

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

█ by and through his parents █ and █
█ and █
Petitioners,

v.

COBB COUNTY SCHOOL DISTRICT,
Respondent.

Docket Nos.:¹
OSAH-DOE-SE-1650896-33-Teate
OSAH-DOE-SE-1705016-33-Teate

FINAL DECISION

For Petitioners:

Chris E. Vance, Esq.
Chris E. Vance, P.C.

For Respondent:

Todd E. Hatcher, Esq.
Allison B. Faust, Esq.
Gregory, Doyle, Calhoun, & Rogers, LLC



JAN 20 2017


Kevin Westray, Legal Assistant

I. SUMMARY OF PROCEEDINGS

Petitioners filed due process hearing requests pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (“IDEA”) on June 16 and August 12, 2016, alleging numerous violations of the IDEA on the part of the Respondent, Cobb County School District (hereinafter “the District”).

The evidentiary hearing took place over the course of five days in October 2016. The record closed on December 12, 2016, when the parties filed their proposed findings of fact and conclusions of law.

After consideration of the evidence and for the reasons explained below, the Court finds that Petitioners failed to meet their burden to demonstrate that the District failed to provide █

¹ Petitioners’ complaints were originally docketed as separate cases, but were later consolidated pursuant to this Court’s Order.

with a free and appropriate public education such that they are entitled to relief under the IDEA, with the exception of their claim regarding vision therapy, for which they are entitled to compensatory relief.

II. FINDINGS OF FACT

█'s Initial Eligibility Determination and IEP

1. █ is fourteen years old. (Tr. 758). He was enrolled at █ Elementary School from kindergarten through the fifth grade and █ Middle School (hereinafter █) from the sixth grade until the eighth grade. (Petitioner's Notebook Tab 6, pp. 542, 983).
2. █ was referred for a psychoeducational evaluation by the tier-based Response to Intervention team in order to determine his eligibility for special education services in 2009. (Exhibit R-4, p. 6). Barbara Beard, Ed. S., performed this evaluation of █ on June 22 and 23, 2009, utilizing the Adaptive Behavior Assessment System, 2nd Edition (ABAS-II), the Beery-Buktenica Developmental Test of Visual-Motor Integration – 5th Edition (VMI), Behavior Assessment System for Children, 2nd Edition (BASC-2), Sentence Completion Test, Wechsler Individual Achievement Test – Second Edition (WIAT-II), and the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV). (*Id.*). In completing the BASC-2, Ms. Beard obtained responses from █'s mother and father. (*Id.*). █ obtained a Full Scale IQ score of 114, which falls within the High Average range, on the WISC-IV. (*Id.*, p. 11). He also exhibited “far above average word reading/decoding skills” and “strongly developed reading comprehension, math computation, and math reasoning skills that [were] above average for chronological age” on the WIAT-II. (*Id.*, p. 18). However, the results of the ABAS-II “indicate[d] that █'s overall adaptive behavior skills [were] below average for his age and significantly below

expectation when compared to measured cognitive ability.” (*Id.*, pp. 16–17). Based on the results of the evaluation, Ms. Beard recommended eligibility consideration for special education services under the “other health impairment” category. (*Id.*, p. 18). In her evaluation report, Ms. Beard opined that “[redacted]’s medical diagnosis of ADHD . . . [was] significantly impacting behavior, adaptive behavior skills, and daily functioning.” (Exhibit R-4; Petitioner’s Notebook Tab 3).

3. The District determined that [redacted] was eligible for special education services under the IDEA under the category of “other health impairment” on August 24, 2009, when [redacted] was entering the second grade. (Exhibit R-25).

4. During an initial individualized education program (“IEP”) meeting held on August 24, 2009, an IEP team that included District personnel and [redacted]’s parents discussed the results of the psychoeducational evaluation and developed an initial IEP for [redacted]. The IEP team determined that [redacted] required supportive instruction in the areas of reading, math, and language arts, as well as support through the co-teaching model in science and social studies. The initial IEP indicates that [redacted]’s parents were provided with a copy of the eligibility and evaluation reports. (Exhibit R-25).

5. After the results of a speech and language evaluation indicated that [redacted] had “a language disorder in the areas of pragmatic language and syntax construction,” the IEP team added speech and language services to [redacted]’s instructional programming in May 2010. (Exhibit R-31, pp. 639, 648).

[redacted]’s Academic Performance

6. [redacted] obtained the following scores on a Criterion-Referenced Competency Test (CRCT) administered Spring 2010:

Reading: 831 (meets requirements)
English/Language Arts: 835 (meets requirements)
Math: 829 (meets requirements)

(Petitioner's Notebook Tab 6, p. 591).

7. [REDACTED] obtained the following scores on a CRCT administered Spring 2011:

Reading: 837 (meets requirements)
Math: 819 (meets requirements)

(Petitioner's Notebook Tab 6, p. 711). Contemporaneous testing indicated that [REDACTED] was performing at or above grade level. (Id.) [REDACTED] also performed at or above grade level on a Scholastic Reading Inventory (SRI) administered Spring 2011. (Id.),

8. [REDACTED] obtained the following scores on a CRCT administered Spring 2012:

Reading: 823 (meets standards)
Math: 770 (does not meet standards)
English/Language Arts: 837 (meets standards)

(Petitioner's Notebook Tab 6, p. 880).

9. [REDACTED] demonstrated strength in reading, but weakness in math, on an Iowa Testing of Basic Skills (ITBS) administered during the fall of 2012. (Petitioner's Notebook Tab 6, p. 880).

10. [REDACTED] obtained the following scores on a CRCT administered Spring 2014:

Reading: 850 (exceeds standards)
Language Arts: 827 (meets standards)
Math: 815 (meets standards)
Science: 805 (meets standards)

(Petitioner's Notebook Tab 6, p. 944).

11. On IOWA Assessments administered in Fall 2014, [REDACTED] achieved scores that fell in the average range in all academic areas with the exception of written expression and math, which were below average. (Petitioner's Notebook Tab 6, p. 946).

12. As of January 9, 2015, [REDACTED]'s grades in each subject were as follows:

Reading:	85% (B)
Social Studies:	81% (B)
Science:	83% (B)
Language Arts:	84% (B)
Math:	81% (B)

(Petitioner's Notebook Tab 6, pp. 948–51). However, his teachers noted that [REDACTED] was easily distracted, had difficulty staying on task, and often required redirection. (Id.)

Revisions to [REDACTED]'s IEP

13. IEP records generated between 2010 and 2013 noted improvements in [REDACTED]'s performance in the areas of speech and language, but also indicated that [REDACTED] continued to exhibit deficits in math. (See, e.g., Petitioner's Notebook Tab 6, pp. 652, 748; see also id. at pp. 653, 662, 817). On or about April 11, 2012, the IEP team agreed that, for the 2012-2013 school year, it was appropriate to remove [REDACTED] from general education setting math and place him in a small group special education setting in an effort to correct “weaknesses in working memory [and] processing speed for visual information.” (Petitioner's Notebook Tab 6, p. 817). The team also decided to place [REDACTED] in small group reading, language arts, and math for the remainder of the 2011-2012 school year “to focus on learning strategies/techniques to correct math, reading and language arts deficits.” Id.

14. [REDACTED]'s behavioral difficulties are also well-documented in these IEPs. During his enrollment in the District, his teachers noted that [REDACTED] had problems staying on task, maintaining focus, organizing his thoughts, and coping with frustration. (Petitioner's Notebook Tab 6, p. 592, 640, 666). Teachers reported that [REDACTED] required consistent assistance, redirection, and prompting. (Id.). These difficulties adversely affected [REDACTED]'s “ability to demonstrate his knowledge in the classroom setting . . . [and] his academic functioning in the classroom.” (Id. at p. 806).

15. To address ██████'s deficiencies with regard to note-taking and organization, ██████'s IEP was amended to allow for thirty minutes of daily consultative support on March 23, 2012. (Petitioner's Notebook Tab 6, p. 798, 801).

16. During the April 11, 2012 annual IEP review, the IEP team agreed to complete a functional behavior assessment for ██████. The IEP developed during that meeting provides: "An FBA [functional behavior assessment] will be conducted and a BIP [behavior intervention plan] will be developed before the end of the school year (2011-2012)." (Petitioner's Notebook Tab 6, p. 810). The IEP meeting notes clarify: "Committee agreed that an FBA would be completed to determine if [██████] has triggers and if so, what they are in order to develop a behavior intervention plan." (*Id.* at p. 820).

17. In April 2013, the IEP team determined that ██████ had met all of his speech and language goals, and to therefore discontinue ██████'s speech and language services. The District based this determination on assessments of ██████'s speech and language needs—namely, a "SPELT-3" evaluation, on which ██████ obtained a standard score of 118 (an improvement from a score of 79, obtained in 2010), and an "OWLS Pragmatic Worksheet" indicating that ██████ was "at a 90%." (Exhibit R-57, pp. 1055–56). The results of these evaluations were discussed with ██████ parents during an April 2013 IEP meeting. *Id.* The IEP completed April 2, 2013 includes the following notation: "Parents agreed that [██████] needs to continue with services for OHI [other health impairment] and that he is no longer eligible for speech/impaired services. Data was presented and agreed upon." (*Id.* at 1056).

18. In an IEP team meeting on April 2, 2013, ██████'s mother indicated that ██████ had been diagnosed with "convergence excess estropia [sic]," a disorder of the vision. (Petitioner's

Notebook Tab 6, p. 883). Notes from a later IEP meeting on September 12, 2013 indicate that [REDACTED]'s mother was "currently following up with the eye doctor." (Id. at p. 910).

19. [REDACTED]'s IEP called for [REDACTED] to be provided with assistive technology. On or about August 25, 2011, the District instituted an assistive technology referral. (Petitioner's Notebook Tab 6, p. 742). The District subsequently issued [REDACTED] a "NEO2" or "NEO AlphaSmart" to assist him with completing classwork and homework. (Id. at p. 748). The District also installed "PaperPort" and "DT Trainer" software. (Id. at p. 706). The District later discontinued use of the PaperPort software after it was determined not to be beneficial. (Id. at p. 903). [REDACTED]'s mother indicated during the April 2, 2013 IEP team meeting that the NEO AlphaSmart posed difficulties for [REDACTED] because the screen was too small. (Id. at p. 894). [REDACTED]'s amended IEP generated September 12, 2013 includes the following notation from Terri Mann, Assistive Technology Specialist:

[REDACTED] currently has access to school-based computer technology (classroom desktops and netbooks on a cart) to support his writing across the curriculum. His middle school recently purchased a word prediction software site license (CoWriter 6) that is available on every computer in the building. At this time, [REDACTED] is able to complete worksheets using handwriting, but uses the computer word processor for tasks requiring more than 3 sentences.

Following discussion at an amendment IEP meeting with [REDACTED]'s parents, teachers, administrator, AT, and special ed [sic] support staff, it was agreed that the technology solutions in place are sufficient to support his current needs. . . .

(Petitioner's Notebook Tab 6, p. 903). During the September 12, 2013 amendment meeting, [REDACTED]'s mother voiced concerns over the current assistive technology [REDACTED] was then receiving, and suggested that the District provide "Dragon" voice-to-text software. (Id. at p. 910). However, District personnel, including Ms. Mann, disagreed with this suggestion as voice-to-text software would prove difficult to use in a classroom environment with background noise and, since [REDACTED] was required to write in all subjects, "voice activated software would not be appropriate in many classrooms." (Id.)

20. Per his annual IEP developed on January 9, 2015, [REDACTED]'s placement for the 2015-2016 school year was to be as follows:

- | | | |
|-----|-------------------|---------------------------------|
| (1) | Language Arts: | Co-Taught |
| (2) | Science: | Co-Taught |
| (3) | Social Studies: | Co-Taught |
| (4) | Exploratories | |
| (5) | Math: | Small Group – Special Education |
| (6) | Foreign Language: | No Support |

(Petitioner's Notebook Tab 6, pp. 960–61).

21. The IEP completed for [REDACTED] on January 9, 2015 includes the following notation under the heading "IEP Team Meeting Notes":

The purpose of this meeting is an Annual/Complete IEP Review. . . . A draft copy of the IEP was emailed to [REDACTED's mother] on 1/6/15.

Introductions were made and parental rights were offered. The parents declined having them reviewed. All components of the IEP were discussed and agreed upon. A finalized copy will be emailed to [REDACTED's parents]. The meeting was adjourned.

(Petitioner's Notebook Tab 6, p. 961).

[REDACTED]'s Injury and Resultant Homebound Services

22. On July 22, 2015, [REDACTED] was involved in an accident on his bicycle in which he sustained a fracture to his left leg. (Exhibit R-2, p. 3). Dr. [REDACTED], [REDACTED]'s orthopedist, later informed the District that [REDACTED] was orthopedically impaired due to his July 22, 2015 injury. (*Id.*, p. 4). Dr. [REDACTED] could not provide a date by which he expected [REDACTED] to recover. (*Id.*).

23. On August 5 and 11, 2015, the IEP team met to amend [REDACTED]'s IEP to address classroom and transition accommodations necessitated by [REDACTED] injury. The IEP team later decided that [REDACTED] would attend school at [REDACTED] Middle School through fourth period each day, and receive Hospital/Homebound services for math and language arts five hours per week. (Exhibit R-74, p. 1244). During the August 11 meeting, [REDACTED]'s mother expressed concern that more than five

hours of home-based services may have been necessary, to which the District responded that it would require more data in order to support additional time for home-based learning. (*Id.* at 1247).

24. Also during the August 11 meeting, the IEP team discussed ██████'s current placement in small group math changing to co-taught math. (Exhibit R-74, p. 1247). ██████'s parents expressed interest in using a Skills Tutor program for math, extra math, and IXL," due to ██████'s need for repetition of skills. ██████'s parents also discussed ██████ "being able to use technology." Kacy Berry, Student Support & Services Support Specialist with the District, recommended an assistive technology referral.

25. ██████ passed hearing and vision screenings administered by the District on September 4, 2015. (Exhibit R-1).

26. On or about October 14, 2015, ██████ fell on the curb at school and reinjured his broken leg. (Tr. 762–64; Petitioner's Notebook Tab 6, p. 1003). He thereafter ceased attending classes at ██████ Middle School. (*Id.*). The District requested that ██████'s parents provide documentation supporting their decision to remove ██████ from classes. (Tr. 1111).

The District's Evaluations of ██████

27. Denise Pennington, Speech Language Pathologist, administered a speech language evaluation to ██████ on September 17, 18 and October 7, 2015. (Exhibit R-10, p. 135–42). Based on the results of this evaluation, Ms. Pennington concluded that ██████'s articulation, voice quality, and resonance were within normal limits; his oral function and structures were within functional limits for speech sound production"; his "receptive and expressive skills were . . . within the average range of functioning"; he was "100% intelligible"; he did not appear to demonstrate characteristics of pragmatic language impairment impacting his educational

functioning; and his fluency was within the average range of functioning. Ms. Pennington further noted that, while [REDACTED] had “typical dysfluencies,” he “[did] not present with stuttering.” (Exhibit R-10). Since [REDACTED]’s scores on the speech language evaluation were within the average range of functioning, further testing was not indicated. (Id.)

28. Sandra McColl conducted a psychoeducational evaluation of [REDACTED] on October 7, 23, and 30 and November 13, 2015 utilizing the BASC-2, Behavior Rating Inventory of Executive Function, Children’s Depression Inventory-2 Self Report, House-Tree-Person, Reynolds Intellectual Assessment Scales (RIAS), WIAT-III, WISC-V, and the Woodcock-Johnson IV – Tests of Cognitive Abilities. (Exhibit R-12, p. 156). According to Ms. McColl, the results of the evaluation indicated that [REDACTED] “demonstrate[d] average cognitive functioning, with commensurate achievement scores in most areas, although his math skills [were] lower than expected.” (Id. at p. 167.) She noted a deficit in [REDACTED]’s processing speed. (Id.). Ms. McColl also noted that [REDACTED]’s “[b]ehavior scales [were] elevated in several areas, including attention, depression, anxiety, aggression, conduct problems, somatization, and functional communication,” and recommended that these areas be monitored. (Id.).

29. Kradan Ostby, licensed occupational therapist, conducted an occupational therapy evaluation of [REDACTED] on September 16 and October 7, 2015 utilizing the Beery Developmental Test of Visual-Motor Integration – 6th Edition, Adolescent/Adult Sensory Profile, and Evaluation Tool of Children’s Handwriting. (Exhibit R-9, p. 129). Based on the results of the evaluation, Ms. Ostby concluded that [REDACTED] “demonstrate[d] functional motor planning, muscle tone, fine motor skills, and activities of daily living.” (Id., p. 133). She further noted that [REDACTED] “demonstrated legible and functional writing in the classroom,” that his “[t]yping speed was

good,” and that there were “[n]o sensory concerns . . . to interfere with his classroom performance” (*Id.*, pp. 133–34).

December 15, 2015 IEP Meeting

30. The IEP team met on December 15, 2015 to address ██████’s Hospital/Homebound services. (Exhibit R-77, P. 1284). ██████’s parents; Cathy Jordan, Local Education Agency Representative; Jean Desvermine, Support and Services Administrator; Deitra Heard, Special Education Teacher; Andy Bristow, School Principal; Valerie Johnson, General Education Teacher, Gregory Nixon Hospital/Homebound teacher; and Jonathan Tabb, School Social Worker, attended this meeting. *Id.* at 1261–62.

31. During the December 15, 2015 IEP meeting, ██████’s parents presented documentation authored by Dr. Jagan Chilakamari. (Tr. 1111–12). In this documentation, Dr. Chilakamari indicated that ██████ had diagnoses of anxiety disorder not otherwise specified, poor executive function issues, and mood disorder in support of continued Hospital/Homebound services for ██████. Up until this point, District personnel had been under the impression that ██████ was returning to ██████ due to his leg injury. (*Id.*). ██████’s then current Hospital/Homebound paperwork was due to expire on December 18, 2016. The IEP team scheduled ██████’s annual IEP meeting for January 8, 2016, the date ██████’s then current IEP was due to expire. (Tr. 1117–18).

32. ██████’s parents formally requested an independent education evaluation in December 2015, whereupon the District filed a due process complaint. The annual IEP meeting scheduled for January 8, 2016 was thereafter canceled. ██████’s parents and the District agreed to extend ██████’s Hospital/Homebound services until an annual IEP meeting was held. (Tr. 1118).

Independent Educational Evaluations

33. On November 16 and 18, 2015, Dr. Warren Walter, Ph.D., a licensed psychologist, conducted a neuropsychological evaluation of [REDACTED]² (Petitioner's Notebook Tab 3, p. 197). Based on the results of the evaluation, Dr. Walter diagnosed [REDACTED] with generalized anxiety disorder, attention-deficit/hyperactivity disorder (ADHD), obsessive-compulsive disorder, nonverbal learning disability, developmental coordination disorder, executive dysfunction, persistent depressive disorder, social anxiety disorder, and specific learning disabilities in math reasoning, math computation, and written expression.³ (*Id.*, p. 224). Dr. Walter noted that [REDACTED] performed at an average level in verbal areas, but struggled in math. (*Id.*, p. 220). He included recommendations for classroom accommodations for [REDACTED] in his evaluation report, some of which he acknowledged the District had already implemented. (*Id.*, p. 227).

34. Dr. Nicole Gurbal, O.D., conducted a visual evaluation of [REDACTED] on December 16, 2015. (Petitioner's Notebook Tab 3, p. 264). Dr. Gurbal concluded, based on the results of this

² Dr. Walter utilized the following procedures in this evaluation:

- Parent Interview
- Clinical Interview with [REDACTED]
- Developmental and Family History Intake Information Form
- Review of Records
- Differential Ability Scales – 2nd Edition (DAS-II)
- NEPSY – A Developmental Neuropsychological Assessment – II (NEPSY-II)
- Wide Range Assessment of Memory and Learning – 2nd Edition
- Developmental Test of Visual Motor Integration (6th Ed.) (VMI)
- Rey-Osterrieth Complex Figure
- Wisconsin Card Sorting Test
- Behavior Rating Inventory of Executive Function - Parent Form
- Behavior Rating Inventory of Executive Function - Teacher Form
- Grooved Pegboard Test
- Conners Comprehensive Behavior Rating Scales - Parent
- Conners Comprehensive Behavior Rating Scales - Teacher
- Conners Comprehensive Behavior Rating Scales – Self-Report
- Rorschach Inkblot Technique
- Wechsler Individual Achievement Test – 3rd Edition (WIAT-III)

(Petitioner's Notebook Tab 3, p. 197–98).

³ [REDACTED] had previously been diagnosed with ADHD, obsessive-compulsive disorder, dysthymia, generalized anxiety disorder, and oppositional-defiant disorder. (Petitioner's Notebook Tab 3, p. 200).

evaluation, that [REDACTED] had “dysfunctions of his reading eye movements and eye teaming,” as well as “deficits in discrete areas of visual perception,” including “visual discrimination skills,” “visual form constancy,” “visual closure,” and “visual figure ground skills.” (Id., p. 266). According to Dr. Gurbal, [REDACTED]’s deficits to vision adversely affected his performance at school because it caused him to lose his place or skip over lines when reading, and made it difficult for him to keep numbers aligned in columns, read from the board, recognize words, organize printed or written work, or recognize misspelled words. (Id.) She recommended glasses and vision therapy as well as classroom accommodations. (Id., p. 267).

35. Mindy Cohen, M.Ed., licensed speech-language pathologist, conducted a speech, language, and academic evaluation of [REDACTED] in December 2015 and January 2016. (Petitioner’s Notebook Tab 3, p. 271). Ms. Cohen concluded that [REDACTED] had “mild articulation disorder,” “significant mixed receptive-expressive language disorder,” “significant social communication disorder,” “significant specific reading disorder,” “significant disorder of written expression,” and “executive functions disorder.” (Id., p. 300–05). She recommended that [REDACTED] receive: Fast ForWord Auditory/Language Processing and Reading Series Programming supervised by a speech-language pathologist; speech language therapy; and occupational therapy. (Id., p. 307–10).

36. Kimberlee Wing, licensed occupational therapist, conducted an occupational therapy evaluation of [REDACTED] on January 8 and 9, 2016. (Petitioner’s Notebook Tab 3, p. 311). In her evaluation report, Ms. Wing indicated that [REDACTED] exhibited weaknesses in vestibular processing, tactile processing, visual processing, processing speed, and sensory regulation. (Id., p. 330). She recommended that [REDACTED] receive occupational therapy as well as academic supports. (Id., p. 330–40).

2016 Revisions of ██████'s IEP

37. On March 4, 2016, an eligibility team⁴ met to reevaluate ██████'s eligibility under the IDEA, taking into account the above-described psychoeducational, occupational, visual, and speech language evaluations. (Exhibit R-81, p. 1304–67). The eligibility team considered ██████'s eligibility in the following categories: Other Health Impairment, Emotional/Behavioral Disorder, and Specific Learning Disability. (*Id.* at 1364). The eligibility team found ██████ eligible in each of those categories. (*Id.*)

38. The IEP team conducted ██████'s annual IEP review on March 4 and 8, 2016.⁵ (Exhibit R-83, pp. 1373–1417). Based on the March 8 annual IEP review, the IEP team decided to conduct additional assessments—specifically, reading and math assessments, as well as a functional behavior assessment—and reconvene at a later date to determine the next steps for ██████'s transition back to school. (Tr. 1147). With regard to the vision therapy recommended by Dr. Gurbal, District personnel, including Jennifer Coleman, concluded that there was insufficient documentation to support providing ██████ with vision therapy, and that ██████'s deficits could be addressed through accommodations. (Tr. 1145–46). The IEP team agreed to reduce the level of difficulty of ██████'s work beginning in March until the team again met in May. (Tr. 1131).

39. The IEP team held an amendment meeting on May 27, 2016 to discuss a reading assessment, possible goals, placement for the 2016-2017 school year, and extended school year services. (Petitioner's Notebook Tab 6, p. 1109). The IEP team agreed that extended school year services were necessary in order for ██████ to receive a free and appropriate public education.

⁴ The eligibility team consisted of Melissa Saunders, Evaluator; Janice Barnard, Special Education Supervisor, Speech; Kradan Ostby, Occupational Therapist; Jessica Coleman, Special Education Assistant Director; Jean Desvernine; Deitra Heard; Erin Donn, note-taker; Helen Upshaw, Coordinator Assistive Technology; Andy Bristow, School Principal; Christy Jaffe, Psychologist; Valerie Johnson, General Education Teacher; and Gregory Nixon.

⁵ Although ██████'s parents attended both meetings, the handwritten notation “in attendance only – not agreeing to IEP” appears next to both of their signatures on the IEP. (Exhibit R-83, pp. 1374, 1375).

(Id. at 1093–94). During this meeting, the District presented ██████'s mother with its plan for extended school year services for ██████ (Id.; Tr. 1170–71). ██████'s mother did not agree to the extended school year services recommended by the District. (Id. at p. 1110; Tr. 1170–71).

40. Notes from the amendment meeting provide “Depending on the outcome of a retention meeting, placement for next year will need to be discussed.” (R-85, p. 1496). According to Jessica Coleman, Special Education Assistant Director with the District, the IEP team planned to hold a retention meeting to determine whether ██████ should be placed in high school after the extended school year was completed and the team had “additional data to determine if [██████] needed to be retained in [the] eighth grade. . . .” (Tr. 1173). Ms. Coleman further testified that, after the state record reporting period ends, the District’s records for each student automatically “roll up” to the next grade, unless there is some indication that the student is being retained in his or her current grade. (Tr. 1176). Because there was no indication in ██████’s records as to whether he would be retained in eighth grade, the system automatically updated to indicate that ██████ would attend Lassiter High School for the 2016-2017 school year. (Id.). However, the District did not plan to unilaterally enroll ██████ in ██████ High School for the 2016-2017 school year. (Id.).

██████ *Enrollment in ██████ Academy*

41. In May 2016, ██████ parents began researching other schools for ██████ (Tr. 815). That summer, they sent ██████ to live with his grandmother in ██████ Massachusetts. (Id. at 816).

██████ later went to stay with a family friend—who is also ██████’s godfather—in Boston. Id.

42. Unbeknownst to the District, ██████’s parents enrolled ██████ in ██████ Academy (hereinafter “████████” a private school located in ██████ in the summer of 2016. (Tr. 717,

818, 916; Tr. 1182). ██████ began attending school at ██████ on August 30, 2016. (Id. at 717). The cost of tuition at ██████ for the 2016-2017 school year was \$68,447.07. Id.

43. According to ██████'s mother, ██████ initially took public transportation to school; he would ride two buses and two trains each way, and it would take him two to two and a half hours to get to school. (Tr. 718). Since October 2016, ██████ has been taking Uber to and from school each day. The ride to and from school takes approximately thirty minutes each way and costs about \$40 per day. (Id. at 718).

44. ██████ currently attends eighth grade at ██████. According to ██████'s mother, ██████ is doing second- or third-grade level work. (Tr. 875, 933-34). ██████ provides him with two 40-minute sessions of speech language therapy, one group-facilitated counseling session, and one private counseling session per week. (Id.).

The Due Process Hearing Requests

45. Petitioners alleged the following violations of the IDEA on the part of the District in their June 16, 2016 due process hearing request:

- (1) The District failed to identify and appropriately address ██████'s speech language disabilities;
- (2) The District failed to timely identify and address ██████'s emotional behavior disorders and learning disabilities;
- (3) The District failed to identify and address ██████'s ocular motor and visual perceptual disabilities;
- (4) The District failed to identify and address ██████'s handwriting issues through occupational therapy and assistive technology;
- (5) The District failed to identify and address ██████'s occupational therapy and sensory integration needs;
- (6) The District improperly placed ██████
- (7) The District's planned placement for the 2016-2017 school year was inappropriate;
- (8) The District failed to develop an appropriate transition plan for ██████ and
- (9) The District failed to develop a plan for ██████'s reentry into a classroom setting.

(Petitioners' Due Process Hearing Request dated June 16, 2016).

46. Petitioners alleged additional violations of the IDEA on the part of the District in their August 12, 2016 due process hearing request, including:

- (1) The District withheld ██████'s educational records;
- (2) The District's evaluations of ██████ were inappropriate;
- (3) The District failed to perform a functional behavior assessment of ██████
- (4) The District denied ██████ appropriate extended school year services;
- (5) The District failed to provide ██████ with any written services and placement in the May 27, 2016 IEP;
- (6) District educators provided ██████ with answers to tests;
- (7) The District did not provide ██████ with homework; and
- (8) The District refused to provide ██████ with more than five hours per week of homebound instruction.

(Petitioners' Due Process Hearing Request dated August 12, 2016).

Expert Witness Testimony

47. At the evidentiary hearing, Petitioners presented the expert testimony of Mindy Cohen, Nicole Gurbal, and Kimberlee Wing. Petitioners also tendered the expert testimony of Dr. Jacque DiGieso, whom ██████'s parents retained to provide assistance in placing ██████ in an educational program.

48. Kimberlee Wing testified that ██████ had an improper pencil grasp, which causes instability and fatigue, and which must be addressed through occupational therapy. (Tr. 285–88). According to Ms. Wing, ██████'s issues with handwriting negatively affect his written expression. (Tr. 294–96). She opined that the District should have provided ██████ with occupational therapy when he was in first grade. (Tr. 285–300, 312–13, 336–39).

49. In her testimony, Mindy Cohen recommended that ██████ receive intensive speech language therapy, the FastForWord program, and Lindamood-Bell's language-based math program. (Tr. 438–91). Ms. Cohen took issue with the District's 2015 speech and language evaluation, specifically in that it purportedly did not note ██████'s word finding issues, employed

assessments that were not sensitive to ■■■'s areas of disability, tested ■■■ insufficiently, and evinced incomplete or faulty analysis. (Tr. 422–46, 604–06, 608–09). Ms. Cohen further testified that the District's decision to remove ■■■ from speech and language therapy in 2013 negatively affected ■■■ She also opined that ■■■ was also adversely affected by the lack of extended school year services. (Tr. 493–95).

50. Dr. Gurbal testified that ■■■ had significant ocular motor impairment, which impeded his education. (Tr. 643–52). According to Dr. Gurbal, ■■■ required 26-28 hours of vision therapy to address his learning-related vision deficits. (Tr. 652).

51. Dr. Digieso testified that the District's provision of five hours per week of homebound services was "wholly inadequate." (Tr. 101–02). According to Dr. Digieso, the District failed to provide ■■■ with a proper education designed to meet his needs. (Tr. 117–19, 125–28, 131–33). She testified that ■■■ should have been tested on a regular basis and that there needed to be a plan that evaluated his progress, defined the specific problems, and implemented a program that addressed the problems, with re-evaluation to follow. (Tr. 125–28). She further testified that ■■■ should have been provided with counseling, occupational therapy, social skills training, assistive technology and extended school year services, and continued speech and language therapy. (Tr. 147–50, 256–57, 265, 267, 270). She opined that the District should have provided ■■■ with an occupational therapy evaluation when he was in second grade. (Tr. 136). Dr. Digieso further testified that placement at ■■■ High School was inappropriate. (Tr. 158–59, 161).

52. Dr. Digieso indicated that ■■■s current placement at ■■■ was appropriate. (Tr. 162). She also recommended that ■■■ attend Lindamood Bell, "a prescriptive program to help students with language difficulties, specifically with reading." (Tr. 169–72).

53. Denise Pennington testified that, when a child like [REDACTED] with attention deficits is tested, one has to be careful that attention issues do not interfere with the testing. (Tr. 1510). She also testified that anxiety is well-documented as causing difficulties with testing and the way the child responds. (*Id.*). In evaluating [REDACTED] Ms. Pennington found that his articulation, voice quality, and resonance were within normal limits, and that he was 100% intelligible. (Tr. 1510–11). She also found that “[h]is oral function and structures were within functional limits for speech and sound production” and that his “receptive and expressive skills were . . . within the average range of functioning.” (*Id.* at 1511, 1519).

54. Ms. Pennington opined, based on the results of her evaluation of [REDACTED] that he did not appear to demonstrate characteristics of pragmatic language impairment, and that his language competence was appropriate. (Tr. 1519).

55. Ms. Pennington further testified that cognitive fatigue could have affected how well [REDACTED] was able to pay attention, remember, and process during Mindy Cohen’s testing. (Tr. 1522–23). She expressed concern that Ms. Cohen did not note how fatigue could have influenced the results of her evaluation of [REDACTED] (Tr. 1523). Ms. Pennington also took issue with Ms. Cohen’s evaluation in that it did not contain all 50 items on the CELF-5’s pragmatic profile; Ms. Cohen did not appear to contemplate how social anxiety disorder, persistent depressive disorder, generalized anxiety disorder, or obsessive-compulsive disorder could have affected the results; Ms. Cohen used discrepancy analysis; and Ms. Cohen employed the TLC-EE test, which Ms. Pennington testified was outdated and had been replaced by the CELF-5. (Tr. 1529–37). According to Ms. Pennington, if [REDACTED] had speech language issues in 2013, when he was determined to no longer require speech language services, she would have noted those issues

when she tested him because they would not have gone away without intervention and, indeed, his performance would have decreased, which it did not. (Id. at 1544).

56. Sandra McColl testified regarding the psychoeducational evaluation she administered to █████ on October 7, 23, and 30 and November 13, 2015. (Tr. 1636). According to Ms. McColl, █████ appeared rushed and eager to complete the evaluation as quickly as possible on the first day. (Tr. 1637). She felt that his scores were so low because he was rushing, and were not a valid measure of his potential, and therefore decided to administer a second test. (Id.). She testified that █████ performed better on the second test. (Id.)

57. Although Ms. McColl believed █████ met the criteria for a learning disability based on the results of her evaluation, she did not see anything warranting the conclusion that █████ had a learning disability in the 2009 psychoeducational report. (Tr. 1648).

58. According to Ms. McColl, it is inconsequential whether a student is determined eligible for special education services under the category of learning disability or other health impairment because, either way, the child will have his or her needs met. (Tr. 1643–44). For example, if a child has difficulty in math skills, the IEP team would write goals to target math skills, regardless of whether the child was determined eligible under the learning disability or other health impairment category. (Tr. 1647).

59. Elizabeth Poulsen, licensed occupational therapist, reviewed the occupational therapy evaluation report prepared by Kradan Ostby and concurred with the conclusions and recommendations expressed therein. (Tr. 1398). She took issue with the evaluation conducted by Kimberlee Wing in that Ms. Wing employed the Sensory Integration and Praxis Test—which, according to Ms. Poulsen, is standardized for children ages four to nine, when █████ was thirteen at the time of testing—and the Comprehensive Trail-Making Test, which she characterized as a

neuropsychological test, the use of which was “borderline[]” outside the scope of an occupational therapists practice. (Tr. 1400–03). Ms. Poulsen was also critical of Ms. Wing’s decision to administer ██████ the TVPS-3, when he had already been administered this test twenty-two days before her evaluation, and repeated administration of this exam within six months may cause the subject to become fatigued. (Tr. 1404). Ms. Poulsen also questioned Ms. Wing’s decision to administer a caregiver questionnaire, when, given ██████’s age and verbal ability, it should have been sufficient to obtain his input. (Tr. 1406).

III. CONCLUSIONS OF LAW

1. The case at bar is governed by the 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. 160-4-7-.01, et seq.

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

A. **Claims that accrued prior to June 16, 2014 are barred by the statute of limitations**

3. Congress has provided the following statute of limitations for impartial due process hearings held under the IDEA:

Timeline for requesting hearing. A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint

20 U.S.C. § 1415(f)(3)(C).

4. The two-year statute of limitations may be tolled under either of two statutory exceptions, as follows:

Exceptions to the timeline. The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to

- (i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or
- (ii) the local educational agency's withholding of information from the parent that was required under this part [20 U.S.C.S. §§ 1411 et seq.] to be provided to the parent.

20 U.S.C. § 1415(f)(3)(D). These exceptions will toll the statute of limitations only if they prevented Petitioners from filing a due process complaint. D.K. v. Abington Sch. Dist., 696 F.3d 233, 246 (3rd Cir. 2012).

5. Petitioners bear the burden of proof to show that an exception to the statute of limitations applies. See Shaffer v. Weast, 546 U.S. 49, 56–62 (2005); M.M. v. Lafayette Sch. Dist., No. CV 09-4624, 2012 U.S. Dist. LEXIS 15631, at *62 (N.D. Cal. Feb. 9, 2012); see also D.K., 696 F.3d at 245–49. Petitioners here contend that the statute of limitations should be tolled. However, they did not meet their evidentiary burden.

i. Exception Based on Specific Misrepresentations

6. For the first tolling exception to apply, Petitioners must prove that they were prevented from requesting a due process hearing because the District made a specific, intentional misrepresentation that it had resolved the problem upon which their complaint was based. D.K., 696 F.3d, at 245. Based on the evidence presented at the hearing, the Court finds that Petitioners introduced no evidence that would merit the conclusion that the District made any misrepresentations, let alone that such misrepresentations *caused* their failure to file a timely hearing request. Id. at 246. Accordingly, the first tolling exception cannot apply.

ii. Exception Based on Withholding of Information

7. For the second tolling exception to apply, the Petitioners must prove that they were prevented from filing a due process complaint because the District withheld “information from the parent that was required under this part. . . .” 20 U.S.C. § 1415(f)(3)(D)(ii). This exception can be applied only where a school district has failed to provide statutorily mandated disclosures, i.e., “a written notice, explanation, or form specifically required by the IDEA statutes and regulations.” D.K., 696 F.3d at 246. As the record contains no credible evidence to support a finding that the District failed to supply ██████’s parents with any IDEA-mandated disclosures, the second exception to the statute of limitations, as provided in 20 U.S.C. § 1415(f)(3)(D)(ii), is likewise inapplicable.

8. Accordingly, Petitioners’ claims regarding the District’s purported failure to identify and appropriately address ██████’s speech language disabilities, emotional behavior disorders and learning disabilities, ocular motor and visual perceptual disabilities, handwriting issues, and occupational therapy and sensory integration needs are barred by the statute of limitations. Further, premitting whether such claims are barred by the statute of limitations, they are unsupported by a preponderance of the credible evidence on record.

B. Petitioners did not meet their burden to demonstrate that the District failed to provide ██████ with FAPE, with the exception of their claim regarding vision therapy

9. The overriding purpose of the IDEA is “to ensure that all children with disabilities have available to them a free appropriate public education [“FAPE”] 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). Related services include “transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.” 20 U.S.C. § 1401(26).

10. The United States Supreme Court has developed a two-part test for determining whether 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.

11. 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 [REDACTED] was deprived of a FAPE based on a procedural violation “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(2).

12. 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. Sys., 349 F.3d 1309, 1312 n.1 (11th Cir. 2003) (internal citations omitted); see J.S.K. v. Hendry Cty. Sch. Bd., 941 F.2d 1563, 1573 (11th Cir. 1991). In reviewing the record, the Court concludes that the District, through the IEP process, formulated an education for ■■■ that, while by no means perfect, was specifically designed to meet his unique needs, and supplemented with services that would permit him to benefit from the instruction.

13. Based on the initial determination of eligibility, the District provided ■■■ with supportive instruction in reading, math, and language arts, science, and social studies. After it was later determined that ■■■ exhibited speech and language difficulties, the District furnished speech and language services. The District set goals for ■■■ monitored his progress, and agreed to adjustments in his IEP as necessary. The District extensively evaluated ■■■ in 2015 and, based on those evaluations, made the reasonable determination that no speech language or occupational therapy services were necessary.

14. Petitioners’ claims that the District withheld ■■■’s educational records, failed to provide him with homework, and supplied him with answers to tests are entirely unsupported by the evidence on record.

15. Petitioners’ claim that the Districts evaluations of ■■■ were “inappropriate” is unsupported. Though Petitioners may disagree with the results of those evaluations, they were

nonetheless administered by competent professionals, who employed acceptable methods of assessment.

16. Petitioners' claim that the District denied █████ extended school year services is unsupported. █████'s parents concurred with conclusions expressed in IEPs that such services were unnecessary until 2016, at which time the IEP team agreed to provide extended school year services. Although extended school year services were not thereafter provided to █████ this was not due to any refusal or unwillingness on the part of the District.

17. The District provided █████ with assistive technology appropriately calculated to address his needs. The IDEA requires the IEP team to "consider whether the child needs assistive technology devices and services." 20 U.S.C. §§ 1414(d)(3)(B)(v). An AT device is "any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability." 20 U.S.C. § 1401(1)(A); 34 C.F.R. § 300.5. An AT service is "any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device." 20 U.S.C. § 1401(2); 34 C.F.R. § 300.6. AT services also include an evaluation of the child's AT needs, the purchase or acquisition of an AT device, and training of the child and the child's family, if appropriate. *Id.* In reviewing the IEPs developed from 2009 – 2016, it appears the IEP team repeatedly considered, and responded to, █████'s need for technology devices and services. █████ was provided with school-based desktops and netbooks and was allowed to use a word processor for tasks requiring more than three sentences. Petitioner introduced insufficient evidence to merit the conclusion that the District's provision of this assistive technology was inadequate.

18. Petitioners' claim that the District failed to develop services for [REDACTED] for the 2016-2017 school year lacks sufficient evidentiary support. The non-existence of an IEP for the 2016-2017 school year is not attributable to any failure on the part of the District. From the record, it appears the IEP team was in the process of developing a plan for [REDACTED]'s transition back to school, when [REDACTED]'s parents decided to send [REDACTED] to Boston and seek private placement.

19. Petitioners' claim that the District failed to develop an appropriate transition plan for [REDACTED] is unfounded. Under the IDEA, an IEP must include "appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills [and] the transition services (including courses of study) needed to assist the child in reaching those goals" beginning with "the first IEP to be in effect when the child is 16." 20 U.S.C. 1414(d)(1)(A)(i)(VIII). [REDACTED] is fourteen years old. Therefore, the District was under no duty to include a transition plan in his IEP.

20. Petitioners failed to show that the District improperly and unilaterally determined to place [REDACTED] in [REDACTED] High School for the 2016-2017 school year. Ms. Coleman testified that records showing [REDACTED] enrolled at [REDACTED] High School for the 2016-2017 school year were generated due to an automated system update, and did not reflect a unilateral decision by the District to place [REDACTED] there. The Court finds Ms. Coleman's testimony to be credible and persuasive.

21. In reviewing the record, the Court does not find that the District unlawfully refused to provide [REDACTED] with additional homebound instruction. Rather, the District provided [REDACTED] with homebound instruction in addition to the instruction he received in a classroom environment until his parents removed him from the classroom entirely in October 2015. Thereafter, the

parties appeared to be in continuous discord over whether [REDACTED] should have received additional homebound services or services designed to transition him back into the classroom.


22. Even assuming, arguendo, that Petitioners established that the District denied [REDACTED] FAPE, as alleged, they by no means established that they were entitled to reimbursement for costs associated with placing [REDACTED] at [REDACTED] Academy.

23. However, Petitioners established that the District should have provided [REDACTED] with vision therapy. On March 8, 2016, [REDACTED]'s parents presented the District with the evaluation of Dr. Gurbal, who indicated that [REDACTED] required 26 to 28 hours of vision therapy to remedy vision deficits. The District declined to do so. Vision therapy is a related service under the IDEA. See, e.g., DeKalb Cty. Sch. Dist. v. M.T.V., 413 F. Supp. 2d. 1322, 1327 (N.D. Ga. 2005). The evidence on record indicates that [REDACTED] had vision deficits and that these deficits impaired his ability to complete his schoolwork. See id. at 1328. The District introduced insufficient evidence to refute Dr. Gurbal's findings or recommendations. Accordingly, Petitioners may obtain 26-28 hours of vision therapy for [REDACTED] the cost of which must be reimbursed by the District. Such therapy may be conducted by Dr. Gurbal or a professional of Petitioners' choosing, but at a reasonable and customary rate for such services. Petitioners are not entitled to transportation costs or other expenses incidental to vision therapy.

IV. DECISION

Based on the foregoing findings of fact and conclusions of law, the undersigned concludes that Petitioners are entitled to the above-described relief for the District's failure to provide [REDACTED] with vision therapy. However, Petitioners otherwise failed to demonstrate that they are entitled to relief under the IDEA.

SO ORDERED, this 20th day of January, 2017.



Steven W. Teate
Administrative Law Judge