

**BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA**

█, by and through █; and █;
Petitioners,

v.

**DEKALB COUNTY SCHOOL
DISTRICT,**
Respondent.

FILED



Docket No.

OSAH

1903555-OSAH-DOE-SE-44-Howells

MAY 08 2019

:

Kevin Westray, Legal Assistant

FINAL DECISION

I. INTRODUCTION

Petitioner █ is a student eligible for services under the Individuals with Disabilities Education Improvement Act of 2004 (“IDEA”). Petitioner █ (“█’s mother”) filed a Due Process Hearing Request (“Complaint”) contending that DeKalb County School District (“District”) violated █’s rights under IDEA when it failed to provide an appropriate placement and failed to provide him with a free appropriate public education (FAPE). The Complaint was received by the Respondent on July 27, 2018. It was received by the Georgia Department of Education (“DOE”) on July 30, 2018, and the Office of State Administrative Hearings (“OSAH”) on August 1, 2018.

The hearing was conducted on January 24, 25, 30, 31, and February 4, 2019, before the undersigned administrative law judge.¹ Petitioners were represented by Chris Vance, Esq. MaryGrace Bell, Esq. represented the District. The record remained open until April 2, 2019 to allow the parties to file post-hearing briefs or proposed findings of fact and conclusions of law.

¹ The hearing was originally set for September 12, 2018. It was continued to October 29, 30, 31, and November 1, 6, 2018, at the request of Petitioners. Thereafter, the parties filed a joint motion for a continuance, which was granted. The hearing was continued to December 12, 13, 14, 17, and 18, 2018. Petitioners subsequently filed another request for continuance, which was granted. The hearing was reset for January 24, 25, 29, 30, and 31 of 2019. Due to expected inclement weather, the Governor’s Office closed state government offices on January 29, 2019, which necessitated the addition of another hearing day on February 4, 2019.

II. FINDINGS OF FACT

1.

█ is currently fifteen (15) years old and eligible to receive special education services under IDEA categories of Autism Spectrum Disorder, Severe Intellectual Disability (SID), and Speech-Language Impairment. █ is also eligible for the related services of Speech Language Therapy (SLT) and Occupational Therapy (OT). (Ex. P-2, at 516, 530, 572, 578, 595, 606.)²

2.

█ mother is a resident of DeKalb County Georgia. She has final decision making authority over █ through her divorce decree.³ (T. Vol. 1 at 77-78.)

3.

█ attended Beth Jacob Preschool from 2004 to 2005. He attended the Walden Early Childhood Program at Emory University from 2005 to 2008, Medlock Elementary School from 2008 to 2010, and Sagamore Elementary School from 2010 to 2015. He began attending Druid Hills Middle School in 2015. (Ex. P-2, at 30, 211, 251; T. Vol. 3 at 10-12.)

4.

During an evaluation in May 2006, at almost age three, █. was able to match shapes to pictures, match colors, use words for a variety of pragmatic reasons (labeling, requesting, commenting), identify photographs, identify body parts on himself and a stuffed animal, identify two articles of clothing, and use a variety of nouns and verbs. (Ex. P-2 at 67.) He also demonstrated an interest in books and was beginning to use modifiers, pronouns, interrogatives, and articles. (Id.) He produced four-to-five word sentences and made requests and comments

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

³ Although █'s mother denied that she tried to declare █. a resident of New Jersey, there is some evidence that such a tactic had been considered for the purpose of Medicaid coverage. (T. Vol. at 78; Ex. R-148.)

during the evaluation. (Id. at 67, 71.) For example, ██████ stated, “I want the phone. I get it. I want the color. I want a piece of paper. It’s stupid.” (Id. at 71.) However, he also used jargon and had difficulty following directions without cues and answering “yes,” “no,” and “Wh” questions. (Id. at 67.) ██████ exhibited self-stimulatory behavior such as hitting, banging on his chest, and galloping, and it was difficult to redirect him once he began engaging in those behaviors. (Id. at 66.) He did not exhibit turn-taking or reciprocal verbal exchanges. (Id. at 71.) As a result of the evaluation, the District found ██████ to be eligible for services under IDEA as a child with a significant developmental delay and speech language impairment. (Ex. P-2 at 66-73.)

5.

██████ attended the Walden Early Childhood Program at Emory University from age two until age five. The school focused on language, socialization, and skills of daily living. (T. Vol. 3 at 10-11.) When ██████ completed his time at Walden he was able to pour himself a drink, put on his socks and shoes, dress and undress, brush his hair, brush his teeth, and use the toilet.⁴ (Id.) He was speaking in five to six word sentences and he knew colors, shapes, letters, and numbers. (Id. at 11.) He was able to sort, match, and do puzzles. (Id.)

6.

█████. attended Medlock Elementary School for pre-kindergarten and two years of kindergarten. During 2009, while attending Medlock, ██████ also attended the Marcus Institute for an applied behavior analysis (“ABA”) program. In his individualized education programs (“IEPs”) at Medlock, it was noted that ██████ was trip-trained for toileting, but he does not indicate his need to use the restroom. (Ex. P-2 at 112, 138, 152, 161, 197, 198, 208.)

█████ had been trip-trained to use the toilet. (Id.)

7.

In a March 30, 2010 IEP, it was noted that [REDACTED] was not toilet trained and that he does not communicate his need to use the restroom. At that time, a toileting objective was added to his IEP, which stated that [REDACTED]. will follow a trip-training schedule with verbal prompting at an accuracy rate of 100% across three data sessions. While at Sagamore Elementary School, [REDACTED]s November 22, 2010 IEP and November 16, 2011 IEP contained a toileting objective. During the November 16, 2011 IEP meeting, [REDACTED]s mother raised concerns about [REDACTED]s eating habits in that he did not like to use utensils. Also during the November 16, 2011 IEP meeting it is noted that [REDACTED]. is almost toilet trained, but that he still has accidents. (Ex. P-2 at 252, 260, 290, 329, 322, 337.)

8.

Describing [REDACTED]s speech and language abilities, it was noted in his April 18, 2014 IEP that he uses phrases and sentences to communicate. It was also noted that he can use complete sentences to make requests and answer questions when he is highly motivated, but his independent use of sentences is not consistent. In [REDACTED]s April 17, 2015 IEP, it is noted that [REDACTED]. primarily uses one word responses and short phrases to communicate. During the April 17, 2015 IEP meeting [REDACTED]s mother raised concerns about [REDACTED] stealing food from others and his toileting accidents.⁵ She also stated that she would like [REDACTED] to use utensils when eating. (Ex. P-2 at 397, 411, 421.)

⁵ With regard to his mother's concerns about [REDACTED]s toileting accidents, the IEP team "agreed that it would be documented in the transition information that [REDACTED] will wear a Pull-Up to school and he requires a frequent and consistent bathroom schedule." It is unclear what is meant by the "transition information," but there is no reference to the Pull-Up or a frequent and consistent bathroom schedule anywhere else in the April 17, 2015 IEP or in the subsequent IEP. (Ex. P-2 at 421, 446-47, 460.)

9.

According to a Psychological Evaluation conducted in early February 2016, at age 12 years and 7 months, █████ earned a full scale IQ score of 40, a non-verbal IQ score of 42, and a verbal IQ score of 43. His scores indicate that he is functioning on a level equivalent to a child who is 3 years and 3 months old. On the adaptive behavior assessment, █████ received the lowest possible scores in all domains (i.e., conceptual, social, and practical).⁶ His scores placed him in the less than 0.1 percentile, which means that he scored worse than 99.9% of his same aged peers. (Ex. P-2, at 36, 43-44.)

10.

The psychologist who conducted the evaluation observed █████ on two dates in January 2016. Based on her first observation, she reported that █████ had difficulty following rules and directions in the cafeteria. Upon sitting at the table, he immediately stole food from someone else's tray. He "was an extremely messy eater and used both hands . . . to tear and eat his food." When prompted by an adult, █████ would use his fork for a bite or two of his food, but then would return to using his hands until reminded again. █████ "stimmed" throughout the psychologist's initial observation.⁷ Specifically, he rocked, hummed, and flapped his hands. She also noted that "[h]e did not verbally interact or make eye contact with any of the students or staff at the table." (Ex. P-2 at 33-34.)

11.

The second observation was in the classroom on January 26, 2016. During that observation, the psychologist noted that █████ required constant monitoring. He was continuously

⁶ The adaptive behavior assessment measures an individual's personal and social functioning in daily activities. (Ex. P-2 at 43.)

⁷ "Stimming" refers to repetitive movements or sounds, such as hand flapping, waving objects in front of your face, banging an object, or repetitively making a particular sound. (T. Vol. 1 at 167-68.)

stimming on objects and noises. “[H]e frequently chewed on a chew toy (i.e., oral motor device) and then banged it on the table repeatedly.”⁸ Additionally, he had a rubber chicken that he would bang on the desk or flap in front of his face. ■■■. babbled to himself and made repetitive sounds and high-pitched noises. When he was seated, he constantly rocked and leaned back in his chair. While working on tasks at the Promethean board, ■■■. “required a lot of verbal prompts and hand-over-hand instruction to complete the tasks,” and he “tended to stim on the task by tapping the board and all the objects presented multiple times.” At no time during the observation did ■■■ initiate or sustain any social interaction with peers or adults. (Ex. P-2 at 34.)

12.

During the testing, the psychologist observed similar self-stimulating behaviors. She noted that those behaviors were consistent with those reported by ■■■’s teacher and parent.⁹ (Id.)

13.

The psychologist recommended that those educating ■■■ should label vocabulary words when he is looking at pictures or books; increase his ability to recognize, match and compare objects based on their characteristics, such as size; focus on increasing the consistency of ■■■’s appropriate responses and compliance; and provide ■■■. with frequent, brief and direct

⁸ Dr. Richard Carpenter, ■■■’s treating developmental neuropsychiatrist, opined that if ■■■. was repeatedly banging a chew toy on the table, he was not engaged or attending to what is going on. (T. Vol. 1 at 119, 133-36, 168.) In Dr. Carpenter’s experience with ■■■, there is no way to engage or direct ■■■. when he is stimming in that manner. (Id. at 135, 173.)

⁹ The psychologist relied, in part, on a Teacher Questionnaire completed by ■■■’s classroom teacher, Ms. Elizabeth Williams on December 14, 2015. In that questionnaire, Ms. Williams listed a major concern as “constant stimming.” Additionally, she noted that ■■■ is able to identify some letters and numbers, count, and perform vocational tasks “when he is not stimming.” (Ex. P-2 at 31.) This observation by Ms. Williams is in contrast to her testimony that she did not believe that his behaviors impeded his education and, specifically, her testimony that if he was constantly stimming and making noises in class, it would not impede his education. For this reason, she testified that she did not believe that ■■■. required a behavior intervention plan (BIP) (T. Vol. 4 at 115-16, 268.)

instruction and repetition. Due to his significant difficulties in adaptive behavior, the psychologist recommended increasing [REDACTED]'s ability to dress and undress himself independently, manipulate fasteners, put on his shoes on the correct feet, care for his toileting needs including wiping himself independently, accurately answer "yes" or "no" questions, and independently express the need to use the toilet. Based on [REDACTED]'s significant difficulties with social skills, the psychologist recommended teaching him "how to cooperate with others, independently share, ask for help when needed, and appropriately express negative emotions." (Ex. P-2 at 49-50.)

14.

An IEP meeting was held on April 13, 2016. [REDACTED]'s mother, his classroom teacher Ms. Williams, and his speech pathologist Ms. Lindsey Goubaitis-Bracken were present. In the IEP that was developed as a result of the meeting, [REDACTED]'s present level of performance was described as follows: [REDACTED] is able to write his own name and identify numbers to 100. He [can] independently count up to at least 20. He is able to identify some sight words and many picture symbols. He is able to answer some comprehension questions with picture prompts. . . . He is able to interact on a computer and navigate on an iPad." The IEP further noted, in the area of vocational skills, [REDACTED] is able to "sort, package, and assemble." The IEP states that [REDACTED] can comprehend language at the word, phrase, and direct request level and that he responds to his name and commands such as "no," "stop," and "look" with gestural and physical prompts. [REDACTED] communicates verbally with an average phrase length of three to four words. However, he also expresses choices by pointing, gesturing or taking items. He can occasionally answer a "what" question such as "what do you want" independently or with a verbal prompt. However, he lacks the language skills necessary to answer a variety of "wh" questions. [REDACTED] has difficulty comprehending sentences, simple conversations, and indirect requests." He does not understand

“basic concepts such as color, money, size, location, time, quantity, body parts, shapes, categories, and emotions.” (Ex. P-2 at 446-47, 460.)

15.

During the April 13, 2016 IEP meeting, ██████’s mother expressed a concern about his behavior in class and raised the issue of possible placement in a residential setting. However, she was told that the people who made such decisions were not there and that was not what they were there to discuss. A residential educational placement was not considered during the April 13, 2016 IEP meeting. (Ex. P-2 at 447, 457; T. Vol. 3 at 28.) ██████’s mother also raised the possibility of a Behavior Intervention Plan (“BIP”), but the team determined that a BIP was not needed. (Ex. P-2 at 460.) Extended School Year (“ESY”) services were not recommended.¹⁰ (Id.) The following Goals and corresponding Objectives were included in the April 13, 2016 IEP:

<p>Goal</p>	<p>█████. will demonstrate improved cognitive/academic skills</p> <p>Objectives:</p> <ul style="list-style-type: none"> When presented a community functional word and the verbal directive “What word?,” ██████. will read 20 sight words by saying the word. (Taught in sets of 5 words at time.) 	<p>Criteria for Mastery</p> <p>Independently with 80%</p>
<p>Goal</p>	<p>█████ will demonstrate improved vocational/leisure skills</p> <p>Objectives:</p> <ul style="list-style-type: none"> When given a visual task analysis ██████. will complete a five step task by the following the task analysis. (Additional steps to be added upon mastery) When given a visual, ██████ will complete a vocational task by counting out items/objects from a group of items/objects to create sets. During adaptive P.E. when completing the daily 	<p>Criteria for Mastery</p> <p>Independently with 80%</p> <p>Independently with 80%</p> <p>80% with verbal</p>

¹⁰ There is no indication that ██████’s mother sought or requested ESY services.

	exercises, [REDACTED]. will stay with his group	prompts
Goal	[REDACTED]. will improve his communication skills from present levels of performance to criteria for mastery. Objectives: <ul style="list-style-type: none"> Given adult proximity, access to visual cues (picture symbols), and a circumstance when assistance is necessary, [REDACTED]. will independently request assistance/help either physically (i.e., approaching staff person and taking them to the task/item needing assistance) and/or verbally. Given visual cues (picture symbols) and upon completion of a given task, [REDACTED] will independently notify staff that his work is complete by providing a physical (i.e., to touch adult) and/or verbal response. 	Criteria for Mastery 75% accuracy 75% accuracy

(Ex. P-2 at 449-54.) [REDACTED].’s placement was in a special education self-contained classroom for the majority of the day.¹¹ The IEP stated that [REDACTED]. would receive 1.5 hours of community based instruction (“CBI”) a week; however, the IEP did not contain any objectives for the CBI.¹² [REDACTED].’s IEP also stated that [REDACTED]. would receive 1 hour a week of speech therapy. (Ex. P-2 at 449-454, 457-58.)

16.

On April 21, 2016, another IEP meeting was conducted to review [REDACTED].’s eligibility and the results of the February 2016 Psychological Evaluation. The following individuals were present for the IEP meeting: [REDACTED].’s mother, Ms. Williams [REDACTED].’s classroom teacher), Ms.

¹¹ It was noted that he would have opportunities to interact with typical peers during physical education (“PE”) and book buddies; however, there was no evidence presented at the hearing that [REDACTED] interacted with typical peers during PE or book buddies. (Ex. P-2 at 458.)

¹² CBI is education based on real-life experiences outside of the school setting. (T. Vol. 1 at 162.) For example, it involves taking students to a business establishment like a store and learning how to find things in the store and how to pay for items. (T. Vol. 4 at 176-77.) CBI also provides opportunities for the student to learn to refrain from maladaptive behaviors while out in the community. (T. Vol. 1 at 164-65.) Dr. Carpenter opined that CBI is critical for students like [REDACTED]. It allows the student to consolidate his learning and improve his skills. (T. Vol. 1 at 162.)

Goubaitis-Bracken [REDACTED]'s speech pathologist), Ms. Judy Hayes (the LTSE), Ms. Patel (a consulting occupational therapist), Ms. Allison Schwartz (school psychologist), and Scott Carroll (behavior analyst). During that meeting it was noted that [REDACTED]. has significant repetitive behaviors, such as flicking his fingers in front of his eyes for a period of five seconds or more, flapping his hands or fingers in front of his face, and making high-pitched sounds or other vocalizations for self-stimulation. [REDACTED]'s scores regarding adaptive functioning were significantly below his same aged peers. His cognitive functioning is in the severe to profound range of functioning. After reviewing the results of the February 2016 Psychological Evaluation, the IEP team determined that [REDACTED] remained eligible under the following IDEA categories: [REDACTED], [REDACTED] and [REDACTED]. Despite the psychologist's recommendations to focus on adaptive behavior such as independently dressing himself and toileting, no changes were made to [REDACTED]'s IEP goals and objectives. (Ex. P-2 at 49, 461-63, 478.)

17.

On December 2, 2016, another IEP meeting was held at the request of [REDACTED]'s mother.¹³ She told the IEP team that she was interested in seeking residential placement for [REDACTED]. She reported that she is no longer able to manage him safely in the home.¹⁴ She had researched residential facilities, but she had not been successful in locating a facility in Georgia because [REDACTED]'s behaviors are not aggressive. She told the IEP team that she was now looking for a residential facility outside of Georgia. [REDACTED]'s mother reported that the Department of

¹³ The following people were present for the meeting: [REDACTED]'s mother, Mrs. Sheley-Williams (classroom teacher), Ms. Hayes (LTSE), Mrs. Million (middle school coordinator), Ms. Nelson (related services coordinator), and Richard Carpenter, MD (neuropsychiatrist). (Ex. P-2 at 532.)

¹⁴ Dr. Carpenter attended the December 2, 2016 IEP team meeting via telephone. He told the IEP team about [REDACTED]'s significant maladaptive behaviors, such as public masturbation, fecal smearing, darting behavior, food stealing, and pica. He explained that it was critical get these behaviors under control and that a 24/7 residential placement was necessary to do so. Yet, the District would not consider a residential placement. (T. Vol. 1 at 137, 143, 170, 173-74.)

Community Health has approved a plan for a residential facility; however, she asked that the District pay for the educational component. The IEP team concluded that [REDACTED]. demonstrated appropriate behaviors in the school setting and that his educational and functional needs were being met in his current placement.¹⁵ For that reason, the team did not agree to the more restrictive placement (i.e., a residential setting). (Ex. P-2, at 532.) Notwithstanding, the District did offer for a behavior analyst to come to [REDACTED] home to provide behavioral support. [REDACTED] mother refused the in-home support because she did not know the specifics of what they were offering and it was not practical for her family to have a revolving door of people coming into the home. (T. Vol. 3 at 40, 43, 191-92.)

18.

An annual IEP meeting was held on March 28, 2017. The following individuals were present: [REDACTED]'s mother, Ms. Williams (classroom teacher), Ms. Judy Hayes (LTSE), Mr. Scott Carroll (behavior specialist). During that meeting, [REDACTED]'s teacher agreed that [REDACTED] has a tendency to put everything in his mouth. She also acknowledged that [REDACTED]. "likes to play with himself," either by rubbing his penis on the outside of his pants or by putting his hands in his pants. When asked if she had taken data when [REDACTED] engaged in masturbation, Ms. Williams indicated that it would be difficult to do so, because she would be taking data "all day long." She further stated that [REDACTED] engaged in masturbation very frequently. To get [REDACTED] to stop engaging in that behavior, Ms. Williams explained that she gives [REDACTED] things to occupy his hands or redirects him to sit at the table and put his hands on the table. [REDACTED]'s mother then suggested that refraining from

¹⁵ The District did not observe many of the behaviors that [REDACTED]'s mother observed in the home or the community. (Ex. R-94; T. Vol. 4 at 112-13, 151, 177-78.) In support of the District's assertion that [REDACTED]. demonstrated appropriate behavior in school, the IEP meeting notes state "data supports adequate progress in the school setting with his behavior since the start of his 2015-2016 school year." However, it appears that no data was collected regarding [REDACTED]'s behaviors. (Ex. P-2 at 532; Ex. P-1 at 13; Ex. P-11; T. Vol. 4 at 222, 228.) Further, the District did observe food stealing, masturbation, and [REDACTED]. placing non-food items in his mouth. (Ex. P-1 at 6-8; Ex. P-11; T. Vol. 4 at 100, 116.)

masturbation should be a goal. In response, Ms. Williams implied that it would be an unrealistic goal because it is a sensory issue and that it is difficult to find something more reinforcing than masturbation. (Ex. P-1 at 6-8, 13; Ex. P-11; Ex. P-2 at 579-80.)

19.

When ██████'s mother asked how the staff handled ██████'s problem behaviors, such as food stealing, Ms. Williams told her that they "fuss at" him or tell him "no" very sternly. (Ex. P-1 at 14-15; Ex. P-11.)

20.

During the March 28, 2017 IEP meeting, ██████'s mother also raised concerns about his toileting accidents. Specifically, she spoke about instances at home when he defecates in his Pull-Up and then takes the Pull-Up off causing the poop to go down his leg and sometimes he loses his balance, steps in it and tracks it through the house. Ms. Williams acknowledged that there was an occasion at school that ██████ had an accident in which ██████ had poop down his legs and in his shoes. She said that was one of the days they "probably changed his shoes." ██████'s mother suggested that ██████'s IEP should have a toileting goal of staying dry and clean for a period of time across all settings. In response, Ms. Williams said, "He might not be able to do it." She further told ██████'s mother that she did not think staying clean and dry and only using the bathroom in the bathroom was a realistic expectation. Ms. Williams stated that "every kid in [her] class is in Pull-Ups." She further stated that she did not think ██████ was toilet trainable and implied that ██████ would be wearing Pull-Ups for the rest of his life. (Ex. P-1 at 11, 27-28; Ex. P-11.)

■■■■'s mother also suggested other goals for ■■■■'s IEP, such as remaining in the area he is supposed to be and not leaving without permission, not taking other people's food without permission, sitting and eating with utensils, and clearing the plates afterward. (Ex. P-1 at 18; Ex. P-11.) None of the goals suggested by ■■■■'s mother were included in the IEP. Instead, the following Goals and corresponding Objectives were included in the March 28, 2017 IEP:

<p>Goal</p>	<p>■■■■ will increase his word recognition</p> <p>Objective:</p> <ul style="list-style-type: none"> When presented a community functional word and the verbal directive "What word?," ■■■■. will read 20 sight words by saying the word. (Taught in sets of 5 words at time.) Current Baseline 40%. 	<p>Criteria for Mastery</p> <p>80%</p>
<p>Goal</p>	<p>■■■■ will increase his self-help skills</p> <p>Objective:</p> <ul style="list-style-type: none"> When given a visual task analysis ■■■■ will complete a five step task by the following the task analysis. (Additional steps to be added upon mastery). Baseline 40%. 	<p>Criteria for Mastery</p> <p>80%</p>
<p>Goal</p>	<p>■■■■ will increase his self-help skills.</p> <p>Objective:</p> <ul style="list-style-type: none"> When presented with an opportunity where he needs help, ■■■■ will request it by coming to the instructor and saying "Please" or "Help." As he masters this, the instructor will get farther and farther away or perform the task in different environments. Baseline 20%. 	<p>Criteria for Mastery</p> <p>60%</p>

(Ex. P-2, at 577.) While the goals are worded differently from the previous goals in ■■■■'s April 13, 2016 IEP, the corresponding objectives are either identical or only slightly different. For

example, the first two objectives are identical to objectives contained in the previous IEP.¹⁶ Further, there are only three objectives in the March 28, 2017 IEP. The April 12, 2016 IEP contained six objectives. (Id.) Additionally, the goals and objectives in the March 28, 2017 IEP are the same goals and objectives that Ms. Williams brought to the meeting. (Ex. P-1 at 16; Ex. P-11; Ex. P-2, at 577; T. Vol. 3 at 49-50.)

22.

For the March 28, 2017 IEP, ■■■■■'s placement was in a special education self-contained classroom for the majority of the day.¹⁷ The March 28, 2017 IEP also provided for CBI; however, it is not listed separately in the IEP.¹⁸ Rather, it is included within his small group instruction. Therefore, it is unclear how much CBI ■■■■■ was to receive for the 2017-2018 school year.¹⁹ (Ex. P-2 at 578-79.)

23.

With regard to extended school year (ESY) services, Ms. Williams stated that they were not recommending ESY. She noted that ■■■■■ goes to summer camp. ■■■■■ mother acknowledged that they did not need ESY.²⁰ (Ex. P-1 at 16; Ex. P-11.)

24.

After describing the behaviors ■■■■■ exhibited at home and in the community, ■■■■■'s mother agreed to accept the District's offer of in-home support. The District employees could not tell ■■■■■'s mother how many hours would be provided or who would provide the support.

¹⁶ The only difference from the previous IEP is that the March 28, 2017 IEP would work on different sight words and a different 5-step task.

¹⁷ It was noted that he would have opportunities to interact with typical peers during physical education (PE) and book buddies; however, there was no evidence presented at the hearing that ■■■■■ interacted with typical peers during PE or book buddies. (Ex. P-2 at 578.)

¹⁸ Like the previous IEP, the March 28, 2017 IEP did not contain any objectives for CBI. (Ex. P-2 at 577.)

¹⁹ At the hearing, Ms. Williams testified that they were supposed to go on CBI twice a month. (T. Vol. 4 at 195.)

²⁰ At the hearing, ■■■■■'s mother acknowledged that she was "okay with him not having ESY." (T. Vol. 3 at 127.)

Rather, they told her that someone would be in contact with her. The in-home support was not included in ■■■■■'s IEP. (Ex. P-1 at 17, 20, 24, 28A, 28B; Ex. P-11; Ex. P-2 at 572-80.)

25.

Near the end of the March 28, 2017 IEP meeting, ■■■■■'s mother informed the team that ■■■■■ would likely be attending a residential school. She then asked the team what responsibility the District would have if ■■■■■ attended a residential school. Ms. Judy Hayes, a lead teacher for special education, told ■■■■■'s mother that information about any responsibility the District may have for a residential placement did not come from her. Rather, such information would have to come from the Director of Special Education or the Superintendent. A residential educational placement was not considered during the March 28, 2017 IEP meeting. (T. Vol. 5 at 8; Ex. P-1 at 28B; Ex. P-11; Ex. P-2 at 578.)

26.

On May 10, 2017, Petitioner's mother notified the District that she was going to be placing ■■■■■ in a private placement and that she was going to be seeking reimbursement at public expense.²¹ (Ex. R-126.)

27.

Petitioners filed their Complaint on July 27, 2018. In the Complaint, Petitioners requested a copy of all of ■■■■■'s educational records prior to any early resolution meeting, mediation, or hearing. (See Complaint.) At the hearing, Ms. Williams indicated that data was taken on ■■■■■'s objectives during the 2015-2016 school year, but she did not submit it to the District's attorney because she did not believe it was requested and she does not know where it is. (T. Vol. 4 at 206-08.)

²¹ ■■■■■ was accepted to Bancroft prior to May 10, 2017. It was likely sometime in April 2017. (T. Vol. 3 at 158.)

█'s Education and Performance While Attending School in the District

28.

While attending school in the District the number of █'s goals and objectives varied. However, there was a downward trend in the number of goals and objectives included in his IEPs in more recent years. From January 2009 to November 2011, █'s IEPs contained anywhere from 7 goals and 19 objectives to 6 or 7 goals and 11 objectives. (Ex. P-2 at 141-46, 164-69, 181-86, 199-205, 214-20, 254-67, 272-78, 284-97, 304-17, 324-34, 344-54.) From November 2012 to April 2015, █'s IEPs contained between 5 goals and 8 objectives and 3 goals and 7 objectives. (Ex. P-2 at 371-78, 384-390, 399-406, 412-418.) From April 2016 to March 2017, █'s IEPs had 3 goals and 6 objectives. (Ex. P-2 at 449-54, 466-71, 521-26.) By March 28, 2017 his IEP had been reduced to 3 goals, each with one objective (i.e., a total of 3 objectives.) Dr. Carpenter found the March 28, 2017 IEP to be lacking as it did not address █'s maladaptive behaviors or the areas of skill acquisition identified by the school psychologist. (Ex. P-2 at 576-77; T. Vol. 1 at 149-51; Ex. P-2 at 50.)

29.

Lindsay Kanka is a former teacher for the District. She was █ special education teacher at Sagamore Elementary School for the 2013-2014 school year and half of the 2014-2015 school year. (T. Vol. 4 at 299-306.) Ms. Kanka is currently employed as a board-certified behavior analyst ("BCBA") with Southern Behavioral Group. (Id. at 298.) During the 2016-2017 school year, the director of special education, Dr. Calloway, asked Ms. Kanka to provide some in home support for █.²² (Id. at 300.)

²² Ms. Kanka testified that she ultimately did not provide the in-home support for █. She was told that the parent declined it. (T. Vol. 4 at 300-01.)

30.

According to Ms. Kanka, public masturbation is a severe problem that has to be stopped. She agreed that food stealing is also a problem behavior. Further, toilet training is a basic skill that should be addressed. To address problem behaviors and skill deficits, one would develop a skill-acquisition plan or a behavior reduction plan. That would require taking data to determine if the plan is working and modifying the plan if it was not working. As a BCBA, those are the types of things Ms. Kanka does. In Ms. Kanka's opinion, repeatedly telling a student to stop masturbating is not an appropriate program.²³ (T. Vol. 4 at 306-09.)

31.

Scott Carroll is a behavior specialist with over 40 years of experience. (T. Vol. 2 at 200-201.) In Mr. Carroll's opinion, telling █████ to "stop," "sit down," or "no" over and over is not an effective way to extinguish problem behaviors. It is a control technique that may work in the moment, but it does not generalize to other areas or work over the long-term. Additionally, the attention gained could potentially reinforce the behavior. (Id. at 229-32.)

32.

During the March 28, 2017 IEP meeting, Ms. Williams told █████'s mother that █████ had essentially mastered his previous objectives.²⁴ (Ex. P-1 at 5; Ex. P-11.) However, it does not appear that any data was taken on the objective that █████ would request help or assistance from the staff. (Ex. P-2 at 584-94.) Furthermore, during that same IEP meeting, Ms. Williams told

²³ The District listed Ms. Kanka as an expert witness. Counsel for the District did not object to the questions asked by Petitioner's counsel during cross examination. However, on the subsequent day, when the District's counsel was not allowed to elicit expert testimony from one of its witnesses who was not previously identified as an expert, counsel for the District objected to the questions Petitioner's counsel asked Ms. Kanka. (T. Vol. 5 at 319-321.) Any such objections were waived when counsel for the District did not timely object.

²⁴ A Transitional Progress Report dated February 15, 2017 listed two of █████'s goals from his April 13, 2016 IEP (i.e., asking for help and notifying staff that his work is complete). The report notes that █████ is not making progress on these goals. (Ex. P-2 at 571.) This report is somewhat at odds with Ms. Williams' statement one and a half months later that █████ has mastered his goals.

■■■■'s mother that she was really going to focus on getting ■■■■. to request help and that she was going to start taking data on that objective. (Ex. P-1 at 16; Ex. P-11.) The IEP stated that ■■■■. was "unable to communicate simple needs such as requesting 'help.'" (Ex. P-2 at 575.) Thus, it is clear that ■■■■. had not mastered the previous objective regarding asking for help or assistance from the staff.

33.

The April 13, 2016 IEP had an objective for ■■■■ to learn 20 sight words. Ms. Williams reported that ■■■■. had not mastered any of his sight words as of October 27, 2016. Further, it appears that ■■■■ only worked on ten sight words during the 2016-2017 school year. According to ■■■■'s mother, as of May 2017, ■■■■ could not read any of the sight words on which he had been working. (Ex. R-101; Ex. P-2 at 584-85; Ex. R-100; T. Vol. 4 at 8-10.)

34.

■■■■ participated in the Georgia Alternative Assessment ("GAA") which is geared toward students with significant disabilities. (T. Vol. 4 at 187-88.) The GAA is a portfolio-based assessment where samples of the student's work are collected in a binder and sent to an outside company to evaluate. (T. Vol. 4 at 187, 231.) ■■■■. did not produce any work samples using paper and pencil. (Ex. P-2 at 491; T. Vol. 4 at 232.) ■■■■ would cut out picture symbols to answer questions. (T. Vol. 4 at 231-32.) Ms. Williams acknowledged that if during the pretest she had to use full physical prompting and then later ■■■■ was able to complete the task with partial physical prompting or verbal prompting it would count as progress. (*Id.* at 233-34.) She further acknowledged that although the materials on which he was evaluated were grade level materials, the problems were much simpler. In many instances, ■■■■. would be evaluated on the prerequisites as opposed to the grade level standard. (T. Vol. 230, 234-235.) Ms. Hayes

acknowledged that there may have been instances where ■■■'s classroom teacher would guide ■■■ hand over hand toward the correct answer for purposes of the GAA. (T. Vol. 5 at 174-76.)

35.

When ■■■'s mother received the report of the GAA, it stated that ■■■ was approaching mastery of grade level subjects such as geography, earth science, and statistics. (T. Vol. 3 at 294.) However, ■■■ was not approaching mastery of any grade level material. (T. Vol. 3 at 294.) He could not do statistics or algebra. (T. Vol. 5 at 174-75.) He could not spell, write, or read any words. (T. Vol. 3 at 295; T. Vol. 5 at 177.)

36.

■■■'s April 13, 2016 IEP stated that he was to have 1.5 hours of CBI per week during the 2016-2017 school year; however, he did not receive any CBI during the months of August or September 2016, because the District only provides CBI during the months of October through April. Furthermore, ■■■ did not receive 1.5 hours of CBI a week during the months of October 2016, November 2016, December 2016, January 2017, February 2017, March 2017, or April 2017, because the District only provides CBI twice a month.²⁵ (T. Vol. 4 at 195-96.)

37.

■■■'s April 13, 2016 IEP stated that he was to have 1 hour of speech therapy a week. Around the beginning of the 2016-2017 school year, ■■■'s speech therapist went on emergency maternity leave. Speech-language pathologist Gregory Kato began providing ■■■ speech therapy in November of 2016. Ms. Williams, ■■■'s classroom teacher did not tell ■■■'s mother that he was not receiving speech therapy for a period of time. (Ex. P-2 at 457; T. Vol. 4 at 142-43; T. Vol. 5 at 192; Ex. R-21; T. Vol. 3 at 53-54.)

²⁵ In February 2017, Ms. Williams told ■■■'s mother that they did not do very much CBI at all "last year." (Ex. R-119.) It is unclear whether she is talking about the school year or calendar year.

In February of 2017, ██████'s mother asked Ms. Williams to take toileting data, including accidents, bathroom trips, and whether he actually used the bathroom. (Ex. R-119.) ██████'s mother did not see the data until the hearing in this matter. (T. Vol. 3 at 189; T. Vol. 4 at 7; Ex. R-30.) In collecting the data, Ms. Williams did not consider it to be an accident if ██████. urinated or defecated in his Pull-Up. She only considered it to be an accident if it leaked outside of the Pull-Up. (T. Vol. 4 at 225-27.) Ms. Williams testified that ██████. only had accidents once or twice a month.²⁶ (Id. at 106, 168.) However, this did not comport with the frequency with which ██████. came home with soiled clothes in his book bag (i.e., a couple times a week). (T. Vol. 3 at 27-28.)

Residential Placement

After raising the possibility of a residential placement in April 2016, ██████'s mother began searching for such a placement with the assistance of a Medicaid caseworker. (T. Vol. 3 at 28, 55.) Many of the placements in Georgia did not accept children. (Id. at 57.) Some did not have openings. (Id. at 57.) Other placements were not appropriate for ██████. because they were for individuals with severe aggressive behavior, which he does not have. (T. Vol. 1 at 234-35.) ██████' mother and the Medicaid caseworker inquired into approximately one hundred different residential placements in Georgia, and they all turned ██████. down. (Id.) After this search, ██████'s mother began looking for an out of state residential placement. She researched several and narrowed down the list. (T. Vol. 3 57-58.) She then visited two residential placements in Alabama and one in New Jersey. (Id. at 58-59, 61.) ██████'s mother finally selected Bancroft in

²⁶ Ms. Williams stated that the leak accidents happened when it appeared that the Pull-Up was full and could not contain any more. (T. Vol. 4 at 168.) ██████ was taken to the bathroom only 2 times during the 7-hour school day. (T. Vol. 4 at 227.)

New Jersey as the residential placement for [REDACTED] however, she did not have the funds to send him there. (Id. at 58-59, 61-62.) After doing some more research, she sought payment of the residential component from Medicaid.²⁷ (T. Vol. 3 at 62-63.)

40.

Once Medicaid agreed to pay for the residential component, [REDACTED]'s mother tried to raise funds to pay for the tuition (i.e., the school component of the placement). (Id. at 63-64.) She received a phone call from a philanthropist named Michelle Hirsch. Initially, Ms. Hirsch agreed to pay for the tuition for [REDACTED] for one year.²⁸ (T. Vol. 3 at 63-64, 242, 245-46.) Ms. Hirsch later told [REDACTED]'s mother that she would pay the tuition for three years. (Id. at 246.) Ms. Hirsch has paid the tuition directly to Bancroft. (Ex. P-3 at 895; T. Vol. 3 at 245.) [REDACTED]'s mother told Ms. Hirsch that she would seek reimbursement from the District and reimburse Ms. Hirsch. (T. Vol. 3 at 64.) Ms. Hirsch agreed that if [REDACTED]'s mother reimbursed her for the tuition, she would roll the funds back into [REDACTED]'s future because he will need support for his entire life. (Id. at 65.) The agreement between [REDACTED]'s mother and Ms. Hirsch is not in writing. (Id. at 65-66.)

Bancroft

41.

The Bancroft School provides two different programs (i.e., a school and a residential program) that serve developmentally disabled children; with autism and intellectual disabilities being the most common disabilities. (T. Vol. 2 at 70-71, 75-76.) If a student is enrolled in both the school program and the residential program, the behavior analysts from both programs

²⁷ As of the time of the hearing, Medicaid, through the Comprehensive Supports Waiver (“COMP waiver”), had paid the daily residential rate of \$771. (Ex. P-3 at 903-918; T. Vol. 3 at 68.) Medicaid has threatened to stop paying for the residential (i.e., room and board) component on several occasions, based on the fact that [REDACTED] is no longer receiving home and community based services in the state of Georgia. (T. Vol. 1 at 79-80, 83.)

²⁸ The daily cost for the school program at Bancroft is \$624 per day for regular school months. With an average of 20 school days per month, the cost for a regular school month is \$12,480. (Ex. P-3 at 895, 901.) Ms. Hirsch has made payments of \$62,434 on May 9, 2017, October 13, 2017, March 1, 2018, and October 9, 2018. (Id. at 895.) She was due to make another payment in the amount of \$62,434 in March 2019. (T. Vol. 1 at 74.)

routinely communicate about the behavioral objectives; have monthly rounds to present data and any other issues; and also participate in a quarterly joint care review. (T. Vol. 2 at 71.) The behavior analysts are supervised by a BCBA. (Id. at 78.) The same methodologies to address behavior and skill acquisition are used in both the school program and the residential program. (Id. at 71-72, 80.) Consistency between the programs is important. (Id. at 72.)

42.

█ began attending Bancroft on May 25, 2017. (Ex. P-3 at 903.) Since that time, he has made significant and meaningful progress. (T. Vol. 1 141.) At admission, Bancroft began taking data on █ for pica, disruption, excrement contact, property destruction, and food stealing. (T. Vol. 2 at 81.) Data collection for inappropriate social behavior or mouthing began in June of 2017. (Id.) The Bancroft staff stopped taking data on █. for pica and disruption in June of 2017 because the incidences were very low. (Id. at 81-83.) As of the time of the hearing, the incidence of █'s excrement contact was down to 0.002. (Id. at 82.) That was a reduction of 91percent. (Id.) The incidence of █. mouthing things (i.e. putting things in his mouth) has reduced by 84 percent. (Id. at 86.) █ has had a 97 percent reduction in his inappropriate social behavior - public masturbation. (T. Vol. 2 at 102.) His food stealing has remained at baseline. (Id.)

43.

While at Bancroft █ has had the following skill acquisition objectives: loading the dishwasher, tooth brushing, showering, “mands” (i.e., making verbal demands or requests), and compliance. (T. Vol. 2 at 88-89.) █. was under 10 percent around March of 2018 on loading the dishwasher, which means he was only able to complete the steps independently 10 percent of the time. (Id. at 90.) He is now varying between 50 and 100 percent in independently

completing the steps. (Id.) He has had variable performance with regard to brushing his teeth. Some days he is around 35 percent independent and other days he is 90 percent independent. (Id.) ■■■. has had a 59 percent increase in making verbal demands. (Id. at 89.) His compliance has been stable. He started out at 98 percent during his first few months and now is 99 percent. (Id.)

44.

■■■ has a toileting service objective. He wears underwear during all waking hours and Pull-Ups at night. (Id. at 91.) He is taken to the bathroom on a schedule, every 60 minutes. (Id. at 91, 93-94.) ■■■. rarely has toileting accidents any more. (Id. at 94; T. Vol. 3 at 7, 76.) During visits, his mother has observed him independently using the bathroom on multiple occasions. (T. Vol. 3 at 76.) Since starting Bancroft, ■■■'s mother is only aware of three toileting accidents. (T. Vol. 4 at 57-58.)

45.

To address the issue of public masturbation, Bancroft initiated a "private time" objective. (T. Vol. 2 at 99.) The purpose of the objective was to teach ■■■. when and where it is appropriate to masturbate. The objective specifies scheduled times when he has access to his room to do whatever he wants to do. If he attempts to masturbate in the common areas, the staff would block him from doing so and redirect him to other things. During the scheduled private times (8:00 a.m. and 3:00 to 4:00 p.m.), the staff puts up a symbol in his room that indicates he is free to do what he wants. (T. Vol. 2 at 99-100.) At the end of private time, ■■■ is prompted to redress, go to the bathroom, and wash his hands, regardless of what he did during private time. (Id. at 101.)

46.

While at Bancroft, ■■■. has had community outings as part of the day school and the residential program. (T. Vol. 2 at 119-20.) He has objectives for those outings, in that to have a successful outing there must be an absence of significant maladaptive or challenging behaviors. (T. Vol. 3 at 83; T. Vol. 2 at 119-21; T. Vol. 1 163-64.) In October 2018, ■■■. had 10 outings and all were successful.²⁹ (T. Vol. 2 at 120-21.)

47.

Since he has been at Bancroft, ■■■ has learned to consistently eat with a fork and spoon. (T. Vol. 1 at 141; T. Vol. 3 at 87-89.) He can sit at a desk, trace letters, write his name, hand in his work, express his needs in words, and speak four-to-five word sentences. (T. Vol. 1 at 141; Ex. P-14 at 2791, 3949, 3950.) He is able to sit and attend to school work for up to 20 minutes at a time. (T. Vol. 1 at 277-78.) ■■■ is now demonstrating an understanding of money, time, waiting, and taking turns. (T. Vol. 3 at 6, 82-83, 84, 92, 93.)

48.

Bancroft uses a reading program designed for children with severe developmental disabilities. Using this program, ■■■. is able to answer reading comprehension questions by circling an answer. (T. Vol. 3 at 79-81.)

49.

■■■. can now access a restaurant and serve himself independently from a buffet line, obtain utensils, get his own drink, and get refills. (T. Vol. 3 at 88-89.) He is able to access other public places, including synagogue, without making a disruption. (T. Vol. 1 at 275; T. Vol. 3 at 93.)

²⁹ Not all of ■■■ outings have been successful. There have been some outings with his family that have not been successful. (Ex. R-146; T. Vol. 3 at 263.)

50.

A group of neurotypical boys from a local Jewish school, ranging in ages from 14 or 15 through 18, have taken █████ under their wing. They visit with him and take him out into the community three to four times a month. (T. Vol. 3 at 10-05; Ex. P-14 at 3829; Ex. P-13 at 4577, 4590.)

51.

In Dr. Carpenter's opinion, █████. needed a 24/7 residential placement to get his maladaptive behaviors under control. (T. Vol. 1 at 173-74, 200.) As part of this 24/7 approach to █████ education, Dr. Carpenter opined that █████. required ESY. He believes Bancroft is an appropriate placement for █████. Dr. Carpenter expressed a preference for █████ to remain at Bancroft because the team knows him and because he has made "amazing progress." Dr. Carpenter further opined that he believes that █████ would regress if he returned home.³⁰ (*Id.* at 161, 176, 192-93.)

Relief Sought by Petitioners

52.

Petitioners seek reimbursement for all costs associated with attending Bancroft, including but not limited to tuition, room and board, transportation, and family visits. (See Complaint.) Additionally, Petitioner seeks an IEP that continues █████'s placement at Bancroft for 2 years going forward and compensatory education. (*Id.*)

53.

In addition to tuition and room and board, Petitioners seek reimbursement for travel and other expenses related to family visits with █████ █████ mother testified that she incurred

³⁰ It appears that Dr. Carpenter did not base that opinion on anything specific to █████, but rather on the fact that he has seen regression in other patients who have returned home from a residential setting. (T. Vol. 1 at 158.)

expenses in the amount of \$31,647.39.³¹ The majority of the expenses were paid by Ms. Hirsch; however, █████'s mother asserted that she paid for some of the expenses herself. (T. Vol. 1 at 98-101.) She did not present any evidence of which expenses she personally paid. During the hearing, she testified that if she recovered these expenses she would return the funds to Ms. Hirsch. The travel and visit expenses for which Petitioners seek reimbursement include flights for █████'s mother and siblings, hotel accommodations, and food consumed by █████, █████'s mother, and siblings at restaurants while visiting █████. Petitioners also seek reimbursement for the cost of enrolling in TSA Pre-check and other miscellaneous expenses. (Ex. P-7.)

III. CONCLUSIONS OF LAW

1.

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

2.

The Court’s review is limited to the issues Petitioner raised in the Complaint. Petitioner may raise no other issues at the due process hearing unless the opposing party agrees or acquiesces. See 20 U.S.C. § 1415(f)(3)(B); see 34 C.F.R. § 300.511(d). Furthermore, IDEA contains a two year statute of limitations. 20 U.S.C. § 1415 (f)(3)(C). Barring any exceptions to the two year statute of limitations, Petitioners’ can recover for injuries occurring within the two years preceding the filing of their Complaint. Id. Petitioners filed their Complaint on July 27, 2018. Accordingly, Petitioners may only recover for injuries occurring between July 27, 2016 and July 27, 2018.

³¹ The chart of expenses submitted by Petitioners does not total this amount. It is unclear how Petitioners arrived at this amount.

3.

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

Brief Overview of IDEA

4.

The purpose of IDEA is to “ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for future education, employment, and independent living” 20 U.S.C. § 1400(d)(1)(A).

5.

The IDEA requires school districts to provide a student eligible for student education services a free appropriate public education (“FAPE”) in the least restrictive environment (“LRE”). 20 U.S.C. § 1412; 34 C.F.R. §§ 300.17, 300.114-300.118. The requirement to provide a FAPE is satisfied by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982). The Supreme Court in Rowley defined a

FAPE as follows:

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

Id. at 200-201.

6.

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

7.

In 2017, the Supreme Court clarified the second portion of this inquiry: “[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” Endrew F. ex rel. Joseph F. v. Douglas County School District, 137 S. Ct. 988, 999 (2017). This requirement does not require that a child’s IEP bring the child to grade-level achievement, but it must aspire to provide more than a *de minimis* educational progress. Id. at 1000-01. If it is not reasonable to expect a child to achieve grade-level advancement, then his IEP need not aim for such. Id. at 1000. Nevertheless, “his educational program must be appropriately ambitious in light of his circumstances.” Id.

8.

In matters alleging a procedural violation of IDEA, the undersigned may find that a child did not receive a FAPE only if the procedural inadequacies: (i) impeded the child’s right to a

FAPE; (ii) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or (iii) caused a deprivation of educational benefit. 20 U.S.C. § 1415 (f)(3)(E)(ii); 34 C.F.R. § 300.513(a). In other words, an IDEA claim is viable only if those procedural violations affected the child’s, or parents, substantive rights. See Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 518 (2007) (holding “parents enjoy rights under IDEA, they are entitled to prosecute IDEA claims on their own behalf).

Denial of a FAPE

9.

Petitioners claim that the District failed to provide █████ with a FAPE because it failed to provide him with an IEP that was reasonably calculated to result in meaningful benefit, it failed to properly implement the IEP that it did provide, it failed to address his behaviors with a functional behavior assessment (FBA) and a behavioral intervention plan (BIP), it failed to consider residential placement, it predetermined █████’s placement and objectives, it misinformed █████’s mother about the amount of CBI he would be receiving, it misinformed █████’s mother by telling her that █████ had mastered the objectives from his April 2016 IEP, and it failed to list in-home support in the March 2017 IEP after █████’s mother requested it and the IEP team agreed to provide it. Petitioners assert that the District denied █████ a FAPE by committing various procedural violations and that the District also denied █████ a FAPE on substantive grounds.

Procedural Violations

10.

In Petitioners’ proposed Findings of Fact and Conclusions of Law, they argue that the District committed the following procedural violations, which denied █████ a FAPE: the District

predetermined [REDACTED]'s placement during the April 2016, December 2016, and March 2017 IEP meetings; the District predetermined [REDACTED]'s objectives for the March 2017 IEP meeting; the District, through [REDACTED]'s teacher, inaccurately reported that [REDACTED] had mastered all of his objectives from the April 2016 IEP;³² the District misinformed [REDACTED]'s mother when it stated that [REDACTED] would be receiving 1.5 hours of CBI a week in the April 2016 IEP; the District did not disclose that [REDACTED] was not receiving his speech therapy for a period of time;³³ the District withheld educational records (i.e., the data from the 2015-2016 school year) from [REDACTED]'s mother; the District did not include the in-home service in the March 2017 IEP; and the District did not specify how much CBI [REDACTED] would receive in the March 2017 IEP.

11.

A school district engages in predetermination when it makes educational decisions prior to the IEP meeting and thereby deprives the parents of a meaningful opportunity to participate as equal members of the IEP team. R.L. v. Miami-Dade Cnty. Sch. Bd., 757 F.3d 1173, 188 (11th Cir. 2014) (cits. omitted). In other words, the school district may not come to the IEP meeting with “closed minds,” already having decided “material aspects of the child’s educational program without parental input.” Id. The school district may come to the IEP meeting with pre-formed opinions about what is appropriate for the child’s education; however, those pre-formed opinions may not prohibit the parents’ meaningful participation in planning their child’s

³² This issue does not appear in Petitioners’ Complaint. Thus, any such allegations should not be considered as issues raised in the Complaint and should not be considered here. See 20 U.S.C. § 1415(f)(3)(B); see also 34 C.F.R. § 300.511(d). Notwithstanding, to the extent that the Complaint may have been amended by the evidence presented, those allegations are addressed herein. See O.C.G.A. 9-11-15(b) (“When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.”).

³³ This issue does not appear in Petitioners’ Complaint. Thus, any such allegations should not be considered as issues raised in the Complaint and should not be considered here. See 20 U.S.C. § 1415(f)(3)(B); see also 34 C.F.R. § 300.511(d). Notwithstanding, to the extent that the Complaint may have been amended by the evidence presented, those allegations are addressed herein. See O.C.G.A. 9-11-15(b) (“When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.”).

education. Id. “It is not enough that the parents are present and given an opportunity to speak at [the] IEP meeting.” Id. Rather, the school district must come to the IEP meeting with an “open mind” and be receptive and responsive to the parents’ position, such that they “might possibly be swayed by the parents’ opinions . . . about IEP provisions they believe are necessary for their child.” Id.

12.

The undersigned agrees with Petitioners that the District predetermined ██████’s placement during the April 2016, December 2016, and March 2017 IEP meetings. At the April 2016 IEP meeting, when ██████’s mother raised the possibility of a residential placement, she was told that the people who would make such decisions were not there and that is not what they were there to talk about. Further, there is no indication that the people present at the IEP meeting actually considered a residential placement.

13.

██████’s mother specifically requested the December 2016 IEP meeting to discuss the possibility of residential placement. While there is some language in the IEP that suggests that the issue was considered, Dr. Carpenter testified that the District was not willing to consider residential placement.

14.

At the March 2017 IEP meeting, when ██████’s mother raised the issue of the District bearing any responsibility for residential placement, she was told that the persons who could answer that question (i.e., the Director of Special Education or the Superintendent) were not present. Residential placement was not substantively discussed or considered.

15.

The undersigned also agrees that the District predetermined [REDACTED] objectives for the March 2017 IEP. Ms. Williams, [REDACTED]s classroom teacher, came to the IEP with three objectives. When [REDACTED].s mother suggested other objectives related to adaptive living skills, Ms. Williams shot them down as “unrealistic.” There was no evidence that the District had an open mind about the objectives suggested by [REDACTED]s mother or that they might possibly be swayed by her opinions. The District’s predetermination of [REDACTED]’s placement and objectives significantly impaired the participation of [REDACTED]’s mother in the decision making process. 20 U.S.C. § 1415 (f)(3)(E)(ii); 34 C.F.R. § 300.513(a). While she was allowed to talk during the IEP meetings, her requests for objectives and her inquiries regarding a residential placement were not seriously considered. Further, the refusal to include objectives regarding adaptive living skills impeded [REDACTED] right to a FAPE. The District’s own psychologist noted [REDACTED]s adaptive living deficits and recommended that [REDACTED]. should be taught to dress and undress himself independently and how to care for his toileting needs. Nevertheless, the District refused to include such objectives.

16.

Petitioners assert that the District committed a procedural violation when Ms. Williams, [REDACTED]s classroom teacher, inaccurately reported that [REDACTED]. had mastered all of his objectives from the April 2016 IEP. The undersigned agrees. Ms. Williams made this report during the March 28, 2017 IEP meeting. The evidence in the record established that [REDACTED] had not mastered all of his objectives. Ms. Williams report to the contrary is troubling. Further, by failing to honestly report [REDACTED].s lack of progress, [REDACTED]’s mother was denied the opportunity to meaningful participation in the IEP meeting.

17.

With regard to the remaining alleged procedural violations, Petitioners failed to establish that they impeded ██████'s right to a FAPE, significantly impeded the opportunity of ██████'s mother to participate in the decision making process, or denied ██████ educational benefit. Petitioners assert that the District misinformed ██████'s mother that he would be receiving 1.5 hours of CBI a week in the April 2016 IEP. Writing 1.5 hours per week in an IEP is disingenuous when the District is aware that the teachers are only allowed to take the students out for CBI twice a month and there is no CBI during the months of August, September, or May.³⁴ Nevertheless, Petitioners have failed to show how *misinforming* ██████'s mother about the CBI significantly impeded ██████'s mother's opportunity to participate in the decision making process, impeded ██████'s right to a FAPE, or denied him educational benefit. The testimony was clear that the District would only allow CBI outings twice a month and only during the months of October through April. If the ██████'s mother had known that the 1.5 hours per week was inaccurate, it appears that nothing would have changed. Perhaps, she could have expressed her discontent, but as a practical matter, CBI outings would have continued at the rate of twice a month, October through April.

18.

Similarly, Petitioners have failed to establish how the District's *failure to disclose* that ██████ was not receiving his speech therapy for a period of time denied him a FAPE. Had the District disclosed the information, ██████'s mother could have express dissatisfaction, but it is not clear that anything would have changed. ██████'s speech pathologist had to go on emergency maternity leave. Speech-language pathologist Gregory Kato began providing ██████ speech therapy services in November of 2016.

³⁴ The undersigned does not condone writing something in an IEP, which the District knows is inaccurate.

19.

Petitioners' assert that the District withheld educational records (i.e., the data from the 2015-2016 school year) from [REDACTED]'s mother. As an initial matter, it is unclear that the District intentionally withheld records. Notwithstanding, Petitioners failed to establish how withholding data from the 2015-2016 school year denied [REDACTED] a FAPE. That school year is outside of the statute of limitations. Petitioners would not be able to raise any injuries related to data taken during the 2015-2016 school year. Moreover, Petitioners failed to show how the withholding of such data affected the substantive rights of [REDACTED] or his mother.

20.

Finally, Petitioners assert that the District committed procedural violations when it failed to include the in-home services and the number of hours [REDACTED] was to receive CBI in the March 2017 IEP. Petitioners failed to show how these procedural violations amounted to a denial of a FAPE. The Eleventh Circuit has held that "violation of any of the procedures of the IDEA is not a *per se* violation of the Act." Weiss v. Sch. Bd., 141 F.3d 990, 996 (11th Cir. 1998). Therefore, not all procedural breaches are IDEA violations. In Weiss, the Court held that where a family has "full and effective participation in the IEP process . . . the purpose of the procedural requirements are not thwarted." Id.

Substantive Denial of a FAPE

21.

Petitioners argue that the District denied [REDACTED] a FAPE on substantive grounds. This tribunal agrees. Over the years that [REDACTED] was attending school within the District, the number of his objectives dwindled. The April 13, 2016 IEP contained only six objectives and none were focused on adaptive living skills. During the April 21, IEP meeting, the February 2016 report of

the District's school psychologist was reviewed. The psychologist noted [REDACTED]'s significant adaptive behavior deficits. She recommended that [REDACTED] be taught to dress and undress independently and how to care for his hygiene needs, in particular toileting. Despite these recommendations, the District did not change [REDACTED]'s IEP or add any objectives. The March 28, 2017 IEP contained only three objectives. When [REDACTED]'s mother suggested adding objectives for adaptive living skills, such as toileting and refraining from masturbating in public, his classroom teacher shot them down as unrealistic. When [REDACTED]'s mother suggested other objectives aimed at adaptive living skills, such as refraining from stealing food and eating with utensils, it appears they were ignored. The April 2016 and March 2017 IEPs were not reasonably calculated to enable [REDACTED] educational benefit. Rowley, 458 U.S. at 206-07. [REDACTED] had significant adaptive living deficits and the District did not even attempt to address them. Moreover, it cannot be said that the IEPs produced by the District were "appropriately ambitious in light of [REDACTED]'s] circumstances."³⁵ Endrew, 137 S. Ct. at 1000. In fact, the naysayer statements by Ms. Williams during the March 28, 2017 IEP meeting are the opposite of ambitious. Rather, they evidence a resignation that [REDACTED] simply will never be able to do certain things, such as become toilet trained. Finally, [REDACTED] did not make meaningful progress on the objectives that were included in his IEPs. In fact, his overall abilities regressed.³⁶

22.

Petitioners assert that the District's failure to conduct an FBA and develop a BIP was a substantive denial of a FAPE. The undersigned agrees. The District should have conducted an

³⁵ School districts are not required to maximize the educational benefit received by an eligible student under IDEA. See Doe v. Bd. of Educ., 9 F.3d 455, 459-60 (6th Cir. 1993) (holding that the IDEA requires a school district to provide "the educational equivalent of a serviceable Chevrolet ... not ... a Cadillac"). In this case, the District provided [REDACTED] with the equivalent of a broken down Yugo.

³⁶ Petitioners also assert that the District's failure to include ESY services in [REDACTED]'s IEP was a substantive denial of a FAPE. The undersigned does not agree. It is clear that [REDACTED]'s mother refused such services at the March 28, 2017 IEP meeting. Additionally, during the hearing she acknowledged that she was "okay with [REDACTED] not having ESY."

FBA and developed a BIP in an attempt to control [REDACTED]'s maladaptive behaviors. The testimony of Ms. Kanka and others support this conclusion.

23.

Petitioners also argue that [REDACTED] was denied a FAPE because the District failed to implement parts of his IEP. Specifically, Petitioners assert that the District failed to provide [REDACTED] with the amount of CBI stated in his IEP, it failed to provide all of his speech therapy, and it failed to provide the in-home services mentioned in the March 28, 2017 IEP meeting.

24.

The question of what standard to apply to failure-to-implement claims under the IDEA has not been addressed by the Eleventh Circuit. However, “the consensus approach to this question among federal courts that have addressed it has been to adopt a standard articulated by the Fifth Circuit. S.S. v. Howard Rd. Acad., 585 F.Supp. 2d 56, 67 (D.D.C. 2008) (*quoting* Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 (5th Cir. 2000)); *see generally* Schoenbach v. District of Columbia, 309 F. Supp. 2d 71, 83 n.10 (D.D.C. 2004) (*citing* Bobby R.); J.P. ex rel. Peterson v. County Sch. Bd. of Hanover County, Va., 447 F. Supp. 2d 553, 567--68 (E.D. Va. 2006) (collecting cases); Manalansan v. Bd. of Educ. of Baltimore City, 2001 U.S. Dist. LEXIS 12608, 2001 WL 939699, [**6] at *11--15 (D. Md. Aug. 14, 2001) (finding FAPE deprivation based on the standard articulated in *Bobby R.*); Melissa S. v. Sch. Dist. of Pittsburgh, 183 Fed. Appx. 184, 2006 WL 1558900, at *2 (3d Cir. 2006) (adopting *Bobby R.* standard); Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 (8th Cir. 2003) (*citing Bobby R.* with approval).

25.

In *Bobby R.*, the court held:

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

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

26.

The undersigned concludes that the failure to provide ■■■ with the CBI stated in his IEPs was a material failure to implement his IEP. The District was aware that ■■■ was exhibiting severe maladaptive behaviors at home and in the community. Thus, CBI was an important part of ■■■’s educational plan. CBI was not provided for 3 months out of the school year and it was not provided every week. Rather, it was provided twice a month, at best.

27.

With regard to the remainder of the alleged failures to implement, the undersigned concludes that they were not material. There is insufficient evidence in the record to determine how much speech therapy ■■■ did not receive. It is clear that Mr. Kato began provided ■■■ speech therapy in November of 2016. However, it is unclear when ■■■’s former speech

therapist ceased providing speech therapy services. There is a reference to the beginning of the year, but there is no date reference from which an amount could be calculated. Without knowing how much speech therapy was not provided, this tribunal cannot determine if it was material.

28.

The failure to provide in-home services discussed at the March 28, 2017 IEP meeting was not significant or material. On May 10, 2017, ██████'s mother notified the District that she was placing him in a private placement. ██████ began attending Bancroft on May 25, 2017. The failure to provide in-home services between March 28, 2017 and May 10, 2017 does not rise to the level of significant or material.

Relief

29.

This Court may award appropriate equitable relief when there has been an actionable violation of IDEA. 20 U.S.C. § 1415(f)(3)(E)(ii)(II). See Cobb County Sch. Dist. v. A.V., 961 F. Supp. 2d 1252 (N.D. Ga. 2013). Courts have interpreted this to mean that a court has “broad discretion” to “fashion discretionary equitable relief.” Florence Cnty. Sch. Dist. Four v. Carter ex rel. Carter, 510 U.S. 7, 15-16 (1993) (internal quotations and citations omitted); Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1285 (11th Cir. 2008), quoting Sch. Comm. Of the Town of Burlington, Mass. v. Dep’t of Educ. of Mass., 471 U.S. 359, 374 (1985). Remedies for a violation of FAPE may include compensatory education, reimbursement, declaratory relief and injunctive relief. See generally Thomas A. Mayes et al., Allocating the Burden of Proof in Administrative and Judicial Proceedings Under the Individuals with Disabilities Education Act, 108 W. Va. L. Rev. 27, 41 (2005). The two primary remedies available under IDEA are

reimbursement for costs of private placement and compensatory education. R.L. v. Miami-Dade Cnty. Sch. Bd., 757 F.3d 1173, 1178 (11th Cir. 2014.)

Reimbursement for Costs of Private Placement³⁷

30.

When parents reject an IEP offered by the school district and unilaterally place their child in private school, they are entitled to reimbursement only if (1) the education provided or offered by the school district did not or would not provide the student with a FAPE; and (2) the parents' alternative placement was appropriate. 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148 (c); R.L. v. Miami-Dade, 757 F.3d at 1181; M.M. v. Sch. Bd., 437 F.3d 1085, 1096-99 (11th Cir. 2006); Draper, 480 F. Supp. 2d at 1352-53 (*citing* G ex. Rel. RG v. Fort Bragg Dependent Sch., 343 F.3d 295, 309 (4th Cir. 2003)); W.C. v. Cobb County Sch. Dist., 407 F. Supp. 2d 1351, 1362 (N.D. Ga. 2005). . . Further, even if the parents establish the school district failed to provide their child with a FAPE and the alternative private school placement chosen by the parent was appropriate, the reimbursement award may be denied or reduced based on equitable factors, such as the parents' insufficient notice of private placement or unreasonable actions taken by the parents. 20 U.S.C. § 1412(a)(10)(C)(iii); 34 C.F.R. § 300.148 (c), (d), (e); R.L. v. Miami-Dade,

³⁷ Prior to the hearing, the District filed a Motion in Limine, premised on an Order issued by the undersigned regarding the sufficiency of Petitioners' Complaint. In the order, the undersigned stated that to the extent Petitioners knew or had available to them specific details regarding any "compensatory education" they would be precluded from presenting such evidence, unless they amended their complaint. The District's Notice of Insufficiency stated, in pertinent part, as follows: "Although the District has not yet received a confirmation of the exact amount of reimbursement that [Petitioner] seeks, the District limits this Notice of Insufficiency to [Petitioner's] request for compensatory education. The Petitioners did not amend their Complaint. The undersigned deferred ruling on the District's Motion in Limine and allowed Petitioners to present evidence regarding the costs associated with attending Bancroft. During the hearing, [redacted]'s mother testified that she did not know the actual costs associated with Bancroft at the time she filed the Complaint. (T. Vol. 1 at 71-73.) Ms. Hirsch paid the tuition directly to Bancroft. [redacted]'s mother testified that she could have found out the costs associated with Bancroft before she filed her Complaint. (T. Vol. 3 at 216-17.) However, she also testified that once she received documents showing the actual costs of [redacted], attending Bancroft, she provided the District with the documents. (T. Vol. 1 at 73.) She believes she did so in September or October of 2018. (*Id.*) Because the District's Notice of Insufficiency and this tribunal's order thereon were limited to "compensatory education," and because the District has failed to show any harm, the District's Motion in Limine is denied.

757 F.3d at 1187; Blount Cnty. Bd. of Ed. v. Bowens, 762 F.3d 1242, 1247 (11th Cir. 2014) (“reimbursement is discretionary, and a court may still deny some – or all – reimbursement based on equitable considerations.”)

31.

With regard to providing the District notice of intent to enroll the child in private school, reimbursement for such placement may be reduced if the parent does not give the District such notice at the most recent IEP meeting or within 10 business days prior to removing the child from the public school. 20 U.S.C. § 1412(a)(10)(C)(iii)(I). In this case, Petitioners complied with the notice requirement. On May 10, 2017, ██████’s mother provided the District with notice that she was going to be placing ██████ in private school and that she would be seeking reimbursement at public expense. ██████ began attending Bancroft on May 25, 2017. Additionally, ██████’s mother told the IEP team at multiple IEP meetings that she was searching for a residential placement. During the March 28, 2017 IEP meeting, she told the team that ██████. ██████ would likely be attending a residential school and she asked the team what responsibility the District would have for such a placement. ██████ residential placement was not a surprise to the District. The District’s argument that ██████’s mother acted unreasonably because she failed to tell the District that ██████. had been accepted to Bancroft before she provided the notice is without merit.

32.

A private placement is proper under IDEA if the education provided in the private placement is reasonably calculated to enable the child to receive educational benefits. Florence Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7, 11 (1993). Further, the private placement identified by a petitioner in a due process complaint does not have to meet all of the IDEA’s requirements,

including the LRE requirement; although a court may consider whether the private placement does not comply with the IDEA's LRE requirement. W.C. ex rel Sue C. v. Cobb Cnty. Sch. Dist., 407 F. Supp. 2d 1351, 1362 (N.D. Ga. 2005); see also West-Windsor-Plainsboro Reg'l Sch. Dist. Bd. of Educ. v. M.F. ex rel. A.F., 2011 U.S. Dist. LEXIS 21827, at *12 (D.N.J., Mar. 4, 2011) (“[T]he standard a [private] placement must meet in order to be ‘proper’ is less strict than the standard used to evaluate whether a school district’s IEP and placement is appropriate.”).

33.

There is ample evidence in the record to support a conclusion that Bancroft was an appropriate placement for ■■■. In particular, Dr. Carpenter opined that Bancroft was an appropriate placement for ■■■. and that he required a 24/7 placement to get his maladaptive behaviors under control. His mother, with the assistance of others, made significant efforts to find a residential placement in Georgia. Available placements within the state were either not appropriate for ■■■. or did not accept him. Furthermore, it is undisputed that ■■■. has made significant and meaningful progress in the reduction of maladaptive behaviors and skill acquisition while at Bancroft.

34.

The District’s argument that Bancroft was not appropriate because it was more restrictive than his placement within the District is not persuasive. ■■■’s placement at Druid Hills Middle School was fairly restrictive. The only opportunities he purportedly had to engage with non-disabled peers were during PE and “book buddies;” however, there was no evidence that he did, in fact, engage with non-disabled peers during those times. In fact, ■■■. did not typically engage with the other students in his self-contained classroom. At Bancroft, some neurotypical students

from a local Jewish school have taken [REDACTED] under their wings. They visit with him and take him into the community three to four times a month. Finally, as noted above, while LRE is a consideration for a private placement, it is not a requirement. W.C., 407 F. Supp. 2d at 1362.

35.

The District argues that the Petitioners do not have standing to seek reimbursement for the expenses incurred for educating [REDACTED] at Bancroft. At first glance, this argument has some appeal. The District cites Emery v. Roanoke City Sch. Bd., 432 F.3d 294 (4th Cir. 2005) in support of its argument. In Emery, a former student brought a claim for reimbursement of \$200,000 in expenses incurred at Cumberland Hospital for Children and Adolescents when his father placed him there on his own accord. Id. at 296-97. The expenses incurred at Cumberland were not paid by the Plaintiff or his father. Id. Rather, they were paid by the father's insurance, which had a lifetime cap of \$350,000 in medical benefits for family members. Id. at 296. The Plaintiff is no longer covered by his father's insurance and his current insurance is not affected by the decrease in lifetime benefits under his father's policy. Id. at 297.

36.

The hearing officer and the district court dismissed the Plaintiff's claim based on the statute of limitations. The Fourth Circuit upheld the dismissal, but on the grounds that the Plaintiff did not have standing. Id. at 298. The court noted that a school district's failure to provide a FAPE gives rise to a core injury. Id. at 299. The court further noted that there is a subsidiary injury incurred when the child or his parents expend funds to pay for the education that was the school district's responsibility. Id. at 299. As to his core injury, the court determined that it was no longer redressable. Id. The plaintiff waited numerous years to bring his claim and thus he was past the age that would qualify him to receive a FAPE. Id. With

regard to the subsidiary injury, the court determined that the plaintiff could not prove that he suffered an injury in fact. Id. He suffered no out-of-pocket loss for the services provided by Cumberland. Id. The court further noted that the Plaintiff did not suffer any loss from the use of the benefits from his father's medical insurance. Id. For example, he did not show that he was unable to obtain appropriate medical care due to the diminution in the lifetime benefits under his father's insurance policy. Id. Nor has it affected any benefits under his current insurance plan. Id. at 300.

37.

The Emery case is distinguishable from this case. As an initial matter, ■■■■■'s core injury (i.e., a denial of a FAPE), is still redressable.³⁸ He is still entitled to a FAPE and his injuries are within the statute of limitations. With regard to the subsidiary injury, it is true that ■■■■■'s mother did not personally pay for the Bancroft tuition. Those expenses were paid by a third party benefactor. However, that benefactor has agreed to pay for three years of tuition at Bancroft. By using the funds from the benefactor, ■■■■■ has lost the value of those funds which could have been used for his future needs. Accordingly, the undersigned concludes that reimbursement in this case does not represent a windfall.

38.

In determining the amount of reimbursement to which Petitioners are entitled, the

³⁸ In arguing that Petitioner is not entitled to continued placement at Bancroft, the District asserts that ■■■■■ is no longer a Georgia resident. The District does not cite any law in support of its argument. Rather, it cites evidence that ■■■■■'s mother was attempting to have ■■■■■ declared a New Jersey resident. The District's argument is without merit. In a memorandum to state directors of special education, the Office of Special Education Programs ("OSEP") stated that it is the Department of Education's position that "a child is a resident of the State in which (1) the parent or guardian legally resides, or (2) the child is a ward of the State. Where State law specifically addresses residency, such provisions would apply." 44 IDELR 46 (2005). In Catlin v. Sobol, 93 F.3d 1112 (2nd Cir. 1996), the Second Circuit, relying on earlier informal guidance from OSEP, concluded that "[a] child's residence is that of his parents, and the parents' district is responsible for funding the child's education." Id. at 1123. The Georgia Supreme Court has found that a minor's domicile is that of his custodial parent. See Taylor v. Jeter, 33 Ga. 195, 201 (1862) (cits. omitted); see also McDowell v. Gould, 144 S.E. 206, 208 (Ga. 1928). ■■■■■'s mother is a resident of DeKalb County, Georgia. She has full decision making authority over ■■■■■. Thus, while she remains ■■■■■'s parent and guardian, ■■■■■ is considered a resident of DeKalb County, Georgia for the purposes of the LEAs responsibility for his education.

undersigned has considered the following equitable factors. When ██████'s mother was first offered in-home support by the District in or around December 2016, she refused it. She also refused ESY services. For those reasons, the undersigned has reduced the amount of reimbursement by excluding the months during the summer and one month for refusing the in-home support. Accordingly, Petitioner is entitled to reimbursement for 17 months of tuition at Bancroft that fall within the statute of limitations and within the April 2016 and March 2017 IEPs.³⁹ At an average cost of \$12,480 per month for 17 months, Petitioners are entitled to reimbursement in the amount of \$212,160.

Reimbursement for Expenses Paid by Medicaid

39.

Petitioners argue that the District should be required to reimburse Medicaid for the funds it expended for ██████'s room and board at Bancroft. Petitioners cite R.L. v. Miami-Dade Cnty. Sch. Bd., 757 F.3d. 1173 (11th Cir. 2014) in support of their argument. Upon review, the undersigned finds Petitioners' argument to be misplaced. In R.L., the court upheld the district court's decision requiring the school board to reimburse Medicaid for the child's related services of speech and occupational therapy provided by Medicaid. Id. at 1184. However, in R.L., there was evidence that the student's use of Medicaid for those services reduced his lifetime eligibility. In this case, there was no such evidence.⁴⁰ Accordingly, the undersigned declines to order the District to reimburse Medicaid.

³⁹ Specifically, the undersigned is granting Petitioners reimbursement for the following months: September 2016, October 2016, November 2016, December 2016, January 2017, February 2017, March 2017, April 2017, May 2017, August 2017, September 2017, October 2017, November 2017, December 2017, January 2018, February 2018, and March 2018.

⁴⁰ There was testimony that Medicaid had threatened to stop funding the room and board at Bancroft; however, the reason was because ██████. was not receiving home and community based services in Georgia.

Reimbursement for Travel of [REDACTED] Family and Miscellaneous Expenses

40.

Petitioners seek reimbursement for various expenses related to traveling to New Jersey to visit [REDACTED], and other miscellaneous expenses.⁴¹ Petitioners cite no authority for the proposition that they should be reimbursed for these expenses. As noted above, IDEA does contemplate reimbursement for costs of private school if there is a denial of a FAPE. However, Section 1412 of Title 20 of the United States Code, references the cost of special education and related services. 20 U.S.C. § 1412(a)(10)(C)(i). It also states that the court or hearing officer may require the agency to reimburse the parents for the “cost of that enrollment.” Section 300.104 of Title 34 of the Code of Federal Regulations, states as follows: “If placement in a public or private residential program is necessary to provide special education and related services . . . the program, including non-medical care and room and board, must be at no cost to the parents of the child.” 34 C.F.R. § 300.104. These provisions support reimbursement of tuition and room and board. They do not support reimbursement for the travel of a parent or family to visit the child. See Drew P. v. Clarke Cnty. School Dist., 877 F.2d 927, 929, 932 (11th Cir. 1989) (affirming the district court’s award of reimbursement, which included the tuition, school fees, and uniform fees of the residential treatment facilities in Tokyo and Boston, but excluded costs for the family’s travel and lodging). Accordingly, Petitioners are not entitled to reimbursement of travel expenses associated with visiting [REDACTED] or other miscellaneous expenses not contemplated by IDEA.

⁴¹ Petitioners assert, in part, that the expenses were necessary because the family received training from the facility on how to address [REDACTED]’s behaviors.

Compensatory Education

41.

“[The Eleventh Circuit] has held compensatory education is appropriate relief where responsible authorities have failed to provide a handicapped student with an appropriate education as required by [the Act].” Todd D. ex rel. Robert D. v. Andrews, 933 F.2d 1576, 1584 (11th Cir. 1991) (*citing* Jefferson County Bd. of Educ. v. Breen, 853 F.2d 853, 857 (11th Cir. 1988)). Compensatory education provides services “prospectively to compensate for a past deficient program.” G ex. Rel. RG v. Fort Bragg Dependent Sch., 343 F.3d 295, 308 (4th Cir. 2003). Compensatory education is awarded to account for the period of time that a petitioner student was deprived of his right to a FAPE. Mary T. v. Sch. Dist. of Philadelphia, 575, F.3d 235, 249 (3d Cir. 2009). This remedy accrues from the point that the school district knew or should have known that an IEP failed to confer a greater than *de minimis* educational benefit to the student. Id. Thus, if compensatory education is appropriate, the calculation for relief should be for a period equal to the period of deprivation, less the time reasonably required for the school district to rectify the problem. Id. A compensatory award should put the child in the position he would have been “but for the violation of the Act.” Draper, 518 F.3d at 1289.

42.

Compensatory education and reimbursement are distinct remedies. P.P. v. West Chester Area Sch. Dist., 585 F.3d 727, 739-40 (3rd Cir. 2009). When parents unilaterally remove their child from the District, thereby taking control of the child’s education, “it can no longer be said that the student’s resulting position or progress is the direct result of the school board’s IDEA violation.” R.L. v. Miami-Dade Cnty. Sch. Bd., No. 07-20321-CIV-LENARD/GARBER, 2011 U.S. Dist. LEXIS 163655 at *27-28 (S.D. Fla. May 6, 2011). Thus, compensatory education is

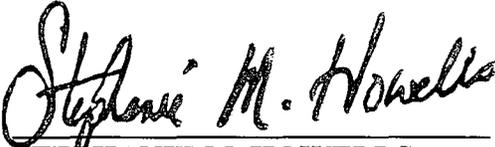
not an available remedy when parents unilaterally enrolled their child in private school. *Id.* at *27; see also *Breanne C. v. S. York County Sch. Dist.*, 732 F. Supp. 2d 474, 488 (M.D. Pa. 2010) (agreeing with the appeals panel that awarding both reimbursement for tutoring and compensatory education would be “remedial double dipping”). Further, in a case such as the present one, it appears that the placement at Bancroft has put [REDACTED] in the position he would have been (or an even better position) if the District had not denied him a FAPE.⁴² In other words, there is nothing to compensate. Accordingly, Petitioners have failed to establish entitlement to compensatory education.⁴³

IV. ORDER

Petitioner has prevailed as set forth above. Accordingly, **it is hereby ordered that the District reimburse Petitioners in the amount of \$212,160. Petitioners are ordered to repay those funds to Ms. Michelle Hirsch.**

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

SO ORDERED, this 8th day of May, 2019.


STEPHANIE M. HOWELLS
Administrative Law Judge

⁴² In Petitioners [Proposed] Findings of Fact and Conclusions of Law, Petitioners state, “At Bancroft, [REDACTED]’s severe maladaptive behaviors of public masturbation, darting, not riding in a car or bus safely, stealing foods, taking off his clothes in public, [and]putting non-food items in his mouth [have] improved greatly or were extinguished, and [REDACTED] can successfully go out into his community.” (Petitioners’ Findings of Fact and Conclusions of Law at ¶ 42.)

⁴³ In addition to the Petitioners’ request for unspecified “compensatory education,” the undersigned construes Petitioners’ request for an IEP placing [REDACTED] at Bancroft for two years going forward to be a request for compensatory education. See *Draper*, 518 F.3d at 1286-87 (upholding the district court’s compensatory award of a prospective placement in a private school). For the reasons stated above, Petitioners have failed to establish that they are entitled to this relief.