IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[redacted] by and through [redacted] and [redacted]	:	
	:	
Petitioners,	:	
	:	**Docket No.:1810680**
v.	:	**1810680-OSAH-DOE-SE-121-SCHROER**
	:	
RICHMOND COUNTY SCHOOL DISTRICT,	:	
	:	
Respondent.	:	

FINAL DECISION

I. INTRODUCTION

On September 19, 2017, [redacted] through his mother, [redacted] filed a due process complaint pursuant to the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA"). The due process hearing was held before the Office of State Administrative Hearings ("OSAH") on November 13, 2017. [redacted] represented herself and [redacted] at the hearing. Respondent Richmond County School District was represented by Leonard O. Fletcher, Esq. and Kim Fletcher Bowen, Esq. The record remained open following the conclusion of the hearing in order for the parties to file post-hearing briefs. Due to the complexity of the issues and the length of the record, the deadline for the issuance of the decision was extended to January 22, 2018, pursuant to 34 C.F.R. § 300.515(c) and Ga. Comp. R. & Regs. 616-1-2-.27.

II. FINDINGS OF FACT

1.

[redacted] is [redacted] years old. Until January 2017, he lived with his mother and siblings in [redacted] Georgia and attended school in the Richmond County School District ("School District"). [redacted] was born premature at 31 weeks and has a number of medical issues, including

asthma and epilepsy. [redacted] also had some developmental delays in his early years and received services through Georgia's "Babies Can't Wait," an early intervention program. During the 2015-2016 school year, [redacted] attended pre-kindergarten ("Pre-K") at [redacted] Elementary School. Because of his medical conditions, [redacted] and [redacted] Elementary staff developed asthma and seizure action plans for [redacted] during Pre-K. (Testimony of [redacted] Exhibit P-8.)

2.

In August 2016, [redacted] began kindergarten at [redacted] Elementary. His teacher was [redacted] L[redacted]. Ms. L[redacted] described [redacted] as a sweet, loving child, who was a little immature for his age and who, at times, had to be redirected to stay on task. For the most part, Ms. L[redacted] found [redacted] to be performing as a typical kindergartener during the early months of school. She noticed that [redacted] sometimes wrote his letters and numbers backwards or upside down, but she considered that to be very common for children his age. (Testimony of S. L[redacted].)

3.

As with all the children in her class, Ms. L[redacted] administered a number of diagnostic tests to determine [redacted]s baseline skills and monitor his progress through the school year. According to Ms. L[redacted], although [redacted]s baseline scores were below average at the beginning of the school year, [redacted]s scores were gradually going up from month to month and she was not concerned with his rate of progress.[1] With respect to [redacted]s speech, Ms. L[redacted] detected a lisp, but both she and his

1 Although the witnesses mentioned a number of diagnostic tests that were administered to [redacted] at the beginning of kindergarten, including GKIDS (Georgia Kindergarten Inventory of Developing Skills), DIBELS (Dynamic Indicators of Basic Early Literacy Skills), and i-Ready, the only exhibits relating to [redacted]'s actual test results in the record are two i-Ready growth monitoring reports for Language Arts and Math. These reports corroborate Ms. L[redacted]'s testimony that [redacted]s scores were going up gradually, but were somewhat below average. (Exhibits P-15, P-16.) Moreover, although Debbie Alexander, the associate superintendent for the School District, testified generally regarding two GKIDS reports from March and April 2017, these reports were prepared by the DeKalb County School District after [redacted] left Richmond County, and they were not admitted into evidence in this case. Dr. Alexander testified that although the DeKalb GKIDS reports appear to indicate that [redacted] was not

peers could easily understand him. In general, compared to other students in his class, [redacted] appeared to have average language skills, except for his understanding of the concept of print, which Ms. L[redacted] rated as significantly below average. (Testimony of S. L[redacted]; Exhibit P-11.)

4.

About eight weeks into the 2016-2017 school year, [redacted] asked R[redacted] M[redacted], [redacted] Elementary School's principal, to schedule a meeting to discuss [redacted]'s concerns regarding [redacted].[2] Specifically, [redacted] was concerned with reports from Ms. L[redacted] that [redacted] was having problems with fine motor skills, especially writing, and with his behavior. According to [redacted] she and Ms. M[redacted] had a difficult relationship as a result of their past interactions involving [redacted]s older son. Ms. M[redacted] did not schedule the meeting as quickly as [redacted] would have liked, which [redacted] attributes to Ms. M[redacted]'s animosity toward her. Eventually, Ms. M[redacted] arranged to meet with [redacted] on October 20, 2016. A number of other [redacted] Elementary educators also attended this meeting, including Ms. L[redacted], C[redacted] L[redacted], [redacted] Elementary's vice-principal; J[redacted] C[redacted], an educator who serves as a "Response to Intervention" or "RTI" chairperson; and others. (Testimony of S. L[redacted], J. C[redacted], C. L[redacted]; Exhibit P-1.)

5.

By all accounts, the October 20, 2016 meeting began on a positive note. The participants discussed [redacted] and his [redacted] brother, their medical issues and their past involvement with Babies Can't Wait, as well as their academic performance. As the meeting progressed, the participants discovered that [redacted]s medical records from Babies Can't Wait and his health action plans from

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performing on grade level in several areas during the spring of 2017, she could not interpret the test results without additional information. (Testimony of D. A[redacted].)

2 [redacted] has a [redacted] brother who also attended kindergarten at [redacted] Elementary. [redacted] sought a meeting to discuss both children. (Testimony of C. L[redacted]; Exhibit P-1.)

Pre-K were not in his school file.[3] However, [redacted] had some of these records with her and offered to provide the school with copies.[4] The school also requested updated medical documentation from [redacted]'s medical providers. (Testimony of J. C[redacted], C. L[redacted], S. L[redacted], [redacted]; Exhibit P-1.)

6.

Even without all of [redacted]s medical records, [redacted] and the other meeting participants generally discussed [redacted]s medical conditions, particularly his asthma and epilepsy diagnoses. The preponderance of the evidence showed that [redacted] did not raise specific concerns at that time regarding whether [redacted]s medical conditions, particularly his seizures, were interfering with or hindering his academic performance in the classroom, and the group did not discuss this possibility.[5] Rather, his teachers reported that [redacted] was "thriving" despite his medical conditions, and Ms. L[redacted] reported that he was making progress and performing on grade level. His teachers did not identify any issues requiring additional interventions, but proposed that [redacted]s file be "left open" and revisited in the future when more data was available. (Testimony of J. C[redacted], C. L[redacted], S. L[redacted], [redacted] Exhibit P-1.)

7.

At the end of the meeting, [redacted] and Ms. M[redacted] began a heated discussion regarding an unrelated matter. Following a rather hostile exchange between the two, [redacted] stated that she did

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3 Some of these records were later located by the school and brought to a meeting with [redacted] in November or December 2016. (Testimony of C. L[redacted].)

4 Although [redacted] asserted that the School District refused to accept certain of the medical documents that she offered, the Court finds that there is insufficient probative evidence regarding which documents were presented by [redacted] and which were accepted by the School District during the October 20, 2016 meeting.

5 [redacted] frequently raised questions at the administrative hearing regarding the School District's failure to address [redacted]s seizure disorder. However, she did not identify any specific interventions or services that should have been offered, and there is no evidence regarding the severity of his condition or any possible or actual effects of seizure activity on [redacted]s access to education, performance in the classroom, or need for special education.

not agree with the group's recommendations as to [redacted] and his brother. She also noted her general disagreement in writing on the summary of the meeting notes. Having weighed the testimony of all the witnesses, the Court finds that although [redacted]s general dissatisfaction with Ms. M[redacted] was obvious, [redacted] did not identify any specific areas of disagreement related to the group's plan, nor did she request that the School District conduct any particular evaluation or offer any particular service to [redacted][6] (Testimony of J. C[redacted], C. L[redacted], S. L[redacted], [redacted] Exhibit P-1.)

8.

Following the October 20, 2016 meeting, on or about October 31, 2016, [redacted] contacted T[redacted] N[redacted], the Director of Special Education and Support Services for the School District, to complain about Ms. M[redacted] and express her frustration with the October 20, 2016 meeting. At that time, [redacted] specifically requested that the School District conduct a psychological evaluation of [redacted] At the administrative hearing, Ms. N[redacted] acknowledged that [redacted] made the request for a psychological evaluation on October 31, 2016, but she is unsure whether or how she documented the request. Ms. N[redacted] did recall contacting Ms. M[redacted] shortly after she received [redacted]s request, and Ms. N[redacted] testified that she expected Ms. M[redacted] to set up a formal RTI meeting to discuss [redacted]s request. According to Ms. N[redacted], [redacted]s request did not "automatically" entitle [redacted] to a formal psychological evaluation.[7]

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6 The only specific complaint identified on the meeting summary was that [redacted] did not agree that [redacted]s twin brother needed a speech consult. (Exhibit P-1.)

7 Although Ms. N[redacted] testified that some conditions, such as blindness, might trigger an immediate referral for an evaluation for special education services, neither epilepsy nor developmental delays would warrant immediate referral. Rather, according to Ms. N[redacted], the School District had the right to say "no" to a parent request for a psychological evaluation and, instead, put into place interventions through the RTI process, which is described in more detail below. Ms. N[redacted] did acknowledge that generally a Student Support Team ("SST") would need to consider a parent's request for an evaluation and provide "prior written notice" if the SST decided to deny the parent's request. (Testimony of Ms. N[redacted].)

Rather, Ms. Newsome testified that an SST should have been convened to determine if such an evaluation was appropriate. (Testimony of T. Newsome, [redacted]

9.

There is no evidence in the record that Ms. N[redacted] specifically relayed [redacted]s request for a psychological evaluation to Ms. M[redacted] or to anyone else in the School District. S[redacted] V[redacted], a school psychologist for the School District, testified that she was only aware of a request for Speech/Language ("SL") and Occupational Therapy ("OT") assessments of [redacted] Ms. V[redacted] never received a referral for a psychological evaluation for [redacted] but testified that she believed that if [redacted] had made such a request, the SST would have been required to review the data regarding [redacted]s progress and to consider [redacted]s request. As a general matter, parent requests for evaluations are often granted, according to Ms. V[redacted], after the proper documentation is collected and the parent signs a consent for an initial evaluation. Once a parent consent is received, the School District generally has sixty days to complete the evaluation. (Testimony of S. V[redacted].)

10.

The Court finds that the School District considered [redacted]s October 31, 2016 request to Ms. N[redacted] to be primarily a request for a Section 504[8] plan for [redacted] and not a request for an initial evaluation under IDEA. On November 3, 2016, the School District held an Initial Section 504 Disability Determination meeting for [redacted] which was led by D[redacted] A[redacted], the

8 Section 504 of the Rehabilitation Act of 1973, codified as 29 U.S.C. § 794, makes it unlawful for a program receiving federal funding to discriminate against, exclude from participation, or deny the benefits of the program to an individual "solely by reason of her or his disability." The evidence in the record shows that on October 31, 2016, [redacted] emailed Ms. Newsome and complained that Ms. M[redacted] had "refused" to convene a Section 504 meeting for [redacted] and his brother. As set forth in this Court's *Order Granting in Part and Denying in Part Respondent's Motion to Dismiss*, issued on November 3, 2017, Petitioner's claims relating to Section 504 are not within the scope of this due process hearing under IDEA. Therefore, the Final Decision does not address whether the School District's actions complied with Section 504. Rather, the Section 504 meetings are considered only to the extent that they relate to Petitioner's claim that the School District's failed to properly and timely identify [redacted] as a student with a disability under IDEA.

Associate Superintendent. In addition to [redacted] and Dr. A[redacted], several other individuals attended the Section 504 meeting, including, among others, Ms. L[redacted], Ms. M[redacted], Ms. V[redacted], and the School District's attorney, Ms. Fletcher-Bowen. [redacted] again provided medical records and background information to the group regarding [redacted]s asthma and seizures. However, the participants did not discuss his medical conditions in any detail and did not develop any interventions to address them, other than limiting his outside play to reduce asthma attacks. Rather, the group focused on [redacted]s reported fine motor difficulties, which they concluded presented a substantial limitation to [redacted]s learning to write. The group determined that [redacted] met Section 504 eligibility requirements and identified his "OT needs" as follows:

> OT needs – Writing affected by some fine motor skills.. [sic] letters turn side-ways, paper direction, time will tell if this just developmental but the teacher will continue to monitor[.]

(Testimony of D. A[redacted]; Exhibit P-8.)

11.

The Section 504 group also developed some preliminary accommodations, which they expected to adjust over time as more information was collected. Specifically, the following accommodations were identified for [redacted] on November 3, 2016: (i) limiting outside play according to [redacted]s asthma plan or weather conditions, (ii) obtaining an OT consult, and (iii) using highlight and arrows to indicate paper direction, hand over hand support, and symbols to support visual cues. The only referral identified on the Section 504 plan was for an OT consult. There was no mention of the development of a seizure action plan for [redacted] or [redacted]'s request for a psychological evaluation, and none of the School District witnesses recalled [redacted] mentioning either of these issues at the November 2, 2016 meeting. Instead, the preliminary Section 504 plan noted that [redacted] was generally "doing well with Math and thriving in other

areas. Writing is the only area of concern." (Testimony of D. A[redacted], S. L[redacted]; Exhibit P-8.)

12.

[redacted] signed a copy of the Section 504 plan on or about November 3, 2016. She did not check the box to indicate whether she agreed or disagreed with the team's decision and the plan, but there is a handwritten note at the bottom of the page that says that "[p]arent would like to be notified and be present for evaluations." At the administrative hearing, [redacted] testified that she discussed many other concerns that were not reflected in the written Section 504 plan, including her concern regarding the validity of some of the diagnostic assessments, particularly i-Ready, [redacted]'s respiratory condition and epilepsy,[9] and his reported overly-affectionate behaviors in the classroom. She also testified that she felt intimidated by the presence of the School District's lawyer and dissatisfied with the minimal, generic interventions listed. Finally, [redacted] was concerned that the outcome of the meeting was pre-determined and, in part, dictated by Ms. Fletcher-Bowen. However, both Dr. A[redacted] and Ms. L[redacted] testified that Ms. Fletcher-Bowen did not prompt Ms. L[redacted] or anyone else to change their statements regarding [redacted] in any way. The Court finds that there is insufficient evidence in the record to prove that Ms. Fletcher-Bowen acted inappropriately at the meeting or interfered with Ms. L[redacted]'s participation in the meeting. (Testimony [redacted] S. L[redacted], D. A[redacted]; Exhibit P-8.)

13.

It is not clear from the evidence in the record whether the November 2, 2016 meeting was intended to serve as an RTI meeting, as well as a Section 504 meeting, and there is no evidence that the meeting resulted in any formal change in [redacted]s RTI status. As Ms. L[redacted] explained, all

9 Although [redacted] initially testified that she brought up her concern that [redacted]s seizures might be affecting his fine motor skills and academic performance, she later acknowledged that she may not have used the exact wording that she used at the hearing to describe these concerns. The Court finds, based on the testimony of all the witnesses who attended the November 2, 2016 meeting, that although [redacted]'s epilepsy was mentioned at the meeting, it was not discussed in detail and was not presented as an academic problem for [redacted]

students in the School District start in "Tier 1" of Georgia's four-tiered RTI model of instruction, but they may move up or down the tiers depending on their need for more specialized interventions and instruction.[10] The evidence in the record showed that the participants in the October 20, 2016 meeting did not determine whether [redacted] should move from Tier 1 to Tier 2,[11] and there is no evidence in the record regarding whether the participants in the November 2, 2016 Section 504 meeting even discussed RTI tiers with respect to [redacted] According to Dr. A[redacted], the School District considers any student who is found eligible for Section 504 accommodations to be in Tier 3, which requires an SST to formally identify a student's barriers to learning and develop individual interventions tailored to the student's needs. Tier 3 also requires frequent progress monitoring and analysis of a student's response to the interventions. (Testimony [redacted] D. A[redacted]; S. L[redacted], J. C[redacted]; Exhibit ALJ #1.)

14.

According to Ms. L[redacted], although she was given a copy of [redacted]s Section 504 plan after the November 2, 2016 meeting, she was not instructed to collect any particular data with respect to [redacted] as a result of the plan. She continued to provide differentiated instruction to [redacted] and all the children in her class and used the same diagnostic tests, namely the i-Ready tests, to monitor their progress. Dr. A[redacted] testified that the collection of monitoring data is not generally required as part of a Section 504 plan, although it would be part of the RTI process. In fact,

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10 As discussed more fully below, Georgia has adopted an RTI model for the delivery of instruction. See Dr. John D. Barge, Response to Intervention: Georgia's Student Achievement Pyramid of Interventions (2011), available at http://www.gadoe.org/Curriculum-Instruction-and-Assessment/Curriculum-and-Instruction/Pages/Response-to-Intervention.aspx (Georgia's RTI Guide"). A copy of Georgia's RTI Guide has been included in the record as Exhibit ALJ #1. Essentially, RTI seeks to assist struggling learners in the general education setting by providing research-based interventions and monitoring their response to those interventions before referring them for special education. Id.

11 Ms. C[redacted] testified that she was the RTI chair for the October 20, 2016 meeting and that she expected the group to discuss whether [redacted] would be in Tier 1 or Tier 2. However, after [redacted] and Ms. M[redacted]'s discussion became heated, the meeting ended without a decision regarding [redacted]s tier. (Testimony of J. C[redacted].)

Georgia's RTI Guide emphasizes the importance of data collection to monitor the effectiveness of interventions in every tier. There is no evidence in the record that the November 2, 2016 meeting resulted in the identification of any specific interventions or the collection of data regarding [redacted]s response to such interventions. Instead, the School District adopted a "time will tell" approach in light of [redacted]'s young age and his steady progress on the diagnostic tests, and they scheduled another meeting approximately one month later. (Testimony of S. L[redacted], D. A[redacted]; Exhibit ALJ #1; Exhibit P-8.)

15.

Before the next meeting occurred, on or about November 18, 2016, which was the last day of school before Thanksgiving break, [redacted] was sick at school and began vomiting. Ms. L[redacted] testified that [redacted] went to the front office, where he continued to vomit frequently. The school called [redacted] who arrived a few hours later, by which time [redacted] had begun to feel better and was no longer vomiting. [redacted] was exasperated that she was called to school when [redacted] did not appear sick, and she testified that she made critical comments on social media about Ms. M[redacted] and the school's handling of this incident. Although the evidence in the record is not sufficient to prove exactly what transpired between [redacted] and [redacted] Elementary staff that day, the evidence does show that either Ms. M[redacted] or someone else told Ms. L[redacted] that [redacted] intended to withdraw [redacted] from the School District. The evidence also shows that Ms. L[redacted] filled out a withdrawal form that indicated that [redacted] would be off the [redacted] Elementary roll as of November 28, 2016. (Testimony [redacted] S. L[redacted]; Exhibit P-6.)

16.

[redacted] denies stating that she intended to withdraw [redacted] in November, and [redacted] returned to [redacted] Elementary after the Thanksgiving break and was not removed from the School

District's roll at that time. On December 8, 2016, K[redacted] L[redacted], an occupational therapist, spent about thirty minutes to an hour conducting an OT screening of [redacted] observing him in the classroom, and reviewing his writing samples. As she had requested, [redacted] was present during the screening. Ms. L[redacted] observed that [redacted] behaved appropriately and could walk, use his hands, hold a pencil, and use scissors independently. She did note that his writing samples showed frequent reversals and fair to poor letter formation. She concluded that [redacted] needed foundational skills for handwriting and that he would benefit from continued instruction in writing mechanics, frequent movement breaks, and the use of an alphabet strip. (Testimony of [redacted] K. L[redacted], D. A[redacted]; Exhibit P-10.)

17.

The next day, December 9, 2016, Dr. A[redacted] led a Section 504 meeting to consider possible amendments to [redacted]s Section 504 plan. [redacted] was present, along with Ms. C[redacted], Ms. L[redacted], Ms. V[redacted], and Ms. M[redacted]. The group considered Ms. L[redacted] report and her recommendation of supplemental writing curriculum. The notes from the meeting stated that the group believed it was too early to determine the significance of [redacted]s handwriting difficulty or to determine whether he needed additional services. The amended plan stated that Ms. L[redacted] would identify appropriate handwriting supports and continue the accommodations from the original Section 504 plan. The team also concluded that [redacted] still needed a speech consult, a finalized asthma plan, and handwriting benchmarks in order to monitor his progress. The summary of the meeting concluded that progress had been made, but the problem has not been resolved, and [redacted] should remain at Tier 3. Dr. A[redacted] testified that [redacted] did not request a psychological evaluation at the December 9, 2016 meeting or request that [redacted] be considered for special education at that time. Dr. A[redacted] believed that [redacted] agreed with the plan to

continue monitoring [redacted]s progress and obtain additional consults. (Testimony of D. A[redacted], [redacted] Exhibit P-9.)

18.

[redacted] signed the amended Section 504 plan and checked a box indicating her agreement with the team's decision and the accommodation plan. However, at the administrative hearing, [redacted] testified that she had not been fully satisfied with the plan, which she considered to be no different from the original Section 504 plan. She also testified that the participants of the meeting sometimes confused [redacted] with his [redacted] brother and that the plan was not individually tailored to [redacted]s needs. Finally, she testified that she had expressed her continued frustration with Ms. M[redacted] to Dr. A[redacted] at the meeting, but did not get a satisfactory response. (Testimony [redacted]

19.

Following the December 9, 2016 meeting, [redacted] testified that the school did not collect any progress monitoring data before the winter break, which may have been because Ms. L[redacted] was out on medical leave during some of this time. There is no evidence in the record to show what progress monitoring was conducted during this period, whether any of the interventions listed in the Section 504 plan were implemented, or how [redacted] responded to these interventions. [redacted] attempted to contact Ms. N[redacted] on or about December 20, 2016 to discuss her continued concerns regarding [redacted] but she did not hear back from her. Shortly after [redacted] returned to school in January, on or about January 9, 2017, Ms. L[redacted] completed a checklist regarding [redacted]s language skills, which she gave to K[redacted] G[redacted], a speech therapist. Ms. G[redacted] observed [redacted] in the classroom on January 10, 2017, but did not observe anything that led her to conclude that he needed a formal evaluation for speech therapy. (Testimony of K.

G[redacted], S. L[redacted], [redacted] Exhibits P-11, P-12, P-15, P-16.)

20.

On or about January 12, 2017, [redacted] withdrew [redacted] from the School District. She and her children moved to DeKalb County, and [redacted] was enrolled in [redacted] Elementary School in Decatur, Georgia. The evidence in the record showed that the DeKalb County School District conducted formal evaluations of [redacted] in the spring of 2017 and that he was ultimately determined to be eligible for special education under IDEA.[12] (Testimony of [redacted] T. N[redacted]; Exhibit P-7.)

21.

[redacted] filed a due process complaint against the Richmond County School District on September 19, 2017. She alleged that she had asked for Section 504 accommodations for [redacted] while he was in Pre-K and was denied by the then-principal of [redacted] Elementary, E[redacted] D[redacted]. She also alleged that during the October 2016 meeting, Ms. M[redacted] had refused to consider [redacted] for Section 504 accommodations without medical documentation. [redacted] also made a number of allegations regarding Ms. M[redacted] and her involvement with one of [redacted]s older siblings. In addition, she described her communication with Ms. N[redacted] on October 31, 2016, the scheduling of the November 2, 2016 Section 504 meeting, and her request that Ms. Fletcher-Bowen not participate in the meeting because she found her presence intimidating. Finally, [redacted] alleged that during the November 2, 2016 meeting, Ms. Fletcher-Bowen prompted Ms. L[redacted] to change some of her statements, particularly Ms. L[redacted]'s alleged statements that [redacted] exhibited signs of a "learning disability" and concerning behavior, including improper touching

12 A few days after the administrative hearing in this case, the Court conducted a hearing on a due process complaint filed by [redacted] and [redacted] against the DeKalb County School District. However, for purposes of this Final Decision, the Court has considered only the evidence admitted into the record in this case in adjudicating Petitioners' claims against the Richmond County School District.

and confrontations with peers. In the complaint, [redacted] sought payment by the School District for occupational therapy for [redacted] for one year, handwriting assistive technology, other unspecified compensatory services, and punitive damages.

22.

On November 3, 2017, the Court issued an *Order Granting in Part and Denying in Part Respondent's Motion to Dismiss*. In this order, the Court dismissed Petitioners' claims relating to Section 504, but allowed Petitioners to proceed with their claim that the School District failed to identify [redacted] as a child with a disability in need of special education services under IDEA.

III. CONCLUSIONS OF LAW

A. General Law

1.

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

2.

Petitioners bear the burden of proof in this matter. *Schaffer v. Weast*, 546 U.S. 49 (2005); Ga. DOE Rule 160-4-7-.12(3)(l); OSAH Rule 616-1-2-.07. The standard of proof on all issues is a preponderance of the evidence. OSAH Rule 616-1-2-.21(4).

3.

Claims brought under IDEA are subject to a two-year statute of limitations. 20 U.S.C. § 1415(f)(3)(C); 34 C.F.R. §§ 300.507(a)(2), 511(e).

B. Child Find

4.

Under IDEA, states are required to establish policies to ensure that children with disabilities are identified, located, and evaluated. 34 C.F.R. § 300.111(a)(1)(i). These provisions are known as the "Child Find" provisions of IDEA. See M.G. v. Williamson Cty. Sch., 2018 U.S. LEXIS 522 (6th Cir. Jan. 9, 2018); Phyllene W. v. Huntsville City Bd. of Educ., 630 Fed. Appx. 917, 925 (11th Cir. 2015) (recognizing school districts' continuing obligation to identify and evaluate all students who are reasonably suspected of having a disability).

> The first responsibility of an educational authority is to locate and identify children who might be disabled in some way. Once such students are identified, the authority must have a particular kind of procedures for the evaluation of such students to determine the nature of their disability, if any, and to decide whether they are eligible for special education services. Students are to be evaluated by a multidisciplinary team of teachers and counselors, which in Georgia is known as the Student Support Team.

Clay T. v. Walton Cty. Sch. Dist., 952 F. Supp. 817, 822 (M.D. Ga. 1997). The federal district court in Clay T. found that in order to establish that a school violated its obligation to identify a child with a disability under IDEA, a party "must show that school officials overlooked clear signs of disability and were negligent in failing to order testing, or that there was no rational justification for not deciding to evaluate." Id., cited by Bd. of Educ. v. L.M., 478 F.3d 307, 313 (6th Cir. 2007) (adopting Clay T. standard); J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d. 635, 661 (S.D.N.Y. 2011) (same).

5.

Although the Child Find provisions do not impose a specific deadline for identifying and evaluating students with suspected disabilities, "evaluation should take place within a 'reasonable time' after school officials are put on notice" that a child might have a disability.

Sch. Bd. of the City of Norfolk v. Brown, 769 F. Supp. 2d 928, 942 (E.D. Va. 2010) (citations omitted). See also Dallas Indep. Sch. Dist. v. Woody, 865 F.3d 303, 320 (5th Cir. 2017); D.K. v. Abington Sch. Dist., 696 F.3d 233, 250 (3d. Cir. 2012) (courts "have inferred a requirement that schools identify disabled children within a reasonable time after school officials are on notice of behavior that is likely to indicate a disability") (citations omitted). A local school district can be deemed to have knowledge of a suspected disability when a parent has expressed concern in writing that the child is in need of special education or "the parent has requested an evaluation of the child pursuant to section 1414(a)(1)(B)." Id., citing 20 U.S.C. § 1415(k)(5)(B).[13] Failure to comply with the Child Find mandates may constitute a procedural violation of IDEA. Id.; see also Phyllene W., 630 Fed. Appx. at 928.

6.

The Child Find provisions arise, in part, out of the importance of early identification and evaluation of children with disabilities, especially children with disabilities where early intervention is critical in minimizing the negative effects of the disability on a child's ability to communicate and learn. See, e.g., Timothy O. v. Paso Robles Unified Sch. Dist., 822 F.3d 1105, 1108-09 (9th Cir. 2016) (discussing importance of early special education services for children with autism).

> That this evaluation is done early, thoroughly, and reliably is of extreme importance to the education of children. Otherwise, many disabilities will go undiagnosed, neglected, or improperly treated in the classroom. See id. § 1400(c). For this reason, the IDEA requires that local school districts must "conduct a full and individual initial evaluation" of a child "*before* the initial provision of special education and related services" to that child. Id. § 1414(a)(1)(A) (emphasis added). Furthermore, the IDEA and its accompanying regulations contain an extensive set of procedural requirements that are designed

13 This section of IDEA provides protections for children who have not yet been found eligible for special education, but who have engaged in behavior that violates the code of student conduct. IDEA provides that such students may assert the protections of a student with a disability when faced with certain disciplinary actions if the local agency had knowledge that the child had a disability before the behavior occurred. 20 U.S.C. § 1415(k)(5)(B).

> to ensure that this initial evaluation (as well as any subsequent reevaluations) achieves a complete result that can be reliably used to create an appropriate and individualized educational plan tailored to the needs of the child.

Id. at 1110.

C. Response to Intervention (RTI)

7.

On the other hand, "[a]s several courts have recognized, Child Find does not demand that schools conduct a formal evaluation of every struggling child." D.K. v. Abington Sch. Dist., 696 F.3d at 249 (citations omitted). Moreover, following the 2004 amendments to IDEA, Georgia and other states began using an RTI model to help identify students with specific learning disabilities and to help general education students who are at risk of academic failure. See Genna Steinberg, Amending § 1415 of the IDEA: Extending Procedural Safeguards to Response-to-Intervention Students, 46 Colum. J.L. & Soc. Prob. 393, 408 (Spring 2013) (Georgia among 12 states that mandate the use of RTI).[14] As discussed previously, RTI refers to a multi-tiered system, where students who are struggling in the classroom "are provided increasingly intense and tailored instruction before they are determined eligible for special education." Angela Ciolfi and James Ryan, Race and Response-to-Intervention in Special

14 This article outlines the history of the development of RTI in response to the over-inclusion of students in special education, particularly students identified as having specific-learning disabilities. In addition, Georgia has a unique relationship with RTI, dating back to the 1980s and a class action lawsuit against the State of Georgia that alleged that black students were disproportionately identified as intellectually disabled and removed from the general education setting. See generally Georgia State Conf. of Branches of NAACP v. Georgia, 775 F.2d 1403 (11th Cir. 1985). In Georgia's RTI Guide, the Georgia Department of Education refers to this litigation as the Marshall v. Georgia case and discusses the federal district court's 1984 permanent injunction, which required every public school in Georgia to have an SST. The SST process was designed to prevent inappropriate referrals to special education by requiring the SST to identify alternative instructional strategies for children prior to or in lieu of a special education referral. Although the Marshall v. Georgia plan acknowledged "limited instances" where the SST process would be unnecessary, bypassing the SST was only appropriate where "the necessity for special education is so clear that use of non-special education options would be non-productive or harmful to the child. In those cases where initial referral is not to the [SST], the reasons therefor will be documented." Georgia's RTI Guide describes in greater detail how the SST process fit generally into the nationwide trend toward RTI, as well as its integral role in Tier 3 of Georgia's "Student Achievement Pyramid of Interventions." (Exhibit ALJ-1, at pp. 3, 44-45.)

Education, 54 How. L.J. 303, 305 (Winter 2011);[15] see also G. Steinberg, Amending § 1415 of the IDEA, 46 Colum. J.L. & Soc. Prob. at 404-405.

8.

In Georgia, RTI is mandatory. See Ga. Comp. R. & Regs. R. 160-4-7-.03(2). In its Child Find rules, the Georgia Department of Education provides the following:

> (2) INTERVENTIONS PRIOR TO REFERRAL.
>
> (b) Prior to referring a student for consideration for eligibility for special education and related services, a student must have received scientific, research or evidence based interventions selected to correct or reduce the academic, social or behavioral problem(s) the child is having.
>
> 1. Student referrals must be accompanied by documentation of scientific, research or evidence based academic and/or behavioral interventions that have been implemented as designed for the appropriate period of time to show effect or lack of effect that demonstrates the child is not making sufficient rate of progress to meet age or State-approved grade-level standards within a reasonable time frame.
>
> 2. Exceptions may be made in circumstances where immediate evaluation and/or placement is required due to significant disability that precludes access to instruction.
>
> 3. The exception noted in (2)(b)2 should be an infrequent and rare occurrence, and the circumstances evidencing the need for the [school district's] use of the exception must be clearly documented in the eligibility decision.

Id.

9.

Georgia's use of RTI is not inconsistent with IDEA's Child Find provisions. See Hupp v. Switzerland of Ohio Local Sch. Dist., 912 F.Supp.2d 572 (S.D. Ohio 2012); G. Steinberg, Amending § 1415 of the IDEA, 46 Colum. J.L. & Soc. Prob. at 403, 408 (IDEA does not

15 "RTI, is at bottom, a general approach to education, especially for students at risk of failure. . . . [T]hese three elements [of RIT] – universal screening, student progress monitoring, tiered intervention – are the basic elements of good instruction.'" Id. at 317.

mandate use of RTI, but the 2004 amendments enabled schools to implement RTI); see also 20 U.S.C. § 1414(b)(6)(B) ("In determining whether child has a specific learning disability, a local educational agency may use a process that determines if child responds to specific, research-based intervention as part of the evaluation procedures. . . ."). Moreover, just as there is no set timeframe for when an evaluation must occur upon suspicion of a disability, there is no specific time period during which a district must complete its interventions and refer a student for a special education evaluation. Id. In the L.M. case, the Sixth Circuit held that when a school district was trying specialized interventions during a child's kindergarten and first grade years with moderate success, there was a rationale justification for postponing a special education evaluation. Bd. of Educ. v. L.M., 478 F.3d at 313-14. "'[I]t is difficult to assess whether a very young child is disabled or merely developing at a rate different from his peers, and the educational experts involved all seem to indicate that a hasty referral for special education can be damaging to a child.'" Id.

10.

Having considered the actions of the School District in this case, the Court concludes that the evidence in the record does not support a finding that the [redacted] Elementary educators overlooked clear signs of disability or were negligent in failing to order a psychological evaluation for [redacted] before he transferred out of the School District in January 2017. Similarly, the Court concludes that given Georgia's mandated RTI process, the School District had a rational basis for trying to identify and implement specialized interventions to address [redacted]'s handwriting and other problem areas before referring him for an initial evaluation for special education. Although the School District had notice that [redacted] was struggling in some areas, there was no evidence in the record that [redacted] had a significant disability that was preventing him from

accessing instruction such that Georgia law would permit an immediate evaluation for special education. Rather, Georgia law required the School District to design and implement tailored interventions over a period of time, monitor [redacted]s responsiveness to them, and determine whether [redacted] could make progress toward meeting grade-level standards within a reasonable period of time. Ga. Comp. R. & Regs. 160-4-7-.03(2).

11.

That process was just beginning at [redacted] Elementary. Consequently, even though [redacted] Elementary and the School District could have been more vigilant and acted with more urgency in developing the appropriate interventions for [redacted] their actions through January 12, 2017, when [redacted] withdrew from the School District, were not unreasonably slow or ineffective. Moreover, whether the School District strictly complied with the provisions of Georgia's RTI Guide is not within the scope of an IDEA due process hearing.[16] As [redacted] effectively pointed out at the hearing, the School District had a somewhat leisurely and nebulous approach to RTI with respect to [redacted] which very well may have violated the provisions of Georgia's RTI Guide. Nevertheless, because the School District's approach to RTI was not so dilatory as to be negligent, the Court concludes that it did not violate the Child Find provisions to identify and evaluate a child with a suspected disability within a reasonable period of time.

D. Prior Written Notice

12.

Although the School District was entitled to use RTI before granting [redacted]s request for a psychological evaluation on October 31, 2016, they were not free to ignore it. Rather, "[i]f a school district wishes to deny the request, it must provide written notice to the parents explaining

16 G. Steinberg, Amending § 1415 of the IDEA, 46 Colum. J.L. & Soc. Prob. at 422 (RTI students are denied the procedural safeguards afforded to students in special education).

that it refuses to conduct an initial evaluation and provide an explanation as to why it does not suspect the child has a disability and what records or evaluations it used as the basis for its decision." Timothy O. v. Paso Robles Unified Sch. Dist., 822 F.3d at 1110, citing 34 C.F.R. § 300.503 (a) & (b). Then, the parent can choose to accept the school district's decision or challenge it by filing a due process hearing request or a state complaint. Id., citing 34 C.F.R. §§ 300.507, 300.153.

13.

The Court concludes that the School District violated the procedural safeguards of IDEA by failing to provide [redacted] with prior written notice of its decision to shelve her request for a psychological evaluation on October 31, 2016. However, "'[v]iolation of any of the procedures of the IDEA is not a per se violation of the Act.'" K.A. v. Fulton County Sch. Dist., 741 F.3d. 1195, 1205 (11th Cir. 2013), quoting Weiss v. Sch. Bd., 141 F.3d 990, 996 (11th Cir. 1998). Under IDEA, in order to be entitled to relief for a procedural violation, Petitioners must show that the procedural inadequacies "(i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit." See 34 C.F.R. § 300.513(2); 20 U.S.C. § 1415(f)(3)(E). The Eleventh Circuit has held that a parent is not entitled to relief under IDEA where there was no evidence of prejudice to a student or parents from defects in notice or delay in producing records. K.A. v. Fulton County Sch. Dist., 741 F.3d at 1205.

14.

In this case, Petitioners have not proven that they were prejudiced by this procedural violation. First, even if the School District had granted [redacted]'s request and she had signed a

consent form on the same day, the School District had 60 calendar days to complete the evaluation. 34 C.F.R. § 300.301(c)(1) (initial evaluation must be conducted within 60 days or within the timeframe established by the State); Ga. Comp. R. & Regs. 160-4-7-.04(1)(b) (school districts have 60 calendar days to complete the initial evaluation, and holiday periods where children are not in attendance for five consecutive days shall not be counted toward the 60-day timeline). Given the Thanksgiving and Christmas breaks, the 60-day timeframe for the completion of the evaluation would not have run until late January 2017, and [redacted] withdrew [redacted] from the School District as of January 12, 2017. Under IDEA, the 60-day time frame does not apply when a child enrolls in another school district after the consent is signed but before the original school district has made a disability determination. 34 C.F.R. § 300.301(d).[17]

15.

Second, even if the School District had provided written notice that it was denying Petitioners' request for an initial evaluation, [redacted]s recourse would have been to seek a review of that decision through a due process hearing, which she has now done. If the Court in this case had found that the School District should have conducted an initial evaluation immediately, Petitioners might have had a claim for relief to compensate for the delay in conducting the evaluation. However, based on the Court's conclusion that the School District was entitled to use the RTI process through [redacted]s first half of kindergarten, Petitioners have suffered no justiciable harm as a result of the School District's failure to provide timely written notice. Consequently, although Petitioners proved by a preponderance of the evidence that the School District committed a procedural violation of the written notice provisions of IDEA, they did not

17 If the subsequent school district is not making sufficient progress to ensure that an evaluation is completed promptly, the obligation of the original school district to complete the evaluation may still apply. However, in this case, there was evidence that the DeKalb County School District did complete an evaluation of [redacted] and there was no evidence in the record of this case to show that the evaluation was not completed promptly or within an agreed-upon time frame. 34 C.F.R. § 300.301(e).

prove that they are entitled to relief.

IV. DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, Petitioners' request for relief is **DENIED**.

SO ORDERED, this 22nd day of January, 2017.

KIMBERLY W. SCHROER
Administrative Law Judge