BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[redacted] **by and through** [redacted] **and** [redacted]
Petitioners,

v.

DEKALB COUNTY SCHOOL DISTRICT,
Respondent.

Docket No.: 1814143
1814143-OSAH-DOE-SE-44-Schroer

FINAL DECISION

I. SUMMARY OF PROCEEDINGS

Petitioners filed a due process hearing request pursuant to the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA") on October 10, 2017, alleging numerous violations of the IDEA on the part of the Respondent, DeKalb County School District (hereinafter "the District"). The evidentiary hearing took place on November 17, 2017. Petitioner [redacted] represented herself and her son, Petitioner [redacted] during the hearing. The District was represented by Neeru Gupta, Esq. The record closed on December 4, 2017 when the parties filed written closing arguments. Due to the complexity of the issues and the length of the record, the deadline for 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

[redacted] *'s Enrollment in the District and the 504 Plan*

1. [redacted] is [redacted] years old. [redacted]s mother, [redacted] enrolled him in [redacted] Elementary, a school in the District, on January 17, 2017. At that time, [redacted] was in the middle of his kindergarten year. (Exhibits R-8; Testimony [redacted]

2. [redacted] formerly attended school in Richmond County, Georgia, where he had a plan for accommodations pursuant to Section 504 of the Rehabilitation Act (hereinafter "504 plan").[1] This 504 plan addressed [redacted]s epilepsy, asthma, and swallowing difficulties. The Richmond County 504 team noted: "[redacted] is doing well with math and thriving in other areas. Writing is the only area of concern." However, because [redacted] had "fine motor difficulty" with writing, the team recommended an occupational therapy ("OT") screening. The results of this screening indicated that [redacted] had "the foundational skills to progress with handwriting instruction." The 504 plan indicates that Richmond County planned to monitor [redacted]s writing to determine whether his difficulties were "just developmental." (Exhibit R-1).

3. [redacted] received general education services pursuant to a "response to intervention" plan while attending school in Richmond County.[2] Records generated by [redacted]s Richmond County 504 team during a meeting on December 7, 2016 indicate that [redacted] was making progress, but would "remain at Tier 3." From the records, it appears that "handwriting supplemental accommodations" were the only interventions provided to [redacted] while he attended school in Richmond County.[3] (Exhibit P-9).

4. On January 30, 2017, [redacted] and District personnel, including Dr. R[redacted] C[redacted], student counselor, and E[redacted]e R[redacted], [redacted] kindergarten teacher, (collectively, "the 504 Eligibility

[1] Section 504 of the Rehabilitation Act provides, in pertinent part: "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." 29 U.S.C. § 794.

[2] The IDEA allows states to "use a process that determines if the child responds to scientific, research-based intervention" as part of the procedure used to evaluate whether the child has a specific learning disability. 20 U.S.C. § 1414(b)(6)(B). Georgia has adopted this "response to intervention" (RTI) process. Ga. Comp. R. & Regs. 160-4-7-.03. Georgia schools adhere to a four-tier model of intervention delivery, with the first tier entailing the least intensive interventions and the fourth tier involving the most intensive interventions. 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.

[3] These interventions are described as "Tier 2" in the records from Richmond County. (Exhibit P-9).

Determination Team") held a meeting to discuss [redacted]s 504 plan. During the meeting, the 504 Eligibility Determination Team completed a form for the establishment of eligibility under Section 504. On this form, the team listed [redacted]s medical impairments, his medications, and the accommodations to be provided by District personnel. The bottom of the first page of the form includes the handwritten notation, "Parent does not agree with language in document," with what appear to be [redacted]s initials. This notation is repeated on the signature page, where [redacted] again indicated that she disagreed with the eligibility determination. (Exhibits R-1, R-3; Testimony of R[redacted]a C[redacted]; Testimony of E[redacted]e R[redacted]; Testimony [redacted]

5. At the hearing, Petitioners and the District offered discrepant accounts regarding whether [redacted] requested a psychological evaluation for [redacted] during the 504 meeting. [redacted] testified that, while she did not use the words "psychological evaluation," she told Dr. C[redacted] and the other meeting attendees that she wanted [redacted] to be evaluated. However, Dr. C[redacted] and Ms. R[redacted] credibly testified that [redacted] made no such request, and that the sole topic of discussion during the meeting was [redacted]'s medical needs, specifically those pertaining to asthma and epilepsy. (Testimony o[redacted]nda C[redacted]; Testimony o[redacted]ine R[redacted]; Testimony [redacted]

6. Prior to the January 30, 2017 meeting, [redacted] provided Dr. C[redacted] with medical documentation concerning [redacted] including a letter from his primary care provider [redacted], M.D., asthma action plans, instructions on how to respond to a seizure, and records of an office visit on September 15, 2016. The District also obtained [redacted]s 504 plans from Richmond County School District ("RCSD"). (Exhibits R-1, R-2; Testimony o[redacted]nda C[redacted]; Testimony [redacted]

7. Petitioner testified that, during a meeting on January 17, 2017, she provided the records indicating that Petitioner was in the RTI process to the principal of [redacted] Elementary

School, who in turn gave the documents to Dr. C[redacted]. According to Petitioner, she attempted to provide these documents to Dr. C[redacted] during the January 30 RTI meeting, but Dr. C[redacted] declined to accept them. (Exhibits P-8, P-9).

8. In the letter [redacted] provided to the District, Dr. [redacted] indicated that [redacted] had "swallowing difficulties" and "significant asthma." (Exhibit R-2).

9. On the office visit record provided to the District, "oppositional defiant disorder" is listed among [redacted]s "Problems and Health Issues." (Exhibit R-2).

10. On January 25, 2017, Dr. C[redacted] faxed a "Health Care Provider's Certification of Medical Impairment" form to [redacted]s healthcare providers. However, [redacted]s providers did not return the completed form to Dr. C[redacted]. (Exhibit R-2; Testimony of R[redacted]a C[redacted]).

The RTI Meeting

11. On March 6, 2017, a Response to Intervention ("RTI") team consisting of [redacted], Dr. C[redacted], Ms. R[redacted], and M[redacted] H[redacted], who is described as "SPEDSTAFF" in meeting notes, met "to review [[redacted]s] Response to Intervention Tier-3 Student Support Team . . . progress data." During the meeting, the RTI team developed an RTI plan for [redacted]. Per the RTI plan, [redacted] would receive ten minutes of "Incremental Rehearsal"[4] three times per week to address math deficits, ten minutes of "Fluency K-1"[5] three times per week to address reading deficits, and ten minutes of "Token Economy"[6] three times per week to address behavioral issues. (Exhibits R-3, R-4; Testimony of R[redacted] C[redacted]; Testimony of E[redacted]e R[redacted]; Testimony [redacted]

[4] The plan describes "Incremental Rehearsal" as "an intervention that helps students with retention and increased fluency. It is helpful for sight/vocabulary words, simple math facts, letter names, and survival words/signs." (Exhibit R-4).

[5] The plan describes "Fluency K-1" as follows: "These interventions build on a child's need for fluency in the following ways: Letter Sound Recognition, Reading Words with speed/accuracy, Reading phrases, and Chunked text. (Exhibit R-4).

[6] According to the plan, "Token Economy" is an intervention whereby "[s]tudents earn tokens that can be exchanged

12. During the RTI meeting, Ms. R voiced concerns regarding s behavior and academic performance, specifically "difficulty with letter and number recognition." The team also noted that 's reading and math scores on a "MAP Assessment" were below average. The team agreed that should undergo a psychological evaluation for the purpose of determining whether he was eligible for special education services. Accordingly, they informed that they would obtain a parental consent for evaluation from her after underwent a vision and hearing screening.[7] (Exhibit R-4; Testimony of R a C).

13. On the RTI Plan, indicated that she was "not satisfied or in agreement [with the] intervention or plan information," that she "did not agree with [the] meeting notes," and that "[n]o progress was being made relating to behavior."[8] also wrote: "School is acting on their own w/o parental input." (Exhibit R-4).

's Academic Performance and Behavioral Functioning

14. Beginning January 2017, Ms. R documented s behavior and her responses thereto pursuant to an "Antecedent, Behavior, Consequence" ("ABC") analysis. She also collected data pertaining to s performance in academic areas, including number recognition, math readiness, reading comprehension, and letter recognition. (Exhibits R-4, R-7; Testimony of R a C).

15. Ms. R also collected data for the Georgia Kindergarten Inventory of Developing Skills (GKIDS), an assessment tool. According to this data, progressed in many "elements" of English language arts, mathematics, social studies, and science. However, he was not yet

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for predetermined rewards/reinforcers for demonstrating specific positive behaviors." (Exhibit R-4).

[7] provided the District with a completed parental consent for evaluation form on March 14, 2017. (Exhibit R-5).

[8] Additional comments written by are not legible on the copy of the RTI plan presented at the hearing. (Exhibit R-4)

demonstrating some elements of each subject, with the exception of science, in which he progressed or met all elements for which he was assessed. According to two GKIDS assessments administered March 12 and April 25, 2017, [redacted]s performance declined slightly in three elements. For example, although [redacted] showed progression in the element "Compare and contrast experience of characters in stories" in March, he did not demonstrate this element in April. However, [redacted]'s performance remained the same with regard to the majority of elements. Indeed, [redacted] improved in two elements of mathematics. With respect to non-academic domains, Ms. R[redacted] listed most elements of "Approaches to Learning" and "Personal and Social Development" as "areas of concern." (Exhibits R-9, P-21, P-22; Testimony of E[redacted]e R[redacted]).

Eligibility Determination and Development of IEP

16. J[redacted] B[redacted], Ed.S., conducted a psychoeducational evaluation of [redacted] on May 8 and May 10, 2017. [redacted] obtained a composite IQ score of 85 on a Reynolds Intellectual Assessment Scales, Second Edition, administered during the evaluation. Ms. B[redacted] noted that [redacted] exhibited deficits in visual-motor coordination, short-term memory, and "phonological awareness, specifically, blending and segmenting letter sounds." She further noted that [redacted] demonstrated significant weaknesses in writing fluency and math calculation. Ms. B[redacted] concluded that [redacted] met the diagnostic criteria for Attention Deficit Hyperactivity Disorder. She also recommended that an occupational therapist and speech language pathologist observe [redacted] "to determine the need for further evaluation." (Exhibit R-6).

17. On May 17, 2017, [redacted] Dr. C[redacted], Ms. R[redacted], Ms. B[redacted], and M[redacted] A[redacted], Lead Teacher of Special Education, met to determine [redacted]s eligibility for special education. The eligibility team determined that [redacted] was eligible for special education services

under the categories of Other Health Impairment and Specific Learning Disability. Although the team had planned to also develop an individualized education program ("IEP") for [redacted] at this meeting, the meeting terminated without such IEP being developed. (Exhibit R-7).

18. During the eligibility meeting, [redacted] asked if [redacted] would be retained in kindergarten for the 2017-2018 school year. Ms. R[redacted] responded that she felt that it would be inappropriate to retain [redacted] in kindergarten because she had observed [redacted] progress in some areas. However, Ms. R[redacted] informed [redacted] that she could override her recommendation and prevent the District from advancing him to the first grade. [redacted] did not exercise her right to override Ms. R[redacted]'s recommendation. (Testimony of E[redacted]e R[redacted]).

19. The District attempted to schedule a meeting to develop [redacted]'s IEP for the following day, May 18, 2017. However, this meeting was canceled[9] and the District generated a meeting notice indicating that the IEP meeting would be held at [redacted] Elementary on May 24, 2017. [redacted] did not attend the rescheduled meeting. Consequently, the team terminated the meeting without developing an IEP for [redacted] (Exhibits P-27, P-28; Testimony of R[redacted]a C[redacted]; Testimony of E[redacted]e R[redacted]; Testimony [redacted]

20. Petitioners and the District offered conflicting accounts regarding the May 24, 2017 meeting. [redacted] testified that she did not receive written notice of the May 24, 2017 meeting, though she could not recall if the team verbally agreed to meet on that date at the close of the May 17 eligibility meeting. Dr. C[redacted] and Ms. R[redacted] testified that the team agreed to reconvene on May 24, 2017 at the close of the eligibility meeting. They further testified that, when [redacted] was not present at the appointed time on May 24, 2017, the rest of the team contacted her by telephone and [redacted] informed them that she was on her way. However,

[9] At the hearing, [redacted] testified that she objected to the May 18 meeting because the District sought to develop IEPs for [redacted] and her other child, [redacted] on the same day. (Testimony [redacted]

according to Dr. C[redacted] and Ms. R[redacted], [redacted] later informed the team that she would not be able to attend, whereupon the meeting was terminated.[10] In her testimony, [redacted] denied that this telephone conversation ever took place, but the Court does not find her testimony credible in this regard. (Exhibit P-28; Testimony of R[redacted]a C[redacted]; Testimony of E[redacted]e R[redacted]; Testimony [redacted]

21. The 2016-2017 school year ended on May 25, 2017. The District did not schedule a meeting to develop [redacted]s IEP during the summer. Dr. K[redacted] M[redacted], the District's Special Education Compliance Coordinator, testified that an IEP meeting was not scheduled prior to the beginning of the 2017-2018 school year because no lead teacher of special education was on duty during the summer. She also speculated that there may have been "some confusion" because [redacted] transferred to [redacted] Elementary School over the summer. (Exhibits P-26, R-8; Testimony of Dr. K[redacted] M[redacted]).

22. The 2017-2018 school year began on August 7, 2017.[11] A team consisting of [redacted] [redacted] and District personnel developed an individualized education program ("IEP") for [redacted] during a meeting on August 28, 2017. The IEP included a finding that [redacted] did not require extended school year services. At the hearing, the District offered no satisfactory explanation for why the meeting was not scheduled prior to the new school year. (Exhibit R-8).

23. Petitioner, who entered the first grade in August 2017, is currently earning passing grades in all subjects according to a recent grade report. (Exhibit R-10; Testimony of E[redacted] R[redacted]).

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[10] At the hearing, [redacted] pointed out at the hearing that the written meeting notice incorrectly lists Fairington Elementary as the location of the meeting. However, as [redacted] avers she never received the meeting notice, this error is immaterial. (Exhibit P-28).

[11] See DeKalb County School District, 2017-2018 Calendar, http://www.dekalbschoolsga.org/wp-content/uploads/2016/01/2017-2018-approved-calendar.pdf

Petitioners' Due Process Hearing Request and the District's Partial Motion to Dismiss

24. Petitioners filed a due process hearing request on October 10, 2017. Their claims, as limited by the Court's October 31, 2017 order, are summarized as follows:

1) On January 30, 2017, the District required [redacted] to go through additional data collection before the District would consider providing him services or accommodations, despite such services and accommodations being provided under a previous school district's 504 plan for [redacted]

2) On January 30, 2017, the District refused Petitioner [redacted]s request to conduct psychological testing on [redacted] immediately, and such testing was not done until March 18, 2017.

3) Petitioner [redacted]'s eligibility was not determined until May 16, 2017, before which time he was not provided with appropriate special education.

4) Petitioner [redacted] was promoted from kindergarten to first grade without acquiring basic kindergarten skills.

5) Petitioner [redacted] did not receive ESY services, causing him to be even further behind.

(Due Process Hearing Request).

25. On November 6, 2017, the District moved for dismissal of Petitioners' first and fourth claims. The District also moved for dismissal of any claim that sought relief prior to April 30, 2017. Prior to the hearing, the Court granted the District's motion as to Petitioners' first claim, denied the motion for dismissal of claims that sought relief prior to April 30, 2017, and took the motion to dismiss Petitioners' fourth claim under advisement.[12]

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. § 300.1, et seq.; and the Rules of the Georgia Department of Education, Ga. Comp. R. & Regs. 160-4-7-.01, et seq.

[12] As Petitioners did not meet their burden to prove entitlement to any relief, the Court need not decide whether April 30, 2017 was the proper commencement date for relief.

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. Petitioners introduced insufficient evidence of a request for an evaluation on January 30, 2017.

3. According to the IDEA and its implementing regulations, school districts must "conduct a full and individual initial evaluation . . . before the initial provision of special education and related services to a child with a disability . . . ." 20 U.S.C. § 1414(a)(1)(A); 34 C.F.R. § 300.301(a). Either the school district or the child's parent may initiate a request for the initial evaluation. 20 U.S.C. § 1414(a)(1)(B); 34 C.F.R. § 300.301(b). In Georgia, the initial evaluation must be conducted "within 60 calendar days of receiving parental consent for the evaluation," excluding holiday periods of five days or more. Ga. Comp. R. & Regs. 160-4-7-.04(1)(b); 20 U.S.C. § 1414(a)(1)(C)(i)(I); 34 C.F.R. § 300.301(c)(1)(i).

4. In order to find a violation of the IDEA relating to the timeliness of the District's evaluation, the Court would have to find that [redacted] clearly requested an evaluation of [redacted] and that the District refused or delayed the evaluation. However, such a finding is not supported by a preponderance of the evidence. There is no written documentation of an evaluation request before March 14, 2017, when [redacted] provided the District with her consent for evaluation. Petitioners offered only [redacted]s uncorroborated testimony in support of their allegation that the District refused [redacted]s request for an evaluation during the 504 meeting on January 30, 2017. However, Dr. C[redacted] and Ms. R[redacted]—both of whom attended that meeting—testified credibly and persuasively that [redacted] did not make such a request. Further, although [redacted] expressed her discontent in numerous handwritten notations on the 504 plan, none of them expressly mention a refusal on the part of the District to conduct an evaluation. Therefore, the

Court concludes that Petitioners did not meet their evidentiary burden with respect to this claim. Rather, the preponderance of the evidence showed that Petitioner consented to an evaluation on March 14, 2017 following the eligibility team's determination that such an evaluation was necessary. Accordingly, the District was obligated to complete the evaluation by May 22, 2017. See Ga. Comp. R. & Regs. 160-4-7-.04(1)(b)(1)(i) (60-day period excludes five-day holiday breaks, including weekends before and after the break); 34 C.F.R. § 300.301(c)(1)(i), (ii).[13] As the evaluation of [redacted] was completed by May 10, 2017, the District complied with this obligation.

B. The District fulfilled its obligation under the IDEA to identify and evaluate [redacted]

5. The Court construes Petitioners' claim that the District failed to immediately evaluate [redacted] as an alleged violation of the "child find" provision under the IDEA. That is, the IDEA places upon school districts "a duty to identify and evaluate children who are suspected of having a qualifying disability within a reasonable time after school officials are placed on notice." Ms. H. v. Montgomery Cty. Bd. of Educ., 784 F. Supp. 2d 1247, 1260 n.17 (M.D. Ala. 2011) (quoting D.R. v. Antelope Valley Union High Sch. Dist., 746 F. Supp. 2d 1132, 1144 (C.D. Cal. 2010); see 20 U.S.C. § 1412(a)(3)(A). The obligation to evaluate is triggered "when the evidence is sufficient to cause a school [district] to have a reasonable belief that such an evaluation is necessary." Jefferson Cty. Bd. of Educ. v. Lolita S., 977 F. Supp. 2d 1091, 1124 (N.D. Ala. 2013). To establish that the school violated this obligation, claimants "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." Clay T. v. Walton

[13] The District had spring break from April 1-9, 2017, which is excluded from the 60-day period. See DeKalb County School District, 2016-2017 Calendar, http://www.dekalbschoolsga.org/wp-content/uploads/2016/01/2016-2017-School-Calendar.pdf

Cty. Sch. Dist., 952 F. Supp. 817, 823 (M.D. Ga. 1997); see also Bd. of Educ. of Fayette Cty. v. L.M., 478 F.3d 307, 313 (6th Cir. 2007) (adopting the standard set forth in Clay T. v. Walton Cty. Sch. Dist.).

6. Having reviewed the information available to the District at the time, and based on the evidentiary record, the Court concludes that the District did not breach its child find duty. [redacted] transferred to the District in the middle of his kindergarten year, when he was very young and little data had been collected to document academic or behavioral deficits. Given his young age, the fact that the District did not immediately suspect that [redacted] had a disability was excusable. See D.K. v. Abington Sch. Dist., 696 F. 3d 233, 252 (3d Cir. 2012) ("[S]chools need not rush to judgment or immediately evaluate every student exhibiting below-average capabilities, especially at a time when young children are developing at different speeds and acclimating to the school environment."). This is especially true considering that many of the outward manifestations of [redacted]s disability were behavioral in nature. See D.B. v. Fairview Sch. Dist., No. 15-cv-00085, 2017 U.S. Dist. LEXIS 179992, at *16–17 (W.D. Pa. Oct. 31, 2017) ("[A] school district does not necessarily violate its Child Find obligation when it fails to identify a student as disabled at the 'earliest possible moment.' This is especially true where the alleged disability manifests itself in behaviors typical of very young children, 'because hyperactivity, difficulty following instructions, and tantrums are not atypical during early primary school years.'") (quoting Bd. of Educ. of Fayette Cty. v. L.M., 478 F.3d. 307, 313 (6th Cir. 2007)).

7. Although [redacted] had a 504 plan at the time he enrolled in the District, this plan indicated only that [redacted] had asthma, epilepsy, swallowing difficulties, and fine motor difficulties that affected his writing. [redacted]s primary care physician indicated that [redacted] had significant asthma and swallowing difficulties. Finally, one patient record listed oppositional defiant disorder

among [redacted]'s "Problems and Health Issues."

8. Moreover, the District was not obligated to immediately refer [redacted] for an evaluation based on the fact that he was in the RTI process at the time he transferred to the District. See Ga. Comp. R. & Regs. 160-4-7-.03 ("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 student is having. . . . Exceptions may be made in circumstances where immediate evaluation and/or placement is required due to a significant disability that precludes access to instruction."). The RTI data supplied by Richmond County included only one conclusory statement that [redacted] was in Tier 3 of RTI. From this data, it appears that the only intervention RCSD provided pertained to [redacted]s handwriting. At the time, school personnel had yet to determine whether [redacted]'s handwriting issues were signs of a disability.

9. From the foregoing information, the Court is unwilling to conclude that the District was on notice that [redacted] had a disability for which special education and/or related services were required. See also Sch. Bd. of the City of Norfolk v. Brown, 769 F. Supp. 2d 928, 943 (E.D. Va. 2010) ("The 'child find' obligation is triggered where the state has reason to suspect that the child may have a disability *and* that special education services may be necessary to address that disability.") (emphasis added). Accordingly, the Court concludes that Petitioners have failed to demonstrate that the District "overlooked clear signs of disability" from January 30, 2017 to March 6, 2017, when the RTI team agreed that an evaluation was appropriate, such as would violate the IDEA child find provision.

C. The District's decision to advance [redacted] from kindergarten to the first grade was not a violation of IDEA.

10. Under the IDEA, parents are given "[a]n opportunity to present complaints with respect

to any matter relating to the identification, evaluation or educational placement of the child, or the provision of a free and appropriate public education to such child." 20 U.S.C. § 1415(b)(6). The decision to promote a child to, or retain them in, a grade does not appear to be equivalent to an "educational placement" decision. Letter to Anonymous, 35 IDELR 35 (OSEP 2000). Therefore, it is unclear whether Petitioners have standing to pursue this claim. Schares v. Katy Indep. Sch. Dist., 252 F. Supp. 2d 364, 366 (S.D. Tex. 2003) (upholding dismissal of claim for lack of standing under the IDEA where parent challenged the decision to provide educational services in the fifth, rather than the sixth grade, but did not challenge the educational services themselves).

11. However, pretermitting whether the decision to advance a child from one grade to another is justiciable under the IDEA, Petitioners' claim that [redacted] had not acquired basic kindergarten skills is not supported by a preponderance of the evidence. Ms. R[redacted] testified that, based on [redacted]s performance in kindergarten, she felt comfortable advancing him to the first grade. [redacted] did not exercise her option to override Ms. R[redacted]'s determination. Judging from the summary of [redacted]s grades in his first grade year, the decision to advance [redacted] to the first grade had no deleterious effect on his academic progress. See, e.g., Sherman v. Mamaroneck Union Free Sch. Dist., 340 F.3d 87, 93 (2d Cir. 2003) ("Passing grades are, of course, often indicative of educational benefit."); Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 130 (2d Cir. 1998) ("[T]he attainment of passing grades and regular advancement from grade to grade are generally accepted indicators of satisfactory progress.")

D. Petitioners failed to demonstrate that extended school year services were appropriate.

12. In their due process hearing request, Petitioners did not expressly object to the District's failure to hold the IEP meeting during the summer before the 2017-2018 school year. However,

this conduct on the part of the District is related to Petitioners' claim that the District failed to provide [redacted] with extended school year services. That is, because the District did not conduct an IEP meeting during the summer, it did not evaluate whether [redacted] needed such services at a time when they could have been provided, if necessary. The District did not evaluate whether [redacted] needed extended school year services until August 28, 2017. Because the District did not articulate a valid reason for the delay, the Court finds that the delay amounts to a procedural violation. K.C. ex rel. Her Parents v. Nazareth Area Sch. Dist., 806 F. Supp. 2d 806, 830 (E.D. Pa. 2011) ("Delays are procedural violations of the IDEA. . . ."). However, "a school district's failure to comply with the procedural requirements of [IDEA] will constitute a denial of [a free and appropriate public education] only if such violation causes substantive harm to the child or his parents." Id.; see 34 C.F.R. § 300.513(a)(2); DeKalb Cty. Sch. Dist. v. J.M., No. 1:06-CV-125-TCB, 2008 U.S. Dist. LEXIS 120177, at *5 (N.D. Ga. Sept. 3, 2008) aff'd, 329 F. App'x 906 (11th Cir. 2009); see also G.J. v. Muscogee Cty. Sch. Dist., 668 F.3d 1258, 1270 (11th Cir. 2012) ("Not every procedural defect results in a violation of the IDEA. Rather, '[i]n evaluating whether a procedural defect has deprived a student of a [free and appropriate public education], the court must consider the impact of the procedural defect, and not merely the defect *per se*.'") (quoting Weiss v. Sch. Bd. of Hillsborough Cty., 141 F.3d 990, 994 (11th Cir. 1998)).

13. In this case, the Court concludes that Petitioners presented insufficient evidence that the District's failure to hold the IEP meeting in a timely manner caused them substantive harm. The harm Petitioners specifically alleged in their due process hearing request was the failure of the District to provide [redacted] with extended school year services. Therefore, in order to be entitled to relief, Petitioners were required to demonstrate that [redacted] required extended school year services, which were denied to him due to the District's failure to hold a timely IEP meeting.

14. In developing an IEP, the IEP team must evaluate whether the child needs extended school year services in order to receive a free and appropriate public education. See 34 C.F.R. § 300.106; A.L. v. Jackson Cty. Sch. Bd., 635 F. App'x. 774, 783 (11th Cir. 2015) ("A public school must provide [extended school year services] if a child's IEP team determines that such services are necessary for the student to receive a [free and appropriate public education]."). Extended school year services are defined as special education and related services that are provided beyond the normal school year at no cost to the parents and in accordance with the child's IEP. 34 C.F.R. § 300.106(b)(1).

15. Federal regulations do not provide guidance for determining whether a child requires extended school year services. Rosemary Queenan, School's Out for Summer — But Should It Be?, 44 J.L. & Educ. 165, 166 (Spring 2015). However, like most other states, the Georgia Department of Education has developed multiple criteria for IEP teams to consider in determining whether such services are necessary for the provision of a free and appropriate public education. Id. at 183. Although courts in the Eleventh Circuit have not specifically addressed Georgia's standards for extended school year services, other circuits have held that such services are only necessary to a free and appropriate public education when the benefits a disabled child gains during a regular school year will be "significantly jeopardized" if extended school year services are not provided. See M.M. ex rel. D.M. v. Sch. Dist. of Greenville Cty., 303 F.3d. 523, 537–38 (4th Cir. 2002) (citing Cordrey v. Euckert, 917 F.2d. 1460, 1473 (6th Cir. 1990); Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2D 1153, 1158 (5th Cir. 1986);[14] Johnson v. Indep. Sch. Dist. No. 4, 921 F.2d 1022, 1028 (10th Cir. 1990). "[A] claimant

[14] The Fifth Circuit held that "if a child will experience severe or substantial regression during the summer months in the absence of a summer program, the . . . child may be entitled to year-round services. The issue is whether the benefits accrued to the child during the regular school year will be significantly jeopardized if he is not provided an educational program during the summer months. Id. at 1158.

seeking [extended school year] must satisfy an even stricter test because providing an [extended school year] is the exception and not the rule under the regulatory scheme." N.B. v. Hellgate Elem. Sch. Dist., 541 F.3d 1202, 1211 (9th Cir. 2008) (quoting Bd. of Educ. of Fayette Cty. v. L.M., 478 F.3d 307, 315 (6th Cir. 2007)) (internal quotations omitted).

16. Petitioners presented no evidence that the progress [redacted] showed during kindergarten was "significantly jeopardized" by the District's decision to not provide extended school year services over the summer or that he otherwise regressed. Petitioners provided no evidence that [redacted] had a unique need for special education services over breaks, such as expert testimony to that effect.[15] Accordingly, Petitioners have failed to demonstrate that the District's procedural violation caused them substantive harm. Therefore, they are not entitled to relief with respect to this claim.

IV. DECISION

Based on the foregoing findings of fact and conclusions of law, the undersigned concludes that Petitioners are not entitled to relief under the IDEA.

SO ORDERED, this _____ day of January, 2018.

Kimberly W. Schroer
Administrative Law Judge

[15] Although evidence of actual regression is not required, courts have held that claimants must show through "expert opinion testimony" that extended school year services are necessary to permit the child to benefit from instruction. See N.B. v. Hellgate Elem. Sch. Dist., 541 F.3d at 1212; M.M. ex re. D.M., 303 F.3d at 538.