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BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS  
STATE OF GEORGIA

FILED  
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OFFICE OF STATE  
ADMINISTRATIVE HEARINGS

█.,  
Plaintiff,  
v.  
GWINNETT COUNTY  
SCHOOL DISTRICT,  
Defendant.

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:  
: 11-254613  
:  
: Docket No.:  
: OSAH-DOE-SE-1132837-67-Miller  
:  
:  
:

FINAL DECISION

For Plaintiff:

█  
Parent, *pro se*

For Defendant:

Victoria Sweeny, Esq.  
Elizabeth F. Kinsinger, Esq.  
Thompson, Sweeny, Kinsinger & Pereira, P.C.

I. SUMMARY OF PROCEEDINGS

On May 20, 2011, the Plaintiff, █., through his mother, █., filed a due process hearing request ("Complaint") against the Gwinnett County School District ("District"), Defendant herein, pursuant to the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA"). The Complaint presented three issues: first, whether █.'s proposed Individualized Education Program ("IEP") for the 2011-12 school year is appropriate; second, whether the District appropriately evaluated █.; and third, whether the District appropriately implemented █. IEP for the 2010-11 school year.

Following an unsuccessful mediation, an evidentiary hearing was held on September 6, 7, and 14, 2011. On September 27, 2011, by agreement of the parties, the undersigned observed

█ in his current educational placement. The record closed on October 12, 2011, upon receipt of the transcript and the parties' proposed Findings of Fact and Conclusions of Law. The deadline for issuance of this Final Decision was therefore extended to November 14, 2011, pursuant to 34 C.F.R. § 300.515(c) and Ga. Comp. R. & Regs. r. 616-1-2-.27.

After consideration of the evidence and for the reasons set forth below, the Court finds that █ proposed 2011-12 IEP is appropriate; that the District's evaluation of █ was appropriate; and that the implementation of █ 2010-11 IEP was appropriate. Accordingly, █ is entitled to no relief under IDEA.

## II. FINDINGS OF FACT

### A. █ Developmental and Educational History

1.

█ was born on █. He is currently ten years old and in the fourth grade at Rock Springs Elementary School ("Rock Springs"). He is eligible for special education services under the categories of orthopedic impairment, speech/language impairment, and blind. (J. 1-50, 322-49.)

2.

█ was born prematurely, at a gestational age of twenty-eight weeks. He suffered malnutrition and a possible traumatic brain injury in the womb.<sup>1</sup> When he was approximately ten months old, he was diagnosed with spastic quadriplegic cerebral palsy. He has difficulty controlling his movements, and he frequently experiences muscle spasms, stiffness, and flailing. He also has either apraxia or dysarthria, both of which are neuromotor disorders that affect his ability to produce speech, secondary to his cerebral palsy. █'s ability to communicate verbally

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<sup>1</sup> █ and █ are █'s adoptive parents. (J. 245.)

is limited, as he has significant difficulty producing speech. In 2010, ■■■ was found to be legally blind due to optic nerve atrophy. He retains sufficient visual acuity to access enlarged visual materials, but he is primarily an auditory learner. ■■■ impairments prevent him from engaging in physical activities such as crawling, walking, dressing himself, and performing other independent personal care tasks. He navigates his surroundings using a motorized wheelchair, which he directs using a head array. (T. 22-23, 45-46, 93-94, 108-09, 165-66, 177, 194, 343-44, 348-49, 353-55, 420, 520-21, 534-35; J. 6, 322-37, 491-95.)

3.

Communicating with ■■■ can be difficult due to his multiple disabilities. In the school setting, assessing his mastery of instructional material is likewise challenging. Generally, ■■■ is presented with a question and offered two or more choices, from which he is directed to select the correct answer. He makes a selection either by activating a switch attached to his head array or by pressing a button mounted on his wheelchair tray. This selection device, known as a “step-by-step,” announces, “Yes, that’s the one I want,” when activated. (T. 201, 206, 519-20, D. 421-22.)

4.

■■■ also operates a computerized augmentative alternative communication (“AAC”) device using the step-by-step. The AAC device is equipped with customized software that allows ■■■ to select particular words or phrases to create sentences or sentence approximations. On the device, different categories of words are visually represented by pictures or symbols on the screen. The device scans slowly through the categories, both visually and audibly, until ■■■ makes a selection, which opens a subcategory containing more choices. He continues to make

selections until he retrieves the particular word or phrase he wishes to use. (T. 288-92, 579-85; D. 421-22.)

5.

At times, ■ also expresses himself verbally. Because he is unable to articulate words clearly, he uses verbal approximations, such as “bah” for “ball.” Although the majority of his speech is unintelligible to an unfamiliar listener, he is able to articulate “yes,” “no,” and “gotta go” effectively. Individuals who have frequent contact with ■ are able to understand a larger proportion of his speech, especially if the context is clear. (T. 28, 157, 228-29, 317, 353, 419-20.)

6.

From an early age, ■ received services through the Babies Can’t Wait program. He has attended schools in the Gwinnett County School District since age three. After participating in an early intervention pre-kindergarten program for two years, ■ entered kindergarten at Rock Springs, where he was placed in a special education class for children with communication disorders. (T. 157, 193-97.)

7.

■ communications class was taught by a speech and language pathologist, Shawn Stevens, and was considered part of the District’s Moderately Intellectually Disabled (“MOID”) program. The purpose of the class was to identify methods of communication for students with communication disorders and to incorporate the use of communication devices into the students’ academic programs. The class contained five to six students from kindergarten through fifth grade, and Ms. Stevens was assisted by two to three paraprofessionals. A physical therapist, an occupational therapist, and a speech and language pathologist also spent time in the classroom.

■ spent two years of kindergarten<sup>2</sup> and his first grade year in the communications class. During this time, he also attended general education classes, where he was accompanied by Ms. Stevens or another adult. (T. 197-200, 209, 214-15, 242-44; P. 1A-G, 2A-B, 3A-B.)

8.

When ■ was in first grade, he attended the communications class only for morning circle, lunch, and a brief period at the end of the school day. Consequently, most of his special education services were provided in the general education setting. Ms. Stevens, who frequently accompanied ■ to his classes, observed that he had difficulty maintaining the pace of the first grade general education classroom. ■ was unable to master the first grade curriculum. (T. 244-45, 272; P. 9A-AM, 11C-E.)

9.

In second grade, ■ was placed in a class for children with orthopedic impairments at Suwanee Elementary School. At the conclusion of that year, and pursuant to a settlement agreement between the parties, ■ returned to Rock Springs for third grade. (T. 440; J. 86-123, 350-55.)

#### **B. 2010-11 School Year**

10.

During his third grade year, under the terms of the settlement agreement, ■ was placed in a general education class for math; a resource class for language arts; and a self-contained Severe or Profound Intellectual Disabilities (“SID/PID”) class for science, social studies, and to meet his orthopedic goals and objectives. ■ also received speech and language services, physical therapy, occupational therapy, paraprofessional support, and assistive technology.

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<sup>2</sup> ■ repeated kindergarten because he had not mastered grade-level material. (T. 209.)

entire school day was spent working on various goals and objectives, with no breaks or down time. often became fatigued by the afternoon, and at times he fell asleep in class. (T. 367, 522-23, J. 86-243, 350-55, 867-68.)

11.

Susan Benjamin was teacher in the self-contained SID/PID class. As required by the settlement agreement, Ms. Benjamin contacted Ms. Stevens for information regarding performance and abilities. Additionally, pursuant to the settlement agreement, a speech and language pathology assistant was added as support in Ms. Benjamin's class. Due to vision impairment, he was given large print materials for school and home use. (T. 359, 361-63, 381-83, 403-04, 689-90; J. 351-52.)

12.

During his third grade year, was unable to master the grade-level general education curriculum. He required frequent prompts and redirection in his general education math class and his language arts resource class, where the material being presented exceeded his instructional level. In contrast, was most engaged, and achieved the most success, in his SID/PID class and during speech therapy sessions with Patricia Beers, his speech and language pathologist. (T. 516-17, 519-20, 524-25, 640-42; J. 466-68.)

13.

In his third grade general education math class, was accompanied by a paraprofessional. The paraprofessional provided support by copying math problems onto a whiteboard and presenting the problems to both orally and visually. required extensive prompting, both verbal and non-verbal (through a vibrating device known as a "silent reminder"), to complete assigned tasks in his math class. Further, the answers he gave were

predominantly incorrect, as the general education curriculum was beyond his instructional level. Even with accommodations and considerable adult support, ■ did not demonstrate progress on concepts such as identification of fractions using shaded diagrams or addition and subtraction with carrying or regrouping. (T. 516-17; J. 2, 466-68; D. 183-246.)

14.

In his language arts resource class, ■ also required repeated prompts to respond to the questions presented, despite one-on-one assistance from his paraprofessional. The instructional material in the resource class, like that of his math class, was above his instructional level, and he was unable to demonstrate mastery. For example, he was not able to identify verbs in a sentence or spell simple consonant-vowel-consonant words, such as “jet,” “let,” “yet,” and “met,” correctly. Further, he was unable to demonstrate comprehension of reading material by answering “who, what, where, when, why” questions regarding a story. (T. 519, 640-42; J. 3; D. 75-182.)

15.

In Ms. Benjamin’s SID/PID class, ■ was animated and interested in the instructional material. For example, he participated with minimal prompting in activities such as cutting with modified electric scissors and creating a picture mat related to a recycling lesson. Ms. Benjamin frequently used manipulatives and real-life examples to illustrate her lessons. ■ achieved academic success in this environment. Similarly, during ■ speech therapy sessions with Ms. Beers, he used his AAC device to create sentence approximations. ■ enjoyed these sessions and required significantly fewer prompts in this setting. (T. 523-26, 682-83; J. 466-68; D. 248-420.)

16.

Ms. Beers has worked with ■■■ for more than six years and has spent over one hundred hours customizing his ACC device for him. ■■■ has made progress in the use of his ACC device, but he has not achieved proficiency. When he uses the device, his communications are generally prompted, rather than spontaneous. On average, he requires more than six minutes to complete a sentence approximation, such as “Kayla good,” or “Me go Ms. Young’s class.” Due to his slow pace, he has not been able to use the device in the general education setting. (T. 335-36, 586-90, 592, 596-98; J. 466-68; D. 318-413.)

17.

■■■’s academic functioning is significantly lower than grade level. He requires multiple repetitions to master new material, and his classroom performance is inconsistent. He continues to work on fundamental skills such as number identification and beginning reading. ■■■ also needs an extended period of time to communicate his responses to questions and on assessments. For example, he may require an hour to complete a test that may take a typical student ten minutes. As the instructional material become more difficult, his ability to answer correctly decreases.<sup>3</sup> Consequently, he is unable to maintain the pace of a general education classroom. (T. 111, 223, 245, 274, 406, 429-31, 505, 543, 592, 626, 642-43; J-40; D. 1-11.)

18.

To be successful at school, ■■■ requires a slower pace, a reduced volume of work, and extensive repetition of instructional material. He also requires adult assistance with mobility, transfers, eating, and toileting throughout the school day. (T. 406, 631-33, 647, 678; J. 1-50.)

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<sup>3</sup> The record contains no credible evidence that ■■■ inability to demonstrate mastery of instructional material is behavior-related. Specifically, the Court notes that ■■■ requires repeated prompting and provides predominantly incorrect answers only in settings where the material presented exceeds his instructional level. (T. 516-17, 519-20, 524-25, 640-41; J. 466-68.)

C. Private Therapies

19.

In addition to the services he receives in the school setting, ■■■ participates in after-school private therapies. He attends two occupational therapy sessions per week; two physical therapy sessions per week; and two speech and language therapy sessions per week. He also receives one-on-one reading instruction once per week. ■■■ private therapists report that he is able to perform at a slightly higher level than that described by school personnel. (T. 40-41; 49.)

20.

Kate Crews is ■■■ private reading specialist. In January 2010, Ms. Crews conducted a language and literacy evaluation of ■■■ Following her evaluation, she provided reading instruction using the Accessible Literacy Learning (“ALL”) reading program. Ms. Crews assessed ■■■ progress in June 2010 and April 2011, and conducted a second language and literacy evaluation in July 2011. During this time, ■■■ showed slight gains in some areas.<sup>4</sup> However, the record contains no credible evidence that ■■■ is able to read beyond a beginner level. The Court gives little weight to Ms. Crews’ opinion regarding ■■■ grade-level proficiency, based on the informal nature of her assessments, the absence of performance-based corroboration of her results, and her unfamiliarity with grade level standards. To the extent Ms. Crews’ testimony conflicted with that of the District’s witnesses, the Court finds the District witnesses’ testimony to be more reliable. (T. 92-146, 429-31, 626; P. 18A-BV, 30A-Q.)

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<sup>4</sup> For example, on a test of phonemic awareness, his score on the blending subtest improved from 11 out of 15 to 12 out of 14, while his score on the isolation subtest improved from 16 out of 20 to 17 out of 20. Similarly, on a test of reading comprehension, ■■■ showed a slight gain, from a grade equivalent of 2.2 to a grade equivalent of 2.5. He experienced difficulty with spelling in both evaluations. During the first evaluation, he correctly identified nine out of ten sight words presented. During the reevaluation, he was able to correctly identify 74 out of 100 words sight words. (T. 98-105, 113-124; P. 18A-X, 30A-Q.)

Brook Todd is [REDACTED]'s private speech and language pathologist. She has provided speech and language therapy to [REDACTED] for nearly eight years, since he was 29 months old. She works with [REDACTED] on verbal communication and does not utilize his ACC device. According to Ms. Todd, [REDACTED] has mastered the production of the consonant sounds represented by the letters B, P, M, T, D, N, K, and G when they appear at the beginning of a word. He is also able to produce vowel sounds.<sup>5</sup> [REDACTED] private speech therapy sessions currently focus on letter sound production and spelling. [REDACTED] goal during a typical thirty-minute session is to spell seven three- or four-letter words by articulating the letters verbally. Due to his difficulty with articulation, he uses approximations for many letter sounds. For example, [REDACTED] produces an approximation of the letter C that sounds like "kah-ee." Similarly, because he has difficulty providing breath support, he is unable to vocalize letters such as S and H. Instead, he produces a lip posture that indicates to Ms. Todd the letter he is attempting to articulate. (T. 156-61, 168-69, 182-85; P. 17A-B.)

**D. Psychological Evaluations of [REDACTED]**

On March 14 and 15, 2011, pursuant to the settlement agreement, Dr. Claudia Dickerson<sup>6</sup> performed an evaluation of [REDACTED]. She selected the Comprehensive Test of Nonverbal Intelligence, Second Edition ("CTONI-2") as the most appropriate testing instrument for [REDACTED] because it

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<sup>5</sup> To the extent Ms. Todd's testimony conflicted with that of the District's witnesses, the Court finds the District witnesses' testimony to be more reliable. Ms. Todd reported, for example, that [REDACTED] was able to read at grade level. However, her opinion was based on her own interpretation of [REDACTED] verbal approximations rather than on an objective assessment method. Moreover, she conceded that she was unable to identify grade-level material. (T. 188-89; P. 17A-B.)

<sup>6</sup> Dr. Dickerson was qualified as an expert in the following areas: the identification and assessment of the special education needs of children with disabilities, including children with orthopedic impairments; the use of psychological and educational test instruments in programming for children with disabilities; and the evaluation of students with developmental disabilities for educational purposes. Dr. Dickerson has practiced educational psychology for thirty-two years, has a Ph. D. in psychology, and is an experienced evaluator of children with disabilities. (T. 469-70; D. 23-24.)

imposed no time limits and did not require verbal or complex motor responses. Dr. Dickerson used an enlarged format to administer the test, and ■■■ answered the test questions using his step-by-step. Dr. Dickerson also utilized the Vineland Adaptive Behavior Scales, Second Edition (“Vineland II”), which assessed ■■■s adaptive skills using ratings scales completed by ■■■ and Ms. Benjamin. In addition to conducting these assessments, Dr. Dickerson interviewed ■■■ and school professionals, reviewed ■■■ records, and observed him in the school setting. (T. 470-74; J. 244-55, 268-313, 351.)

23.

As part of the standard administration of the CTONI-2, ■■■ was required to complete three pretest “teaching or training” questions for each of the instrument’s six subtests before beginning the assessment portion of the evaluation. Dr. Dickerson initially attempted to administer the test on the morning of March 14, 2011. However, ■■■ did not answer enough pretest questions correctly on four of the six subtests to qualify for the assessment portion of the test. As a result, Dr. Dickerson was unable to obtain an overall test score. After consulting with ■■■, Dr. Dickerson decided to re-administer the CTONI-2 later that afternoon.<sup>7</sup> ■■■ successfully completed four of the six subtests during the afternoon session. When he displayed signs of fatigue, Dr. Dickerson discontinued testing and completed the remaining two subtests on the morning of March 15, 2011. (T. 476-81; J. 248, 260-67.)

24.

■■■ achieved a full scale score of 46 on the CTONI-2, which falls within the “very poor” range of functioning. This score suggests that he “has trouble managing nonverbal information,

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<sup>7</sup> To the extent the second administration of the test may have distorted the results, ■■■ scores would be expected to increase, not decrease, upon the second administration due to a practice effect. (T. 85, 483.)

perceiving visual data, organizing spatially oriented material, and mastering abstract properties of visual symbols.” (T. 483; J. 251, 264.)

25.

█████ full scale score on the March 2011 administration of the CTONI-2 is within the same “very poor” range of functioning reported by Dr. Robert Montgomery, who evaluated █████ on April 6, 2009, using the same testing instrument. At that time, █████ achieved a full scale score of 62.<sup>8</sup> Any score below 70 is considered within the “very poor” range, indicating that █████ has a global cognitive impairment. (T. 79-82, 86-87, 483; J. 250; P, 13A-F.)

26.

█████’s performance on the CTONI-2 is inconsistent, to some degree, with his scores on the Cognitive Abilities Test (“CogAT”) in October 2008<sup>9</sup> and the Iowa Test of Basic Skills (“ITBS”) in October 2010, which were generally in the low average range of functioning. However, █████ day-to-day school performance is more consistent with his scores on the CTONI-2 than with his CogAT and ITBS scores. Further, he did not meet grade-level performance standards on the May 2011 CRCT. Other factors, including his lack of proficiency with his ACC device, his need for extensive repetition, and his difficulty applying skills across multiple settings, also suggest a cognitive impairment. Moreover, the results of intelligence testing are only one consideration when an IEP is developed and are not used to drive placement. (T. 346-47, 487-88, 98, 613-14, 647, 717; P. 8A-B, 22A-Z, J. 476-87.)

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<sup>8</sup> Dr. Montgomery originally reported a full scale score of 68, with component scores of 63 for pictorial intelligence quotient and 74 for geometric intelligence quotient. However, his report contained errors that caused him to report an inaccurate higher score. (T. 79-80; P. 13A-F.)

<sup>9</sup> The CogAT was also administered to Gwinnett County third graders in September 2010. At █████ request, █████ did not participate in testing at that time. (T. 718-19.)

**E. Proposed IEP for 2011-12 School Year**

27.

The District convened IEP meetings on March 23 and April 11, 2011, to develop [REDACTED] IEP for the 2011-12 school year. Many District employees attended the meetings, including representatives from the general education, MID, MOID, and orthopedic impairment settings. [REDACTED], her attorney, and [REDACTED] private reading teacher also attended. The IEP team discussed [REDACTED] present levels of performance and developed a series of specific, measurable goals and objectives in the areas of communication, mobility, feeding, math, reading, and writing. The team also discussed an appropriate placement for implementation of his goals and objectives during the 2011-12 school year. Specifically, the team considered the following options: the general education setting, with and without support; an orthopedically impaired class; a self-contained MID class; and/or a self-contained MOID class. (T. 340-42, 408-10, 432-34, 628; J. 1, 12-20, 41, 44.)

28.

After discussion and input from all IEP team members, including [REDACTED] the team recommended placement in a self-contained MOID class located at Walnut Grove Elementary School for 23.25 hours per week, with placement in general education classes for “specials” such as art and music. Additionally, under the proposed IEP, [REDACTED] would receive three hours per week of direct speech and language therapy; one hour per month of physical therapy; and 0.25 hours per month of occupational therapy. (T. 341-42, 644-45; J. 8-9, 50.)

29.

[REDACTED] and her attorney participated in the placement discussion but disagreed with the IEP team’s recommendation. At the close of the meeting, [REDACTED] revoked her consent for special

education services under IDEA. Following the issuance of prior written notice on April 15, 2011, ■■■ rescinded her revocation of consent. On May 20, 2011, she filed the Complaint that is the subject of this proceeding. As relief, ■■■ seeks private placement at public expense or, in the alternative, the assignment of Ms. Stevens as a one-on-one speech and language pathologist for ■■■ during the entirety of his school day. ■■■ has remained in a “stay-put” placement pending resolution of the Complaint. (J. 49, 375-406.)

30.

■■■’s performance in his stay-put placement during the current school year has been consistent with his performance during the 2010-11 school year. He continues to experience significant difficulty in the general education and resource settings, and he is unable to master the fourth grade general education curriculum. In contrast, he is engaged and achieves success in the self-contained and speech therapy settings. The Court is persuaded that ■■■ receives little educational benefit in his general education and resource classes, despite the best efforts of his teachers and paraprofessionals. (T. 318-19, 429-31, 527-533, 632-40.)

31.

The placement recommended by the IEP team in the proposed 2011-12 IEP is appropriate for ■■■ Multiple experts in the provision of special education and related services to children with multiple disabilities, including children with orthopedic impairments and children with intellectual disabilities, as well as all of the educators who testified at the hearing, agree that this placement is appropriate for ■■■ given his comprehensive needs. (T. 412, 436, 533, 606-07, 621-22, 627-31, 714-15.)

32.

In the MOID classroom, ■ will be able to develop his communication and independence skills in a small-group setting with significant opportunities for peer interaction. These skills are absolutely critical to ■ future functioning and to his engagement in learning. His current stay-put placement, with its emphasis on a general education curriculum that he is unable to master, does not provide sufficient opportunity for him to practice these skills. ■ has demonstrated that he is motivated by other students,<sup>10</sup> and the MOID class would allow him to participate in meaningful activities with his peers. (T. 320-21, 330-31, 335-36, 339-40, 342-43, 603-07, 643.)

33.

Instruction in the MOID classroom will be delivered at a slower pace driven by ■'s needs. The placement offers an integrated curriculum where skills are achieved through meaningful life activities, and the grade-level curriculum is adapted to meet each student's specific needs. The structure of the MOID class allows for frequent repetition and opportunities for ■ to practice learned skills with age-appropriate peers who are learning similar concepts. The current MOID teacher at Walnut Grove, Dawn Hobbins, is a respected educator with twenty-four years of experience. Ms. Hobbins is adept at integrating assistive technology devices into the classroom and differentiating her instruction so that each student is able to access instructional material at his or her own level. Although ■ currently functions at a lower level academically than some of his peers in the MOID class, he shares the same basic needs as those peers. (T. 554-559, 603-04, 606, 627-30, 646-47.)

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<sup>10</sup> ■ enjoyed having his friend D. accompany him to speech therapy sessions. D. is a neurotypical peer who attends Rock Springs and is also the younger brother of ■ babysitter. (T. 44-45, 320-21, 536.)

### III. CONCLUSIONS OF LAW

1.

The case at bar is governed by IDEA, 20 U.S.C. § 1400, et seq.; its implementing federal regulations, 34 C.F.R. § 300.01, et seq.; and the Rules of the Georgia Department of Education, Ga. Comp. R. & Regs. r. 160-4-7-.01, et seq.

2.

Claims brought under IDEA are generally subject to a two-year statute of limitations. 34 C.F.R. § 300.507(a)(2). In this case, however, the parties executed a settlement agreement that resolved all potential claims arising before the date of the agreement, July 27, 2010. Accordingly, only events occurring after July 27, 2010 are at issue in this proceeding. See █ v. Gwinnett County Sch. Dist., Docket No. OSAH-DOE-SE-1119117-67-Miller (Final Decision and Order Granting Defendant's Motion for Summary Determination entered April 5, 2011) (D. 359-66).

3.

The Plaintiff bears the burden of proof in this matter. Schaffer v. Weast, 546 U.S. 49 (2005); Ga. Comp. R. & Regs. rr. 160-4-7-.12(3)(n); 616-1-2-.07. The standard of proof is a preponderance of the evidence. Ga. Comp. R. & Regs. r. 616-1-2-.21(4).

#### **A. Evaluation**

4.

IDEA requires school districts to identify and evaluate students who may be eligible to receive special education services. 20 U.S.C. §§ 1412(a)(3), 1414; 34 C.F.R. § 300.111; Ga. Comp. R. & Regs. r. 160-4-7-.04. When conducting an evaluation, a district must:

- (A) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining--
  - (i) whether the child is a child with a disability; and
  - (ii) the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities;
- (B) not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and
- (C) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

20 U.S.C. § 1414(b)(2).

5.

The Plaintiff failed to prove, by a preponderance of the evidence, that the District's evaluation of ■ did not meet IDEA requirements. As set forth in the Findings of Fact, above, the District's evaluation was appropriate and fulfilled the statutory criteria, despite the challenges of assessing ■ given his multiple disabilities. 20 U.S.C. § 1414(b)(2).

**B. Free Appropriate Public Education ("FAPE")**

6.

The overriding 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." 20 U.S.C. § 1400(d)(1)(A). The statute offers the following definition of FAPE:

Free appropriate public education. The term “free appropriate public education” means special education and related services that—

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 614(d) [20 USCS § 1414(d)].

20 U.S.C. § 1401(9).

7.

The United States Supreme Court has developed a two-part test for determining whether a FAPE has been provided. Board of Educ. v. Rowley, 458 U.S. 176, 206 (1982). The first inquiry is whether the school district complied with the procedures set forth in IDEA. Id. The second prong of the test is whether the IEP developed through these procedures is “reasonably calculated to enable the child to receive educational benefits.” Id.

8.

A procedural violation under the first prong of the Rowley test is not a *per se* denial of a FAPE. Weiss v. School Bd., 141 F.3d 990, 996 (11th Cir. 1998). Pursuant to 20 U.S.C. § 1415(f)(3)(E)(ii), this Court is authorized to find that ■ was deprived of a FAPE based on a procedural defect “only if the procedural inadequacies--

- (I) impeded the child's right to a free appropriate public education;
- (II) significantly impeded the parents’ opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents’ child; or
- (III) caused a deprivation of educational benefits.”

20 U.S.C. § 1415(f)(3)(E)(ii); see also 34 C.F.R. 300.513.

9.

In this case, the Complaint does not allege a procedural violation. Moreover, no procedural violation was proven by a preponderance of the evidence, and there is no evidence of any harm to ■■■ resulting from a procedural defect. See Weiss, 141 F.3d at 996. Therefore, the Court concludes that the District complied with IDEA's procedural requirements.

10.

Under the second prong of the Rowley test, known as the "basic floor of opportunity" standard, a school district is not required to provide an education that will "maximize" a disabled student's potential. Instead, IDEA mandates only "an education that is specifically designed to meet the child's unique needs, supported by services that will permit him to benefit from the instruction." Loren F. v. Atlanta Indep. Sch. Dist., 349 F.3d 1309, 1312 n.1 (11th Cir. 2003) (internal citations omitted); see JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1573 (11th Cir. 1991). In determining whether a student has received adequate educational benefits, "great deference must be paid to the educators who developed the IEP." JSK, 941 F.3d at 1573.

11.

IDEA further mandates the provision of a FAPE in the "least restrictive environment." 20 U.S.C. § 1412(a)(5). This means that "[t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the

use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C. § 1412(a)(5); see also 34 C.F.R. § 300.114.

12.

The Plaintiff failed to prove, by a preponderance of the evidence, that [REDACTED] proposed 2011-12 IEP is not reasonably calculated to allow him to receive educational benefits. 20 U.S.C. §§ 1400(d)(1)(A), 1401(9); Rowley, 458 U.S. at 206. As set forth in the Findings of Fact, above, the proposed placement addresses [REDACTED] comprehensive needs by providing him with direct pull-out speech and language instruction, small group instruction, and instruction in the general education setting each day.<sup>11</sup> Under the 2011-12 IEP, [REDACTED] will be educated with non-disabled peers to the maximum extent appropriate and is the least restrictive environment that will enable him to receive educational benefits. 20 U.S.C. § 1412(a)(5).

### **C. Implementation of 2010-11 IEP**

13.

To establish a FAPE violation based on improper implementation of an IEP, an IDEA plaintiff must prove more than *de minimis* failures of implementation. B.F. v. Fulton County Sch. Dist., 2008 U.S. Dist. LEXIS 76714, \*72 (11th Cir. 2008). Instead, a plaintiff must prove that a school district failed to implement “substantial,” “material,” or “essential” IEP provisions. See Van Duyn v. Baker Sch. Dist., 502 F.3d 811, 822 (9th Cir. 2007); Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 (5th Cir. 2000); Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022 (8th Cir. 2003). “A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child’s IEP.” Van Duyn, 502 F.3d at 822.

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<sup>11</sup> The Court specifically finds that the Plaintiff’s proposal for one-on-one instruction by a speech and language pathologist in the general education setting will not provide him with a FAPE and is not reasonably calculated to allow him to receive educational benefits.

14.

The Plaintiff failed to prove, by a preponderance of the evidence, that the District failed to implement a material provision of [REDACTED] 2010-11 IEP. See, e.g., Van Duyn, 502 F.3d at 822. As set forth in the Findings of Fact, above, the evidence showed that [REDACTED] was afforded all services, supplementary aids, modifications, and accommodations identified in the 2010-11 IEP.

**IV. ORDER**

In accordance with the foregoing Findings of Fact and Conclusions of Law, the Plaintiff's request for relief under IDEA is hereby **DENIED**.

**SO ORDERED**, this 10<sup>th</sup> day of November, 2011.



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**KRISTIN L. MILLER**  
**Administrative Law Judge**