IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

A.K., by and through her parent, E.K., and E.K, Plaintiffs, v. GWINNETT COUNTY SCHOOL DISTRICT, Defendant.	DOCKET NO. OSAH-DOE-SE-	Baxter

FINAL ORDER

The above-styled matter was initiated by Plaintiffs A.K., by and through her parent, E.K.,[1] and E.K. pursuant to the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA"), 20 U.S.C. §§ 1400 et. seq., and its implementing regulations, 34 C.F.R. Part 300, and Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794, against Defendant Gwinnett County School District. After Plaintiffs completed the presentation of their case, Defendant moved for an involuntary dismissal pursuant to Administrative Rule of Procedure ("ARP") 35 due to Plaintiffs' failure to carry the burden of persuasion. For the reasons that follow, this Court finds that Defendant's motion for involuntary dismissal is GRANTED and Plaintiffs' claims for relief are DISMISSED.

I. PROCEDURAL HISTORY

Plaintiffs initiated the above-styled action on August 17, 2010 raising claims related to the identification, evaluation, and placement of A.K. Plaintiffs first filed a Due Process Complaint ("Due Process Complaint I") on October 2, 2009 raising similar concerns related to

[1] Though not listed in the Due Process Complaint and thus not a named party in this action, A.K.'s mother S.M. also appeared at the hearing and testified on her daughter's behalf.

the identification, evaluation, placement, and provision of a free appropriate public education ("FAPE") to A.K. At an early resolution conference convened on October 7, 2009, the parties entered into a written agreement which resolved Due Process Complaint I. See D. p.1.[2] Pursuant to the settlement agreement, Plaintiffs withdrew Due Process Complaint I on October 9, 2009, and this Court entered an Order of Dismissal on October 14, 2009. See A.K. v. Gwinnett County School District,

The present Due Process Complaint ("Due Process Complaint II") was filed by Plaintiffs on August 17, 2010. Again, Plaintiffs claim a failure to provide Plaintiff A.K. with a FAPE generally, and more specifically, contend that Defendant failed to properly identify, evaluate, and recommend an appropriate placement for Plaintiff A.K. pursuant to the IDEA and Section 504 of the Rehabilitation Act of 1973. This Court finds as follows:

II. FINDINGS OF FACT

1.

Plaintiff A.K. is an eleven year old student (D.O.B. 1/1/99) who resides within the territorial boundaries of the Gwinnett County School District and is eligible to receive a FAPE from Defendant pursuant to the IDEA. See e.g. D. pp. 48-70.

2.

A.K. has been diagnosed with autism spectrum disorder ("ASD"), a seizure disorder, mental retardation, and attention deficit hyperactivity disorder ("ADHD"). See e.g. P. pp. 193-206, 229-239. A.K. is eligible for special education services under the IDEA pursuant to the

[2] Citations to the record are: "P" followed by the page number for Plaintiffs' exhibits; "D" followed by the page number for Defendant's exhibits; and "T" followed by the page number for the hearing transcript.

eligibility categories of autism spectrum disorder, severe intellectual disability, and speech/language impairment. D. p. 48.

3.

A.K. presents with significant delays that impact her in all areas of development including cognitive, adaptive-behavior, communication, physical, and social-emotional. P. pp. 193-206; D. pp. 48-70, 72-75. A.K.'s strengths include matching colors and pictures, identifying several pictures, initiating using the restroom, imitating words and short phrases, and following one-step directions. D. p. 49. A.K. spontaneously vocalizes approximately four (4) words and a scripted phrase, and often speaks in an unintelligible speech which is a mixture of English and Bosnian, both of which are spoken in her home. P. pp. 193-4; D. p. 49.

4.

A.K. loves to interact with adults and peers, though she is often physically aggressive both towards herself and others. P. p. 193; D. p. 49. A.K.'s aggressive behaviors include hitting and/or grabbing materials during work sessions when demands are placed on her, slapping, shoving, and elopement. Id. She is easily distracted and is able to work consistently for very short periods of time, often two to three minutes with 2:1 adult assistance. D. p. 49.

5.

A.K. also suffers from a seizure disorder, for which she is prescribed Trileptal, the only prescription medication which she currently takes. T. p. 117:6-9, 151:12-22. A seizure disorder plan has also been developed by Defendant with A.K.'s parent's participation, and when A.K. attends school, the school monitors any apparent seizures and communicates them to the parent. D. pp. 12-13; T. pp. 113:15-114:8.

6.

In light of A.K.'s educational needs, she requires direct instruction in a small group setting addressing functional life skills, a structured environment, frequent repetition and prompts, a visual schedule, and a structured behavioral plan. D. pp. 48-70, 42-83; P. pp. 193-206; T. pp. 148:5-149:19.

7.

Pursuant to the parties' settlement agreement resolving Due Process Complaint I, A.K. was placed in a moderate ASD class located at Benefield Elementary School beginning October 13, 2009. D. p. 1.

8.

Additionally pursuant to the parties' settlement agreement, Defendant's school psychologist Dr. Janet Benford conducted a psychological evaluation of A.K. in January 2010. P. pp. 193-206; D. p. 1.

9.

Dr. Benford concluded that A.K.'s current level of intellectual functioning falls within the severely intellectually disabled range and that she exhibits the difficulties with communication, social relatedness, emotional responsiveness, stereotyped behaviors, and sensory behaviors that are often associated with autism. P. pp. 203-204. Among Dr. Benford's recommendations for A.K. include the use of a highly structured cooperative learning group to foster social interactions. P. p. 205.

10.

Plaintiff's parent E.K. agrees with Dr. Benford's evaluation and conclusion that A.K. is severely intellectually disabled and autistic. T. pp.147:7-148:4.[3] In fact, E.K. testified at the hearing that Dr. Benford is "one of the best psychologists I've ever met." T. p. 124:5-6.

11.

Also pursuant to the settlement agreement resolving Due Process Complaint I, A.K. was evaluated at the parent's expense by David Cantor, Ph.D., a psychologist in private practice. P. pp. 229-239; D p. 1. Dr. Cantor similarly determined A.K. to exhibit autism, though he adjudged her intellectual impairment to be in the profound range. P. p. 235.[4] Among Dr. Cantor's recommendations include monitoring social interactions and developing social behavior goals. P. p. 236.

12.

Dr. Cantor also recommended that A.K. receive what E.K. refers to as "medical nutritional therapy" consisting of vitamins and supplements purchased from an affiliate of his practice. T. pp. 71:11-72:20.

13.

On February 18, 2010, the parties met to review A.K.'s IEP as well as Dr. Benford's and Dr. Cantor's evaluations of A.K. D. pp. 17-40. At the IEP meeting E.K. discussed a nutritional

[3] Though E.K. cited one portion of Dr. Benford's evaluation which he disagreed, that is, the inclusion of a teacher rating score on the BASC-2 assessment that placed A.K. in the 'clinically significant' range for somatization, A.K.'s private evaluator David Cantor, Ph.D. also noted the existence of A.K.'s somatic complaints. P. pp. 201, 229, 231; T. pp.146:3-147:2.

[4] E.K. testified that he prefers to agree with Defendant's school psychologist Dr. Benford, who assessed A.K. as having a severe intellectual disability, as opposed to Dr. Cantor, who describes A.K. as having a profound intellectual disability. T. p. 147:5-18.

program that A.K. was beginning which reportedly required her to take nutritional supplements every 45 minutes. D. p. 40. E.K. requested that A.K. be placed on home-based services in a low stress environment so that she could take her supplements. D. p. 40; T. pp. 128:5-130:7.[5]

14.

School representatives explained to E.K. at the IEP meeting that the school could provide A.K. with her supplements at the clinic. D. p. 40; T. p. 130:8-11. E.K. rejected this offer, as he preferred to provide A.K. with the nutritional supplements. T. pp. 130:8-131:2.

15.

E.K. informed the team that A.K.'s regimen of nutritional supplements would end in three months, or the end of the school year. D. p. 40. In order to work with the parent, A.K.'s IEP team agreed to provide home-based services to A.K. from February 19, 2010 until the end of the school year, on May 25, 2010. D. pp. 21, 40; T. p. 131:3-20.

16.

A.K.'s IEP team and the parents agreed that, due in part to the lack of opportunities for social interaction in the home, A.K. would return to school at the beginning of the 2010-2011 school year. D. pp. 21, 40; T. p. 131:7-20. Thus, A.K.'s IEP developed on February 18, 2010 calls for weekly home based services until May 25, 2010, with 31.00 hours per week of cognitive/functional school based services, 1.5 hours per week of speech-language services, and one (1) hour of occupational therapy services beginning on August 9, 2010. D. p. 21.

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[5] E.K. also presented a request for "hospital/homebound" services for A.K. which had been signed by David Cantor, Ph.D. P. p. 245. The form did not comply with state regulations, as it was not signed by a licensed physician or licensed psychiatrist. See Ga. Comp. R. & Regs. 160-4-2-.31. Home-based services are a short-term placement option which IEP teams are required to consider as part of the continuum of placement options. See Ga. Comp. R. & Regs. 160-4-7-.07.

17.

E.K. agreed with and signed the February 18, 2010 IEP which calls for A.K. to return to a school based placement beginning on August 9, 2010. D. pp. 22, 37; T. pp. 122:1-9; 131:3-20.

18.

The IEP team agreed to reconvene in May 2010 to discuss extended school year (ESY) services and placement for the 2010-2011 school year. D. p. 40.

19.

A.K.'s IEP team reconvened on May 14, 2010. D. pp. 48-70, 72-74. The IEP team recommended providing A.K. with ESY services in the home setting for three hours per week over the summer, a recommendation with which E.K. agreed. D. pp. 68-69, 73; T. p. 134:4-11.

20.

At the May 14, 2010 meeting the IEP team additionally discussed the importance of A.K. returning to school, in part so she could have the opportunity to socialize with peers. D. pp. 72-74. The IEP team recommended placing A.K. in a severe autism classroom for the 2010-2011 school year. D. pp 48-70, 72-74. A.K.'s parents expressed disagreement with this recommendation, stating that they preferred home-based instruction for the school year as they do not want A.K. to become ill or develop stress. D. p. 72-74.

21.

After discussing the benefits of a school based placement and the parents' concerns, the IEP team recommended reintegrating A.K. back into the school setting through a modified day placement by placing her in a severe autism class for two (2) hours per day with three (3) hours per week of home-based support. D. pp 48-70, 72-74. The IEP team recommended reviewing A.K.'s IEP after a nine (9) week period. D. pp. 53, 73.

22.

A.K.'s parents continued to express their disagreement with the IEP team's recommendation of a modified day school placement and did not sign the IEP. D. pp 48-70, 72-74; T. pp. 133:17-135:2. The IEP team agreed to reconvene in August and review any medical information the parents may have. D. p. 74.

23.

A.K.'s IEP team met again on August 13, 2010 to discuss A.K.'s IEP. D. pp. 76-83. The team continued to recommend returning A.K. to a school setting and again proposed a modified day placement, with two (2) hours per day in a severe autism classroom supplemented by three (3) hours per week of home-based instruction, as recommended in A.K.'s May 14, 2010 IEP. D. pp. 76-83. School representatives explained that the principles of applied behavior analysis ("ABA"), which E.K. requested, would be used in the autism classroom, and that a functional behavioral analysis would be conducted in order to develop a behavior intervention plan ("BIP") for A.K.. D. pp. 76-83. A.K.'s parents were invited to observe the proposed classroom for A.K but declined the opportunity. D. p. 82.

24.

A.K.'s parents continued to reject a school based placement, even the modified day, two hour per day placement in a severe autism class recommended by the IEP team, and continued to insist on home-based instruction so that A.K. could take her nutritional supplements. D. pp. 76-83. E.K. explained at the August 13, 2010 meeting that A.K. could come back to school when she is healed. D. 79. On August 19, 2010, E.K. filed the present Due Process Complaint.

25.

A hearing convened on November 1, 2010. A.K.'s father E.K. and mother S.M. testified on A.K.'s behalf.

26.

E.K. testified at the hearing that A.K. has made educational progress at home, and expressed his opinion that she needs to remain at home so that she can follow a "strict diet." T. pp. 70:25-71:4, 87:19-88:2.

27.

E.K. admitted at the hearing that A.K. is not under the regular care of a medical doctor.[6] T. pp. 152:19-157:1. But for A.K.'s seizure disorder, for which she takes Trileptal, A.K. does not have a physical illness that is being treated with a prescription medication. T. p. 151:12-21.

28.

The only apparent basis for which E.K. wishes to have A.K. remain at home is so that he or his wife can administer non-prescription nutritional supplements to A.K. approximately four (4) to five (5) times per day, supplements which the school has offered to administer. T. pp. 158:3-5.

29.

The nutritional supplements are not recommended by a medical doctor. T. p. 128:13-15. No evidence was presented that a medical doctor recommends A.K. remain isolated within the home.

[6] E.K. did note that A.K. sees a gastroenterologist "maybe once a month", a cardiologist once every six months, and her pediatrician and neurologist as needed. T. pp. 152:19-157:1

30.

At the close of Plaintiffs' evidence, Defendant moved for an involuntary dismissal pursuant to ARP 35 on grounds that Plaintiffs failed to meet their burden of proof.

III. CONCLUSIONS OF LAW

1.

The Court's review is limited to the issues Plaintiffs raised in the Due Process Complaint; Plaintiffs may raise no other issues at the due process hearing. 20 U.S.C. § 1415(f)(3)(B); 34 C.F.R. § 300.511(d). Thus, the issues before this Court concern the identification, evaluation, and placement of A.K. See Complaint.

2.

This Court review is limited further by the principle of res judicata. See e.g. Brown & Williamson Tobacco Corp. v. Gault, 280 Ga. 420 (2006); Fowler v. Vineyard, 261 Ga. 454 (1991).[7] The parties to this matter entered into an agreement resolving a disagreement as to the identification, evaluation, and placement of Plaintiff A.K. on October 7, 2009, and Plaintiffs subsequently withdrew their first Due Process Complaint, resulting in a dismissal. Thus, any claims predating that agreement which Plaintiffs raised, or could have raised, in their previous complaint are barred by res judicata. Id.

3.

"The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief." Schaffer v. Weast, 546 U.S. 49, 62 (2005); see also 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."). The "[IDEA] 'creates a presumption in favor of the

[7] The Administrative Rules of Procedure provide that ALJs may consult the Civil Practice Act contained in the Official Code of Georgia Annotated and the Uniform Rules for the Superior Courts to resolve procedural questions. Ga. Comp. R. & Regs. 616-1-2-.02.

education placement established by [a child's] IEP, and the party attacking its terms should bear the burden of showing why the educational setting established by the IEP is not appropriate.' Christopher M. v. Corpus Christi Indep. Sch. Dist., 933 F.2d 1285, 1290-91 (5th Cir. 1991) (internal citation omitted.)" Devine v. Indian River Co. Sch. Bd., 249 F.3d 1289, 1291-92 (11th Cir. 2001). Thus, in this case, Plaintiffs bear the burden of persuasion and must produce evidence sufficient to support the allegations concerning the evaluation, identification, and placement of A.K., raised in the Due Process Complaint. Id.

Brief Overview of IDEA

4.

The IDEA allows for federal funding to assist state and local education agencies in educating children with disabilities in return for the education agencies' compliance with the IDEA's rigorous requirements. 20 U.S.C. §§ 1400, 1411; Bd. of Educ. of the Hedrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176 (1982).

5.

The purpose of the 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).

6.

The IDEA requires school districts to provide to a student eligible for special 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.

7.

The IDEA is designed to open the door of public education to children with disabilities but it does not guarantee any particular level of education once inside those doors. Rowley, 458 U.S. 176; J.S.K. v. Hendry Co. Sch. Bd., 941 F.2d 1563 (11th Cir. 1991). The Eleventh Circuit has determined that when measuring whether a handicapped child has received educational benefits from an IEP and related instructions and services, courts must only determine whether the child has received the basic floor of opportunity. J.S.K. 941 F.2d at 1572-3.

8.

The "IDEA requires school districts to develop an IEP for each child with a disability, with parents playing a 'significant role' in this process." Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 524 (2007) (internal citations omitted). While the parents' concerns must be considered by the IEP team, the parents are not entitled to the placement they prefer. M.M. v. Sch. Bd. of Miami-Dade Co. Fla., 437 F.3d 1085, 1102 (11th Cir. 2006); see also Heather S. v. State of Wisconsin, 125 F.3d 1045, 1057 (7th Cir. 1997). "The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs was left by the [IDEA] to state and local educational agencies in cooperation with the parents or guardian of the child." Rowley, 458 U.S. at 207. Thus, the educators who develop a child's IEP are entitled to "great deference." Todd D. v. Andrews, 933 F.2d 1576, 1581 (11th Cir. 1991).

Evaluation

9.

School districts must ensure that students who may be eligible to receive services are properly identified and evaluated. 20 U.S.C. §§ 1412, 1414; 34 C.F.R. §§ 300.111, 300.300-

300.306; Ga. Comp. R & Regs. 160-4-7-.04. In conducting an evaluation, the public agency must (1) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child; (2) not use any single measure or assessment as the sole criterion; and (3) use technically sound instruments. 20 U.S.C. §§ 1412, 1414; 34 C.F.R. §§ 300.111, 300.300-300.306; Ga. Comp. R & Regs. 160-4-7-.04.

10.

Plaintiffs presented no evidence that Dr. Benford's evaluation of A.K. failed to comply with the requirements of the IDEA. See 20 U.S.C. § 1412; 34 C.F.R. § 300.111; Ga. Comp. R & Regs. 160-4-7-.04.

11.

To the contrary, compelling evidence suggests that Defendant's evaluation of A.K. was appropriate. E.K. testified that Dr. Benford was "one of the best psychologists" he had ever met and that he agrees with much of her report. T. pp. 124:5-6, 146:2-22. Though E.K. cited a minor portion of Dr. Benford's report with which he disagreed, the inclusion of a teacher rating score on a BASC-II noting somatization, this falls far short of showing the evaluation to be inadequate under the IDEA.[8] As Plaintiffs failed to present any evidence calling into question the sufficiency of the evaluation of A.K., their claims concerning Defendant's evaluation of A.K. are dismissed.[9]

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[8] Moreover, A.K.'s private evaluator Dr. Cantor also noted somatization in his assessment of A.K. P. pp. 229, 231; T. p.146:3-147:2.

[9] Though outside of the scope of Plaintiffs' Due Process Complaint, Plaintiffs requested an independent educational evaluation (IEE) at the hearing. T. p. 94:1-5. Even if this issue were properly before the Court, it would likewise be denied as Plaintiffs failed to show that they disagreed with the Defendant's evaluation, and all evidence before the Court suggests that Defendant's evaluation is appropriate. See 34 C.F.R 300.502. Further, while Plaintiffs complained at the hearing that prior school psychologists who evaluated A.K. were not licensed by the State of Georgia's Board of Examiners of Psychologists, this complaint too is not properly

Identification

12.

The purpose of the evaluation is to determine whether the child has an eligible disability and the related content of the child's IEP. 20 U.S.C. § 1414(b)(2)(A). The IDEA specifies the disabilities that may entitle a child to eligibility for special education and related services. 20 U.S.C. § 1402(3). [10] A student is not entitled to a specific disability classification. Letter to Fazio, 21 IDELR 572 (OSEP 1994).

13.

A.K. is identified as a child with a disability and eligible for special education services as a student with autism spectrum disorder, a severe intellectual disability, and speech/language impairment. D. p. 48. No evidence was presented at the hearing which calls into question A.K.'s identification as a child with a disability pursuant to these eligibility categories.

14.

To the contrary, E.K. testified that he agrees that, as Dr. Benford determined, A.K. is a child with autism and a severe intellectual disability. T. pp. 147:5-148:4. E.K. also testified that A.K. needs speech/language services, and he did not dispute her identification as having a speech/language impairment. T. pp. 120:24-121:3. As no evidence was presented by Plaintiffs

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before the Court as it is both outside the scope of Plaintiffs' Complaint and barred by res judicata. T. p. 20:7-12. The Court notes, however, that no evidence was presented that any of Defendant's evaluators lacked proper qualifications pursuant to the Georgia Department of Education's regulations, which do not require school psychologists to be licensed by the Board of Examiners of Psychologists. See Ga. Comp. R. & Regs. 160-4-7-.04.

[10] The eligibility categories are: mental retardation, hearing impairments, speech or language impairments, visual impairments, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, and specific learning disabilities. 20 U.S.C. § 1402(3).

suggesting that A.K. has been improperly identified as a child with a disability, their claims concerning identification are properly dismissed.

Placement

15.

The primary issue in this case, and the focus of much of Plaintiffs' testimony in the hearing, concerns whether Defendant's proposed school placement for A.K. provides her with a FAPE in the LRE, or whether, as Plaintiffs contend, A.K.'s medical needs require her to receive home-based education so that she can take non-prescribed nutritional supplements given to her by her parents.

16.

The IDEA's mandate for least restrictive environment ("LRE") is clear:

> To 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, and 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 aides and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5)(A). See also 34 C.F.R. §§ 300.114 – 300.118.

17.

"Included in a FAPE is the requirement that the child be educated in the least restrictive means possible. 20 U.S.C. § 1412(a)(5). This means that the school's goal must be to educate [Plaintiff] in an environment that is as close to a typical school education as possible but that will still give him an appropriate education." L.G. v. Sch. Bd. of Palm Beach Co., Fla., 512 F. Supp. 2d 1240, 1244 (S.D. Fla. 2007) aff'd sub nom. L.G. ex rel. B.G. v. Sch. Bd. of Palm Beach County, 255 F. App'x. 360 (11th Cir. 2007).

18.

Congress has therefore created a "statutory preference" for educating students with disabilities with their non-disabled peers. Greer v. Rome City Sch. Dist., 950 F.2d 688, 695 (11th Cir. 1991) citing Rowley, 458 U.S. at 181 fn. 4.[11] Indeed, Georgia Department of Education regulations implementing the IDEA list home-based programming as among the most restrictive of placement options, and it is to be used only on a "short term" basis. See Ga. Comp. R. & Regs. 160-4-7-.07.

19.

Two IEPs are at issue before this Court: the February 18, 2010 IEP which places A.K. on home-based instruction for a short-term basis with a school based placement to resume at the start of the 2010-2011 school year, and the May 14, 2010 IEP which returns A.K. into a school setting for the 2010-2011 school year.

20.

Plaintiffs failed to present any complaints at the hearing with regard to the February 18, 2010 IEP and the home-based services provided under that IEP. In fact, E.K. testified that he signed the February 18, 2010 IEP, that he agreed with the services contained in the IEP, that A.K. made educational progress in the home, and that he wished to see the home-based services continued. T. pp. 87:19-88:3, 89:16-23, 118:23-119:10, 120:16-123:11 [12]

[11] As the commentary to the federal regulations explains "the Act presumes that the first placement option considered for each child with a disability is the regular classroom in the school that the child would attend if not disabled, with appropriate supplementary aids and services to facilitate the child's placement." 71 Fed. Reg. 46588 (2006).

[12] Though E.K. complained that ABA services were not provided in the home, he admitted that A.K. was making educational progress without those services, and that the severe ASD classroom the IEP team proposes for A.K. utilizes ABA strategies. T. pp. 87:19-88:3.

21.

As Plaintiffs failed to present any evidence suggesting that the home-based services were inappropriate, their requests for compensatory services are properly denied. See Todd D., 933 F.2d 1576 (recognizing that compensatory education is appropriate relief only where schools have failed to provide an appropriate education as required by the IDEA).

22.

Similarly, no evidence was presented at the hearing which suggests that the May 14, 2010 IEP that reintegrates A.K. back into the school environment is inappropriate. Though Plaintiffs clearly prefer A.K. to remain educated in the home, they failed to present any evidence that justifies such a restrictive placement which removes A.K. from a public school setting and isolates her from any opportunity for an education with peers. Notably, no evidence was presented that a medical doctor recommends isolation within the home.

23.

On the other hand, compelling evidence before the Court establishes that the IEP team's recommendation that A.K. return to a school-based setting on a modified day basis is appropriate to meet A.K.'s needs. A.K., who loves to interact with peers, will have that opportunity in severe ASD classroom proposed by her IEP team, making the proposed school based placement less restrictive than that preferred by Plaintiffs.

24.

Indeed, given the evidence before this Court, Defendant would be deficient in its obligation under the IDEA to educate A.K. in the LRE were it to continue to provide the parent's preferred home-based placement in light of the lack of any evidence suggesting that A.K. has a medical need for one of the most restrictive placements possible on the continuum of

placements. See Ga. Comp. R. & Regs. 160-4-7-.07; see also Chris D. v. Montgomery Co. Bd. of Educ., 743 F.Supp. 1524 (M.D. Ala. 1990) (recognizing full-time residential placement as less restrictive than individual instruction either in the home or in a school administration building as student will have the opportunity to interact with other students); Metropolitan Sch. Dist of Lawrence Township, 36 IDELR 282 (SEA Ind. 2002) (holding that homebound placement for autistic student is inappropriate because student had no contact with other students); Lafayette Sch. Corp., 30 IDELR 736 (SEA Ind. 1999) (rejecting parents' preferred homebound placement as unduly restrictive when full-day treatment program at hospital could be provided).

25.

The Court finds that A.K., who requires a structured environment, frequent repetition and prompts, a visual schedule, and a structured behavioral plan, will receive those opportunities in the severe ASD class, and the May 14, 2010 IEP offers her an appropriate education in the least restrictive environment. Plaintiffs failed to meet their burden of persuasion suggesting otherwise.

Section 504

26.

Plaintiffs also alleged in their Due Process Complaint a violation of Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794. Section 504 has nearly identical requirements as to FAPE in the LRE as the IDEA. In fact, the requirements are so nearly identical for compliance in a special education case that a civil action may not be brought under Section 504 without first complying with the IDEA's exhaustion requirement. Babicz v. Sch. Bd of Broward Co., 135 F.3d 1420 (11th Cir. 1998).

27.

The primary difference between the requirements of Section 504 and those of the IDEA is that in addition to the findings necessary for a petitioner to prevail under the IDEA, a petitioner must prove discrimination in order to prevail under Section 504. Thus, if an educational agency's actions were proper under the IDEA, then the actions could not have been discriminatory under Section 504. This means that if an educational agency is in compliance with IDEA, it is necessarily in compliance with Section 504.[13] Having found that Plaintiffs have not shown that Defendant failed to comply with any aspect of the IDEA, and that in fact A.K. has been offered a FAPE by Defendant, Defendant is necessarily in compliance with Section 504. Consequently, Plaintiffs' claims of violation of Section 504 are similarly denied.

Now therefore, in light of the above findings, Plaintiffs' request for relief is **DENIED** and Defendant's motion for involuntary dismissal is **GRANTED.**

SO ORDERED this 18th day of November, 2010.

AMANDA C. BAXTER
ADMINISTRATIVE LAW JUDGE

ORDER PREPARED BY:
Victoria Sweeny
Georgia Bar Number 694663
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[13] In fact, the regulations interpreting Section 504 specifically state that compliance with IDEA is one method of complying with Section 504. 34 C.F.R. §104.36.