georgia sixth-grade students earning a Level 1 or Level 2 score on the Milestone Assessment was 61%; 65%; 62%; and 68% respectively. These percentages were not limited to special education students. The

principal of Buford City Middle School testified that it was not atypical for students to have 1s and 2s on their Milestones yet achieve As, Bs, and Cs in the classroom. (T-339, T-495; Ex. R-6.)

C. Seventh Grade: 2016 to 2017 School Year

16.

Seventh grade proved to be a very difficult year for the relationship between the School District and ■■■ because of ■■■'s intensifying concerns regarding ■■■'s standardized test scores, and her inability (not necessarily due to her own fault) to communicate with School District employees regarding what she was seeking from them. The school year was filled with heated discussions and multiple IEP Team meetings. (T-483, T-491.)

1. IEP Team Meetings

17.

On August 31, 2016, ■■■ requested an IEP meeting to discuss her concerns about ■■■'s performance on the Milestones testing, Math and Science Benchmarks, and Iowa scores. On October 6, 2016, the IEP Team met. At that meeting, ■■■ asked for data on ■■■'s progress on his goals and objectives. Recent grades were discussed, but ■■■ did not receive information that she believed was responsive to her request for data on ■■■'s specific goals and objectives. ■■■ asked about the continuum of services – possible resource placement for Science or Social Studies and she requested a formal assistive technology evaluation. The meeting was adjourned to invite the School District's Direct of Special Education, Dana Maxwell, to discuss these requests. (T-473-77.)⁴

18.

At the October 18, 2017, meeting, ■■■ again expressed concerns about ■■■'s Milestones scores and how data was being taken. ■■■ also requested weekly checks for vocabulary acquisition

⁴ After the October 6, 2016 IEP meeting, ■■■ contacted the parent helpline at the GaDOE to voice concerns about the District's understanding of the term "co-taught" and the collection/retention of data. Based on this and other phone calls to GaDOE, and one disciplinary incident in between these multiple IEP Team meetings, ■■■ believed the School District was retaliating against her family. The School District denies any connection between the calls and ■■■'s disciplinary incident. While ■■■ and Maxwell clearly disagreed on the issues (and at times impolitely and with apparent hurt feelings), this Court finds no evidence of retaliation and found this entire line of testimony irrelevant. (T-420-21; T-477-478.)

and an assistive technology evaluation. Finally, █████ requested that █████ be placed in a resource class for Science and Social Studies. (T-481-83.)

19.

In response to █████'s concerns, █████'s teachers provided information on █████'s progress to date, inquired how she would like to see data presented if what they were providing was not sufficient, and shared some classroom work samples. █████ did not believe the teachers provided specific enough information on █████'s goals and objectives, even though the grades and teacher observations were two of the allowable measures for assessing █████'s progress on his goals. (T-388, T-481-83.)

20.

The School District also agreed to provide individualized reading and vocabulary instruction by a certified Orton-Gillingham ("OG") teacher during flex time for 30 minutes and to perform the requested assistive technology checklist and evaluation even though the School District did not feel it was necessary. (T-447; Ex. P-1.)

21.

The School District disagreed with █████ that █████ needed to be placed in a resource setting. During this discussion, █████ and Maxwell had a heated disagreement about the meaning of the term co-taught. Maxwell would not admit that the School District had failed to provide the IEP-required placement. (T-431, T-443, T-483; Ex. P-1.)

22.

Another IEP meeting was held on November 9, 2016. At that meeting █████ again asked for data on █████'s IEP goals and objectives. District staff showed her work samples for █████ and provided observations. █████ was not provided examples of any multi-paragraph essays scored for grammar and punctuation, nor word problems with relevant facts highlighted (Objective 1 from Goal 1 and Objective 1 from Goal 2). (T-488-91.)

23.

The parties signed off on a new IEP on November 9, 2016. While containing many of the same goals, a new goal was added providing that "Given a grade appropriate passage, █████ will correctly decode words to increase his oral reading rate." The criteria for mastery were also modified on several goals. Many goals were identical to those in the two most recent IEPs. █████

not only did not object to having the goals repeat, but was insistent on maintaining mastery of vocabulary as a goal and the IEP Team conceded to her request. (T-401, T-429; Ex. P-1.)

24.

All of ■■■'s goals and most of his objectives for both his sixth- and seventh-grade years contained words (or their functional equivalents) that both the GaDOE and the School District stated should not be used in an IEP because the words made the goals difficult to measure. (Exs. P-1, P-2, P-3, P-12, P-13.)⁵

25.

At the hearing, Belinda Whitney, a certified special education teacher, testified as an expert in special education. Whitney testified that IEP goals and objectives are intended to be mastered within a year; otherwise, the goals should be rewritten and something should be done to adapt or change them so that a student will make progress. (T-26-27, T-33-34.)

26.

Whitney testified that ■■■ had identical Language Arts goals on his April 3, 2015 IEP, January 29, 2016 IEP, and November 9, 2016 IEP. ■■■ also had duplication of other goals and objectives on his January 29, 2016 and November 9, 2016 IEPs. Whitney testified that objectives had been repeated on ■■■'s IEPs, which raised concerns because if ■■■ had not progressed on those goals and objectives, something should have been changed. (T-38-40.)

27.

■■■ received the following instruction as part of the November 9, 2016 IEP: resource Language Arts; co-taught Math with a full-time special education teacher; co-taught Science and Social Studies with full-time supportive services (paraprofessional);⁶ a connections class for remedial support with Language Arts; and 30 minutes per day of individualized direct reading instruction through a certified O.G. teacher, Heidi Waller. (Ex. P-2.)

28.

■■■ was invited but declined to attend the school's after-school program called "Overtime." Overtime provides additional assistance in subject areas, primarily Language Arts and Math,

⁵ A GaDOE publication and the Special Education Implementation Manual for the School District state that words like "demonstrate, extend, increase, identify, learn, recognize" are forbidden to be used in an IEP because they make a goal not measurable. (Exs. P-12, P-13.)

⁶ This clarification, as the School District refers to it, was a change from the previous IEPs which did not delineate that a paraprofessional would be the second staff member. (T-431-45.)

with small classes of no more than 10 to 12 students. During Overtime, Language Arts teachers were present that could have supplied additional instruction for [REDACTED] (T-345, T-616.)

29.

Notwithstanding the signed IEP on November 9, 2016, and in light of [REDACTED]'s request for [REDACTED] to attend resource classes in Science and Social Studies, Maxwell sent prior written notice to [REDACTED] explaining that the District did not believe a more restrictive environment for Science and Social Studies was appropriate especially in light of [REDACTED]'s success in [REDACTED]'s current placement. At the time of the prior written notice, [REDACTED]'s Math, Social Studies, and Science classes did not contain a special education teacher. (Ex. R-1.)

30.

Prior to finalizing the November 9, 2016 IEP, Waller began [REDACTED]'s O.G. instruction. When Maxwell learned that Waller had begun instruction before the November 9, 2016 IEP had been signed by [REDACTED] Maxwell directed Waller to stop the instruction and not begin until the IEP was finalized. Waller complied, began instruction, and continued with instruction through the end of the year with some minor disruptions in tutoring when [REDACTED] would fail to come to her classroom. (T-253-55, T-260-62, T-274-75, T-419-21.)

31.

Another IEP meeting was held on January 24, 2017. At that meeting [REDACTED] asked about data collection on [REDACTED]'s IEP goals and objectives and his progress. Of concern was the fact that [REDACTED] scored poorly on the Math and Science Benchmarks. [REDACTED] testified that while [REDACTED] was getting As, Bs, and some Cs in his classes, she was concerned that his grades were not relevant to his classroom performance. She did not, given his poor standardized test scores, believe the grades were an accurate reflection of what [REDACTED] was learning. [REDACTED] testified that while she was shown work samples for [REDACTED] during the January 24, 2017 IEP meeting, she did not see any work samples directly relevant to [REDACTED]'s specific IEP goals and objectives. The School District maintained that [REDACTED] was progressing and believed his grades and teacher observations were more accurate assessments of his progress than the Benchmarks scores or the standardize testing. During that meeting, [REDACTED] asked that data on [REDACTED]'s specific goals and objectives be provided and the District agreed to do so. (T-495-98.)

32.

Following the January 24, 2017 IEP meeting, the District provided to [REDACTED] data on [REDACTED]'s IEP goals and objectives. The data provided to [REDACTED] began at the beginning of seventh grade and went through the date the information was provided. Maxwell testified that the School District does not have a policy on how long it maintains data. She further testified that once a new IEP is written and goals are established, especially if new goals are developed, the data is discarded. (T-380-81, T-503, T-509-10; Ex. P-4.)

33.

Whitney testified that data on IEP goals and objectives should be kept for three years so that it can be provided to a parent if they request, and also so that staff members working with the student can review the data and understand what they need to work on with the student. (T-34-35.)

34.

Whitney also reviewed the data that had been provided by the District on [REDACTED]'s IEP goals and objectives and concluded that the information provided was not data on [REDACTED]'s specific goals and objectives because it did not indicate where [REDACTED] was on his road to mastery of his goals and objectives. According to Whitney, if the School District continued to maintain data the same way, no one would be able to ascertain whether [REDACTED] mastered his goals and objectives. (T-41-60.)

35.

On March 10, 2017, [REDACTED] met with Maxwell and Waller to discuss the data provided by the District. The meeting quickly became heated. [REDACTED] maintained that the information provided by the District was not data on [REDACTED]'s goals and objectives because it consisted merely of grades on various assignments and tests, even though grades were an allowable measure of [REDACTED]'s progress on his goals. [REDACTED] offered to the District sample datasheets and rubrics as examples of how to provide data on goals. The District maintained that it had produced appropriate data. [REDACTED] again raised [REDACTED]'s standardized test scores as a concern. The District maintained that [REDACTED] was making progress. (T-389, T-391, T-510-12.)

2. Assistive Technology Evaluation

36.

Dr. Heather Radlmann performed the assistive technology evaluation on January 20, 2017. Radlmann spoke with ■■■■■s teachers, reviewed work samples and did several assessments, but did not speak with ■■■■■ about her concerns. While ■■■■■ had multiple concerns with the evaluation,⁷ the evaluation was thorough and concluded that spelling errors dramatically decreased with a program called Co:Wrighter. Radlmann confirmed that the District maintains Co:Wrighter software and that it is compatible with both Chromebooks used in the classroom and iPads. Further, Radlmann utilized the Protocols for Accommodations for Reading (PAR) assessment to assess ■■■■■s reading. She determined that ■■■■■ “performed significantly better when he was reading visually versus the computer-generated text,” thus, undermining ■■■■■s repeated requests for text-to-speech software. (T-557-65; Ex. R- 2.)

37.

Radlmann testified that it is important for a child, as well as the teachers, to receive training on an assistive technology device and that lack of training can cause an assistive technology intervention to fail. Following her evaluation, Radlmann was not asked by the District to do any training for ■■■■■ or his teachers. (T-572-73.)

3. ■■■■■s Grades and Test Scores

38.

■■■■■s report card for his seventh-grade year reflects the following yearly averages in core subjects:

<u>Class</u>	<u>Grade</u>
Math 7	81
Life Science 7	82
Language Arts 7	86
Social Studies 7	85

⁷ ■■■■■ testified that the assistive technology evaluation did not include a creative writing sample for assessment or an evaluation for text-to-speech. ■■■■■ believes the assistive technology evaluation did not indicate how ■■■■■ would be able to perform in a classroom setting, or reading or listening and then responding to questions. (T-500-02.)

█ was promoted to eighth grade. (Ex. R-4.)

39.

Reading data assessments and diagnostic battery scores commencing when Waller began individualized OG instruction in November 2016 through May 24, 2017, showed immediate and substantial gains. By way of example, █ progressed on the Gray's Oral Reading Test from a grade equivalent (GE) of 5.1 to a GE of 8.0 and on the Slosson Oral Reading Test from a GE of 8.4 to a GE of high school. (Ex. R-2.)

40.

Tracy Taylor, █'s Social Studies teacher, testified that █ had Bs in her class, but testified that a student could have significant vocabulary issues and it would not show up in the student's grade. (T-125, T-139-41.)

41.

█'s Benchmark scores primarily dropped as the year progressed. School District witnesses testified that variation from classroom grades to the Benchmarks is typical. Amy Edwards, █'s Math teacher, testified that the Benchmark tests are cumulative tests, and thus, the trend is to see the highest score at the beginning of the year when the student does not have as much information to remember. (T-133, T-229; Ex. R-3.)

42.

█'s absences also impacted his Benchmark scores. Edwards testified that █ missed school around the time of the Third Quarter Benchmark and thus, became concerned about his performance. █ also missed a pretest for the Milestones while attending a club lacrosse tournament in Florida. (T-230-31, T-540.)

43.

Two teachers testified that █ had rushed through testing like the Benchmarks tests. (T- 154, T-613.)

44.

At the end of the school year, the District sent █ the annual progress report and a packet of data on █'s goals and objectives. According to the progress report, █ had not mastered any of his goals or objectives, but rather was working ("W") on all of his goals and objectives. (Ex. P-5.)

45.

Lauren Larsen, ■■■s Science teacher, testified that ■■■ had met his objective related to vocabulary in Science. Similarly, Waller testified that the progress report was incorrect in reporting that ■■■ had not mastered the reading fluency objective for which she was responsible. (T-156-157, T-167, T-250; Ex. P-5.)

46.

Peek testified that he completed the progress report after he gathered data from ■■■s teachers and he decided to put “W” on all of J.D’s goals and objectives. (T-621-26, T-634.)

47.

■■■ testified that based upon the data that the District had provided to her on ■■■s IEP goals and objectives, she did not know if ■■■ had mastered his goals and objectives or where he was in that process. Peek also admitted that he had documents which would have permitted ■■■ to understand the deficiencies in ■■■s writing samples but those documents were “probably not” provided to ■■■ or he did not recall if they were provided to ■■■ (T-519-20, T-621-26, T-634.)

D. Petitioners’ Proposed Remedy

48.

Petitioners presented evidence regarding three possible schools that would provide the type of instruction ■■■ required and is requesting as a remedy for the alleged violations. ■■■ testified about the Sage School, Mill Spring Academy, and The Cottage Schools as schools for children with learning disabilities. The costs of those schools ranged from about \$20,000 to just under \$25,000 per scholastic school year. (T-515-18.)

CONCLUSIONS OF LAW

1.

Petitioners bear the burden of proof in this matter. Schaffer v. Weast, 546 U.S. 49, 62 (2005). The standard of proof is a preponderance of the evidence. Ga. Comp. R. & Regs. 616-1-2-.21(4).

2.

Under both the IDEA and Georgia law, students with disabilities have the right to a free appropriate public education (“FAPE”). See 20 U.S.C. § 1412(a)(1); 34 C.F.R. §§ 300.1-

300.102; Ga. Comp. R. & Regs. 160-4-7-.01(1)(a). The Supreme Court has developed a two-part inquiry to determine whether the 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. v. Rowley, 458 U.S. 176, 206-07 (1982). Ultimately, a school must offer an IEP “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” Endrew F. v. Douglas Cty. Sch. Dist., 137 S. Ct. 988, 1001 (2017).

A. Alleged Procedural Violations

3.

Petitioners allege that the District procedurally denied ■■■ FAPE by: (a) failing to take and maintain data on ■■■s specific IEP goals and objectives, and (b) issuing an incorrect progress report on ■■■s IEP.

4.

To prevail on a procedural claim, Petitioners must demonstrate that the alleged procedural inadequacies “(I) impeded the child’s right to [FAPE]; (II) significantly impeded the parents’ opportunity to participate in the decision[-]making process regarding the provision of [FAPE] to the parents’ child; or (III) caused a deprivation of educational benefits.” 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2)(i)-(iii).

5.

While the IDEA’s procedural safeguards are complex, the Eleventh Circuit has rejected the notion that violation of a procedural requirement is a per se denial of FAPE. Rather, the Eleventh Circuit has held that a petitioner must show actual harm as a result of the procedural violation in order to be entitled to relief. See Weiss v. Sch. Bd. of Hillsborough Cty., 141 F.3d. 990, 996-97 (11th Cir. 1998); see also Doe v. Ala. Dep’t of Educ., 915 F.2d 651, 662-63 (11th Cir. 1990).

6.

Here, Petitioners have demonstrated procedural inadequacies in the process, but have failed to prove by a preponderance of the evidence that these inadequacies caused actual harm.

1. Collection of IEP Data on Goals and Objectives

7.

Petitioners allege that the District failed to take and maintain data on ██████'s specific goals and objectives, thus preventing ██████'s mother a full opportunity to participate in the process.

8.

IDEA requires that parents have the opportunity to examine all records relating to their child. 20 U.S.C. § 1415(b)(1); Ga. Comp. R. & Regs. 160-4-7-.08(2). The IDEA does not have specific requirements regarding when and how data must be collected. See 34 C.F.R. § 300.320. As a result, courts have not required strict compliance with data collection. For example, the District Court of Massachusetts found that a school district provided FAPE although the district's data collection was, at times, sporadic and a number of data sheets were barely, if at all, filled out. Doe v. Hampden-Wilbraham Reg'l Sch. Dist., 715 F. Supp. 2d 185, 195-99 (D. Mass. 2010) (finding while there may have been failure to implement IEP, there has not been "complete" failure to implement because student made progress in IEP goals); see also T.M. v. Quakertown Cmty. Sch. Dist., No. 16-3915, 2017 U.S. Dist. LEXIS 60187, at *20-39 (E.D. Pa. Apr. 19, 2017) (finding district did not deny FAPE where "chosen data collection techniques produced reliable records and provided a comprehensive picture of [student's] progress" and student demonstrated incremental progress). Accordingly, as long as the data provides a picture of the student's progress and basically follows the IEP, it will likely comply with the IDEA.

9.

Here, the evidence demonstrates that the District was sloppy in its record retention, as evidenced by their destroying the data from ██████'s sixth-grade year. Without that data, ██████ found it difficult to determine whether ██████ made any progress on his goals and objectives during his sixth-grade year. Given that ██████ had substantially similar goals and objectives in both sixth and seventh grades, having access to data from both of those years was important for ██████ to be able to participate in the decision-making process for ██████

10.

██████ however, was an active, leading member of the IEP Team, requesting and receiving multiple meetings to receive first-hand information from ██████'s teachers regarding his progress. Further, the District provided data to ██████ in the form of class assignments, work samples, grades, data sheets, and teacher observations at multiple IEP meetings. The Court agrees with

█ that the School District's data sheets were not that informative, especially considering the data rarely aligned to █'s goals and objectives, but taken with all the other information to which █ had access, the Court finds that █ had adequate information to provide her a full opportunity to participate in the process.

11.

While the District did not provide all of █'s educational records and could have provided better data aligned with █'s specific goals and objectives, Petitioners failed to demonstrate by a preponderance of the evidence how this significantly impeded the parent's opportunity to participate in the decision-making process or harmed █. The Court, therefore, concludes that the Respondent's handling of █'s data is not an IDEA procedural rights violation.

2. Inadequate Progress Report for Seventh Grade

12.

Petitioners also allege that the District denied █ FAPE by failing to provide an adequate progress report for seventh grade. IDEA requires that parents are provided periodic progress statements, but IDEA does not provide any specific requirements as to the contents of these progress statements. See 34 C.F.R. § 300.320(a).

13.

Here, the School District reported that █ was working on all his goals and objectives, but the evidence demonstrates that certain teachers had determined that █ had mastered certain objectives. Thus, the Progress Report was inaccurate and did not adequately demonstrate █'s actual progress. The inaccuracy in the Progress Report did not come to light until the due process hearing in this matter.

14.

The District's failure to provide an accurate progress report constitutes a violation of 34 C.F.R. § 300.320(a). █'s parent, however, was not significantly impeded in her opportunity to participate in the decision-making process without an accurate report and Petitioners did not present evidence of any harm to █. Doe v. Ala. Dept. of Educ., 915 F.2d at 662 (holding deficiencies had no impact on parental participation); C.M. v. Bd. of Educ., 128 F. App'x 876, 881 (3d Cir. 2005) (finding parents were not deprived of participation rights when parents

actively participated in IEP development). Accordingly, this violation does not amount to a denial of FAPE.

B. Alleged Substantive Violations

15.

Petitioners allege several substantive violations associated with ██████'s sixth and seventh grade IEPs. Specifically, Petitioners allege that the District: (1) did not provide ██████ with co-taught classrooms, (2) did not provide measurable IEP goals in ██████'s IEPs or collect data on ██████'s specific IEP goals and objectives, (3) did not provide adequate assistive technology, and (4) stopped O.G. services the District had agreed to provide.

1. Failure to Provide Co-Taught Classrooms

16.

Petitioners contend that the School District failed to provide FAPE when it failed to provide the placement required by his sixth and seventh grade IEPs. Specifically, ██████'s IEP for sixth grade required co-taught placement for three classes. ██████ was not serviced in a co-taught classroom in sixth grade, but rather was placed in a regular education classroom. ██████'s initial IEP for seventh grade required co-taught placement for three classes. Again, ██████ did not receive co-taught placement.

17.

“Once an IEP is in place, the school must provide the services listed in it, and the IDEA sets out many rules governing the process of amending an IEP.” Jamie S. v. Milwaukee Pub. Schs., 668 F.3d 481, 486 (7th Cir. 2012). If, at any time between annual meetings, an IEP team member wishes to revise the IEP, that team member can request an IEP team meeting. Swan v. Bd. of Educ. of Chic., No. 13 C 3623, 2013 U.S. Dist. LEXIS 115294, at *41-42 (N.D. Ill. Aug. 15, 2013) (citing 20 U.S.C. § 1415; 34 C.F.R. §§ 300.320-324). However, failure to perform exactly as required by an IEP does not violate IDEA unless the violation materially fails to implement a child’s IEP. Van Duyn v. Baker Sch. Dist., 502 F.3d 811, 815 (9th Cir. 2007).

18.

Here, the School District failed, in part, to implement the IEPs it helped create. In response, the School District inexplicably attempts to claim that (1) ██████'s parent misunderstood what this

School District meant by co-taught placement and (2) [REDACTED] should never have been placed in a co-taught setting.

19.

First, there is no dispute as to the definition of co-taught placement. GaDOE is explicit in its definition that co-taught placement requires a special education teacher in a general education class providing instruction along with a general education teacher. See Ga. Comp. R. & Regs. 160-4-7-.07 (referring to “co-teaching” as services from special education personnel). Second, if the School District believed that [REDACTED]’s placement in a regular education setting was more appropriate, it had the opportunity, several times, to revise [REDACTED]’s IEP. In fact, after [REDACTED]’s mom’s repeated efforts to implement the IEP correctly, the School District finally did revise the IEP and issued prior written notice.

20.

Although the School District failed to implement its IEP correctly and [REDACTED] had significant absences in both classes, [REDACTED] finished his sixth-grade year in Science and Social Studies with an 82 and 85, respectively.

21.

The District’s failure to provide co-taught placement (with a special education teacher and a general education teacher) in classes in which [REDACTED]’s IEPs stated he required co-taught placement was a failure to perform the IEP. Implementation failures do not violate the IDEA when “the significant provisions of [the child’s] IEP were followed, and, as a result, [the child] received educational benefit.” Van Duyn, 502 F.3d at 821 (citing Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 (5th Cir. 2000)). Rather, the IDEA is violated “if there is evidence that the school actually failed to implement an essential element of the IEP that was necessary for the child to receive an educational benefit.” Id. at 821-22 (citing Neosho RV Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 (8th Cir. 2003)). To determine if such failure gives rise to a statutory violation, evidence regarding the child’s progress must be considered. Id. When a “child performed at or above the anticipated level, that would tend to show that the shortfall in instruction was not material.” Id. at 822. Here, [REDACTED] performed at level in Science and Social Studies during both school years, and therefore the failure to provide co-taught placement did not result in a statutory violation.

2. Failure to Provide Measurable Goals & Objectives & Data

22.

Petitioners contend that ■■■ was denied FAPE because ■■■s IEP goals and objectives were not measurable and were repeated on multiple IEPs. Additionally, Petitioners contend that ■■■ was denied FAPE when the District chose to take data in a fashion that was not specific to ■■■s goals and objectives ensuring that ■■■ could not assess ■■■s progress.

23.

An IEP must be “likely to produce progress, not regression or trivial educational advancement.” Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245, 248 (5th Cir. 1997). Further, IDEA provides that an IEP must have “measurable” goals. 34 C.F.R. § 300.320(a)(2); see Evans v. Bd. of Educ. of Rhinebeck Sch. Dist., 930 F. Supp. 83, 98 (S.D.N.Y. 1996) (failure of measurable objectives denies FAPE).

24.

If a child’s annual goals are not achieved, then the child’s IEP must be revised to “address . . . any lack of expected progress toward the annual goals.” 20 U.S.C. § 1414(d)(4)(A). This standard is balanced by a basic IDEA principle that a mastery of goals and objectives is not required to provide FAPE. Rowley, 458 U.S. at 192. In fact, the Supreme Court has found no issue with an IEP that “largely carried over the same basic goals and objectives from one year to the next.” Andrew, 137 S. Ct. at 996.

25.

In this matter, the evidence indicates that the IEP Team did rely on words that made the goals and objectives hard to measure, that several of the goals and objectives were repeated from sixth grade to seventh grade, and that the data, while barely sufficient, could have been collected in a more informative, consistent, and helpful manner. Further, the evidence in this case demonstrates that ■■■ even though he had significant absences and declined after school tutoring, earned all Bs in his four core academic subjects for seventh grade and two Bs and two Cs in sixth grade. The school psychologist also testified that ■■■ performed commensurate or above his cognitive ability. While his standardized testing scores and benchmarks were low, the evidence also demonstrates that the scores were not inconsistent with a large percentage of regular education students.

26.

Thus, in this matter, there is a School District that made mistakes, could have performed better, and should likely improve its IEP writing. And then there is a child that received additional support and made educational progress with his regular education classmates.

27.

Thus, while the Court sympathizes with the Petitioners' frustration at some of the School District's actions, ■■■ is receiving FAPE. "The IEP must aim to enable the child to make progress." Endrew, 137 S. Ct. at 999. The IEP must be reasonable, not ideal. "[T]he essential function of an IEP is to set out a plan for pursuing academic and functional advancement." Id. Based on the evidence presented at this hearing, this Court finds that Petitioners failed to meet their burden in demonstrating that the School District failed to provide FAPE.

3. Adequacy of Assistive Technology

28.

Petitioners allege that the School District failed to provide sufficient assistive technology to ■■■ by failing to maintain appropriate software on ■■■'s iPad and failing to provide a sufficient assistive technology evaluation. The evidence demonstrates that ■■■'s assistive technology evaluation was thorough and comprehensive and indicated that the technology accessible to all the students in the classroom were sufficient to meet ■■■'s educational needs. As such, the Court finds that Petitioners have failed to meet their burden in demonstrating any violation of FAPE for this issue.

4. Adequacy of O.G. Services

29.

Petitioners allege that the School District failed to provide O.G. services as required by the November 2016 IEP. In fact, the School District began the services prior to the implementation of the IEP, discontinued the services pending the IEP's implementation, and then renewed the services with some minor disruptions for the remainder of ■■■'s seventh-grade year. The evidence demonstrates that there were minor disruptions in the services, but these missed services do not constitute a violation of FAPE. "[T]o prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a *de minimis* failure to

implement all elements of that IEP” Bobby R., 200 F.3d at 349. Here, in the overall scheme of the IEP, these minor disruptions in services do not amount to a denial of FAPE. As such, Petitioners have failed to meet their burden on this issue.

DECISION

█ has progressed from year-to-year and made progress through the general education curriculum in the least restrictive environment appropriate to meet his unique needs. Accordingly, Petitioners’ request for relief is **DENIED**.

SO ORDERED, this 2nd day of October, 2017.



AMANDA C. BAXTER
Administrative Law Judge